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THE
AMERICAN AND ENGLISH
ENCYCLOPÆDIA
OF
LAW

EDITED BY
DAVID S. GARLAND AND LUCIUS P. MCGEHEE
UNDER THE SUPERVISION OF
JAMES COCKCROFT

SECOND EDITION

VOLUME XII.

NORTHPORT, LONG ISLAND, N. Y.
EDWARD THOMPSON COMPANY

LONDON: C. D. CAZENOVE AND SON, 2 HENRIETTA STREET

1899

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EXECUTORY CONTRACT. (See also the title **CONTRACTS**, vol. 7, p. 95.) — An executory contract is one where it is stipulated by the agreement of minds, upon a sufficient consideration, that something is to be done or not to be done by one or both of the parties.¹

EXECUTORY DEVISE. (See also the titles **LEGACIES AND DEVISES**; **REMAINDERS**, **REVERSIONS**, AND **EXECUTORY INTERESTS**.) — An executory devise of lands is such disposition of them by will that thereby no estate vests on the death of the deviser, but only on some future contingency. It differs from a remainder in three material points: (1) it needs no particular estate to support it; (2) a fee simple or other less estate may be limited by it, after a fee simple; (3) a remainder may be limited, of a chattel interest, after a particular estate for life in the same property.²

EXECUTORY REMAINDER. (See also the title **REMAINDERS**, **REVERSIONS**, AND **EXECUTORY INTERESTS**.) — Contingent remainders, or executory remainders as they are sometimes called, are where the estate in remainder is limited to take effect either to a dubious or uncertain person or upon a dubious and uncertain event, so that the particular estate may chance to be determined and the remainder never take effect.³

EXECUTORY TRUST. (See also the title **TRUSTS AND TRUSTEES**.) — A trust is said to be executory or directory when the objects take, not immediately under it, but by means of some further act to be done by a third person, usually him in whom the legal estate is vested. The trusts are executed when they are directly and wholly declared by the testator or grantor, or are to be attached immediately on the lands under the will or instrument of gift itself.

EXECUTRIX. — See the title **EXECUTORS AND ADMINISTRATORS**, vol. 11. p. 720.

1. *Farrington v. Tennessee*, 95 U. S. 683.

2. *Doe v. Considine*, 6 Wall. (U. S.) 475.

Other Definitions. — An *executory devise* is a devise of a future interest in lands, or chattels, not to take effect at the testator's death, but limited to arise upon some future contingency. *Patterson v. Ellis*, 11 Wend. (N. Y.) 278.

An *executory devise* is a future interest, such as the rules of law do not permit to be created in conveyances, but allow in the case of wills, like an interest given after an estate in fee simple, or to arise *in futuro*, without a

particular estate to support it. *Burleigh v. Clough*, 52 N. H. 273.

An *executory devise* is a limitation by will of a future estate or interest in lands or chattels. *Brown's Estate*, 38 Pa. St. 294.

Every devise of a future interest, which is not preceded by an estate of freehold created by the same will, or which, being so preceded, is limited to take effect before or after and not at the expiration of such prior estate or freehold, is an *executory devise*. *Thompson v. Hoop*, 6 Ohio St. 487.

3. 2 Bl. Com. 169; *Leppes v. Lee*, 92 Ky. 19.

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See the title *DAMAGES*, vol. 8, p. 541, and the references there given.

I. INTRODUCTORY. — Various terms have been employed by courts and text writers to denominate the species of damages which is the subject of the present article.¹ Those most frequently employed, however, are "exemplary," "punitive," and "vindictive."² These words, though not literally synonymous, are practically so in legal terminology,³ and will therefore be used indifferently throughout this article.

1. Various Terms Employed. — In the case of *Murphy v. Hobbs*, 7 Colo. 541, 49 Am. Rep. 366, Helm, J., in delivering the opinion of the court, said: "The words 'smart money' and also the following adjectives have been used to designate this class of damages: speculative, imaginary, presumptive, exemplary, vindictive, and punitive or punitory." And see *Hendrickson v. Kingsbury*, 21 Iowa 386.

"**Retributory**" Damages. — In the case of *Bell v. Midland R. Co.*, 10 C. B. N. S. 308, 100 E. C. L. 308, it was said that "where a wrongful

act is accompanied by words of contumely and abuse, the jury are warranted in taking that into their consideration and giving retributory damages."

2. See authorities cited throughout this article.

3. *Alabama*. — *Wilkinson v. Searcy*, 76 Ala. 176.

Illinois. — *Lowry v. Coster*, 91 Ill. 185.
Kentucky. — *Louisville, etc., R. Co. v. Smith*, 2 Duv. (Ky.) 556; *Chiles v. Drake*, 2 Metc. (Ky.) 146, 74 Am. Dec. 406.

In Some Jurisdictions, However, the term "exemplary damages" seems to have been employed to denote merely such elements of recovery as are insusceptible of pecuniary measurement,¹ or, as such damages have been also designated, "indeterminate damages."² But either of these uses of the word is opposed to that most generally accepted.

II. ORIGIN OF EXEMPLARY DAMAGES. — The rule of exemplary damages is said to have had its origin in cases involving elements of recovery incapable of pecuniary estimate, and hence, of necessity, peculiarly within the discretion of the jury.³ But the principle in its latter-day application has come to be much broader than this.⁴ Another theory advanced has been that the doctrine had its origin and foundation in a failure to recognize as items of recovery for which compensation could be given elements which should have been so regarded.⁵

III. GENERAL PRINCIPLES REGULATING — 1. **In General.** — It is elementary that in order to the recovery of exemplary damages the injury complained of must have been the consequence of the defendant's act.⁶ Thus, though a defendant has been grossly negligent, it must be shown that the injury and

Missouri. — Rouse v. Metropolitan St. R. Co., 41 Mo. App. 298.

South Carolina. — Quinn v. South Carolina R. Co., 29 S. Car. 386.

Practically though Not Literally Synonymous. — In the case of Hendrickson v. Kingsbury, 21 Iowa 386, it was said that the terms "exemplary," "vindictive," "punitive," "imaginary," "presumptive," "speculative," and "smart money" seemed to be used in law as synonymous; that while the words certainly have a critical or technical difference of signification as defined by lexicographers, yet they have been too long used as synonymous by legal writers to justify now the making of any distinction in their meaning in construing the decisions or opinions of judges or other law writers in which they are used. To the same effect it was observed in the case of Fay v. Parker, 53 N. H. 342, 16 Am. Rep. 270, that, in considering the subject of the present article, it is proper to regard the terms "exemplary," "vindictive," and "punitive" or "punitory" as meaning the same thing; such being the acceptance of the language of the courts generally in cases where the terms are employed with reference to damages in a civil action.

No Distinction Between Exemplary and Punitive Damages. — In the case of Meidel v. Anthis, 71 Ill. 241, it was held that, under the circumstances of the case, exemplary damages were recoverable; that is, such damages as would operate as an example or a warning to deter the party or others from similar transactions, but not damages by way of punishment to the offender. This distinction was very properly condemned and repudiated in the later case of Lowry v. Coster, 91 Ill. 182, where it was said that "exemplary damages, punitive damages, or damages recovered as a punishment, all mean the same thing. Roth v. Eppy, 80 Ill. 283. And in so far as the case of Meidel v. Anthis declares a different rule it must be overruled."

1. *Michigan.* — See opinion of Cooley, C. J., in Stilson v. Gibbs, 53 Mich. 283; Ross v. Leggett, 61 Mich. 445, 1 Am. St. Rep. 608; Newman v. Stein, 75 Mich. 402.

West Virginia. — See Pegram v. Stortz, 31 W. Va. 220.

Canada. — In Canada, in some cases at least, elements of recovery insusceptible of pecuniary measurement have been termed "exemplary." Falardaen v. Couture, 2 L. C. Jur. 96; Mathien v. Laflamme, 4 Rev. Leg. 371; Brossoit v. Turcot, 20 L. C. Jur. 141.

2. **Indeterminate Damages — Illustration.** — Damages of this class have been also termed indeterminate damages, instances of which are, according to Green, J., in Pegram v. Stortz, 31 W. Va. 237, "damages for physical suffering consequent upon the injury inflicted by the defendant, including any temporary, protracted, or permanent deformity, disability, or disfiguring, as by scars or the like, or damages caused by mental anguish, loss of honor, or sense of shame of the plaintiff, caused by the defendant's tort, the sense of wrong or degradation felt by the plaintiff, and the like, or damages resulting from the defendant's act in injuring the business reputation, social standing and the like, of the plaintiff."

3. *Huckle v. Money*, 2 Wils. 205; *Beardmore v. Carrington*, 2 Wils. 244; *Fay v. Parker*, 53 N. H. 342, 16 Am. Rep. 270.

Antiquity of Rule. — The right of the jury to give exemplary damages for injuries wantonly, recklessly, or maliciously inflicted has been said to be "as old as the right of trial by jury itself;" and "is not, as many seem to suppose, an innovation upon the rules of the common law." Walton, J., in *Goddard v. Grand Trunk R. Co.*, 57 Me. 218, 2 Am. Rep. 39.

4. See authorities cited in succeeding notes.

5. *Stuart v. Western Union Tel. Co.*, 66 Tex. 588, 59 Am. Rep. 623.

6. **Injury Must Be Result of Defendant's Act.** — *Wallace v. New York*, 2 Hilt. (N. Y.) 440; *Missouri Pac. R. Co. v. Shuford*, 72 Tex. 165.

The Government May Recover Punitive or Exemplary Damages under the same circumstances as will warrant a recovery by a private individual. *U. S. v. Taylor*, 35 Fed. Rep. 484.

Jurisdiction of Equity to Allow. — Though a court of equity may, as incidental to other relief, award compensatory damages in proper cases, it cannot assess exemplary damages.

damage complained of resulted therefrom, or there can be no recovery.¹

Unlawful Business. — It has been held that no exemplary damages are recoverable for the interruption of an unlawful business.²

2. Natural and Proximate Cause. — It has been declared, in conformity with the well-known general rule, that there can be no recovery in punitive damages unless the injuries complained of were the natural and proximate result of the defendant's act.³ Where, therefore, the accident was due to the concurrence of a latent defect, not discoverable, and without which it would not have happened, it was held there could be no recovery of exemplary damages, though a known defect also contributed to the injury.⁴

3. Certainty. — As exemplary damages are imposed for the sake of punishment, and are within the discretion of the jury, within reasonable limits, the rule that the party seeking recovery must show with reasonable certainty the amount of his damages does not apply.⁵

4. Object and Theory of Exemplary Damages — *a.* IN GENERAL. — The object of exemplary or punitive damages has been held to be to compensate the person injured⁶ and to punish the offender,⁷ with all that punishment implies; that is, in addition to inflicting a penalty for the past offense, to deter the offender from the commission of similar wrongs in the future, as well as all other persons, by the example thereby afforded.⁸ And it has been held that an instruction which tells the jurors that they may allow damages for punish-

Bird v. Wilmington, etc., R. Co., 8 Rich. Eq. (S. Car.) 46, 64 Am. Dec. 739.

1. *Missouri Pac. R. Co. v. Johnson,* 72 Tex. 95; *Missouri Pac. R. Co. v. Brazzil,* 72 Tex. 233; *Missouri Pac. R. Co. v. Shuford,* 72 Tex. 165.

2. *Kauffman v. Babcock,* 67 Tex. 241.

3. **Natural and Proximate Cause** — *Alabama.* — *Patterson v. South, etc., Alabama R. Co.,* 89 Ala. 318; *Kansas City, etc., R. Co. v. Sanders,* 98 Ala. 293; *Richmond, etc., R. Co. v. Vance,* 93 Ala. 144, 30 Am. St. Rep. 41.

New York. — *Wallace v. New York,* 2 Hilt. (N. Y.) 440.

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For a full discussion of this subject see the title DAMAGES, vol. 8, p. 537.

4. *Richmond, etc., R. Co. v. Vance,* 93 Ala. 144, 30 Am. St. Rep. 41.

5. *Mobile Furniture Commission Co. v. Little,* 108 Ala. 399.

6. **Object of Exemplary Damages.** — *Smith v. Bagwell* 19 Fla. 117, 45 Am. Rep. 12; *Burr v. Burr,* 7 Hill (N. Y.) 207; *Polk v. Fancher,* 1 Head (Tenn.) 336; *Cole v. Tucker,* 6 Tex. 266; *Brown v. Swineford,* 44 Wis. 282, 28 Am. Rep. 582.

7. *United States.* — *Day v. Woodworth,* 13 How. (U. S.) 363; *Mr Justice Davis in Milwaukee, etc., R. Co. v. Arms,* 91 U. S. 489; *Missouri Pac., etc., R. Co. v. Humes,* 115 U. S. 512.

Florida. — *Smith v. Bagwell,* 19 Fla. 117, 45 Am. Rep. 12.

Illinois. — *Grable v. Margrave,* 4 Ill. 373, 38 Am. Dec. 88.

Iowa. — *Root v. Sturdivant,* 70 Iowa 55.

Minnesota. — *Boetcher v. Staples,* 27 Minn. 308, 38 Am. Rep. 295.

New York. — *Eichberry v. Levielle,* 2 Hilt. (N. Y.) 40; *Tillotson v. Cheetham,* 3 Johns. (N. Y.) 56, 3 Am. Dec. 459; *Burr v. Burr,* 7 Hill (N. Y.) 207.

Tennessee. — *Polk v. Fancher,* 1 Head (Tenn.) 336.

Texas. — *Cole v. Tucker,* 6 Tex. 266.

Vermont. — *Devine v. Rand,* 38 Vt. 626.

West Virginia. — *Mayer v. Frobe,* 40 W. Va. 246.

Wisconsin. — *McWilliams v. Bragg,* 3 Wis. 424.

Exemplary Damages Penal in Theory. — Smart money allowed by a jury and a fine imposed at the suit of the people depend, it has been said, upon the same principle. Both are penal, and intended to deter others from the commission of the like crime. The former, however, becomes incidentally compensatory for damages, and at the same time answers the purposes of punishment. *Cook v. Ellis,* 6 Hill (N. Y.) 466, 41 Am. Dec. 757.

But under a Statute providing that "in every tort there may be aggravating circumstances" for which additional damages may be given, "either to deter the wrongdoer from repeating the trespass or as compensation for the wounded feelings of the plaintiff," it has been held error to charge that exemplary damages might be given as a "punishment" to the defendant. The jury should be instructed, it was held, in the terms of the statute. *Chatanooga, etc., R. Co. v. Liddell,* 85 Ga. 482.

8. *Smith v. Bagwell,* 19 Fla. 117, 45 Am. Rep. 12; *Grable v. Margrave,* 4 Ill. 373, 38 Am. Dec. 88; *Root v. Sturdivant,* 70 Iowa 55; *Boetcher v. Staples,* 27 Minn. 308, 38 Am. Rep. 295; *Eichberry v. Levielle,* 2 Hilt. (N. Y.) 40; *Burr v. Burr,* 7 Hill (N. Y.) 207; *Tillotson v. Cheetham,* 3 Johns. (N. Y.) 56, 3 Am. Dec. 459; *Polk v. Fancher,* 1 Head (Tenn.) 336; *McWilliams v. Bragg,* 3 Wis. 424; *Mayer v. Frobe,* 40 W. Va. 246.

Doctrine of Punitive Damages Protection to Society in General. — In vindictive actions, as they are sometimes called, such as libel, assault and battery, and false imprisonment, the conduct and motive of the defendant are open to inquiry with a view to the estimation

ment and also by way of example is not erroneous as allowing two kinds of damages.¹

b. WHAT IS THE PRIMARY CONSIDERATION. — Some cases hold that compensation to the person injured is still the primary consideration, the punishment of the wrongdoer and the example to others being of subordinate importance.² But while it is true, in a sense, that punitive damages are only incidental to actual or compensatory damages, as will be more fully considered hereafter,³ yet it is also the fact that when the elements warranting punitive damages are found to exist, then the idea of the punishment of the defendant at once becomes predominant, mere compensatory considerations being almost if not quite lost sight of.⁴ But whatever may be regarded as the first and controlling consideration, it is clear that the theory of exemplary damages involves a blending of the interests of society in general with those of the aggrieved individual in particular.⁵

5. Objections to Doctrine — *a. IN GENERAL.* — The doctrine of punitive damages has been not infrequently doubted on principle, and sometimes denied, but, with the exception of a few jurisdictions in this country, the principle is now firmly established, both in *England* and the *United States*.⁶ Some of the objections urged against the doctrine of exemplary damages will be found in the notes below.⁷

of damages; and if the defendant in committing the wrong complained of acted recklessly or wilfully and maliciously with a design to oppress and injure the plaintiff, the jury in fixing the damages may disregard the rule of compensation, and beyond that may, as a punishment to the defendant, and as a protection to society against a violation of personal rights and social order, award such additional damages as in its discretion it may deem proper. *Voltz v. Blackmar*, 64 N. Y. 440. And similarly in the case of *Phillips v. Lawrence*, 6 W. & S. (Pa.) 150, the general object of exemplary damages was spoken of as being "to promote the peace and quiet of society and to protect every one in the full enjoyment of his rights."

A Hybrid Doctrine. — In *Haines v. Schultz*, 50 N. J. L. 481, *Garrison, J.*, characterized the doctrine of punitive damages as "a sort of hybrid between a display of ethical indignation and the imposition of a criminal fine."

1. *Knittel v. Schmidt*, (Tex. Civ. App. 1897) 40 S. W. Rep. 507.

2. *Chiles v. Drake*, 2 Metc. (Ky.) 146, 74 Am. Dec. 406; *Brown v. Swineford*, 44 Wis. 282, 23 Am. Rep. 582. In the case first cited, *Simpson, C. J.*, delivering the opinion of the court, said, with reference to exemplary damages, that "such damages, although given to recompense the sufferer, do inflict a punishment upon the offender."

3. See *infra*, this title, *Requisites to Recovery* — *Necessity for Actual Damages*.

4. *Pike v. Dilling*, 48 Me. 539; *Goetz v. Ambs*, 27 Mo. 28; *Buckley v. Knapp*, 48 Mo. 163; *Titus v. Corkins*, 21 Kan. 722.

Doctrine of Day v. Woodworth. — In the case of *Day v. Woodworth*, 13 How. (U. S.) 363, which is a leading case in the *United States* on the subject of exemplary damages, it was held that the considerations regulating the allowance of such damages have in view the nature and enormity of the defendant's conduct, rather than the measure of compensation to the plaintiff. To the same effect see the case of *Schippel v. Norton*, 38 Kan. 567, wherein it

was held that exemplary damages are not given upon any theory that the plaintiff has any just right to recover them, but only upon the theory that the defendant deserves punishment for his wrongful acts, and that it is proper for the public to impose them upon the defendant as punishment for such wrongful acts though in the private action brought by the plaintiff. And see the opinion of Mr. Justice Grier in *Stimpson v. Rail Roads*, 1 Wall. Jr. (C. C.) 164.

Idea of Compensation Abandoned. — Where punitive damages are recoverable "the idea of compensation is abandoned and that of punishment is introduced." *Goetz v. Ambs*, 27 Mo. 28.

Incidentally Compensatory. — In the case of *Cook v. Ellis*, 6 Hill (N. Y.) 466, 41 Am. Dec. 757, exemplary damages are referred to as being incidentally compensatory.

5. *Smith v. Bagwell*, 19 Fla. 117, 45 Am. Rep. 12; *Taber v. Hutson*, 5 Ind. 322, 61 Am. Dec. 96; *Smith v. Eakin*, 2 Sneed (Tenn.) 456; *Dougherty v. Shown*, 1 Heisk. (Tenn.) 302; *Byram v. McGuire*, 3 Head (Tenn.) 530; *Cox v. Crumley*, 5 Lea (Tenn.) 529.

6. See authorities cited *infra*, this title, *Exemplary Damages in Actions for Torts; Exemplary Damages in Actions on Contracts; infra*, this section, *Jurisdictions Where Not Allowed*.

Doctrine of Exemplary Damages Thoroughly Established. — "It is a well-established principle of the common law," said Mr. Justice Grier in *Day v. Woodworth*, 13 How. (U. S.) 363, "that in actions of trespass and all actions on the case for torts, a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant, having in view the enormity of his offense rather than the measure of compensation to the plaintiff. We are aware that the propriety of this doctrine has been questioned by some writers; but if repeated judicial decisions for more than a century are to be received as the best exposition of what the law is, the question will not admit of argument."

7. **Objections to Doctrine Stated.** — The objections to the doctrine are stated in
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b. CONSTITUTIONALITY. — The rule awarding exemplary damages as a punishment though the defendant's act may be punishable as a crime is not in conflict with the "twice in jeopardy" inhibitions contained in the Federal Constitution and in the constitutions of most of the states.¹

The Term "Jeopardy" as used in constitutional provisions applies strictly to criminal prosecutions.² It has been declared, indeed, that there would be as much propriety in the argument that compensatory damages for an act which is also a crime operate as a double punishment as that this result is produced when the damages are merely increased and made exemplary, any damages operating *pro tanto* as a punishment to the party required to pay them.³

c. JURISDICTIONS WHERE NOT ALLOWED. — In several of the states of the *United States* the rule of exemplary or punitive damages is not recognized, and in others it applies only in an exceptional or modified form.⁴

tions to the doctrine of exemplary damages as stated by Helm, J., in *Murphy v. Hobbs*, 7 Colo. 550, 49 Am. Rep. 366, consist of the impropriety of judicially recognizing as criminal that which is not so by statute or at common law; the incongruity and confusion arising from trial and punishment under the rules of evidence, pleading, and practice controlling in civil actions; the injustice of denying the defendant the benefit of principles and procedure maintained in criminal prosecutions; the manifest inequity of awarding the plaintiff something to which he is not entitled. Similar objections to the doctrine of punitive damages have been made by its opponents in other jurisdictions. Thus in another case some of the reasons against the awarding of damages as a punishment in a civil proceeding have been held to be the fact that there is no indictment by the grand jury; that the civil suit is not within the statute of limitations applying to criminal offenses; that there is no limit prescribed to the extent of the pecuniary mulct. *Pegram v. Stortz*, 31 W. Va. 220.

1. Constitutionality of Rule. — *Brown v. Evans*, 8 Sawy. (U. S.) 492, *Smith v. Bagwell*, 19 Fla. 117, 45 Am. Rep. 12; *Hendrickson v. Kingsbury*, 21 Iowa 380; *Chiles v. Drake*, 2 Metc. (Ky.) 151, 74 Am. Dec. 406; *Brown v. Swineford*, 44 Wis. 282, 28 Am. Rep. 582; *Mayer v. Frobe*, 40 W. Va. 246. See, however, observations of Helm, J., in *Murphy v. Hobbs*, 7 Colo. 541, 49 Am. Rep. 366.

Exemplary Damages Not Public Punishment. — In the case of *Hendrickson v. Kingsbury*, 21 Iowa 380, the court held that the damages allowed in a civil case by way of punishment have no necessary relation to the penalty incurred for the wrong done to the public, but are called punitive damages by way of distinction from pecuniary damages, and to characterize them as a punishment for the wrong done to the individual. In this view, the awarding of punitive damages can in no just sense be said to be in conflict with the constitutional or common-law inhibition against inflicting two punishments for the same offense.

Rule Not in Conflict with Either Letter or Spirit of Constitution. — In the case of *Chiles v. Drake*, 2 Metc. (Ky.) 151, 74 Am. Dec. 406, it was declared that though it was against the spirit of the constitution to inflict more than one punishment for the same offense, still the law which authorizes this action and the recovery therein of punitive damages is not

liable to condemnation. Its object is not to inflict a penalty, but to remunerate for the loss sustained. Every recovery for a personal injury, with or without vindictive damages, operates in some degree as a punishment, but it is a punishment which results from the redress of a private wrong, and does not therefore violate either the meaning or spirit of the constitution.

It Is a Matter of Arbitrary Regulation, and not of principle, whether a given violation of law shall be redressed by a civil or criminal prosecution or by both. *Elliott v. Van Buren*, 33 Mich. 49, 20 Am. Rep. 668.

Punitive Damages by Statute — Due Process of Law — Equal Protection of the Laws. — It has been held that a statute providing for punitive damages in actions against railroad companies under prescribed conditions is not unconstitutional as depriving the corporation of its property without due process of law or denying to it the equal protection of the laws within the meaning of the Fourteenth Amendment of the Federal Constitution. *Missouri Pac. R. Co. v. Humes*, 115 U. S. 512.

2. *Brown v. Evans*, 8 Sawy. (U. S.) 492; *Brown v. Swineford*, 44 Wis. 287, 28 Am. Rep. 582.

3. *Chiles v. Drake*, 2 Metc. (Ky.) 151, 74 Am. Dec. 406.

4. Where Rule Does Not Obtain — Massachusetts. — This state is usually regarded as one of the few denying the principle of exemplary damages *in toto*. And in the early case of *Barnard v. Poor*, 21 Pick. (Mass.) 378, which was an action for damages for the destruction of property resulting from the defendant's alleged negligence, it was held that the measure of damages was compensation merely. Although, however, the foregoing case seems to be generally regarded as a general exclusion of the rule, yet in the later case of *Austin v. Wilson*, 4 Cush. (Mass.) 273, 50 Am. Dec. 766, the court, with reference to the subject of punitive damages, employed the following language: "If such damages are ever recoverable, we are clearly of opinion that they cannot be recovered in an action for an injury which is also punishable by indictment; as libel, and assault and battery. If they could be, the defendant might be punished twice for the same act. We decide the present case on this single ground." This is only a qualified denial. In the case of *Reed v. Davis*, 4 Pick. (Mass.) 216, antedating *Barnard v. Poor*, 21

Thus, in some jurisdictions, while no damages are recovered as a punishment, what have been termed "added" damages, or "indeterminate" damages, and sometimes "exemplary" damages, are recoverable where, from the malice of the defendant and the manner of commission of the tort, it is more aggravating and disturbing in its mental effect than a wrong not so attended.¹ And it is observable that in the jurisdictions denying the rule of punitive damages a greater liberality is exhibited towards the allowance of damages for so-called mental injuries resulting from any wantonness and outrage accompanying the commission of the tort.² It has been sometimes regarded,

Pick. (Mass.) 378, *supra*, by almost twelve years, something very like the doctrine of punitive damages is discernible. In this case the plaintiff recovered a verdict of five hundred dollars for a wrongful eviction of the plaintiff and his family from a dwelling house. The evidence seems to have shown the plaintiff to be a man in reduced circumstances, while the defendant was a man of wealth and influence. In refusing to disturb the verdict as excessive, Putnam, J., delivering the opinion of the court, said that the jury seemed to have manifested "a determination to vindicate the rights of the poor against the aggressions of power and violence." And continuing: "These motives are sound and should be cherished; and we ascribe the amount of the verdict to those considerations rather than to partiality, or passion, or any unworthy motive." The earlier case is not noticed in the later decision.

Michigan. — The courts of this state deny the right of recovery in a civil action of more than compensatory damages. *Detroit Daily Post Co. v. McArthur*, 16 Mich. 447; *Kreiter v. Nichols*, 28 Mich. 496; *Ganssly v. Perkins*, 30 Mich. 495; *Raynor v. Nims*, 37 Mich. 34, 26 Am. Rep. 493; *Stilson v. Gibbs*, 53 Mich. 280; *Wilson v. Bowen*, 64 Mich. 133; *Ross v. Leggett*, 61 Mich. 445, 1 Am. St. Rep. 608; *Mattice v. Brinkman*, 74 Mich. 705; *Stuyvesant v. Wilcox*, 92 Mich. 233, 31 Am. St. Rep. 580; *Lucas v. Michigan Cent. R. Co.*, 98 Mich. 1, 39 Am. St. Rep. 517; *Haviland v. Chase*, (Mich. 1898) 74 N. W. Rep. 477. And see *Alford v. Vincent*, 53 Mich. 555.

Nebraska. — In this state damages as a punishment are not recoverable. *Boyer v. Barr*, 8 Neb. 68, 30 Am. Rep. 814; *Roose v. Perkins*, 9 Neb. 304; *Riewe v. McCormick*, 11 Neb. 261; *Fremont, etc., R. Co. v. Leslie*, 41 Neb. 159; *Fremont, etc., R. Co. v. French*, 48 Neb. 638.

New Hampshire. — Though earlier cases in this state adopted the rule of punitive damages, since the decision of *Fay v. Parker*, 53 N. H. 342, 16 Am. Rep. 270, the recovery of such damages has been denied. *Fay v. Parker* is the leading American case opposing the doctrine of exemplary damages on principle. It only, however, in terms, decided against the right to recover punitive damages where the defendant's act is also punishable criminally. But later cases, supported, indeed, by the reasoning of the court in *Fay v. Parker*, deny the right in general terms of exclusion. See *Bixby v. Dunlap*, 56 N. H. 456, 22 Am. Rep. 475; *Kimball v. Holmes*, 60 N. H. 164; *Felch v. Concord R. Co.*, 66 N. H. 320.

Washington. — In Washington punitive damages are not recoverable. *Spokane Truck, etc., Co. v. Hoefler*, 2 Wash. 45, 26 Am. St. Rep. 842.

Colorado and West Virginia. — These two states were, until very recently, opposed to the doctrine of punitive damages, but in Colorado the rule was changed by statute, and in West Virginia by a decision of the Supreme Court. For the existing Colorado doctrine see *Mills's Annot. Stat.*, 1891, § 1512; also the cases of *Courvoisier v. Raymond*, 23 Colo. 113; *Eisenhart v. Ordean*, 3 Colo. App. 162. Before the enactment of the statute, the case of *Murphy v. Hobbs*, 7 Colo. 552, 49 Am. Rep. 366, was the leading case in this state against the recovery of exemplary damages — a principle, however, recognized by earlier cases therein. See *Kansas Pac. R. Co. v. Lundin*, 3 Colo. 101; *McClelland v. Burns*, 5 Colo. 394. In West Virginia the right of recovery of damages by way of punishment was denied in *Wilson v. Wheeling*, 19 W. Va. 323, 42 Am. Rep. 780; *Pegram v. Stortz*, 31 W. Va. 220; *Beck v. Thompson*, 31 W. Va. 459, 13 Am. St. Rep. 870. But in *Mayer v. Frobe*, 40 W. Va. 246, the earlier cases were expressly overruled, and the right of recovery, under proper circumstances, of damages in a civil action by way of punishment was established. And see also *Downey v. Chesapeake, etc., R. Co.*, 28 W. Va. 732; *Ricketts v. Chesapeake, etc., R. Co.*, 33 W. Va. 433, 25 Am. St. Rep. 901; *Turner v. Norfolk, etc., R. Co.*, 40 W. Va. 675; *Talbott v. West Virginia, etc., R. Co.*, 42 W. Va. 560.

1. *Raynor v. Nims*, 37 Mich. 34, 26 Am. Rep. 493; *Alford v. Vincent*, 53 Mich. 555; *Ross v. Leggett*, 61 Mich. 445, 1 Am. St. Rep. 608; *Bixby v. Dunlap*, 56 N. H. 456, 22 Am. Rep. 475; *Pegram v. Stortz*, 31 W. Va. 220. And see *Stilson v. Gibbs*, 53 Mich. 280.

Manner of Commission of Tort. — In an action of tort for a wilful injury to the person, the manner and manifest motive of the wrongful act may be given in evidence as affecting the question of damages; for when the merely physical injury is the same, it may be more aggravated in its effects upon the mind if it is done in wanton disregard of the rights and feelings of the plaintiff than if it is the result of mere carelessness. *Hawes v. Knowles*, 114 Mass. 518, 19 Am. Rep. 383. It is proper to observe, however, that in this state such damages are not termed "added" or "exemplary," but are termed, simply, from their true nature, damages for mental injuries.

2. *Howlett v. Tuttle*, 15 Colo. 454; *Hawes v. Knowles*, 114 Mass. 518, 19 Am. Rep. 383; *Fay v. Parker*, 53 N. H. 342, 16 Am. Rep. 270; *Bixby v. Dunlap*, 56 N. H. 456, 22 Am. Rep. 475; *Kimball v. Holmes*, 60 N. H. 164; *Felch v. Concord R. Co.*, 66 N. H. 318.

The True Doctrine of Exemplary Damages Has Been Held to Be that while, ordinarily, in ac-

indeed, a matter of inconsequence whether the rule of damages allows a recovery on the one score or the other,¹ and in some cases this may be so;² but it is important in principle to preserve the distinction, as damages for mental injuries are compensatory and not exemplary in their nature,³ and in proper cases there may be a recovery of punitive damages in addition to damages for mental suffering.⁴ And there may also be a recovery for mental suffering in cases which would not warrant punitive damages, according to the principles regulating the application of the rule.⁵

6. Where Act of Defendant Punishable Criminally. — The most conspicuous objection urged to the doctrine of exemplary damages has arisen in cases where the act of the defendant for which such damages were sought was also punishable as a criminal offense, the contention being that an award of exemplary damages would inflict a double punishment.⁶ In some jurisdictions, punitive damages are denied absolutely where the act complained of is punishable as a crime.⁷ In others, the fact that the defendant has been pun-

tions for torts, the rule of damages is compensation strictly, yet when the element of malice enters into the wrong, a more liberal rule of damages prevails; and the jury, taking into consideration all the circumstances of the wrong, should endeavor, according to its best judgment, to give as compensation what it is reasonable and just that the plaintiff should receive and the defendant pay. *Bixby v. Dunlap*, 56 N. H. 456, 22 Am. Rep. 475.

1. Full Compensation for All Actual Damages may, in the case of severe injuries or the disappointment of important engagements, embrace amounts as large as if given by way of punishment. *Chalmers, C. J.*, in *Chicago, etc., R. Co. v. Scurr*, 59 Miss. 456, 42 Am. Rep. 373. And in the case of *Devine v. Rand*, 38 Vt. 625, it was observed that it could be of little practical consequence to either the plaintiff or defendant, if damages are allowed according to the wickedness or wilfulness of the act, whether they are allowed upon the ground that the wickedness or wilfulness of the act increased or aggravated the injuries to the plaintiff or upon the ground that the defendant should be punished in damages.

2. The Practical Unimportance of This Distinction is pointed out by *Ryan, C. J.*, in *Brown v. Swineford*, 44 Wis. 282, 28 Am. Rep. 582, as well illustrated by the three reports of the case of *Bass v. Chicago, etc., R. Co.*, 36 Wis. 456, 17 Am. Rep. 495, 39 Wis. 636, and 42 Wis. 654, 24 Am. Rep. 437. This case was three times tried in different counties — twice upon instructions allowing exemplary damages, and once upon instructions disallowing them — and yet the verdict on each trial was for exactly the same sum. Apparently what was allowed on two trials for exemplary damages was allowed on the third trial for compensatory damages for wounded feelings, etc.

3. *Murphy v. Hobbs*, 7 Colo. 547, 49 Am. Rep. 366; *Baltimore, etc., Turnpike Road Co. v. Boone*, 45 Md. 344; *Wolf v. Trinkle*, 103 Ind. 355; *McKinley v. Chicago, etc., R. Co.*, 44 Iowa 319, 24 Am. Rep. 748; *Parkhurst v. Masteller*, 57 Iowa 474; *Philadelphia, etc., R. Co. v. Larkin*, 47 Md. 161, 28 Am. Rep. 442; *Hamilton v. Third Ave. R. Co.*, 35 N. Y. Super. Ct. 118; *Craker v. Chicago, etc., R. Co.*, 36 Wis. 657.

Inconvenience and Annoyance — Compensatory. — An instruction that the jury may, in assess-

ing the plaintiff's damages, consider the inconvenience and annoyance occasioned by the defendant's wrong is not equivalent to an instruction that vindictive damages may be given. *Shepard v. Milwaukee Gas Light Co.*, 15 Wis. 318, 82 Am. Dec. 679. "The 'inconvenience and annoyance' occasioned directly by the wrongful act or refusal of the defendant," said the court in this case, "are always legitimate items in estimating the damages in actions of this kind. Vindictive damages are those which are given over and above all this, as a punishment for the other party."

Where the Jurors Were Instructed that They Might Give "Vindictive Damages", that is, such damages as will satisfy the highly excited feelings of the party injured," it was held to be error. *Jones v. Turpin*, 6 Heisk. (Tenn.) 181.

4. *Parkhurst v. Masteller*, 57 Iowa 474; *Root v. Sturdivant*, 70 Iowa 55.

5. *Smith v. Pittsburg, etc., R. Co.*, 23 Ohio St. 10; *American Water-Works Co. v. Dougherty*, 37 Neb. 373; *Fry v. Bennett*, 4 Duer (N. Y.) 257.

6. See cases cited in succeeding notes.

7. Where Act Complained of Punishable Criminally — *United States*. — See opinion of *Woodbury, J.*, in *Taylor v. Carpenter*, 2 Woodb. & M. (U. S.) 22.

Colorado. — *Murphy v. Hobbs*, 7 Colo. 541, 49 Am. Rep. 366. But see the later case of *Howlett v. Tuttle*, 15 Colo. 454, and *Sess. Laws 1889*, p. 64 changing the rule of exclusion of exemplary damages.

District of Columbia. — *Huber v. Teuber*, 3 MacArthur (D. C.) 484, 36 Am. Rep. 110.

Georgia. — *Cherry v. McCall*, 23 Ga. 193.

Indiana. — *Taber v. Hutson*, 5 Ind. 322, 61 Am. Dec. 96; *Struble v. Nodwift*, 11 Ind. 64; *Butler v. Mercer*, 14 Ind. 479; *Nossaman v. Rickert*, 18 Ind. 350; *Humphries v. Johnson*, 20 Ind. 190; *Koerner v. Oberly*, 56 Ind. 284; *Stewart v. Maddox*, 63 Ind. 51; *Farman v. Lanman*, 73 Ind. 568; *Wolf v. Trinkle*, 103 Ind. 355; *Tracy v. Hackett*, 19 Ind. App. 133. And see *Meyer v. Bohlfling*, 44 Ind. 238; *Ziegler v. Powell*, 54 Ind. 173.

Massachusetts. — See *Austin v. Wilson*, 4 Cush. (Mass.) 273, 50 Am. Dec. 766.

Canada. — *Guest v. Macpherson*, 3 Leg. N. (Quebec) 84.

Where the Plaintiff Had Procured an Indictment against the defendant for an assault, upon the

ished criminally for his act is held to go in mitigation of damages, though not necessarily in bar.¹

But in the Majority of Jurisdictions the liability to criminal punishment, or the fact of its actual infliction, is held not to affect the question of punitive damages.² Thus, there may be a recovery in exemplary damages although the defendant has been convicted and fined in a criminal prosecution for the same offense.³ Nor is the fact that, in a civil action founded on a criminal act, the

trial of which he had been fined, and the plaintiff had received out of the treasury the sum of one hundred pounds, part of the fine imposed, it was held that as no actual damages were shown the plaintiff could recover only nominal damages. *Jacks v. Bell*, 3 C. & P. 316, 14 E. C. L. 325. From the report of this case it is not thoroughly clear whether the judgment would have been restricted to nominal damages but for the fact that it did not appear that the plaintiff had suffered any actual personal injury, and that he had received a part of the fine in the civil case. But the observations of Lord Tenterden, C. J., seem to have been chiefly invoked by considerations of double punishment to the defendant.

Nominal Damages. — Where a person who had been tried and convicted for a criminal offense was sued civilly for the same act, it was held that only nominal damages would be awarded. *Guest v. Macpherson*, 3 Leg. N. (Quebec) 84.

Different Rule Not Unconstitutional but Unjust. — It seems to be admitted that the affirmative of the rule under discussion would not be unconstitutional, but it is rather held that the recovery of punitive damages where the act is also punishable criminally would be unjust, and opposed to the spirit of free institutions. Thus in the case of *Taber v. Hutson*, 5 Ind. 322, 61 Am. Dec. 96, the court said: "The constitution declares that 'no person shall be twice put in jeopardy for the same offense;' and though that provision may not relate to the remedies secured by civil proceedings, still it serves to illustrate a fundamental principle inculcated by every well-regulated system of government, viz., that each violation of the law should be certainly followed by one appropriate punishment and no more."

1. *Rhodes v. Rodgers*, 151 Pa. St. 634; *Jackson v. Wells*, 13 Tex. Civ. App. 275; *Flanagan v. Womack*, 54 Tex. 50. And see *Porter v. Seiler*, 23 Pa. St. 424, 62 Am. Dec. 341; *Barr v. More*, 87 Pa. St. 385, 30 Am. Rep. 367; *Cole v. Tucker*, 6 Tex. 266. Compare, however, *Foster v. Com.*, 8 W. & S. (Pa.) 77.

Evidence of Payment of Fine. — In the case of *Flanagan v. Womack*, 54 Tex. 45, it was held that evidence of the payment of a fine in a criminal prosecution for the same act for which exemplary damages were sought was admissible, presumably with a view of mitigating the damages. "If exemplary damages are allowed as punishment," said the court, "and not strictly as compensation, then all the facts and circumstances of the case which would enable the jury to act advisedly in imposing the appropriate punishment would be proper for their consideration." But this distinction has been held unsatisfactory by the opponents of the doctrine in its entirety. Thus in the case of *Murphy v. Hobbs*, 7 Colo. 544, 49 Am. Rep. 366, Helm, J., in delivering

the opinion of the court, said: "An effort has been made to mitigate the undeniable hardship and injustice by declaring that juries in the second prosecution, whether it be civil or criminal in form, may consider the punishment already inflicted. But both reason and authority conclusively show that this proposition is illusory; that the application of such a rule is impracticable; and that the attempt to apply it, while producing confusion, would not effectively accomplish the purpose intended."

2. *England.* — See *Jones v. Clay*, 1 B. & P. 191.

United States. — *Brown v. Evans*, 8 Sawy. (U. S.) 488.

Alabama. — *Phillips v. Kelly*, 29 Ala. 628.

California. — *Wilson v. Middleton*, 2 Cal. 54; *Bundy v. Maginess*, 76 Cal. 532.

Delaware. — *Jefferson v. Adams*, 4 Harr. (Del.) 321.

Florida. — *Smith v. Bagwell*, 19 Fla. 117, 45 Am. Rep. 12.

Iowa. — *Hendrickson v. Kingsbury*, 21 Iowa 379; *Garland v. Wholeham*, 26 Iowa 185; *Guengerich v. Smith*, 36 Iowa 587; *Reddin v. Gates*, 52 Iowa 210; *Root v. Sturdivant*, 70 Iowa 55; *Hauser v. Griffith*, 102 Iowa 215.

Kentucky. — *Chiles v. Drake*, 2 Metc. (Ky.) 146, 74 Am. Dec. 406; *Slater v. Sherman*, 5 Bush (Ky.) 206.

Maine. — *Johnson v. Smith*, 64 Me. 553.

Minnesota. — *Boetcher v. Staples*, 27 Minn. 308, 38 Am. Rep. 295.

Mississippi. — *Wheatley v. Thorn*, 23 Miss. 62.

Missouri. — *Corwin v. Walton*, 18 Mo. 71, 59 Am. Dec. 285.

New York. — *Cook v. Ellis*, 6 Hill (N. Y.) 466, 41 Am. Dec. 757; *Fry v. Bennett*, 4 Duer (N. Y.) 247.

North Carolina. — *Sowers v. Sowers*, 87 N. Car. 303.

Ohio. — *Roberts v. Mason*, 10 Ohio St. 277.

South Carolina. — *Wolff v. Cohen*, 8 Rich. L. (S. Car.) 144.

Texas. — *Cole v. Tucker*, 6 Tex. 266.

Vermont. — *Hoadley v. Watson*, 45 Vt. 289, 12 Am. Rep. 197; *Edwards v. Leavitt*, 46 Vt. 126; *Roach v. Caldbeck*, 64 Vt. 593.

Wisconsin. — *McWilliams v. Bragg*, 3 Wis. 424; *Klopfer v. Bromme*, 26 Wis. 372; *Brown v. Swineford*, 44 Wis. 282, 28 Am. Rep. 582; *Corcoran v. Harran*, 55 Wis. 120.

Rule Applied in Action for Tort to Person. — The plaintiff may recover vindictive damages for a tort to the person committed with circumstances of aggravation, although the defendant might be indicted for the same offense. The recovery in one case is for the private injury and in the other for the public wrong. *Chiles v. Drake*, 2 Metc. (Ky.) 151, 74 Am. Dec. 406.

3. *Jones v. Clay*, 1 B. & P. 191; *Wilson v. Middleton*, 2 Cal. 54; *Bundy v. Maginess*, 76

guilty party has been compelled to pay exemplary damages to the party injured on account of the act a bar to the prosecution in a criminal proceeding for the same act.¹ And though the criminal action and civil suit are pending at the same time, in which the same party is prosecutor and plaintiff respectively, the law will not compel an election between the two proceedings.²

As the Rule Has Been Well Stated, the judgment for the criminal offense is for the wrong done to the public; the judgment for the tort, including the punitive damages, is for the offense against the private sufferer.³

Rationale. — The liability both to criminal punishment and to such damages as the jury may impose in a civil suit is merely the preordained consequence of any act that is criminal and also creates a civil liability.⁴

Criminal Prosecution Not Admissible in Mitigation of Damages. — From what has foregone it naturally follows that in the jurisdictions in which all objection to exemplary damages as double punishment is denied, the liability to criminal prosecution and fine or other punishment, or, indeed, the fact that a fine or other punishment has actually been inflicted, will not be allowed to go even in mitigation of damages in the civil action,⁵ or a recovery of damages in a civil action in mitigation of the punishment in a criminal prosecution.⁶

7. Several Defendants — *a.* IN GENERAL. — Where several are sued jointly for the commission of a tort concurred in by all, there cannot, in general, be a several assessment of damages.⁷

b. DAMAGES ACCORDING TO LIABILITY OF LEAST CULPABLE. — This has given rise to a question of some doubt, where several have concurred in the commission of a tort, but fewer than all are liable in punitive damages, under the rule of its allowance. Some authorities have held in such cases that the assessment should be according to the measure to be applied to the least culpable.⁸

Cal. 534; *Jefferson v. Adams*, 4 Harr. (Del.) 321; *Root v. Sturdivant*, 70 Iowa 55; *Hauser v. Griffith*, 102 Iowa 215; *Boetcher v. Staples*, 27 Minn. 308, 38 Am. Rep. 295; *Corwin v. Walton*, 18 Mo. 71, 59 Am. Dec. 285; *Cook v. Ellis*, 6 Hill (N. Y.) 466, 41 Am. Dec. 757; *Roberts v. Mason*, 10 Ohio St. 278; *Hoadley v. Watson*, 45 Vt. 289, 12 Am. Rep. 197; *Edwards v. Leavitt*, 46 Vt. 126; *McWilliams v. Bragg*, 3 Wis. 424.

Early Statute — Necessity for Criminal Prosecution. — By a statute in *Georgia*, since repealed, it was provided that if the act of infliction of personal injuries amounts to a felony, the person injured must, "either simultaneously or concurrently or previously, prosecute for the same" or allege a good reason for not doing so, before any damages, compensatory or punitive, can be recovered therefor in a civil action. It is not, therefore, necessary in this state to show a criminal prosecution, though the defendant's act for which damages are sought amounts to a felony. *Parker v. Lanier*, 82 Ga. 216. To the same effect see *Western*, etc., *R. Co. v. Meigs*, 74 Ga. 857; *Powell v. Augusta*, etc., *R. Co.*, 77 Ga. 193.

1. *Foster v. Com.*, 8 W. & S. (Pa.) 77; *Hoadley v. Watson*, 45 Vt. 289, 12 Am. Rep. 197.

2. *Jones v. Clay*, 1 B. & P. 191; *Cook v. Ellis*, 6 Hill (N. Y.) 466, 41 Am. Dec. 757. And see *McWilliams v. Bragg*, 3 Wis. 424.

Nor Will the Court Stay Proceedings in the civil action to govern itself by the event of a pending criminal prosecution. *Cook v. Ellis*, 6 Hill (N. Y.) 466, 41 Am. Dec. 757. And see *McWilliams v. Bragg*, 3 Wis. 424.

3. *Brown v. Swineford*, 44 Wis. 282, 28 Am. Rep. 582.

Not in Lieu of Other Punishment. — Exemplary damages are given by way of punishment, and not in lieu of other punishment. *Hoadley v. Watson*, 45 Vt. 289, 12 Am. Rep. 197.

4. *Hoadley v. Watson*, 45 Vt. 289, 12 Am. Rep. 197.

5. Criminal Liability — Mitigation of Damages. — *Reddin v. Gates*, 52 Iowa 210; *Cook v. Ellis*, 6 Hill (N. Y.) 466, 41 Am. Dec. 757; *Hoadley v. Watson*, 45 Vt. 289, 12 Am. Rep. 197; *Edwards v. Leavitt*, 46 Vt. 126; *Roach v. Caldbeck*, 64 Vt. 593; *Klopper v. Bromme*, 26 Wis. 372.

6. *Hoadley v. Watson*, 45 Vt. 289, 12 Am. Rep. 197.

7. Several Persons Sued Jointly. — *Heydon's Case*, 11 Coke 8; *Yeazel v. Alexander*, 58 Ill. 254; *Smith v. Wunderlich*, 70 Ill. 437; *Pardridge v. Brady*, 7 Ill. App. 639; *Turner v. Hitchcock*, 20 Iowa 310.

Action Against Principal and Sureties on Bond. — In the case of *Mayer v. Duke*, 72 Tex. 445, which was action against principal and sureties in an attachment bond, a verdict seems to have been rendered against the principal for exemplary damages and against the sureties for actual compensatory damages.

8. *Clark v. Newsam*, 1 Exch. 131; *Pardridge v. Brady*, 7 Ill. App. 639; *McCarthy v. De Armit*, 99 Pa. St. 63; *Lombard v. Batchelder*, 58 Vt. 558. And see *Smith v. Wunderlich*, 70 Ill. 437.

Rule and Rationale of "Least Culpable." — In the case of *Clark v. Newsam*, 1 Exch. 131, *Pollock, C. B.*, said that "it would be very unjust to make the malignant motive of one party the ground of aggravation of damage against the other party, who was altogether

c. DAMAGES ACCORDING TO LIABILITY OF MOST CULPABLE. — On the other hand, the proper rule of damages has been held to be according to the liability of the one to whom the most liberal standard of damages should be applied.¹

d. ACTION AGAINST HUSBAND AND WIFE. — Where the action is against the husband and wife for the tort of the latter, there could, of course, be no objection to assessing punitive damages, though the judgment would go against both.²

IV. EXEMPLARY DAMAGES IN ACTIONS FOR TORTS — 1. Statement of Rule. — The general rule of the jurisdictions wherein the doctrine under discussion is recognized is that where malice, fraud, or gross negligence or recklessness enters into the commission of a tort, exemplary damages are recoverable.³

free from any improper motive. In such case the plaintiff ought to select the party against whom he means to get aggravated damages."

Plaintiff's Proper Course. — If a plaintiff in an action against several defendants makes a case for exemplary damages against one, but not the rest, he may dismiss as to the latter and have his recovery against the former. *Partridge v. Brady*, 7 Ill. App. 639.

1. Rule and Rationale of "Most Culpable." — In an action seeking compensatory and exemplary damages for the joint tort of several defendants who joined in their pleas, it has been held proper for the jury to assess damages against all the defendants jointly according to the amount which, in its judgment, the most culpable of them ought to pay; and whatever, therefore, would be competent evidence in that view as to one would be competent as to all of the defendants. Otherwise a wealthy defendant who was principally implicated in a tort warranting punitive damages might escape the payment of a just and reasonable amount by having others without property associated with him in the unlawful act. *Bell v. Morrison*, 27 Miss. 68.

Illustration. — In a joint assault, if one of the participants was actuated by malice, each will be liable for all damages, actual and exemplary. *Reizenstein v. Clark*, 104 Iowa 287.

2. *Lombard v. Batchelder*, 58 Vt. 558.

3. General Rule as to Exemplary Damages —
England. — *Beardmore v. Carrington*, 2 Wils. 244; *Doe v. Filliter*, 13 M. & W. 47; *Bell v. Midland R. Co.*, 10 C. B. N. S. 287, 100 E. C. L. 287.

Canada. — *Brouillet v. Clarke*, Montreal L. R. 2 Super. Ct. 417; *Clissold v. Machell*, 26 U. C. Q. B. 422; *Stephens v. Chaussé*, Montreal L. R. 3 Q. B. 270; *Derry v. Derry*, 19 New Bruns. 621; *Dreyfus v. Peruvian Guano Co.*, 42 Ch. Div. 66. And see *Lalonde v. Bessette*, Montreal L. R. 4 Super. Ct. 39.

United States. — *Philadelphia, etc., R. Co. v. Quigley*, 21 How. (U. S.) 214; *Milwaukee, etc., R. Co. v. Arms*, 91 U. S. 493; *Brown v. Evans*, 8 Sawy. (U. S.) 488; *Story, J., in The Amiable Nancy*, 3 Wheat. (U. S.) 546; *Tracy v. Swartwout*, 10 Pet. (U. S.) 80; *Missouri Pac. R. Co. v. Humes*, 115 U. S. 512; *Scott v. Donald*, 165 U. S. 58; *Gallena v. Hot Springs R. Co.*, 13 Fed. Rep. 116; *Chambers v. Upton*, 34 Fed. Rep. 473, U. S. v. Taylor, 35 Fed. Rep. 484; *Press Pub. Co. v. McDonald*, 63 Fed. Rep. 238; *Press Pub. Co. v. Monroe*, 73 Fed. Rep. 201; *Downing v. Outerbridge*, 79 Fed.

Rep. 931; *Lake Shore, etc., R. Co. v. Prentice*, 147 U. S. 101.

Alabama. — *Alabama G. S. R. Co. v. Sellers*, 93 Ala. 9, 30 Am. St. Rep. 17; *McCullough v. Walton*, 11 Ala. 492; *Floyd v. Hamilton*, 33 Ala. 235; *Mobile, etc., R. Co. v. Ashcraft*, 48 Ala. 15; *Barbour County v. Horn*, 48 Ala. 566; *South, etc., Alabama R. Co. v. McLendon*, 63 Ala. 266; *Wilkinson v. Searcy*, 76 Ala. 176.

Arkansas. — *Clark v. Bales*, 15 Ark. 452; *Walker v. Fuller*, 29 Ark. 448; *Barlow v. Lowder*, 35 Ark. 492; *O Connell v. Rosso*, 56 Ark. 603; *Texarkana Gas, etc., Co. v. Orr*, 59 Ark. 215, 43 Am. St. Rep. 30. See also *Ward v. Blackwood*, 41 Ark. 295, 48 Am. Rep. 41.

California. — *Wilson v. Middleton*, 2 Cal. 54; *Dorsey v. Manlove*, 14 Cal. 553; *St. Ores v. McGlashen*, 74 Cal. 148; *Arzaga v. Villalba*, 85 Cal. 191; *Gorman v. Southern Pac. Co.*, 97 Cal. 1, 33 Am. St. Rep. 157.

Colorado. — In Colorado it is provided by statute that "in all civil actions in which damages shall be assessed by a jury for a wrong done to the person, or to personal or real property, and the injury complained of shall have been attended by circumstances of fraud, malice, or insult, or a wanton and reckless disregard of the injured party's rights and feelings, such jury may, in addition to the actual damages sustained by such party, award him reasonable exemplary damages." *Mills's Annot. Stat.*, 1891, § 1512; *Courvoisier v. Raymond*, 23 Colo. 113; *Eisenhart v. Ordean*, 3 Colo. App. 162. And see *Howlett v. Tuttle*, 15 Colo. 454. Before the enactment of this statute exemplary damages had been denied in this state, though there seems to have been some little conflict between the cases as to whether such damages were wholly excluded or only where the defendant's act was punishable criminally. See the following cases as announcing the pre-existing doctrine: *Murphy v. Hobbs*, 7 Colo. 552, 49 Am. Rep. 366; *Hoosac Min., etc., Co. v. Donat*, 10 Colo. 535; *Greeley, etc., R. Co. v. Yeager*, 11 Colo. 350, *Little Pittsburg Consol. Min. Co. v. Little Chief Consol. Min. Co.*, 11 Colo. 231, 7 Am. St. Rep. 226; *Republican Pub. Co. v. Miner*, 12 Colo. 87; *Republican Pub. Co. v. Mosman*, 15 Colo. 399; *Howlett v. Tuttle*, 15 Colo. 454. But for an even earlier recognition of the rule of exemplary damages in this jurisdiction, see *Kansas Pac. R. Co. v. Lundin*, 3 Colo. 101; *McClelland v. Burns*, 5 Colo. 394.

Connecticut. — *Edwards v. Beach*, 3 Day (Conn.) 447; *Huntley v. Bacon*, 15 Conn. 267, *Welch v. Durand*, 36 Conn. 182, 4 Am. Rep.

As the rule of exemplary damages in its various applications is fully considered elsewhere in this series, the reader should refer to the several titles which treat the various classes of persons, things, wrongs, and remedies. It is for the

55; *Dalton v. Beers*, 38 Conn. 529; *Pratt v. Pond*, 42 Conn. 318; *Mason v. Hawes*, 52 Conn. 12, 52 Am. Rep. 552.

Dakota. — *Bates v. Callender*, 3 Dakota 256.

Delaware. — *Robinson v. Burton*, 5 Harr. (Del.) 335; *Bonsall v. McKay*, 1 Houst. (Del.) 520; *Hysore v. Quigley*, 9 Houst. (Del.) 348; *Watson v. Hastings*, (Del. 1897) 39 Atl. Rep. 587.

District of Columbia. — *Woodward v. Ragland*, 5 App. Cas. (D. C.) 220.

Georgia. — *Georgia R., etc., Co. v. Dougherty*, 86 Ga. 744; *Coleman v. Ryan*, 58 Ga. 132; *Parker v. Lanier*, 82 Ga. 216; *Jones v. Lamont*, 92 Ga. 529; *Western, etc., R. Co. v. Ledbetter*, 99 Ga. 318. In Georgia it is provided by statute (code, § 3066) that where in the commission of a tort there are aggravating circumstances in the act or intention, the jury may give "additional damages, either to deter the wrongdoer from repeating the trespass, or as compensation for the wounded feelings of the plaintiff." Under this statute it was held erroneous to instruct the jurors that they "may give exemplary damages, not only as compensation for the wounded feelings of the plaintiff, but to punish the defendant, and to deter others from the commission of like offenses." *Ratteree v. Chapman*, 79 Ga. 574. It has also been held error to charge that such damages may be given as a punishment, the code providing that they may be given "to deter the wrongdoer from repeating the trespass," on the ground that "it is best that the law of the case, when expressed in the code, be given as expressed, in charge to the jury." *Ratteree v. Chapman*, 79 Ga. 574; *Chattanooga, etc., R. Co. v. Liddell*, 85 Ga. 496.

Illinois. — *McNamara v. King*, 7 Ill. 432; *Dean v. Blackwell*, 18 Ill. 336; *Bull v. Griswold*, 19 Ill. 631; *Peoria Bridge Assoc. v. Coomis*, 20 Ill. 235, 71 Am. Dec. 263; *Williams v. Reil*, 20 Ill. 147; *Ously v. Hardin*, 23 Ill. 403; *Foot v. Nichols*, 28 Ill. 486; *Donnelly v. Harris*, 41 Ill. 126; *Dickey v. McDonnell*, 41 Ill. 62; *Chicago v. Martin*, 49 Ill. 245, 95 Am. Dec. 590; *Reno v. Wilson*, 49 Ill. 95; *Johnson v. Camp*, 51 Ill. 219; *Farwell v. Warren*, 51 Ill. 468; *Chicago v. Langlass*, 52 Ill. 256, 4 Am. Rep. 603; *Decatur v. Fisher*, 53 Ill. 407; *Tripp v. Grouner*, 60 Ill. 474; *Toledo, etc., R. Co. v. Patterson*, 63 Ill. 307; *Holmes v. Holmes*, 64 Ill. 294; *Peters v. Lake*, 66 Ill. 206, 16 Am. Rep. 593; *Jasper v. Purnell*, 67 Ill. 358; *Smith v. Wunderlich*, 70 Ill. 426; *Jones v. Jones*, 71 Ill. 562; *Toledo, etc., R. Co. v. Roberts*, 71 Ill. 540; *Miller v. Kirby*, 74 Ill. 242; *Scott v. Bryson*, 74 Ill. 420; *Becker v. Dupree*, 75 Ill. 167; *Drohn v. Brewer*, 77 Ill. 280; *Smalley v. Smalley*, 81 Ill. 70; *Harrison v. Ely*, 120 Ill. 83; *West Chicago St. R. Co. v. Morrison, etc., Co.*, 160 Ill. 288.

Indiana. — *Moore v. Crose*, 43 Ind. 30; *Ziegler v. Powell*, 54 Ind. 173; *Binford v. Young*, 115 Ind. 174; *Citizens' St. R. Co. v. Willooby*, 134 Ind. 563.

Iowa. — In the case of *Lucas v. Flinn*, 35 Iowa 9, which was an action for damages for

assault and battery, it was held that the correct rule was that the jury should allow no damages by way of punishment, or beyond actual compensation for the injuries sustained. This, however, is certainly not the law at the present time. As laying down or recognizing the rule stated in the text, see *Brown v. Allen*, 35 Iowa 306; *Nordhaus v. Peterson*, 54 Iowa 68; *Inman v. Ball*, 65 Iowa 543; *Root v. Sturdivant*, 70 Iowa 55; *Redfield v. Redfield*, 75 Iowa 435; *Waller v. Waller*, 76 Iowa 513; *Wright v. Waddell*, 89 Iowa 350; *Byford v. Girton*, 90 Iowa 661; *Casey v. Ballou Banking Co.*, 98 Iowa 107.

Kansas. — *Wiley v. Keokuk*, 6 Kan. 94; *Titus v. Corkins*, 21 Kan. 722; *Jockers v. Borgman*, 29 Kan. 109, 44 Am. Rep. 625; *Morris v. Shew*, 29 Kan. 662; *Dow v. Julien*, 32 Kan. 576; *Cady v. Case*, 45 Kan. 733.

Kentucky. — *Bronson v. Green*, 2 Duv. (Ky.) 234; *Slater v. Sherman*, 5 Bush (Ky.) 206; *Fleet v. Hollenkemp*, 13 B. Mon. (Ky.) 219; *Tyson v. Ewing*, 3 J. J. Marsh. (Ky.) 185; *Jennings v. Maddox*, 8 B. Mon. (Ky.) 430; *Chiles v. Drake*, 2 Metc. (Ky.) 151, 74 Am. Dec. 406; *Louisville, etc., R. Co. v. Ballard*, 85 Ky. 307, 7 Am. St. Rep. 600.

Louisiana. — *Jackson v. Schmidt*, 14 La. Ann. 818; *Graham v. St. Charles Street R. Co.*, 47 La. Ann. 1656; *Webb v. Rothschild*, 49 La. Ann. 244.

Maine. — *Pike v. Dilling*, 48 Me. 539; *Ames v. Hilton*, 70 Me. 36.

Maryland. — *McTavish v. Carroll*, 13 Md. 429; *Baltimore, etc., R. Co. v. Blocher*, 27 Md. 277; *Wanamaker v. Bowes*, 36 Md. 42; *Philadelphia, etc., R. Co. v. Larkin*, 47 Md. 161, 28 Am. Rep. 442; *Sapp v. Northern Cent. R. Co.*, 51 Md. 115; *Baltimore, etc., Turnpike Road Co. v. Boone*, 45 Md. 344.

Minnesota. — *Lynd v. Pickett*, 7 Minn. 184, 82 Am. Dec. 79; *McCarthy v. Niskern*, 22 Minn. 90; *Boetcher v. Staples*, 27 Minn. 308, 38 Am. Rep. 295; *Craig v. Cook*, 28 Minn. 232; *Michaelis v. Michaelis*, 43 Minn. 123; *Kemmitt v. Adamson*, 44 Minn. 121; *Gardner v. Minea*, 47 Minn. 295; *Cronsfeldt v. Arrol*, 50 Minn. 327, 36 Am. St. Rep. 648. And see *Fox v. Stevens*, 13 Minn. 272; *Seeman v. Feeney*, 19 Minn. 79.

Mississippi. — *Bell v. Morrison*, 27 Miss. 68; *New Orleans, etc., R. Co. v. Statham*, 42 Miss. 607, 97 Am. Dec. 478; *Storm v. Green*, 51 Miss. 103.

Missouri. — *Milburn v. Beach*, 14 Mo. 104, 55 Am. Dec. 91; *Corwin v. Walton*, 18 Mo. 73, 59 Am. Dec. 285; *Mooney v. Kennett*, 19 Mo. 551, 61 Am. Dec. 576; *Walker v. Borland*, 21 Mo. 289; *Freidenheit v. Edmundson*, 36 Mo. 226, 88 Am. Dec. 141; *Kennedy v. North Missouri R. Co.*, 36 Mo. 351; *Callahan v. Caffarata*, 39 Mo. 136; *Franz v. Hilterbrand*, 45 Mo. 121; *Green v. Craig*, 47 Mo. 90; *Buckley v. Knapp*, 48 Mo. 152; *Parker v. Sheckelford*, 61 Mo. 68; *Joice v. Branson*, 73 Mo. 28, Beck v. Dowell, 111 Mo. 506 33 Am. St. Rep. 547, *Munter v. Bande*, 1 Mo. App. 484; *Hitchler v. Voelker*, 8 Mo. App. 492; *Fry v. Estes*, 52 Mo. App. 1;

reason indicated that only a very general classification will here appear. Although the readiest arrangement of the subject of torts in this connection is an apportionment between torts to the person and to property, there are

Canfield v. Chicago, etc., R. Co., 59 Mo. App. 359; *Berlin v. Thompson*, 61 Mo. App. 234, 1 Mo. App. Rep. 370.

New Hampshire. — *Whitney v. Swett*, 22 N. H. 10 53 Am. Dec. 228; *Hopkins v. Atlantic, etc.*, R. Co., 36 N. H. 9, 72 Am. Dec. 287; *Knight v. Foster*, 39 N. H. 576; *Perkins v. Towle*, 43 N. H. 220, 80 Am. Dec. 149; *Towle v. Blake*, 48 N. H. 92; *Evans v. Foss*, 49 N. H. 490; *Belknap v. Boston, etc.*, R. Co., 49 N. H. 358. In the well-known case of *Fay v. Parker*, 53 N. H. 342, 16 Am. Rep. 270, however the rule was changed, the earlier cases being overruled. Damages as a punishment are not therefore recoverable in this state at the present time. See to this effect, in addition to *Fay v. Parker*, *supra*, *Bixby v. Dunlap*, 56 N. H. 456, 22 Am. Rep. 475; *Kimball v. Holmes*, 60 N. H. 164; *Felch v. Concord R. Co.*, 66 N. H. 320.

New Jersey. — *Den v. Sparks*, 1 N. J. L. 79; *Magee v. Holland*, 27 N. J. L. 86, 72 Am. Dec. 341; *Winter v. Peterson*, 24 N. J. L. 524, 61 Am. Dec. 678; *Hoboken Printing, etc., Co. v. Kahn*, 59 N. J. L. 218; *Trainer v. Wolff*, 58 N. J. L. 381.

New York. — *Voltz v. Blackmar*, 64 N. Y. 440; *Mattice v. Wilcox*, 147 N. Y. 624; *Smith v. Matthews*, 152 N. Y. 152; *Tillotson v. Cheetham*, 3 Johns. (N. Y.) 56 3 Am. Dec. 459; *Walker v. Wilson*, 8 Bosw. (N. Y.) 586; *Schuler v. Roberts*, 66 Hun (N. Y.) 626 21 N. Y. Supp. 27; *Alliger v. Mail Printing Assoc.*, 66 Hun (N. Y.) 626, 20 N. Y. Supp. 763; *Kolzem v. Broadway, etc.*, R. Co., 1 Misc. Rep. (N. Y. C. Pl.) 148; *Miller v. Donovan*, 16 Misc. Rep. (N. Y. Supreme Ct.) 453; *Van Ingen v. Star Co.*, 1 N. Y. App. Div. 429; *Karowski v. Pitass*, 20 N. Y. App. Div. 118; *Prince v. Brooklyn Daily Eagle*, 16 Misc. Rep. (N. Y. Supreme Ct.) 186.

North Carolina. — *Louder v. Hinson*, 4 Jones L. (49 N. Car.) 369; *Hays v. Askew*, 7 Jones L. (52 N. Car.) 272; *Johnson v. Allen*, 100 N. Car. 131; *Knowles v. Norfolk Southern R. Co.*, 102 N. Car. 59; *Holmes v. Carolina Cent. R. Co.*, 94 N. Car. 318.

Ohio. — *Roberts v. Mason*, 10 Ohio St. 277; *Hayner v. Cowden*, 27 Ohio St. 292, 22 Am. Rep. 303.

Oregon. — *Day v. Holland*, 15 Oregon 464.

Pennsylvania. — *Porter v. Seiler*, 23 Pa. St. 424, 62 Am. Dec. 341; *Barnett v. Reed*, 51 Pa. St. 190, 88 Am. Dec. 574; *Herdic v. Young*, 55 Pa. St. 176, 93 Am. Dec. 739; *Ellis v. Academy of Music*, 120 Pa. St. 608; *Huling v. Henderson*, 161 Pa. St. 553; *Matheis v. Mazet*, 164 Pa. St. 580; *Grohmann v. Kirschman*, 168 Pa. St. 189; *Long v. Trexler*, (Pa. 1887) 8 Atl. Rep. 620; *Hodgson v. Millward*, 3 Grant's Cas. (Pa.) 406.

Rhode Island. — *Herrshoff v. Tripp*, 15 R. I. 92.

South Carolina. — *Windham v. Rhame*, 11 Rich. L. (S. Car.) 283, 73 Am. Dec. 116; *Jefcoat v. Knotts*, 11 Rich. L. (S. Car.) 649; *Greenville, etc.*, R. Co. v. *Partlow*, 14 Rich. L. (S. Car.) 237; *Samuels v. Richmond, etc.*, R.

Co. 35 S. Car. 493, 28 Am. St. Rep. 883; *Mack v. South Bound R. Co.*, 52 S. Car. 323.

Tennessee. — *Cumberland Tel., etc., Co. v. Poston*, 94 Tenn. 696; *Polk v. Fancher*, 1 Head (Tenn.) 336; *Byram v. McGuire*, 3 Head (Tenn.) 530; *Dougherty v. Shown*, 1 Heisk. (Tenn.) 302; *Smith v. Eakin*, 2 Sneed (Tenn.) 456; *Johnson v. Perry*, 2 Humph. (Tenn.) 569; *Wilkins v. Gilmore*, 2 Humph. (Tenn.) 140; *Cox v. Crumley*, 5 Lea (Tenn.) 529; *Louisville, etc., R. Co. v. Guinan*, 11 Lea (Tenn.) 98, 47 Am. Rep. 279; *R. R. Springer Transp. Co. v. Smith*, 16 Lea (Tenn.) 498.

Texas. — *Cole v. Tucker*, 6 Tex. 266; *Kolb v. Bankhead*, 18 Tex. 228; *Hedgepeth v. Robertson*, 18 Tex. 858; *Champion v. Vincent*, 20 Tex. 811; *Harris v. Finberg*, 46 Tex. 79; *Bradshaw v. Buchanan*, 50 Tex. 492; *Weaver v. Ashcroft*, 50 Tex. 427; *Craddock v. Goodwin*, 54 Tex. 578; *Rodgers v. Ferguson*, 36 Tex. 544; *Gross v. Hays*, 73 Tex. 515; *Clark v. Pearce*, 80 Tex. 146; *Neese v. Radford*, 83 Tex. 585; *Frank v. Tatum*, (Tex. Civ. App. 1894) 26 S. W. Rep. 900; *Jackson v. Wells*, 13 Tex. Civ. App. 275; *Long Mfg. Co. v. Gray*, 13 Tex. Civ. App. 172; *Stephens v. Taylor*, (Tex. Civ. App. 1896) 36 S. W. Rep. 1083; *Gary v. Wells, etc.*, Express, (Tex. Civ. App. 1897) 40 S. W. Rep. 845; *Galveston, etc., R. Co. v. Patterson*, (Tex. Civ. App. 1898) 46 S. W. Rep. 848; *San Antonio, etc.*, R. Co. v. *Kniffen*, 4 Tex. Civ. App. 484; *Steel v. Metcalf*, 4 Tex. Civ. App. 313.

Vermont. — *Blodgett v. Brattleboro*, 30 Vt. 579; *Devine v. Rand*, 38 Vt. 626; *Ellsworth v. Potter*, 41 Vt. 685; *Edwards v. Leavitt*, 46 Vt. 126.

Virginia. — *Borland v. Barrett*, 76 Va. 128, 44 Am. Rep. 152; *Norfolk, etc.*, R. Co. v. *Anderson*, 90 Va. 1, 44 Am. St. Rep. 884.

West Virginia. — *Mayer v. Frobe*, 40 W. Va. 246; *Turner v. Norfolk, etc.*, R. Co., 40 W. Va. 675; *Ricketts v. Chesapeake, etc.*, R. Co., 33 W. Va. 433, 25 Am. St. Rep. 901; *Talbott v. West Virginia, etc.*, R. Co., 42 W. Va. 560. And see *Downey v. Chesapeake, etc.*, R. Co., 28 W. Va. 732. By earlier cases in this state the doctrine of exemplary damages was denied. See *Wilson v. Wheeling*, 19 W. Va. 323, 42 Am. Rep. 780; *Beck v. Thompson*, 31 W. Va. 459 13 Am. St. Rep. 870; *Pegram v. Stortz*, 31 W. Va. 220.

Wisconsin. — *McWilliams v. Bragg*, 3 Wis. 324; *Birchard v. Booth*, 4 Wis. 67; *Barnes v. Martin*, 15 Wis. 240, 82 Am. Dec. 670; *Pickett v. Crook*, 20 Wis. 358; *Sorenson v. Dundas*, 50 Wis. 335; *Lueck v. Heisler*, 87 Wis. 644; *Lamb v. Stone*, 95 Wis. 254.

Wyoming. — *Union Pac. R. Co. v. Hause*, 1 Wyoming 27.

Statement of Rule. — In actions of trespass where the injury has been wanton and malicious, or gross and outrageous, the courts permit jurors to add to the measured compensation of the plaintiff something further by way of punishment. Mr. Justice Grier in *Day v. Woodworth*, 13 How. (U. S.) 363.

some torts which are, in strictness, neither the one nor the other, for which exemplary damages are recoverable.¹

Various Enumerations in Stating Rule. — In their announcements of the principle the courts have frequently varied in the enumerations of the particular elements required, but it is believed that they may, in general, all be classified and grouped under the rule as first given.²

2. Necessity for Concurrence of Elements. — Any one of the proper elements will warrant the giving of punitive damages. There need not be a concurrence of several.³ And where one or more of the requisite elements exist the rule

1. For Example, various instances of official misconduct, which are considered under such titles as ARREST vol. 2, p. 832; ATTACHMENT, vol. 3, p. 181; FALSE IMPRISONMENT *post*; JUSTICES OF THE PEACE; MALICIOUS PROSECUTION; PUBLIC OFFICERS; SHERIFFS, MARSHALS, AND CONSTABLES; TAXATION. See also in this connection, the title LABOR COMBINATIONS; also the various titles treating of injuries to rights arising from peculiar relations, such as ABDUCTION, vol. 1, p. 162, CRIMINAL CONVERSATION, vol. 8, p. 260; HUSBAND AND WIFE; MASTER AND SERVANT; PARENT AND CHILD; SEDUCTION.

2. "The Idea Is Variously Expressed by different text writers and judges," said the court, in *Chicago, etc., R. Co. v. Scurr*, 59 Miss. 456, 42 Am. Rep. 373, "and sometimes with a multitude of words."

"Flagrant" or "Aggravated" Torts. — These terms are not infrequently used to characterize a tort or the manner of its communication for which punitive damages are recoverable. See *Clark v. Bales*, 15 Ark. 452; *Robinson v. Burton*, 5 Harr. (Del.) 335.

"Aggravation or Cruelty, with Vindictiveness or Malice." — For a tort committed with such attendant circumstances, exemplary damages are recoverable. *Lamb v. Stone*, 95 Wis. 254.

"Wanton and Wilful" Torts. — The expression that for "wanton and wilful" torts or "wilful" torts exemplary damages are recoverable is also frequently met with. See *Watson v. Hastings*, (Del. 1897) 39 Atl. Rep. 587; *Jones v. Jones*, 71 Ill. 562; *Reeler v. Purdy*, 48 Ill. 261; *Pike v. Dilling*, 48 Me. 539; *Vicksburg, etc., R. Co. v. Scanlan*, 63 Miss. 413; *Higgins v. Louisville, etc., R. Co.*, 64 Miss. 80; *Porter v. Seiler*, 23 Pa. St. 424, 62 Am. Dec. 341. And see also the case of *Jennings v. Maddox*, 8 B. Mon. (Ky.) 430, where it was said that vindictive damages may be given where a trespass is committed wilfully and "in a high-handed and threatening manner."

Wantonness and Malice. — Where a tort is committed with a bad motive, or so recklessly as to imply a disregard of ordinary obligations, or when the defendant appears to have acted wantonly, maliciously, or wickedly, the jury may in its discretion give exemplary damages. *Day v. Holland*, 15 Oregon 464.

Where, in the commission of a tort, the defendant acted recklessly or criminally and maliciously, with a design to oppress or injure the plaintiff, the jury, in fixing the damages, may disregard the rule of compensation, and beyond that may, as a punishment to the defendant and as a protection to society against a violation of personal rights and social order, award such additional damages as in its dis-

cretion it may deem proper. *Voltz v. Blackmar* 64 N. Y. 440.

Deliberation and Force. — In some cases the expression "deliberately and forcibly" is used in describing the manner of commission of a tort which will warrant punitive damages. *Baltimore, etc., Turnpike Road Co. v. Boone*, 45 Md. 344; *Philadelphia, etc., R. Co. v. Larkin*, 47 Md. 161, 28 Am. Rep. 442.

"Insult," "Cruelty," "Vindictiveness." — Punitive damages are recoverable where a tort is committed under such circumstances. *McWilliams v. Bragg*, 3 Wis. 424.

More Particular Enumeration. — In the case of *Holmes v. Carolina Cent. R. Co.*, 94 N. Car. 318, the court said that "punitive damages are never awarded except in cases 'when there is an element either of fraud, malice, such a degree of negligence as indicates a reckless indifference to consequences, oppression, insult, rudeness, caprice, wilfulness, or other causes of aggravation in the act or omission causing the injury.'" Quoting *Thompson on Carriers of Passengers*, 575.

Merely Mercenary Motives. — Where, in the announcement of the rule of punitive damages, the enumeration of the circumstances which will warrant recovery is in the disjunctive, and includes an element which would not justify an assessment of punitive damages, it will be held error. Thus an instruction was held erroneous where it authorized the assessment of exemplary damages if the jury found that the party had wrongfully sued out a writ of attachment without probable cause, and in so doing had been actuated by hostile, angry, vindictive, mercenary, or malicious motives. The enumeration, being in the disjunctive, was declared to warrant the assessment of such damages for merely mercenary motives, which was not good law. *Fry v. Estes*, 52 Mo. App. 1.

3. Concurrence of Several Elements. — *Devaughn v. Heath*, 37 Ala. 595; *St. Ores v. McGlashen*, 74 Cal. 148; *Drohn v. Brewer*, 77 Ill. 283; *Samuels v. Richmond, etc., R. Co.*, 35 S. Car. 493, 28 Am. St. Rep. 883.

Need Not Be Malice if Wantonness and Outrage Exist. — It has been held that, in actions for damages for an assault and battery, punitive damages are recoverable in the absence of malice, if the assault was of a wanton, gross, and outrageous character. *Drohn v. Brewer*, 77 Ill. 283. It is, however, difficult to conceive an assault which is wanton, gross, and outrageous which would not also be malicious. But the instruction that if the defendant in assaulting the plaintiff had neither malice nor deliberate purpose to injure, the measure of damages is compensatory and not vindictive,

of exemplary damages is the same in trespass and in case.¹

3. Torts to the Person. — There may be a recovery of exemplary damages for torts to the person where one or more of the necessary elements are attendant upon the commission of the wrong.² Thus an assault by throwing

has been held erroneous, because if a tort is committed wantonly, and in wilful disregard of the rights of others, the rule of punitive damages applies. *Borland v. Barrett*, 76 Va. 128, 44 Am. Rep. 152. In the case of *Devaughn v. Heath*, 37 Ala. 595, which was an action of trespass *quare clausum fregit*, it was held that the charge to the jurors, asserting that they could not give vindictive damages "unless they believe from the evidence that the defendants maliciously entered the plaintiff's lands, in a rude, aggravating, or insulting manner," was erroneous, as improperly restricting the standard of liability. Such a charge assumes that to justify the jury in awarding vindictive damages the defendant must have entered the plaintiff's premises maliciously, in a rude, aggravating, or insolent manner. These conjoined words are improperly restrictive of liability. A trespass might be so wantonly or recklessly committed as to justify the imposition of vindictive damages, without any evidence of actual malice towards the owner of the property trespassed upon.

Under a Statute providing that "in any action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, actual or presumed, the jury, in addition to the actual damages, may give damages for the sake of example and by way of punishing the defendant" malice is not essential to the assessment of punitive damages. Under such a statute, the presence of any one of the elements stated will warrant the application of the rule, the concurrence of several or all not being necessary. *St. Ores v. McGlashen*, 74 Cal. 148.

1. *Merrills v. Tariff Mfg. Co.*, 10 Conn. 384, 27 Am. Dec. 682; *Linsley v. Bushnell*, 15 Conn. 225, 38 Am. Dec. 79; *Fleet v. Hollenkemp*, 13 B. Mon. (Ky.) 219.

2. Recovery of Exemplary Damages for Torts to Person — *England*. — *Huckle v. Money*, 2 Wils. 205; *Grey v. Grant*, C. B. Trin. 4 Geo. III.

Canada. — *Gerbie v. Bessette*, 7 Leg. N. (Quebec) 156; *Leroux v. Victor Hudson Cotton Co.*, 4 Leg. N. (Quebec) 46. *Clissold v. Machell*, 26 U. C. Q. B. 422. See *Silver v. Dominion Tel. Co.*, 14 Nova Scotia 17.

United States — *Press Pub. Co. v. McDonnell*, 63 Fed. Rep. 238, 26 U. S. App. 167.

Alabama. — *Donnell v. Jones*, 13 Ala. 490; *Alabama G. S. R. Co. v. Sellers*, 93 Ala. 9, 30 Am. St. Rep. 17.

Arkansas. — See *Ward v. Blackwood*, 41 Ark. 295, 48 Am. Rep. 41; *Texarkana Gas, etc., Co. v. Orr*, 59 Ark. 215, 43 Am. St. Rep. 30.

California. — *Wade v. Thayer*, 40 Cal. 585; *Bundy v. Maginess*, 76 Cal. 532; *Gorman v. Southern Pac. Co.*, 97 Cal. 1, 33 Am. St. Rep. 157.

Connecticut. — *Dalton v. Beers*, 38 Conn. 529; *Wynne v. Parsons*, 57 Conn. 73.

Delaware. — *Watson v. Hastings*, (Del. 1897) 39 Atl. Rep. 587.

Florida. — *Smith v. Bagwell*, 19 Fla. 117, 45 Am. Rep. 12.

Georgia. — *Atlanta Consol. St. R. Co. v. Keeny*, 99 Ga. 266; *Georgia R. Co. v. Olds*, 77 Ga. 673; *Coleman v. Allen*, 79 Ga. 637, 11 Am. St. Rep. 449; *Ratteree v. Chapman*, 79 Ga. 574; *Parker v. Lanier*, 82 Ga. 216; *Western, etc. R. Co. v. Ledbetter*, 99 Ga. 318.

Illinois. — *McNamara v. King*, 7 Ill. 432; *Ously v. Hardin*, 23 Ill. 403; *Foote v. Nichols*, 28 Ill. 486; *Reeder v. Purdy*, 48 Ill. 261; *Jones v. Jones*, 71 Ill. 562; *Drohn v. Brewer*, 77 Ill. 280; *Harrison v. Ely*, 120 Ill. 83.

Indiana. — *Ziegler v. Powell*, 54 Ind. 173; *Citizens' St. R. Co. v. Willooby*, 134 Ind. 563.

Iowa. — *Parkhurst v. Masteller*, 57 Iowa 474; *Root v. Sturdivant*, 70 Iowa 55; *Mallett v. Beale*, 66 Iowa 70.

Kansas. — *Malone v. Murphy*, 2 Kan. 250; *Titus v. Corkins*, 21 Kan. 722.

Kentucky. — *Slater v. Sherman*, 5 Bush (Ky.) 206; *Chiles v. Drake*, 2 Metc. (Ky.) 146, 74 Am. Dec. 406; *Fleet v. Hollenkemp*, 13 B. Mon. (Ky.) 219.

Louisiana. — *Webb v. Rothschild*, 49 La. Ann. 244.

Maine. — *Pike v. Dilling*, 48 Me. 539; *Webb v. Gilman*, 80 Me. 177.

Maryland. — *Baltimore, etc., R. Co. v. Blocher*, 27 Md. 277; *McWilliams v. Hoban*, 42 Md. 56; *Baltimore, etc., Turnpike Road Co. v. Boone*, 45 Md. 344; *Philadelphia, etc., R. Co. v. Larkin*, 47 Md. 155, 28 Am. Rep. 442.

Minnesota. — *McCarthy v. Niskern*, 22 Minn. 90; *Peck v. Small*, 35 Minn. 465.

Mississippi. — *Bell v. Morrison*, 27 Miss. 68.

Missouri. — *Munter v. Bande*, 1 Mo. App. 484; *Callahan v. Caffarata*, 39 Mo. 136, *Green v. Craig*, 47 Mo. 90; *Canfield v. Chicago, etc., R. Co.*, 59 Mo. App. 354; *Morgan v. Durfee*, 69 Mo. 409, 33 Am. Rep. 508; *Joice v. Branson*, 73 Mo. 28. Compare *Mooney v. Kennett*, 19 Mo. 551, 61 Am. Dec. 576.

New Jersey. — *Stout v. Prall*, 1 N. J. L. 93; *Hoboken Printing, etc., Co. v. Kahn*, 59 N. J. L. 218.

New York. — *Kendall v. Stone*, 2 Sandf. (N. Y.) 269; *King v. Root*, 4 Wend. (N. Y.) 113, 21 Am. Dec. 102; *Tillotson v. Cheetham*, 3 Johns. (N. Y.) 56, 3 Am. Dec. 459; *Cook v. Ellis*, 6 Hill (N. Y.) 466, 41 Am. Dec. 757; *Van Ingen v. Star Co.*, 1 N. Y. App. Div. 429; *Prince v. Brooklyn Daily Eagle*, 16 Misc. Rep. (N. Y. Supreme Ct.) 186; *Alliger v. Mail Printing Assoc. (Supreme Ct.)* 20 N. Y. Supp. 763, 66 Hun (N. Y.) 626; *Karowski v. Pitass*, 20 N. Y. App. Div. 118, *Voltz v. Blackmar*, 64 N. Y. 440, *Mattice v. Wilcox*, 147 N. Y. 624; *Smith v. Matthews*, 152 N. Y. 152; *Kolzern v. Broadway, etc., R. Co.*, 1 Misc. Rep. (N. Y. C. Pl.) 140; *Rosenkranz v. Hass*, 1 Misc. Rep. (N. Y. City Ct.) 220; *Miller v. Donovan*, 16 Misc. Rep. (N. Y. Supreme Ct.) 453.

North Carolina. — *Bradley v. Morris*, Busb. L. (44 N. Car.) 395; *Louder v. Hinson*, 4 Jones L. (49 N. Car.) 369; *Sowers v. Sowers*, 87 N. Car. 303; *Bowden v. Bailes*, 101 N. Car. 612.

vitriol has been held to be a proper case for the application of the rule.¹

Specific Applications of the Rule of exemplary damages in this connection will be found under appropriate titles elsewhere.²

4. Torts to Personal Property — *a.* IN GENERAL. — There may be a recovery of exemplary damages for a destruction of, an injury to, or a trespass upon personal property under any of the circumstances above enumerated.³

Knowles v. Norfolk Southern R. Co., 102 N. Car. 59.

Oregon. — *Heneky v. Smith*, 10 Oregon 349, 45 Am. Rep. 143.

Pennsylvania. — *Porter v. Seiler*, 23 Pa. St. 424, 62 Am. Dec. 341; *McCarthy v. De Armit*, 99 Pa. St. 63; *Matheis v. Mazet*, 164 Pa. St. 580; *Grohmann v. Kirschman*, 168 Pa. St. 189, 36 W. N. C. (Pa.) 389.

South Carolina. — *Rowe v. Moses*, 9 Rich. L. (S. Car.) 423, 67 Am. Dec. 560; *Mack v. South Bound R. Co.*, 52 S. Car. 323.

Tennessee. — See *Jones v. Turpin*, 6 Heisk. (Tenn.) 181.

Texas. — *Jackson v. Wells*, 13 Tex. Civ. App. 275.

Vermont. — *Newell v. Whitcher* 53 Vt. 589, 38 Am. Rep. 703; *Ellsworth v. Potter* 41 Vt. 685; *Edwards v. Leavitt*, 46 Vt. 126; *Boardman v. Goldsmith*, 48 Vt. 403.

Virginia. — *Norfolk, etc., R. Co. v. Anderson*, 90 Va. 1, 44 Am. St. Rep. 884; *Borland v. Barrett*, 76 Va. 128, 44 Am. Rep. 152.

Wisconsin. — *Cramer v. Noonan*, 4 Wis. 231; *Birchard v. Booth*, 4 Wis. 67; *Winn v. Peckham*, 42 Wis. 493; *Sorenson v. Dundas*, 50 Wis. 335; *Shay v. Thompson*, 59 Wis. 540, 48 Am. Rep. 538; *Spear v. Hiles*, 67 Wis. 350; *Draper v. Baker* 61 Wis. 450, 50 Am. Rep. 143; *Lueck v. Heisler*, 87 Wis. 644; *Lamb v. Stone*, 95 Wis. 254.

1. *Munter v. Bande*, 1 Mo. App. 484.

2. See Such Titles as ABDUCTION, vol. 1, p. 162; ARREST, vol. 2, p. 832; ASSAULT AND BATTERY, vol. 2, p. 952; CARRIERS OF PASSENGERS, vol. 5, p. 474, CIVIL DAMAGE ACTS, vol. 6, p. 36; CONSPIRACY, vol. 6, p. 830; CRIMINAL CONVERSATION, vol. 8, p. 260; DEATH BY WRONGFUL ACT, vol. 8, p. 851; FALSE IMPRISONMENT, *post*; FIRES; INNS AND INNKEEPERS; JUSTICES OF THE PEACE; LIBEL AND SLANDER; MALICIOUS PROSECUTION; MASTER AND SERVANT; NEGLIGENCE; NUISANCES; SEDUCTION; SHERIFFS, MARSHALS, AND CONSTABLES.

3. **Recovery of Exemplary Damages for Torts to Personal Property** — *England*. — *Thomas v. Harris*, 3 H. & N. 961; *Bell v. Midland R. Co.*, 10 C. B. N. S. 287 100 E. C. L. 287. And see *Roy v. Beaufort*, 2 Atk. 192.

Canada. — *Falardeau v. Couture*, 2 L. C. Jur. 96; *Ravary v. Grand Trunk R. Co.*, 6 L. C. Jur. 49.

United States. — *Scott v. Donald*, 165 U. S. 58; *Downing v. Outerbridge*, 79 Fed. Rep. 931, 51 U. S. App. 106; *Chambers v. Upton* 34 Fed. Rep. 473.

Alabama. — *Marshall v. Betner*, 17 Ala. 832; *Parker v. Mise*, 27 Ala. 480, 62 Am. Dec. 776; *Floyd v. Hamilton*, 33 Ala. 235; *Jefferson County Sav. Bank v. Eborn*, 84 Ala. 529.

California. — *Arzaga v. Villalba*, 85 Cal. 191.

Connecticut. — *Edwards v. Beach*, 3 Day (Conn.) 447; *Merrills v. Tariff Mfg. Co.* 10 Conn. 384, 27 Am. Dec. 682; *Huntley v.*

Bacon, 15 Conn. 267; *Dibble v. Morris*, 26 Conn. 416.

Dakota. — *Bates v. Callender* 3 Dakota 256.

Georgia. — *Coleman v. Ryan*, 58 Ga. 132;

Jones v. Lamont, 92 Ga. 529.

Illinois. — *Sherman v. Dutch*, 16 Ill. 283; *Dean v. Blackwell*, 18 Ill. 336; *Bull v. Griswold*, 19 Ill. 631; *Johnson v. Camp*, 51 Ill. 219; *Clevenger v. Dunaway*, 84 Ill. 367.

Iowa. — *Byford v. Girtton*, 90 Iowa 661; *Saunders v. Mullen*, 66 Iowa 728; *Casey v. Balue Banking Co.*, 98 Iowa 107.

Kansas. — *Western News Co. v. Wilmarth*, 33 Kan. 510; *Morris v. Shew*, 29 Kan. 661.

Kentucky. — *Kountz v. Brown*, 16 B. Mon. (Ky.) 577.

Maryland. — *Schindel v. Schindel*, 12 Md. 108; *Snively v. Fahnestock*, 18 Md. 391; *Young v. Mertens*, 27 Md. 114.

Minnesota. — *Cronfeldt v. Arrol*, 50 Minn. 327, 36 Am. St. Rep. 648; *Kemmitt v. Adamson*, 44 Minn. 121; *Lynd v. Pickett*, 7 Minn. 184, 82 Am. Dec. 79; *Gardner v. Minea*, 47 Minn. 295.

Mississippi. — *Whitfield v. Whitfield*, 40 Miss. 352; *Briscoe v. McElween*, 43 Miss. 556; *Silver v. Kent*, 60 Miss. 124; *Storm v. Green*, 51 Miss. 103.

Missouri. — *Friedenheit v. Edmundson*, 36 Mo. 226, 88 Am. Dec. 141.

Montana. — *Bohm v. Dunphy*, 1 Mont. 333.

New York. — *Schuler v. Roberts*, (Supreme Ct.) 21 N. Y. Supp. 27, 66 Hun (N. Y.) 626; *Wort v. Jenkins*, 14 Johns. (N. Y.) 352; *Tillotson v. Cheetham*, 3 Johns. (N. Y.) 56, 3 Am. Dec. 459; *Bump v. Betts*, 23 Wend. (N. Y.) 87.

Ohio. — *Peckham Iron Co. v. Harper*, 41 Ohio St. 100.

Pennsylvania. — *Herdic v. Young*, 55 Pa. St. 176, 93 Am. Dec. 739; *Nagle v. Mullison*, 34 Pa. St. 48; *Taylor v. Morgan*, 3 Watts (Pa.) 333.

Tennessee. — *Polk v. Fancher*, 1 Head (Tenn.) 336; *Johnson v. Perry* 2 Humph. (Tenn.) 569.

Texas. — *Clark v. Pearce*, 80 Tex. 146; *Cole v. Tucker*, 6 Tex. 266; *Champion v. Vincent*, 20 Tex. 811; *Conly v. Wood*, (Tex. 1889) 12 S. W. Rep. 615; *Parks v. Young*, 75 Tex. 278; *White v. Stribling*, 71 Tex. 108; *Biering v. Galveston First Nat. Bank*, 69 Tex. 599; *Harris v. Finberg*, 46 Tex. 79; *Gary v. Wells, etc.*, Express (Tex. Civ. App. 1897) 40 S. W. Rep. 845; *San Antonio, etc., R. Co. v. Kniffen*, 4 Tex. Civ. App. 484; *Frank v. Tatum*, (Tex. Civ. App. 1894) 26 S. W. Rep. 900; *Steel v. Metcalf*, 4 Tex. Civ. App. 313; *Craddock v. Goodwin*, 54 Tex. 578.

Vermont. — *Wright v. Clark*, 50 Vt. 130 28 Am. Rep. 496.

Interruption of Business. — Punitive damages may be awarded for the unlawful seizure and detention of one's property whereby he is prevented from the orderly and usual prosecution

Action for Value of Property or for the Property Itself. — And it is not material to the application of the rule whether the action be for the value of the property or for the recovery of the property itself.¹

b. SEIZURE OF EXEMPT PROPERTY UNDER PROCESS. — For the wanton or malicious seizure of exempt property under attachment or execution, exemplary damages are recoverable.² Such damages, however, it has been held, should not be assessed where process was levied in ignorance of the filing of a supersedeas bond, the appeal having been perfected by the execution of a bond for costs only.³

c. RECOVERY OF PROPERTY PENDING SUIT. — In actions for the recovery of personal property and damages for the tort the fact that the plaintiff has obtained possession of the property pending suit does not affect the question of exemplary damages.⁴

Other Specific Applications of the Rule of exemplary damages to cases of torts to personal property will be found under appropriate titles elsewhere.⁵

5. Torts to Real Property. — The rule of punitive damages also applies to trespasses to real property.⁶ Thus, in an early case, where the defendant

of his business. Nor can such wrong be said to constitute only a nominal injury. *Robinson v. Goings*, 63 Miss. 500. And see *Chambers v. Upton*, 34 Fed. Rep. 473; *Freidenheit v. Edmundson*, 36 Mo. 226, 88 Am. Dec. 141.

1. *Arzaga v. Villalba*, 85 Cal. 191.

2. **Exempt Property.** — *Lynd v. Pickett*, 7 Minn. 184, 82 Am. Dec. 79; *Cronfeldt v. Arrol*, 50 Minn. 327, 36 Am. St. Rep. 648; *Coleman v. Ryan*, 58 Ga. 132. See the title EXEMPTIONS (FROM EXECUTION), *post*.

3. *Neese v. Radford*, 83 Tex. 585. See the title EXEMPTIONS (FROM EXECUTION), *post*.

4. *Arzaga v. Villalba*, 85 Cal. 191.

5. See *Such Titles as ATTACHMENT*, vol. 3, p. 181; *CARRIERS OF GOODS*, vol. 5, p. 154; *CARRIERS OF LIVE STOCK*, vol. 5, p. 427; *DISTRESS*, vol. 9, p. 617; *SHERIFFS, MARSHALS, AND CONSTABLES, TROVER AND CONVERSION*.

6. **Exemplary Damages for Torts to Real Property** — *England*. — *Merest v. Harvey*, 5 Taunt. 442, 1 E. C. L. 150; *Tullidge v. Wade*, 3 Wils. 18; *Bell v. Midland R. Co.*, 10 C. B. N. S. 287, 100 E. C. L. 287; *Brewer v. Dew*, 11 M. & W. 625.

United States. — *U. S. v. Taylor*, 35 Fed. Rep. 484.

Alabama. — *Devaughn v. Heath*, 37 Ala. 595; *Rosser v. Bunn*, 66 Ala. 89; *Hughes v. Anderson*, 68 Ala. 280, 44 Am. Rep. 147.

California. — *Dorsey v. Manlove*, 14 Cal. 553; *Waters v. Dumas*, 75 Cal. 563.

Connecticut. — *Curtiss v. Hoyt*, 19 Conn. 154.

Delaware. — *Bonsall v. McKay*, 1 *Houst. (Del.)* 520; *Hysore v. Quigley*, 9 *Houst. (Del.)* 348.

Georgia. — *Shores v. Brooks*, 81 Ga. 468, 12 Am. St. Rep. 332.

Illinois. — *Cutler v. Smith*, 57 Ill. 252; *Bauer v. Gottmanhausen*, 65 Ill. 499; *Jasper v. Purnell*, 67 Ill. 358; *Smith v. Wunderlich*, 70 Ill. 426; *Chicago, etc., R. Co. v. Baker*, 73 Ill. 316; *Smalley v. Smalley*, 81 Ill. 70; *West Chicago St. R. Co. v. Morrison, etc., Co.*, 160 Ill. 288.

Iowa. — *Keirnan v. Heaton*, 69 Iowa 136.

Kansas. — *Hesley v. Baker*, 19 Kan. 9.

Kentucky. — *Jennings v. Maddox*, 8 B. Mon. (Ky.) 439.

Maine. — *Ames v. Hilton*, 70 Me. 36.

Maryland. — *McTavish v. Carroll*, 13 Md. 429.

Michigan. — *Briggs v. Milburn*, 40 Mich. 512.

Minnesota. — *Craig v. Cook*, 28 Minn. 232; *Michaelis v. Michaelis*, 43 Minn. 123.

Missouri. — *Newman v. St. Louis, etc., R. Co.*, 2 Mo. App. 402; *Parker v. Shackelford*, 61 Mo. 68.

New Hampshire. — *Whitney v. Swett*, 22 N. H. 10, 53 Am. Dec. 228; *Perkins v. Towle*, 43 N. H. 220, 80 Am. Dec. 149; *Evans v. Foss*, 49 N. H. 490.

New Jersey. — *Winter v. Peterson*, 24 N. J. L. 524, 61 Am. Dec. 678; *Trainer v. Wolff*, 58 N. J. L. 381.

New York. — *Allaback v. Utt*, 51 N. Y. 651.

North Carolina. — *Mosseller v. Deaver*, 106 N. Car. 494, 19 Am. St. Rep. 540.

Oregon. — *Day v. Holland*, 15 Oregon 464.

Rhode Island. — *Herreshoff v. Tripp*, 15 R. I. 92.

South Carolina. — *Windham v. Rhame*, 11 Rich. L. (S. Car.) 283, 73 Am. Dec. 116; *Jefcoat v. Knotts*, 11 Rich. L. (S. Car.) 649; *Greenville, etc., R. Co. v. Partlow*, 14 Rich. L. (S. Car.) 237.

Tennessee. — *Cox v. Crumley*, 5 Lea (Tenn.) 529.

Texas. — *Cook v. De la Garza*, 9 Tex. 358; *Hedgepeth v. Robertson*, 18 Tex. 588; *Champion v. Vincent*, 20 Tex. 811; *Long Mfg. Co. v. Gray*, 13 Tex. Civ. App. 172; *Stephens v. Taylor*, (Tex. Civ. App. 1896) 36 S. W. Rep. 1083; *Gross v. Hays*, 73 Tex. 515.

Vermont. — *Ellsworth v. Potter*, 41 Vt. 685; *Weston v. Gravin*, 49 Vt. 507; *Burnham v. Jenness*, 54 Vt. 272; *Camp v. Camp*, 59 Vt. 667.

Wisconsin. — *Koenigs v. Jung*, 73 Wis. 178.

An Unauthorized Entry into a Dwelling House and the wrongful removal of personal property therefrom, coupled with grossly offensive conduct, will warrant the imposition of exemplary damages. *Singer Mfg. Co. v. Holdford*, 86 Ill. 455, 29 Am. Rep. 43.

Injuries to Adjoining Owner by Blasting. — Where the plaintiff and the defendants were adjoining owners of real estate, the latter conducting a stone quarry, on which blasting was

entered the plaintiff's premises and placed poison thereupon to destroy the latter's poultry, punitive damages were held recoverable.¹ And there may be a recovery of punitive damages for the wanton and negligent destruction of shade or ornamental trees or shrubbery.² But where a defendant built a house on the land of another under the *bona fide* belief that it was his own, it was held that exemplary damages were not recoverable though the building so constructed was located so near a house of the plaintiff as to darken it and otherwise greatly impair its value.³

For Specific Applications of the Rule of exemplary damages to the class of actions under consideration the reader is referred to appropriate titles elsewhere.⁴

V. EXEMPLARY DAMAGES IN ACTIONS ON CONTRACTS — 1. In General. — As a general rule exemplary damages are not recoverable in actions for the breach of contracts,⁵ irrespective of the motive on the part of the defendant which prompted the breach.⁶

2. Where Breach of Contract Also a Tort. — Where a breach of contract also amounts to a tort, there may be a recovery of exemplary damages upon proper allegations.⁷ Thus an action on the case for the wrongful expulsion of a pas-

done in a manner which showed a malicious intent to injure the plaintiff, it was held that exemplary damages might be recovered. *Berlin v. Thompson*, 61 Mo. App. 234, 1 Mo. App. Rep. 370. See also the title EXPLOSIONS AND EXPLOSIVES, *post*.

Advising and Inciting Trespass. — One who advised and incited a party of rebel soldiers to camp on the farm of another, and to consume and destroy his provisions and carry off his property, was liable for the value of property so destroyed and carried off, and also for smart money by way of damages. *Bronson v. Green*, 2 Duv. (Ky.) 234.

1. *Sears v. Lyons*, 2 Stark. 317, 3 E. C. L. 426.

2. *Cumberland Tel., etc., Co. v. Poston*, 94 Tenn. 696; *Huling v. Henderson*, 161 Pa. St. 553.

Trespass by Cutting Timber. — In an action of trespass for cutting and carrying away the plaintiff's timber, where the evidence showed that the defendant had wilfully or through gross negligence cut over the line, it was held that it was the right of the jury to give such damages as would be adequate, in its judgment, not only for compensation but also for prevention. *Kolb v. Bankhead*, 18 Tex. 228.

3. *Hays v. Askew*, 7 Jones L. (52 N. Car.) 272. In this case the court said that there did not appear to be any evidence of personal indignity offered to the plaintiff, or of insult and oppression other than such as ordinarily occurs when two men differ as to their right to a piece of land, and one, in the belief that it is his property, takes possession in the presence of the other and contrary to his remonstrance, being determined to assert his right of property at the risk of the consequences.

4. See Such Titles as ATTACHMENT, vol. 3, p. 181; EXPLOSIONS AND EXPLOSIVES, *post*; FLOODS; HIGHWAYS; TRESPASS; WATER AND WATERCOURSES.

5. **Rule in Case of Breach of Contract** — *Arkansas*. — *Snow v. Grace*, 25 Ark. 570; *O'Connell v. Rosso*, 56 Ark. 603.

Georgia. — *Chattanooga, etc., R. Co. v. McLendon*, 86 Ga. 517.

Illinois. — *Dalby v. Campbell*, 26 Ill. App.

502; *Spaids v. Barrett*, 57 Ill. 290, 11 Am. Rep. 10; *Cobb v. People*, 84 Ill. 511. And see opinion of Breese, J., in *Ously v. Hardin*, 23 Ill. 403; *Gorton v. Brown*, 27 Ill. 489; *Roberts v. Fahs*, 36 Ill. 271.

Kentucky. — *Lexington, etc., R. Co. v. Lyons*, (Ky. 1898) 46 S. W. Rep. 209.

New York. — *Duche v. Wilson*, 37 Hun (N. Y.) 519.

Pennsylvania. — *Hoy v. Gronoble*, 34 Pa. St. 9, 75 Am. Dec. 628.

South Carolina. — *McClendon v. Wells*, 20 S. Car. 514.

Tennessee. — See *Morrison v. Searight*, 4 Baxt. (Tenn.) 476.

Texas. — *Houston, etc., R. Co. v. Shirley* 54 Tex. 125; *Thomas v. Peterson*, (Tex. Civ. App. 1894) 24 S. W. Rep. 1125.

Canada. — *Guildford v. Anglo-French Steamship Co.*, 9 Can. Sup. Ct. Rep. 303.

See, however, the case of *Massie v. Baily*, 33 La. Ann. 485, in which the court observed that as the failure to comply with the contract sued on was not caused by fraud or bad faith, only actual and not exemplary damages were recoverable. But it is not believed that the court intended in this case to intimate an opinion contrary to the general rule.

In an Action Ex Contractu, by Attachment, for goods sold and delivered, the plaintiff is not entitled to exemplary damages. *Snow v. Grace*, 25 Ark. 570.

Damages for "Violation of Faith." — An instruction in an action for the breach of contract that punitive damages may be given for the "violation of faith" is erroneous. *Hoy v. Gronoble*, 34 Pa. St. 9, 75 Am. Dec. 628.

Statutory Rule. — By the Code of *Georgia* (1895), § 3797, it is provided that "exemplary damages can never be allowed in cases arising on contracts." See *Chattanooga, etc., R. Co. v. McLendon*, 86 Ga. 517.

6. **Motive Immaterial.** — *Duche v. Wilson*, 37 Hun (N. Y.) 519.

7. **Where Breach of Contract Also a Tort — Modification.** — *Head v. Georgia Pac. R. Co.*, 79 Ga. 358, 11 Am. St. Rep. 434; *Shirley v. Waco Tap R. Co.*, 78 Tex. 131; *Hooks v. Fitzenrieter*, 76 Tex. 277; *San Antonio, etc., R. Co. v. Kniffen*, 4 Tex. Civ. App. 484.

senger by a carrier may, although the declaration allege a contract of carriage, be founded on the tort for breach of duty, and exemplary damages may be recoverable.¹ But though a tortious act be shown, if the action proceeds on the contractual obligation no exemplary damages are recoverable.²

3. Actions on Statutory Bonds — a. GENERAL RULE. — On this subject there is conflict of opinion, with the weight of authority opposed to the recovery of exemplary damages in such actions.³ Nor is an attachment bond, it has been held, security for vindictive damages though the bond expressly provides for the payment of such damages as shall be awarded "in any suit or suits which may hereafter be brought for wrongfully suing out the attachment."⁴

b. CONTRARY DOCTRINE. — As has been stated, however, the rule on this subject is not uniform, some cases holding that sureties on attachment bonds may be held liable in punitive damages, not to exceed the penalty of the bond, for the malicious acts of the principal.⁵ And likewise, a surety on the bond of a saloonkeeper conditioned to pay any damage sustained by reason of the sale of liquor by the principal has been held liable for punitive as well as compensatory damages.⁶

4. Contracts to Marry. — Contracts to marry are exceptions to the rule excluding exemplary damages in actions on contracts, and in such cases it has been held that the jury in awarding damages may consider the punishment of the defendant if they deem his conduct reprehensible.⁷

VI. REQUISITES TO RECOVERY — 1. In General. — As indicated by the general rule above given, in order to the recovery of exemplary damages there must be either (1) malice, wantonness, or oppression; (2) fraud; or (3) gross negligence or recklessness.

2. Malice, Wantonness, or Oppression — a. IN GENERAL. — The cardinal essential of the doctrine of punitive damages is generally held to be the

1. *Head v. Georgia Pac. R. Co.*, 79 Ga. 358, 11 Am. St. Rep. 434.

2. *Spaids v. Barrett*, 57 Ill. 290, 11 Am. Rep. 10; *North v. Johnson*, 58 Minn. 242; *McClen-don v. Wells*, 20 S. Car. 514. And see *Gorton v. Brown*, 27 Ill. 489; *Roberts v. Fahs*, 36 Ill. 271.

3. **Attachment Bonds.** — See *Com. v. Magnolia Villa Land, etc., Co*, 163 Pa. St. 99; *Wallace v. Finberg*, 46 Tex. 49; *Mayer v. Duke*, 72 Tex. 445.

Bond for Distress Warrant. — *Hamilton v. Kilpatrick*, (Tex. Civ. App. 1895) 29 S. W. Rep. 819.

Sequestration and Replevin Bonds. — *McArthur v. Barnes*, 10 Tex. Civ. App. 318. And see *Blum v. Gaines*, 57 Tex. 135.

4. *Spaids v. Barrett*, 57 Ill. 289, 11 Am. Rep. 10.

5. *Floyd v. Hamilton*, 33 Ala. 235; *Renkert v. Elliott*, 11 Lea (Tenn.) 235. And see *Jefferson County Sav. Bank v. Eborn*, 84 Ala. 529.

6. *Richmond v. Shickler*, 57 Iowa 486. To the contrary, however, see *Cobb v. People*, 84 Ill. 511.

7. **Breach of Promise of Marriage — Indiana.** — *Hughes v. Nolte*, 7 Ind. App. 526.

Michigan. — *McPherson v. Ryan*, 59 Mich. 33.

Minnesota. — *Clement v. Brown*, 57 Minn. 314; *Tamke v. Vangsness*, (Minn. 1898) 75 N. W. Rep. 217.

Missouri. — *Green v. Spencer*, 3 Mo. 318, 26 Am. Dec. 672; *Hill v. Maupin*, 3 Mo. 323; *Davis v. Slagle*, 27 Mo. 600.

New Hampshire. — *Chesley v. Chesley*, 10 N. H. 327; *Merrill v. Peaslee*, 17 N. H. 540.

New Jersey. — *Coryell v. Colbaugh*, 1 N. J. L. 90, 1 Am. Dec. 192.

New York. — *Johnson v. Jenkins*, 24 N. Y. 252; *Thorn v. Knapp*, 42 N. Y. 474, 1 Am. Rep. 561; *Wolters v. Schultz*, 1 Misc. Rep. (N. Y. City Ct.) 196.

Tennessee. — *Goodall v. Thurman*, 1 Head (Tenn.) 209.

Texas. — *Houston, etc., R. Co. v. Shirley*, 54 Tex. 125.

Wisconsin. — *Simpson v. Black*, 27 Wis. 206.

Canada. — *Mathieu v. Laflamme*, 4 Rev. Leg. 371.

See generally the title BREACH OF PROMISE OF MARRIAGE, vol. 4, p. 882.

In Massachusetts, and the same would doubtless be true in other states which deny the rule of exemplary damages, damages for breach of promise of marriage are computed on the principle of compensation, and not as punitive. But as the jury may consider in estimating the plaintiff's loss the disappointment of her hopes and reasonable expectations, including the money value of a marriage which would have afforded her a permanent home and establishment, the wounded affections, and the mortification and distress of mind resulting from the failure of the defendant to fulfil his promise, the amount of recovery is probably practically the same as if exemplary damages were recoverable. See *Harrison v. Swift*, 13 Allen (Mass.) 144. As was said by Chalmers, C. J., in *Chicago, etc., R. Co. v. Scurr*, 59 Miss. 461, 42 Am. Rep. 373, full compensation for all actual damages may, in the case of severe injuries or the disappointment of im-

defendant's malice or wrong motive.¹ The doctrine of exemplary damages, therefore, has been said to involve rather the extent of the injury intended than that which was really inflicted,² and to depend on circumstances mani-

portant engagements, embrace amounts as large as if given by way of punishment.

1. **Malice, Wantonness, or Oppression**—(*United States* — *McCall v. McDowell*, 1 Abb. (U. S. 212); *Taylor v. Carpenter*, 2 Woodb. & M. (U. S.) 11; *Philadelphia, etc., R. Co. v. Quigley*, 21 How. (U. S.) 213; *Gould v. Christianson*, B. & H. Adm. 507; *Morse v. Duncan*, 14 Fed. Rep. 396; *Smith v. Sun Printing, etc., Assoc.*, 55 Fed. Rep. 240.

Alabama. — *Devaughn v. Heath*, 37 Ala. 595; *Garrett v. Sewell*, 108 Ala. 521.

Arkansas. — *Snow v. Grace*, 25 Ark. 570; *Kelly v. McDonald*, 39 Ark. 387; *Citizens St. R. Co. v. Steen*, 42 Ark. 321.

California. — *Phelps v. Owens*, 11 Cal. 22; *Selden v. Cashman*, 20 Cal. 56, 81 Am. Dec. 93; *Turner v. North Beach, etc., R. Co.*, 34 Cal. 594; *Lyles v. Perrin*, 119 Cal. 264.

Colorado. — *Eisenhart v. Ordean*, 3 Colo. App. 162; *Republican Pub. Co. v. Conroy*, 5 Colo. App. 262; *Crymble v. Mulvaney*, 21 Colo. 203.

Connecticut. — *Dibble v. Morris*, 26 Conn. 416.

District of Columbia. — *Kilbourn v. Thompson*, *MacArthur & M. (D. C.)* 401.

Georgia. — *Jones v. Lamon*, 92 Ga. 529.

Illinois. — *Sherman v. Dutch*, 16 Ill. 283; *Williams v. Reil*, 20 Ill. 147; *Hawk v. Ridgeway*, 33 Ill. 473; *Mackin v. Blythe*, 35 Ill. App. 216; *Pierce v. Millay*, 44 Ill. 189; *Reeder v. Purdy*, 48 Ill. 261; *Chicago v. Martin*, 49 Ill. 243, 95 Am. Dec. 590; *Cutler v. Smith*, 57 Ill. 252; *Stillwell v. Barnett*, 60 Ill. 210; *Tripp v. Grouner*, 60 Ill. 474; *Louisville, etc., R. Co. v. Wurl*, 62 Ill. App. 381; *Toledo, etc., R. Co. v. Patterson*, 63 Ill. 304; *Mansur-Tebbetts Implement Co. v. Smith*, 65 Ill. App. 319; *Smith v. Wunderlich*, 70 Ill. 426; *Drohn v. Brewer*, 77 Ill. 280. And see *Doremus v. Hennessy*, 62 Ill. App. 391.

Indiana. — *Moore v. Crose*, 43 Ind. 30.

Iowa. — *Brown v. Allen*, 35 Iowa 306; *Fitzgerald v. Chicago, etc., R. Co.*, 50 Iowa 79; *Jones v. Marshall*, 56 Iowa 739.

Kansas. — *Atchison, etc., R. Co. v. Hogue*, 50 Kan. 40. And see *Potter v. Stamfil*, 2 Kan. App. 788.

Kentucky. — *Louisville, etc., R. Co. v. Ballard*, 85 Ky. 307, 7 Am. St. Rep. 600; *Jennings v. Maddox*, 8 B. Mon. (Ky.) 430; *McHenry Coal Co. v. Sneddon*, 98 Ky. 684. And see *Carter v. Illinois Cent. R. Co.*, (Ky. 1896) 34 S. W. Rep. 907.

Louisiana. — *Biggs v. D'Aquin*, 13 La. Ann. 21; *Carter v. Tufts*, 15 La. Ann. 16; *Marin v. Satterfield*, 41 La. Ann. 742; *Townsend v. Fontenot*, 42 La. Ann. 890.

Maine. — *Webb v. Gilman*, 80 Me. 177.

Maryland. — *Wanamaker v. Bowes*, 36 Md. 42; *Smith v. Philadelphia, etc., R. Co.*, (Md. 1898) 38 Atl. Rep. 1072; *Baltimore, etc., Turnpike Road Co. v. Boone*, 45 Md. 344; *Philadelphia, etc., R. Co. v. Larkin*, 47 Md. 162, 28 Am. Rep. 442; *Philadelphia, etc., R. Co. v. Hoefflich*, 62 Md. 300, 50 Am. Rep. 223; *Eliason v. Grove*, 85 Md. 215.

Michigan. — *Hyatt v. Adams*, 16 Mich. 180.

Mississippi. — *Memphis, etc. R. Co. v. Green*, 52 Miss. 779, *Chicago, etc., R. Co. v. Scurr*, 59 Miss. 456, 42 Am. Rep. 373; *Higgins v. Louisville, etc., R. Co.*, 64 Miss. 80; *Silver Creek Nav., etc., Co. v. Mangum*, 64 Miss. 682; *Dorrah v. Illinois Cent. R. Co.*, 65 Miss. 14; *Alabama, etc., R. Co. v. Gibbs*, (Miss. 1893) 12 So. Rep. 545; *Illinois Cent. R. Co. v. Brookhaven Mach. Co.*, 71 Miss. 663; *Biloxi City R. Co. v. Maloney*, 74 Miss. 738.

Missouri. — *Nelson v. Wallace*, 48 Mo. App. 193; *Engle v. Jones*, 51 Mo. 316; *Joice v. Branson*, 73 Mo. 28.

New Jersey. — *Bullock v. Delaware, etc., R. Co.* 61 N. J. L. 550, *Haines v. Schultz*, 50 N. J. L. 481.

New York. — *Wallace v. Williams*, (Supreme Ct.) 14 N. Y. Supp. 180, 59 Hun (N. Y.) 628; *Hamilton v. Third Ave. R. Co.*, 53 N. Y. 25; *Donivan v. Manhattan R. Co.*, 1 Misc. Rep. (N. Y. C. Pl.) 368; *MacGowan v. Duff*, 14 Daly (N. Y.) 315; *Ives v. Humphreys*, 1 E. D. Smith (N. Y.) 196.

North Carolina. — *Hansley v. Jamesville, etc., R. Co.*, 115 N. Car. 602, 44 Am. St. Rep. 474; *Allen v. Wilmington, etc. R. Co.*, 119 N. Car. 710; *Sowers v. Sowers*, 87 N. Car. 303; *Bowden v. Bailes*, 101 N. Car. 612; *Waters v. Greenleaf-Johnson Lumber Co.*, 115 N. Car. 648.

Pennsylvania. — *Heil v. Glanding*, 42 Pa. St. 493, 82 Am. Dec. 537; *Philadelphia Traction Co. v. Orbann*, 119 Pa. St. 37; *Pittsburgh, etc., R. Co. v. Lyon*, 123 Pa. St. 140, 10 Am. St. Rep. 517.

Texas. — *O'Neil v. Wills Point Bank*, 67 Tex. 36; *Heidenheimer v. Sides*, 67 Tex. 32; *Erie Tel., etc., Co. v. Kennedy*, 80 Tex. 71; *International, etc., R. Co. v. Greenwood* 2 Tex. Civ. App. 76; *Tignor v. Toney*, 13 Tex. Civ. App. 518. And see *Sheckles v. Bryant* (Tex. Civ. App. 1895) 30 S. W. Rep. 934; *Stell v. Paschal*, 41 Tex. 640.

Vermont. — *Blodgett v. Brattleboro*, 30 Vt. 579.

West Virginia. — *Talbott v. West Virginia, etc., R. Co.*, 42 W. Va. 560.

Wisconsin. — *Beveridge v. Welch*, 7 Wis. 465.

Statutory Exception. — Under the *Ohio Civil Damage Act*, the jury, where actual damage is shown, may assess exemplary damages without proof of actual malice or other special circumstances of aggravation. *Schneider v. Hosier*, 21 Ohio St. 98.

Malice Against Third Person. — In an action on an attachment bond, if the attachment is not vexatious as against the defendant himself, the fact that the attaching creditor was actuated by malice toward a third person, not a party to the process, is no ground for the recovery of exemplary damages. *Wood v. Barker*, 37 Ala. 60, 76 Am. Dec. 346.

2. *Pearson, J.*, in *Gilreath v. Allen*, 10 Ired. L. (32 N. Car.) 67; *Hildreth v. Hancock*, 55 Ill. App. 572.

Guilty Intent Requisite. — In the case of

festing moral turpitude or atrocity in the defendant's conduct,¹ the damages to be increased according to the degree of malice by which the evidence shows the defendant to have been actuated.²

Infants and Persons of Unsound Mind. — Exemplary damages cannot be awarded against a person who, on account of infancy, insanity, or imbecility, is incapable of forming a criminal intent.³

Plaintiff Must Prove or Raise Presumption of Malice. — Where such wrongful intent or malice is not inherent in the act and manifest therefrom, the plaintiff must present some proof of it or evidence from which it may be legally inferred.⁴ But there need not be positive proof of malice or oppression if the transaction, or the facts shown in connection therewith, fairly imply its existence.⁵

6. MALICE AS SOLE ESSENTIAL. — It is held by some authorities that in order to the recovery of punitive damages there should be either malice or such gross negligence, wantonness, oppression, or fraud as is equivalent to malice;⁶ and it is observable that the generality of cases in which punitive damages have been recovered have involved elements very nearly assimilated to malice, if not malice itself. Some cases, it is true, declare in terms that there need not be malice, provided there is wantonness and oppression.⁷ But from such

Lake Shore, etc., R. Co. v. Prentice, 147 U. S. 101, the court said that exemplary damages will be awarded if the defendant "has acted wantonly, or oppressively, or with such malice as implies a spirit of mischief or criminal indifference to civil obligations; but such guilty intention on the part of the defendant is required in order to charge him with exemplary or punitive damages." There should be clear and unmistakable evidence of an intention to do the injury complained of before the jury would be justified in finding an amount greatly beyond the actual loss sustained by the person injured. Union Pac. R. Co. v. Hause, 1 Wyoming 27. Similarly in the case of Inman v. Ball, 65 Iowa 543, it was held that to warrant a jury in inflicting damages by way of punishment it should appear that the act complained of was a wilful or malicious wrong. There must be a purpose or intent to harass, oppress, or injure another.

1. Mr. Justice Grier, in Day v. Woodworth, 13 How. (U. S.) 363.

2. Gilreath v. Allen, 10 Ired. L. (32 N. Car.) 67.

No Exemplary Damages in Friendly Suit. — Where parties have agreed to an amicable action to try their respective rights to a division wall, part of which has been wrongfully used by the defendant, it is error to instruct the jurors that if there had been a wanton invasion of the plaintiff's rights they were not confined to the actual damages done. Amer v. Longstreth, 10 Pa. St. 145.

Test Case. — But where the defendant caused the plaintiff's arrest with a view of making a test case to secure a judicial interpretation of the statute, exemplary damages are recoverable. Kolzern v. Broadway, etc., R. Co., 1 Misc. Rep. (N. Y. C. Pl.) 148. And see Richer v. Montreal, 7 Leg. N. (Quebec) 790. Where, however, a person voluntarily puts himself in a position to receive the injuries complained of, in order to make a test case of his rights, it has been held that exemplary damages are not recoverable. Cincinnati, etc., R. Co. v. Cole, 26 Ohio St. 126, 23 Am. Rep. 729.

3. McIntyre v. Sholty, 121 Ill. 660, 2 Am. St. Rep. 140; O'Brien v. Loomis, 43 Mo. App. 29;

Ullrich v. New York Press Co., 23 Misc. Rep. (N. Y. Supreme Ct.) 163.

A Lunatic Having No Will of His Own, and his acts lacking the element of intention, the only proper measure of damages in an action against him for a wrong is the mere compensation of the party injured. Punishment is not the object of the law when persons unsound in mind are the wrongdoers. McIntyre v. Sholty, 121 Ill. 660, 2 Am. St. Rep. 140.

Action Against Child Ten Years Old. — The case of O'Brien v. Loomis, 43 Mo. App. 29, was an action against a child ten years old, for personal injuries caused by the child, the petition charging that the injuries were due to the recklessness and want of discretion of the defendant in the use of a firearm. In declaring that exemplary damages were not recoverable the court observed that it knew of no case where such damages had been allowed in the case of an injury by a child of such tender years, though such a child might, under some circumstances, be criminally responsible. But at any rate, the court concluded, however it might be in the case of an adult, no exemplary damages could be recovered in such an action as the one at bar, under allegations such as were contained in the plaintiff's petition. In other words, that in the case of a child of the age of the defendant, mere recklessness and want of discretion were insufficient to warrant a punitive recovery.

4. Haines v. Schultz, 50 N. J. L. 481.

5. Magee v. Holland, 27 N. J. L. 86, 72 Am. Dec. 341; Louisville, etc., R. Co. v. Guinan, 11 Lea (Tenn.) 104, 47 Am. Rep. 279.

6. **Malice as Sole Essential.** — Barbour County v. Horn, 48 Ala. 566; South, etc., Alabama R. Co. v. McLendon, 63 Ala. 266; Wilkinson v. Searcy, 76 Ala. 176; Lyles v. Perrin, 119 Cal. 264; Pickett v. Crook, 20 Wis. 358.

7. Devaughn v. Heath, 37 Ala. 595; Drohn v. Brewer, 77 Ill. 283.

Where the Tort Is of a Grievous or Wanton Nature, manifesting a wilful disregard of the rights of others, actual malice need not be shown to entitle the aggrieved party to exemplary or vindictive damages. Borland v. Barrett, 76 Va. 128, 44 Am. Rep. 152.

circumstances malice is a presumption of law, if not indeed of fact.¹

c. WHAT IS MALICE IN THIS CONNECTION — (1) *In General*. — The malice spoken of in connection with the rule of punitive damages has been said to imply not merely an unlawful or injurious act, but the doing of an act conceived in a spirit of mischief or criminal indifference to civil obligations.² As has been elsewhere stated, the act complained of must partake of a criminal or wanton nature.³

Need Not Be Ill Will Toward Person Injured. — It is not necessary, however, in order to warrant the recovery of punitive damages for a tort to the person, that there should be ill will or hostility towards the person injured. If the trespass is committed under circumstances of general wantonness and outrage, there may be a recovery,⁴ or though the spirit in which the act is done is one of wanton sport or mischief merely,⁵ or only an intent to annoy, harass, and tease.⁶

(2) *Act Merely Unlawful*. — An act will not be deemed malicious, and so warranting punitive damages, merely because it is unlawful or wrongful.⁷ Nor would the circumstance that the defendant would be liable to a criminal prosecution for the act complained of be in itself sufficient to determine his liability in exemplary damages.⁸ But it has been laid down as a general proposition that the intentional doing of a wrongful act with full knowledge of its character, and without cause or excuse, is malicious so as to warrant an award of exemplary damages.⁹

(3) *Act Committed by Force*. — The mere fact that the act complained of was forcibly committed is not of itself sufficiently determinative of its malicious character to warrant punitive damages.¹⁰

(4) *Conscious Disregard of Plaintiff's Rights*. — It has also been held that more than a mere conscious disregard of the rights of others is necessary to warrant exemplary damages on the score of malice.¹¹

1. *Willis v. Miller*, 29 Fed. Rep. 238; *Farwell v. Warren*, 51 Ill. 467; *Fulkerson v. Murdock*, 53 Mo. App. 151; *Callahan v. Ingram*, 122 Mo. 355, 43 Am. St. Rep. 583; *Smith v. Matthews*, 6 N. Y. Misc. Rep. (Buffalo Super. Ct.) 162, 9 N. Y. Misc. Rep. (Buffalo Super. Ct.) 427; *Bergmann v. Jones*, 94 N. Y. 51; *Louisville, etc., R. Co. v. Guinan*, 11 Lea (Tenn.) 106, 47 Am. Rep. 279; *Wright v. Clark*, 50 Vt. 130, 28 Am. Rep. 496. And see *Samuels v. Evening Mail Assoc.*, 75 N. Y. 604.

Actual Malice Not Necessary. — The right to recover exemplary damages is not confined to cases of actual malice; that is every unlawful act done wilfully to the injury of another upon insufficient provocation is presumed by law to be malicious. *Borland v. Barrett*, 76 Va. 128, 44 Am. Rep. 152.

2. **What Is Meant by Malice.** — *Philadelphia, etc., R. Co. v. Quigley*, 21 How. (U. S.) 213; *Milwaukee, etc., R. Co. v. Arms*, 91 U. S. 489; *Louisville, etc., R. Co. v. Wurl*, 62 Ill. App. 381.

The recovery of punitive damages is allowed only where the act causing the injury has been wilfully done, or where the circumstances show that there was deliberate, pre-conceived, or positive intention to injure. *Wallace v. New York*, 2 Hilt. (N. Y.) 440.

3. *Chicago v. Martin*, 49 Ill. 245, 95 Am. Dec. 590.

4. **Ill Will towards Person Injured.** — *Goetz v. Ambis*, 27 Mo. 28; *Etchberry v. Levielle*, 2 Hilt. (N. Y.) 40..

5. **Spirit of Wanton Sport or Mischief.** — *Genay*

v. Norris, 1 Bay (S. Car.) 6; *Etchberry v. Levielle*, 2 Hilt. (N. Y.) 40.

6. **Intent to Annoy, Harass, and Tease.** — In *Etchberry v. Levielle*, 2 Hilt. (N. Y.) 40, the plaintiff and the defendant were engaged in a game of shooting at a target by blowing a sharp steel arrow through a tube. The defendant, apparently in sport, blew through the tube at the plaintiff, and, notwithstanding the repeated remonstrances of the latter and of others, continued to do so, until at last the arrow struck the plaintiff in the eye, severely wounding him, so as to confine him to his bed for nearly four months and a half, and resulting in the loss of sight in the eye struck. It was held that the circumstances warranted an inference of actual malice, and therefore justified a verdict for exemplary damages.

7. **Where Act Merely Unlawful.** — *Wilkinson v. Searcy*, 76 Ala. 176; *Brown v. Allen*, 35 Iowa 306; *Inman v. Ball*, 65 Iowa 543; *Atchison, etc., R. Co. v. Hogue*, 50 Kan. 40; *Remington v. Kirby*, 120 N. Car. 320; *Connor v. Sewell*, 90 Tex. 275.

8. **Liability to Criminal Prosecution.** — *Bados-tain v. Graziade*, 115 Cal. 425.

9. *Etchberry v. Levielle*, 2 Hilt. (N. Y.) 40.

10. **Force.** — *White v. Naerup*, 57 Ill. App. 114; *Philadelphia, etc., R. Co. v. Hoeslich*, 62 Md. 300, 50 Am. Rep. 223.

11. *Wilkinson v. Searcy*, 76 Ala. 176.

Where Defendant Had "Good Reason to Believe" His Act Wrongful. — In the case of *Inman v. Ball*, 65 Iowa 543, the trial court instructed the jurors that if they "found that

(5) *Where Defendant Acts in Good Faith.* — Where the defendant acts in good faith and without malice or wantonness, believing that he has a right to do the act complained of, punitive damages are not recoverable as a rule, even though there may have been a technical violation of the plaintiff's legal rights.¹ But the fact that a party believes he has a right to do a certain act will not shield him from punitive damages if the act is done in a wanton and outrageous manner.² Even though a defendant may actually have a right to

the defendants committed the wrongful acts complained of, and at the time they committed the same they had full knowledge that the acts were wrongful, or had good reason to believe they were wrongful, then the doing of the thing would be wilful and malicious" and warrant an assessment of punitive damages. This instruction was held to have been erroneous in so far as the jury was told that the defendants would be liable in punitive damages if they merely had good reason to believe that their acts were wrongful.

1. *Acts Done in Good Faith* — *United States.* — *Booth v. Lloyd*, 33 Fed. Rep. 593; *Wiggin v. Coffin*, 3 Story (U. S.) 1; *Tracy v. Swartwout*, 10 Pet. (U. S.) 80.

Alabama. — *Wilkinson v. Searcy*, 76 Ala. 176.

Arkansas. — *Walker v. Fuller*, 29 Ark. 448.

California. — *Phelps v. Owens*, 11 Cal. 22; *Lyles v. Perrin*, 119 Cal. 264.

Colorado. — *Courvoisier v. Raymond*, 23 Colo. 113; *Denver Tramway Co. v. Cloud*, 6 Colo. App. 445.

Connecticut. — *St. Peter's Church v. Beach*, 26 Conn. 355.

Georgia. — *Georgia R., etc., Co. v. Eskew*, 86 Ga. 641.

Illinois. — *Silverman v. McGrath*, 10 Ill. App. 413; *Hawk v. Ridgway*, 33 Ill. 473; *Gray v. Waterman*, 40 Ill. 523; *Johnson v. Jones*, 44 Ill. 142, 92 Am. Dec. 159; *Pierce v. Millay*, 44 Ill. 189; *Farwell v. Warren*, 70 Ill. 28.

Iowa. — *Plummer v. Harbut*, 5 Iowa 308; *Brown v. Allen*, 35 Iowa 306; *Fitzgerald v. Chicago, etc., R. Co.*, 50 Iowa 79; *Inman v. Ball*, 65 Iowa 543.

Louisiana. — *Biggs v. D'Aquin*, 13 La. Ann. 21; *Carter v. Tufis*, 15 La. Ann. 16.

Maine. — *Pierce v. Getchell*, 76 Me. 216.

Michigan. — *Allison v. Chandler*, 11 Mich. 542.

Minnesota. — *Hoffman v. Northern Pac. R. Co.*, 45 Minn. 53.

Mississippi. — *Kansas City, etc., R. Co. v. Fite*, 67 Miss. 373.

New York. — *Ives v. Humphreys*, 1 E. D. Smith (N. Y.) 196; *Bennett v. Smith*, 23 Hun (N. Y.) 50; *Donivan v. Manhattan R. Co.*, 1 Misc. Rep. (N. Y. C. Pl.) 368; *Dyke v. National Transit Co.*, 22 N. Y. App. Div. 360; *Hamilton v. Third Ave. R. Co.*, 53 N. Y. 25.

Tennessee. — *Louisville, etc., R. Co. v. Guinan*, 11 Lea (Tenn.) 103, 47 Am. Rep. 279.

Texas. — *Ulander v. Orman*, (Tex. Civ. App. 1894) 26 S. W. Rep. 1103; *Burris v. Booth*, (Tex. Civ. App. 1897) 40 S. W. Rep. 186. And see *Hillman v. Baumbach*, 21 Tex. 203.

Vermont. — *Blodgett v. Brattleboro*, 30 Vt. 579.

Virginia. — *Burruss v. Hines*, 94 Va. 413.

Wisconsin. — *Beveridge v. Welch*, 7 Wis. 465; *Hamlin v. Spaulding*, 27 Wis. 360.

Entry of Mortgagee by Mistake. — Where a mortgagee, after foreclosure of his mortgage, entered upon the land under a mistake as to what were his rights, it was held that the mortgagor could not recover exemplary damages for the trespass. *Ashley v. Wilson*, 61 Ga. 297.

Where Act Done under Mistaken Sense of Duty. — If the defendant acted under a mistaken sense of duty and without any evil intent it is not a case for exemplary damages. *Wiggin v. Coffin*, 3 Story (U. S.) 1; *Louisville, etc. R. Co. v. Guinan*, 11 Lea (Tenn.) 98, 47 Am. Rep. 279.

Must Be Reasonable Ground for Defendant's Belief of Right. — A mere belief in the right to do the act complained of cannot shield a person where there is no reasonable ground for it. *Mansur-Tebbetts Implement Co. v. Smith*, 65 Ill. App. 324; *Jasper v. Purnell*, 67 Ill. 358; *Singer Mfg. Co. v. Holdford*, 86 Ill. 455, 29 Am. Rep. 43.

Defendant's Act Induced by Plaintiff's Conduct — *Estoppel.* — A tenant in possession agreed with his landlord to surrender the premises immediately in case of a sale. A party, on the faith of such assurance, bought the premises for the purpose of erecting a warehouse thereon, and contracted for the construction of the building. The tenant gave possession of a part of the lot, upon which excavations were begun, and promised to vacate entirely in a few days, and not delay the work, but soon afterwards repudiated his agreement and refused to leave, whereupon the workmen, in his absence, removed his goods and tore down the house which he had occupied, so as to proceed with their work. It was held that exemplary damages were not recoverable, if indeed the plaintiff was not estopped to claim any damage at all. *Farwell v. Warren*, 70 Ill. 28.

A Person Cannot Consent to an Invasion of His Rights and Then Claim Punitive Damages. — *Mansur-Tebbetts Implement Co. v. Smith*, 65 Ill. App. 324.

2. *Dalton v. Beers*, 38 Conn. 529; *Best v. Allen*, 30 Ill. 30, 61 Am. Dec. 338; *Raynor v. Nims*, 37 Mich. 34, 26 Am. Rep. 493; *Lucas v. Michigan Cent. R. Co.*, 98 Mich. 1, 39 Am. St. Rep. 517; *Hayner v. Cowden*, 27 Ohio St. 292, 22 Am. Rep. 303.

In Addition to Good Faith, there must be proper prudence and caution. *Singer Mfg. Co. v. Holdford*, 86 Ill. 460, 29 Am. Rep. 43.

Doctrine that Party Is Presumed to Know Law. — The fact that one who has committed a wilful trespass under circumstances indicating wantonness and malice believed that he had a right to do the act complained of will not shield him from exemplary damages. He is bound to know the law, and acting in ignorance thereof will be regarded as reckless.

do in a proper manner the act complained of, if the act is committed with unnecessary outrage and violence exemplary damages may be recovered.¹ On the other hand, one who exercises a legal right simply, and does no more than he has a legal right to do, and acts without unnecessary wantonness and violence, cannot be held liable in exemplary damages merely because his conduct was instigated by malice.²

3. Fraud. — Many of the cases, in stating the rule of punitive damages, include fraud as an element which will warrant a recovery.³ Thus, in an action for cheating the plaintiff in weighing a quantity of merchandise, it was held that upon evidence of wilful fraud the jury might assess punitive damages.⁴

Doctrine Not Well Settled. — But this branch of the doctrine cannot be considered well settled. Some authorities deny that a mere intent to derive profit by deception in a trade or business transaction will warrant the imposition of punitive damages.⁵ One line of cases, however, permits a plaintiff, where there has been wilful fraud, to recover attorney's fees and the expenses of litigation, in addition to the taxable costs, though under the name of punitive damages, in addition to compensatory damages as usually estimated.⁶

4. Gross Negligence or Recklessness — *a. IN GENERAL.* — It is stated as a general rule that punitive damages are recoverable where the injury received results from the defendant's gross negligence or recklessness.⁷ Thus, in an

Jasper v. Purnell, 67 Ill. 358. And see *Farwell v. Warren*, 51 Ill. 467.

Where a party wilfully took and carried away property it has been held that punitive damages might be recovered though the defendant thought that he had a right to commit the act complained of. The defendant, it was declared, should have learned his rights, if he did not know them. *Johnson v. Camp*, 51 Ill. 219.

1. *Philadelphia, etc., R. Co. v. Larkin*, 47 Md. 163, 28 Am. Rep. 442.

Wrong Done under Pretense of Right. — If a party should take opportunity, under pretense of right, to inflict upon another a wanton and malicious assault, there might be a recovery of exemplary damages. *Kiff v. Youmans* 86 N. Y. 324, 40 Am. Rep. 543.

2. *Kiff v. Youmans*, 86 N. Y. 324, 40 Am. Rep. 543.

3. Fraud as an Element — *Connecticut.* — *Ives v. Carter*, 24 Conn. 392; *Platt v. Brown*, 30 Conn. 336; *Bennett v. Gibbons*, 55 Conn. 450. And see *Beecher v. Derby Bridge, etc., Co.*, 24 Conn. 491.

Illinois. — *Kelly v. Valentine*, 17 Ill. App. 87; *Chicago v. Martin*, 49 Ill. 241 95 Am. Dec. 590.

Indiana. — *Millison v. Hoch*, 17 Ind. 227.

Kansas. — *Cady v. Case*, 45 Kan. 733.

Louisiana. — *Massie v. Baily*, 33 La. Ann. 485.

Minnesota. — *Boetcher v. Staples*, 27 Minn. 308, 38 Am. Rep. 295.

Texas. — *San Antonio, etc., R. Co. v. Kniffen*, 4 Tex. Civ. App. 484; *Graham v. Roder* 5 Tex. 141; *Cole v. Tucker*, 6 Tex. 266; *Oliver v. Chapman*, 15 Tex. 400; *Gordon v. Jones*, 27 Tex. 620.

Vermont. — *Nye v. Merriam*, 35 Vt. 438. And see *Devine v. Rand*, 38 Vt. 626.

Statement of Rule. — In actions for torts where there has been fraud, malice, or oppression, the jury may allow exemplary or punitive damages, intending in some measure a

punishment upon the defendant for the wrong act done and an example to deter others from similar acts. *Boetcher v. Staples*, 27 Minn. 308, 38 Am. Rep. 295.

Illustration — False Representation as to Party's Credit. — In the case of *Addington v. Allen*, 11 Wend. (N. Y.) 380, which was an action for damages for falsely representing the credit of a party, whereby the plaintiff was induced to sell him goods to the value of two thousand dollars, the trial judge instructed the jury that if it should consider the plaintiff entitled to recover he would be entitled not only to the amount of the goods sold, with interest thereon, but also to exemplary damages. Though the judgment was reversed on another ground, it was held that the rule of damages laid down was not objectionable.

4. *Nye v. Merriam*, 35 Vt. 438. And see *Devine v. Rand*, 38 Vt. 626.

5. For fraud, merely, in the sale of personal property, punitive damages are not recoverable. *Singleton v. Kennedy*, 9 B. Mon. (Ky) 222. And see *Durfee v. Newkirk*, 83 Mich. 522.

Action by Mortgagee of Personality Against Vendee of Mortgagor. — An action by the mortgagee of a colt against a purchaser from the mortgagor to recover the animal or its value has been held not a case for exemplary damages, even though the defendant's refusal to deliver the colt, and his disposition and concealment of it, were fraudulent and malicious. *McDonald v. Norton*, 72 Iowa 652.

In *Colorado*, where exemplary damages are expressly allowed by statute, in the enumeration of elements held to warrant a recovery fraud is included. See *Mills's Annot. Stat.*, 1891, § 1512.

6. *Ives v. Carter*, 24 Conn. 392; *Platt v. Brown*, 30 Conn. 336; *Bennett v. Gibbons*, 55 Conn. 450. And see *Beecher v. Derby Bridge, etc., Co.*, 24 Conn. 491.

7. **Gross Negligence or Recklessness** — *England.* — *Emblen v. Myers*, 6 H. & N. 54.

action against a physician for the alleged improper manner of his treatment of a disease, if gross negligence is shown there may be a recovery of damages to punish the defendant in addition to those which are compensatory merely; ¹ and exemplary damages have also been allowed for injuries sustained by reason of a defect in a bridge which the defendants were bound to keep in repair. ²

United States. — Philadelphia, etc., R. Co. v. Quigley, 21 How. (U. S.) 213; Milwaukee, etc., R. Co. v. Arms, 91 U. S. 489; U. S. v. Taylor, 35 Fed. Rep. 484; Henning v. Western Union Tel. Co., 41 Fed. Rep. 864; Morning Journal Assoc. v. Rutherford, 51 Fed. Rep. 513, 1 U. S. App. 296.

Alabama. — Mobile, etc., R. Co. v. Ashcraft, 48 Ala. 15; Western Union Tel. Co. v. Seed, 115 Ala. 670; South, etc., Alabama R. Co. v. McLendon, 63 Ala. 266; Lienkauf v. Morris, 66 Ala. 406; Wilkinson v. Searcy, 76 Ala. 181; Kansas City, etc., R. Co. v. Phillips, 98 Ala. 159; Patterson v. South, etc., Alabama R. Co., 89 Ala. 318; Alabama G. S. R. Co. v. Hill, 90 Ala. 71, 24 Am. St. Rep. 764; Richmond, etc., R. Co. v. Greenwood, 99 Ala. 501.

Arkansas. — Texarkana Gas, etc., Co. v. Orr, 59 Ark. 215, 43 Am. St. Rep. 30; Citizens' St. R. Co. v. Steen, 42 Ark. 321.

Colorado. — Western Union Tel. Co. v. Eyser, 2 Colo. 162.

Connecticut. — Lindsley v. Bushnell, 15 Conn. 225, 38 Am. Dec. 79; Welch v. Durand, 36 Conn. 182, 4 Am. Rep. 55.

District of Columbia. — Kilbourn v. Thompson, MacArthur & M. (D. C.) 401.

Illinois. — Dean v. Blackwell, 18 Ill. 336; Peoria Bridge Assoc. v. Loomis, 20 Ill. 236, 71 Am. Dec. 263; Chicago v. Martin, 49 Ill. 246, 95 Am. Dec. 590; Kolb v. O'Brien, 86 Ill. 210.

Indiana. — Louisville, etc., R. Co. v. Shanks, 94 Ind. 598.

Iowa. — Cochran v. Miller, 13 Iowa 128; Frink v. Coe, 4 Greene (Iowa) 555, 61 Am. Dec. 141.

Kansas. — Wiley v. Keokuk, 6 Kan. 94; Leavenworth, etc., R. Co. v. Rice, 10 Kan. 426; Kansas Pac. R. Co. v. Kessler, 18 Kan. 523; Hefley v. Baker, 19 Kan. 9; Kansas Pac. R. Co. v. Little, 19 Kan. 267; Atchison, etc., R. Co. v. Long, 5 Kan. App. 644.

Kentucky. — Bowler v. Lane, 3 Metc. (Ky.) 311; Fleet v. Hollenkemp, 13 B. Mon. (Ky.) 219; Kentucky Cent. R. Co. v. Dills & Bush (Ky.) 593; Jacobs v. Louisville, etc., R. Co., 10 Bush (Ky.) 263; Kountz v. Brown 16 B. Mon. (Ky.) 577; Louisville, etc., R. Co. v. Greer (Ky. 1895) 29 S. W. Rep. 337; Central Pass. R. Co. v. Chatterson, (Ky. 1895) 29 S. W. Rep. 18; Louisville, etc., R. Co. v. Kelly, 100 Ky. 421.

Louisiana. — Hamilton v. Morgan's Louisiana, etc., R., etc., Co., 42 La. Ann. 824.

Maine. — Wilkinson v. Drew, 75 Me. 360.

Maryland. — Baltimore, etc., R. Co. v. Breinig, 25 Md. 378, 90 Am. Dec. 49.

Mississippi. — Vicksburg, etc., R. Co. v. Patton, 31 Miss. 156, 66 Am. Dec. 552; Heirn v. M'Caughan, 32 Miss. 17, 66 Am. Dec. 588; Memphis, etc., R. Co. v. Whitfield, 44 Miss. 466, 7 Am. Rep. 699; Silver v. Kent, 60 Miss. 124.

Missouri. — Von Fragstein v. Windler, 2 Mo. App. 598.

New Hampshire. — Whipple v. Walpole, 10 N. H. 130; Hopkins v. Atlantic, etc., R. Co., 36 N. H. 9, 72 Am. Dec. 287; Taylor v. Grand Trunk R. Co., 48 N. H. 304, 2 Am. Rep. 229.

New York. — Millard v. Brown, 35 N. Y. 297; Caldwell v. New Jersey Steamboat Co., 47 N. Y. 282; Fisher v. Metropolitan El. R. Co., 34 Hun (N. Y.) 433; Andrews, J., in Voltz v. Blackmar, 64 N. Y. 440.

North Carolina. — Holmes v. Carolina Cent. R. Co., 94 N. Car. 318; Knowles v. Norfolk Southern R. Co., 102 N. Car. 59.

Pennsylvania. — Nagle v. Mullison, 34 Pa. St. 48; Lake Shore, etc., R. Co. v. Rosenzweig, 113 Pa. St. 535; Pittsburgh, etc., R. Co. v. Lyon, 123 Pa. St. 140, 10 Am. St. Rep. 517.

South Carolina. — Palmer v. Charlotte, etc., R. Co., 3 S. Car. 583, 16 Am. Rep. 750; Quinn v. South Carolina R. Co., 29 S. Car. 381; Mack v. South Bound R. Co., 52 S. Car. 323.

Tennessee. — Byram v. McGuire, 3 Head (Tenn.) 530; Louisville, etc., R. Co. v. Guinan, 11 Lea (Tenn.) 98, 47 Am. Rep. 279.

Texas. — Kolb v. Bankhead, 18 Tex. 228; Southern Cotton Press, etc., Co. v. Bradley, 52 Tex. 587; Gulf, etc., R. Co. v. Levy, 59 Tex. 542; Missouri Pac. R. Co. v. Johnson, 72 Tex. 95.

Wisconsin. — Pickett v. Crook, 20 Wis. 358; Meibus v. Dodge, 38 Wis. 300, 20 Am. Rep. 6.

Wyoming. — Union Pac. R. Co. v. Hause, 1 Wyoming 27.

Statutory Exception to Rule. — Under a statute, however, providing for punitive damages where the defendant has been guilty of oppression, fraud, or malice, actual or presumed, it has been held that an instruction authorizing an assessment of punitive damages for "gross carelessness" was erroneous. Yerian v. Linkletter, 80 Cal. 137. Thornton and Works, JJ., dissenting. And see Moody v. McDonald, 4 Cal. 297.

Ordinary Negligence. — Exemplary damages are not recoverable for ordinary negligence. Moody v. McDonald, 4 Cal. 297; Louisville, etc., R. Co. v. Shanks, 94 Ind. 598; Kansas Pac. R. Co. v. Cutter, 19 Kan. 83; Chicago, etc., R. Co. v. Scurr, 59 Miss. 456, 42 Am. Rep. 373; Mack v. South Bound R. Co., 52 S. Car. 323; Missouri Pac. R. Co. v. Shuford, 72 Tex. 165.

An instruction, therefore, which allows exemplary damages without a finding that the negligence was gross or wanton is erroneous. Gibney v. Lewis, 68 Conn. 392. And see Atchison, etc., R. Co. v. Chamberlain, 4 Okla. 542.

1. Cochran v. Miller, 13 Iowa 128.

2. South, etc., Alabama R. Co. v. McLendon 63 Ala. 266; Whipple v. Walpole, 10 N. H. 130.

In the well-known case of Fay v. Parker, 53 N. H. 342, 16 Am. Rep. 270, punitive damages were denied in *New Hampshire*, and since this decision they have not been recoverable.

b. CHARACTER OF NEGLIGENCE REQUIRED — (1) *In General*. — The negligence which will warrant an assessment of punitive damages has been defined as the omission of that care which might be expected of a person habitually careless.¹

(2) *Doctrine that Negligence Must Amount to Positive Misconduct*. — While the term "gross" is constantly used in this connection,² many cases explain it by declaring that the rule of exemplary damages requires negligence in such degree as to amount to wantonness and positive misconduct, manifesting a conscious disregard of the rights of others and a reckless indifference to consequences. And so is believed to be the weight of authority.³

1. Louisville, etc., R. Co. v. Greer, (Ky. 1895) 29 S. W. Rep. 337.

Contributory Negligence. — It has been held that if the party injured could have both seen and heard the train in time to avoid it, but did not use the proper means, or, indeed, any precautions to do so, he will not be entitled to vindictive damages. Chicago, etc., R. Co. v. McKean, 40 Ill. 218. And see generally the title CONTRIBUTORY NEGLIGENCE, vol. 7, p. 368.

2. **Difficulty of Determining Precise Meaning.** — In the case of Milwaukee, etc., R. Co. v. Arms, 91 U. S. 489, the court said: "It is insisted, however, that where there is 'gross negligence' the jury can properly give exemplary damages. There are many cases to this effect. The difficulty is that they do not define the term with any accuracy; and, if it be made the criterion by which to determine the liability * * * beyond the limit of indemnity, it would seem that a precise meaning should be given to it. This the courts have been embarrassed in doing."

Distinction Between Degrees of Negligence. — In *The Steamboat New World v. King*, 16 How. (U. S.) 469, Mr. Justice Curtis, in speaking of the different terms for the several degrees of negligence, doubts if these terms can be usefully applied in practice. Their meaning, it is observed, is not fixed, or capable of being so. One degree, thus described, not only may be confounded with another, but it is quite impracticable exactly to distinguish them. Their signification necessarily varies according to circumstances, to whose influence the courts have been forced to yield, until there are so many real exceptions that the rules themselves can scarcely be said to have a general operation. If the law furnishes no definition of the terms "gross negligence" and "ordinary negligence" which can be applied in practice, but leaves it to the jury to determine, in each case, what the duty was, and what omissions amount to a breach of it, it would seem that imperfect and confessedly unsuccessful attempts to define that duty had better be abandoned.

In the case of *Wilson v. Brett*, 11 M. & W. 113, Lord Cranworth said that gross negligence was ordinary negligence "with the addition of a vituperative epithet." And see *Beal v. South Devon R. Co.*, 3 H. & C. 337, *Grill v. General Iron Screw Collier Co.*, L. R. 1 C. P. 600. See the title NEGLIGENCE, for a discussion of degrees of negligence.

3. **What Degree or Kind of Negligence Necessary** — *England*. — *Emblen v. Myers*, 6 H. & N. 54. *United States*. — *Hull v. Treasurer*, 2 Woodb. & M. (U. S.) 337; *Philadelphia, etc., R. Co. v.*

Quigley, 21 How. (U. S.) 213; *U. S. v. Taylor*, 35 Fed. Rep. 484; *Lake Shore, etc., R. Co. v. Prentice*, 147 U. S. 101; *Milwaukee, etc., R. Co. v. Arms*, 91 U. S. 495.

Alabama. — *Lienkauf v. Morris*, 66 Ala. 406; *Wilkinson v. Searcy*, 76 Ala. 176; *Columbus, etc., R. Co. v. Bridges*, 86 Ala. 448, 11 Am. St. Rep. 58.

Arkansas. — *Citizens' St. R. Co. v. Steen*, 42 Ark. 321; *St. Louis, etc., R. Co. v. Hall*, 53 Ark. 7.

Georgia. — *Chattanooga, etc., R. Co. v. Liddell*, 85 Ga. 482.

Illinois. — *Peoria Bridge Assoc. v. Loomis*, 20 Ill. 235, 71 Am. Dec. 263; *Kolb v. O'Brien*, 86 Ill. 210.

Indiana. — *Louisville, etc., R. Co. v. Shanks*, 94 Ind. 598.

Kansas. — *Wiley v. Keokuk*, 6 Kan. 94; *Leavenworth, etc., R. Co. v. Rice*, 10 Kan. 426; *Kansas Pac. R. Co. v. Kessler*, 18 Kan. 523; *Hefley v. Baker*, 19 Kan. 9; *Kansas Pac. R. Co. v. Little*, 19 Kan. 267; *Parsons v. Lindsay*, 26 Kan. 426; *Southern Kansas R. Co. v. Rice*, 38 Kan. 404, 5 Am. St. Rep. 766; *West v. Western Union Tel. Co.*, 39 Kan. 93, 7 Am. St. Rep. 530; *Kansas City, etc., R. Co. v. Kier*, 41 Kan. 661; *Atchison, etc., R. Co. v. Stewart*, 55 Kan. 667; *Atchison, etc., R. Co. v. Lamoreux*, 5 Kan. App. 813.

Kentucky. — *Kentucky Cent. R. Co. v. Dills*, 4 Bush (Ky.) 593; *Jacobs v. Louisville, etc., R. Co.*, 10 Bush (Ky.) 263. And see *Louisville, etc., R. Co. v. Smith*, 2 Duv. (Ky.) 556.

Louisiana. — *Hamilton v. Morgan's Louisiana R., etc., Co.*, 42 La. Ann. 824.

Michigan. — *Allison v. Chandler*, 11 Mich. 542.

Mississippi. — *Chicago, etc. R. Co. v. Scurr*, 59 Miss. 456, 42 Am. Rep. 373.

Missouri. — *Leahy v. Davis*, 121 Mo. 227.

New York. — *Wallace v. New York, 2 Hilt. (N. Y.) 440*; *Fisher v. Metropolitan El. R. Co.*, 34 Hun (N. Y.) 433; *Millard v. Brown*, 35 N. Y. 297; *Caldwell v. New Jersey Steamboat Co.*, 47 N. Y. 282.

North Carolina. — *Holmes v. Carolina Cent. R. Co.*, 94 N. Car. 318; *Knowles v. Norfolk Southern R. Co.*, 102 N. Car. 59.

Oklahoma. — *Atchison, etc., R. Co. v. Chamberlain*, 4 Okla. 542.

Pennsylvania. — *Lake Shore, etc., R. Co. v. Rosenzweig*, 113 Pa. St. 535.

Tennessee. — *Louisville, etc., R. Co. v. Guinan*, 11 Lea (Tenn.) 98, 47 Am. Rep. 279; *East Tennessee, etc., R. Co. v. Lee*, 90 Tenn. 570.

Texas. — *Southern Cotton Press, etc., Co. v. Bradley*, 52 Tex. 587; *Gulf, etc., R. Co. v. McFadden*, (Tex. Civ. App. 1894) 25 S. W.

Doctrine that Mere "Gross" Negligence Is Insufficient. — Some cases, indeed, seem to hold that mere "gross" negligence is not sufficient; that is, that this term alone does not imply the extreme degree of negligence required.¹

Consciousness of Probable Injury. — It must, it has been held, be shown that the person in default was conscious that injury would be a probable consequence of his negligence.²

(3) *Wilful Design to Injure.* — It is not necessary, however, to the recovery of exemplary damages for negligence that the defendant's acts should actually evince a wilful design to injure.³

(4) *Entire Want of Care.* — It has also been held unnecessary to the recovery of exemplary damages for negligence that there should be an entire want of all care.⁴

5. Necessity for Actual Damages — *a. IN GENERAL.* — It is a general rule that in order to recover exemplary damages there must be actual damages shown, though the elements otherwise authorizing the assessment of exemplary damages may exist.⁵ Or, as it has been otherwise expressed, exemplary dam-

Rep. 451; *International, etc., R. Co. v. Brazzil*, 78 Tex. 314.

Wisconsin. — *Pickett v. Crook*, 20 Wis. 358.

Must Be Grossest Negligence. — The negligence which warrants punitive damages has been said to be "gross negligence within the strictest signification of the phrase, which must be construed to mean 'such entire want of care as to raise a presumption that the person in fault is conscious of the probable consequences of his carelessness, and is indifferent, or worse, to the danger of injury to the persons or property of others.'" *Lienkauf v. Morris*, 66 Ala. 406; *Wilkinson v. Searcy*, 76 Ala. 181.

Doctrine that Negligence Must Be Equivalent to Intentional Wrong. — In order for punitive damages to be recoverable for negligence, there must be wilful misconduct, or such reckless indifference to the rights of others as is equivalent to an intentional violation of them. *Milwaukee, etc., R. Co. v. Arms*, 91 U. S. 489; *Philadelphia, etc., R. Co. v. Quigley*, 21 How. (U. S.) 213. Similarly it has been held that the act done or omitted must be the result of intention, and mere neglect cannot, ordinarily, be so regarded. *Peoria Bridge Assoc. v. Loomis*, 20 Ill. 236, 71 Am. Dec. 263; *Chicago v. Martin*, 49 Ill. 246, 95 Am. Dec. 590.

Of a Criminal Nature. — In order to warrant a recovery in punitive damages for negligence, it must be reckless and of a criminal nature, and must be clearly established. *Cleghorn v. New York Cent., etc., R. Co.*, 56 N. Y. 44, 15 Am. Rep. 375.

Must Be Equivalent to Malice. — In the case of *Pickett v. Crook*, 20 Wis. 358, it was said that exemplary damages could proceed only from gross criminal negligence — such negligence as evinces on the part of the defendant a wanton disregard of the safety of others, and which in law is equivalent to malice. And see *McFee v. Vicksburg, etc., R. Co.*, 42 La. Ann. 790.

Negligence Insufficient to Warrant Punitive Damages — *Illustration.* — In an action against a municipal corporation for a personal injury sustained by reason of the mere negligence of the corporation to repair a defect in a street but little used, and not in the business part of the city, punitive damages are not recoverable. *Chicago v. Martin*, 49 Ill. 241, 95 Am. Dec. 590.

1. Doctrine that Mere "Gross" Negligence Is Insufficient. — It has been held error to instruct the jury that such damages are recoverable for "gross negligence," as that term does not necessarily imply the extreme degree of negligence required. *Florida Southern R. Co. v. Hirst*, 30 Fla. 1, 32 Am. St. Rep. 17. And see *Chattanooga, etc., R. Co. v. Liddell*, 85 Ga. 482. And similarly in the case of *East Tennessee, etc., R. Co. v. Lee*, 90 Tenn. 570, it was held that a charge upon the subject of punitive damages in a personal injury case is erroneous if it merely instructs the jurors that they may allow vindictive damages if they find that the defendant's act was characterized by "gross negligence," without explaining that "gross negligence" in this connection implies such entire want of care or recklessness of conduct as is the equivalent of "positive misconduct" or evinces "a conscious indifference to consequences."

Rationale of Rule. — Inasmuch as there is no intelligible distinction between the several degrees of negligence so termed, an instruction which authorizes the jury to award exemplary damages for gross negligence is improper. *Milwaukee, etc., R. Co. v. Arms*, 91 U. S. 493.

2. *Richmond, etc., R. Co. v. Vance*, 93 Ala. 144, 30 Am. St. Rep. 41.

3. *Kansas Pac. R. Co. v. Kessler*, 18 Kan. 523; *Palmer v. Charlotte, etc., R. Co.*, 3 S. Car. 583, 16 Am. Rep. 750; *Quinn v. South Carolina R. Co.*, 29 S. Car. 381.

4. *Alabama G. S. R. Co. v. Hill*, 93 Ala. 514, 30 Am. St. Rep. 65.

5. General Rules as to Actual Damages — *United States.* — Press Pub. Co. v. Monroe, 73 Fed. Rep. 196, 38 U. S. App. 410.

Illinois. — *Freese v. Tripp*, 70 Ill. 496; *Meidel v. Anthis*, 71 Ill. 241; *Graham v. Fulford*, 73 Ill. 596. And see *Kelly v. Valentine*, 17 Ill. App. 87; *Lowry v. Coster*, 91 Ill. 185.

Iowa. — *Kuhn v. Chicago, etc., R. Co.*, 74 Iowa 141; *Boardman v. Marshalltown Grocery Co.*, 105 Iowa 445.

Kansas. — *Schippel v. Norton*, 38 Kan. 572; *Adams v. Salina*, 58 Kan. 246.

Maine. — *Gilmore v. Mathews*, 67 Me. 517.

Michigan. — *Ganssly v. Perkins*, 30 Mich. 494.

New York. — See *Hamilton v. Third Ave. R. Co.*, 35 N. Y. Super. Ct. 118.

ages can never constitute the basis of a cause of action.¹ The right of a party to exemplary damages will not, however, be affected by his failure to recover actual damages, where such failure is due merely to an error or omission in his pleadings.²

b. ACTUAL DAMAGES INSUSCEPTIBLE OF PECUNIARY MEASUREMENT. — It is not at all necessary to the recovery of exemplary damages that the actual damages should be susceptible of measurement by a money standard.³

c. NOMINAL DAMAGES. — The requirement that damages shall be shown before exemplary damages are recoverable is, it is held, satisfied by nominal damages merely.⁴ This, however, is denied by some authorities.⁵

6. Constitutional and Statutory Provisions — *a. IN GENERAL.* — In some of the states constitutional provisions have been adopted on the subject of exemplary damages,⁶ and statutory provisions, generally merely confirmatory of the common law, but in some instances modifying or prescribing particular rules in this connection, are not infrequently met with.⁷

Ohio. — *Mulford v. Clewell*, 21 Ohio St. 191. And see *Schneider v. Hosier*, 21 Ohio St. 98.

Texas. — *Mickie v. McGehee*, 27 Tex. 134; *Flanagan v. Womack*, 54 Tex. 45; *Gulf, etc., R. Co. v. Levy*, 59 Tex. 542; *Gulf, etc., R. Co. v. Levy*, 59 Tex. 563, 46 Am. Rep. 278, *Jones v. Matthews*, 75 Tex. 1; *Claunch v. Osborn*, (Tex. Civ. App. 1893) 23 S. W. Rep. 937; *Carson v. Texas Installment Co.*, (Tex. Civ. App. 1896) 34 S. W. Rep. 762. And see *Stuart v. Western Union Tel. Co.*, 66 Tex. 588, 59 Am. Rep. 623.

Wisconsin. — *Barber v. Kilbourn*, 16 Wis. 485; *Maxwell v. Kennedy*, 50 Wis. 645.

Actual Damages to Complaining Party. — The foundation of exemplary damages, under the *Michigan* statute, providing a right of action against persons sustaining certain relations to one intoxicated by drink supplied by another, is held to rest on the wrong done wilfully to the complaining party, and not to the wrong done alone without reference to that party. Otherwise every one entitled under the statute to bring an action might bring his or her separate action in the same wrong, and while each would recover as his own actual damages no more than his own injury, the same exemplary damages would be multiplied and recoverable in addition to actual damages in each action. *Ganssly v. Perkins*, 30 Mich. 492. See generally the title CIVIL DAMAGE ACTS, vol. 6, p. 36.

1. *Schippel v. Norton*, 38 Kan. 572.

2. *Favorite v. Cottrill*, 62 Mo. App. 119.

3. *Press Pub. Co. v. Monroe*, 73 Fed. Rep. 201.

4. Merely Nominal Damages Sustain. — *Wilson v. Vaughn*, 23 Fed. Rep. 229; *Press Pub. Co. v. Monroe*, 73 Fed. Rep. 196; *Alabama G. S. R. Co. v. Sellers*, 93 Ala. 9, 30 Am. St. Rep. 17; *Atlanta, etc., R. Co. v. Conдор*, 75 Ga. 51; *Hefley v. Baker*, 19 Kan. 9; *Prince v. Brooklyn Daily Eagle*, 16 Misc. Rep. (N. Y. Supreme Ct.) 186; *Champion v. Vincent*, 20 Tex. 811; *Flanagan v. Womack*, 54 Tex. 45. And see *Robinson v. Goings*, 63 Miss. 500.

In the case of *Hefley v. Baker*, 19 Kan. 9, which was an action for damages for a malicious trespass to realty, a verdict for seventy-five dollars actual damages was held erroneous, although the court declared that a verdict for punitive damages would not have been improper. The plaintiff had shown no actual

damages at all, hence was entitled only to nominal recovery on that score.

5. *Stacy v. Portland Pub. Co.*, 68 Me. 279; *Claunch v. Osborn*, (Tex. Civ. App. 1893) 23 S. W. Rep. 937; *Girard v. Moore*, 86 Tex. 675; *Maxwell v. Kennedy*, 50 Wis. 645.

Texas Rule. — The two Texas cases above cited seem to indicate a conflict of authority in that state as to the point under discussion, for in the preceding note will be observed Texas adjudications maintaining the contrary position. The late cases ignore the earlier decisions, and *Girard v. Moore*, 86 Tex. 675, *supra*, is not really in conflict with them, for this seems to have been a case where it was necessary to show some damage to constitute the right of action, and not one involving those damages presumed where a right of action is shown. In the case of *Claunch v. Osborn*, (Tex. Civ. App. 1893) 23 S. W. Rep. 937, *supra*, the observations of the court considered in connection with the facts would bring it in conflict with the earlier cases, but the precise point under consideration does not seem to have been distinctly discussed.

6. Constitutional Provisions. — See, for example, *Const. Kentucky*, § 241; *Const. Texas*, 1876, art. 16, § 26. See also *Louisville, etc., R. Co. v. Kelly*, 100 Ky. 421.

7. Statutes — *Colorado.* — Under Sess. Laws 1889, p. 64, exemplary damages may be recovered where there has been a wanton and reckless disregard of the plaintiff's rights and feelings. See *Williams v. Williams*, 20 Colo. 51.

Dakota. — "In any action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, actual or presumed, the jury, in addition to the actual damages, may give damages for the sake of example, and by way of punishing the defendant." *Civ. Code* 1895, § 1946. See also *Fell v. Northern Pac. R. Co.*, 44 Fed. Rep. 248.

Georgia. — In Georgia the rule by statute (see *Code* 1895, § 3906) is that in the event of "aggravating circumstances" attending the commission of a tort, the jury may give damages in addition to those merely compensatory, "either to deter the wrongdoer from repeating the trespass, or as compensation for the wounded feelings of the plaintiff." *Georgia R., etc., Co. v. Dougherty*, 86 Ga. 744.

b. DOUBLE AND TREBLE DAMAGES. -- Provision is made by statute in some states for double or treble damages for certain proscribed acts of trespass.¹ These statutes are penal or punitive in character,² and are not unconstitutional³ though directed against a particular class, as that a railroad company which fails to construct and maintain a proper fence along the line of its road shall be liable in double the value of any stock killed by it.⁴ It will be observed that in some jurisdictions denying the propriety of the general rule of exemplary damages special provision is made by statute for particular cases.⁵

These Statutes Will Be Specifically Considered in connection with the particular cases and classes of wrongs to which they apply.⁶

VII. LIABILITY OF PRINCIPAL FOR ACT OF AGENT — 1. **In General.** — There is no more vexed question in connection with the doctrine of exemplary damages than that of the liability of a principal or master for the malicious or wanton or grossly negligent acts of his agent or servant. The authorities are agreed only to the extent of holding that there may be such liability in proper cases; as to what is a proper case for the application of the rule there is much confusion.

2. Doctrine that Principal Is Liable for Any Act Done in Line of Agent's Employment — *a. IN GENERAL.* — A considerable number of cases are authority for the proposition that a principal or master is liable in exemplary damages

1. Statutes—Double and Treble Damages—
England. — Atty.-Gen. *v. Hatton*, M'Clel. 214, 13 Price 476; *Buckle v. Bewes*, 6 D. & R. 1, 4 B. & C. 154, 10 E. C. L. 298; *Deacon v. Morris*, 1 Chit. Rep. 137, 18 E. C. L. 52; *Doe v. Roe*, 1 Chit. Rep. 141, 18 E. C. L. 53; *Clark v. Irwin*, 8 U. C. L. J. 21.

Canada. — *Brown v. Blackwell*, 35 U. C. Q. B. 239; *Hamilton v. Lyons*, 5 U. C. Q. B. (O. S.) 503.

United States. — *Cross v. U. S.*, 1 Gall. (U. S.) 26; *Whitemore v. Cutter*, 1 Gall. (U. S.) 478.

California. — *Galvin v. Gualala Mill Co.*, 98 Cal. 268.

Connecticut. — *Hart v. Brown*, 2 Root (Conn.) 301; *Bill v. Lyme*, 2 Root (Conn.) 213; *Bateman v. Goodyear*, 12 Conn. 575; *Broschart v. Tuttle*, 59 Conn. 1.

Iowa. — *Hopper v. Chicago, etc., R. Co.*, 91 Iowa 639.

Kentucky. — *Stovall v. Smith*, 4 B. Mon. (Ky.) 378.

Maine. — *Quimby v. Carter*, 20 Me. 218.

Massachusetts. — *Clark v. Worthington*, 12 Pick. (Mass.) 571; *Lobdell v. New Bedford*, 1 Mass. 153; *Prescott v. Tufts*, 4 Mass. 146. See *Pierce v. Spring*, 15 Mass. 489.

Michigan. — *Wallace v. Finch*, 24 Mich. 255; *Clark v. Field*, 42 Mich. 342; *Shepard v. Gates*, 50 Mich. 495; *Kilgannon v. Jenkinson*, 57 Mich. 325.

Minnesota. — *Bagley v. Sternberg*, 34 Minn. 470.

Mississippi. — *Terrel v. Ligon*, Walk. (Miss.) 170.

Missouri. — *Walther v. Warner*, 26 Mo. 143; *Herron v. Hornback*, 24 Mo. 492; *Young v. Kansas City, etc., R. Co.*, 52 Mo. App. 530; *Brewster v. Link*, 28 Mo. 147; *Withington v. Hilderbrand*, 1 Mo. 280.

New York. — Anonymous, 4 Wend. (N. Y.) 216; *Pharis v. Gere*, 31 Hun (N. Y.) 443; *Starkweather v. Quigley*, 7 Hun (N. Y.) 26.

2. Craig v. Gerrish, 58 N. H. 513.

3. Missouri Pac. R. Co. v. Humes, 115 U. S. 512; *Shepard v. Gates*, 50 Mich. 495; *Craig v. Gerrish*, 58 N. H. 513.

4. Such a statute, it has been held, is not in conflict with the "due process of law" and the "equal protection" clauses of the Federal Constitution. *Missouri Pac. R. Co. v. Humes*, 115 U. S. 512.

5. Massachusetts. — *Lobdell v. New Bedford*, 1 Mass. 153; *Prescott v. Tufts*, 4 Mass. 146; *Clark v. Worthington*, 12 Pick. (Mass.) 571. And see *Pierce v. Spring*, 15 Mass. 489.

Michigan. — *Wallace v. Finch*, 24 Mich. 255; *Clark v. Field*, 42 Mich. 342; *Shepard v. Gates*, 50 Mich. 495; *Kilgannon v. Jenkinson*, 57 Mich. 325.

Example and Construction. — In *Michigan* it was provided by Comp. L. 1871, §§ 6370, 6371, that there might be a recovery of treble damages for trespass to realty in cutting down and carrying off any trees or timber; provided however, only single damages might be recovered where it appeared that the trespass was casual or involuntary or committed under a *bona fide* belief on the part of the defendant that the land was his own. In an action under this statute evidence was offered that the defendant had by letter accepted an offer made by the plaintiff to sell the lands; that such letter of acceptance, however, owing to an unexpected delay in its transmission, was not received by the plaintiff until after he had sold the lands to a third person; and that the acts of trespass complained of were committed by the defendant after the mailing of the letter of acceptance, and before he had notice of the sale of the lands to another. This evidence, it was held, was properly admissible and sufficient to restrict the recovery to single damages. *Wallace v. Finch*, 24 Mich. 255.

6. See such titles as BRIDGES, vol. 4, p. 918; FIRES; HIGHWAYS; RAILROADS; TRESPASS; WASTE; WATERS AND WATERCOURSES.

for any act of his agent or servant committed in the course of or connection with his duties or employment; and this irrespective of whether the particular act has or has not been either expressly authorized or subsequently ratified by the principal or master.¹ If the tortious act of the agent or servant when

1. Rule Making Principal Liable for Acts of Agent in Line of His Employment—United States.—*Gallena v. Hot Springs R. Co.*, 13 Fed. Rep. 116; *Malloy v. Bennett*, 15 Fed. Rep. 371; *Fell v. Northern Pac. R. Co.*, 44 Fed. Rep. 248.

Alabama.—*Jackson v. Smith*, 75 Ala. 97; *Alabama G. S. R. Co. v. Sellers*, 93 Ala. 9, 30 Am. St. Rep. 17; *Alabama G. S. R. Co. v. Frazier*, 93 Ala. 45, 30 Am. St. Rep. 28; *Kansas City, etc., R. Co. v. Phillips*, 98 Ala. 168; *Western Union Tel. Co. v. Seed*, 115 Ala. 670. *Compare City Nat. Bank v. Jeffries*, 73 Ala. 183.

Arkansas.—*Citizens' St. R. Co. v. Steen*, 42 Ark. 321; *St. Louis, etc., R. Co. v. Davis*, 56 Ark. 51.

Georgia.—*Gasway v. Atlanta, etc., R. Co.*, 58 Ga. 216; *Western, etc., R. Co. v. Turner*, 72 Ga. 292, 53 Am. Rep. 842.

Illinois.—*Chicago, etc., R. Co. v. Parks*, 18 Ill. 460, 68 Am. Dec. 562; *St. Louis, etc., R. Co. v. Dalby*, 19 Ill. 353; *Illinois Cent. R. Co. v. Hammer*, 72 Ill. 353; *Pullman Palace Car Co. v. Reed*, 75 Ill. 125, 20 Am. Rep. 232; *Toledo, etc., R. Co. v. Harmon*, 47 Ill. 298, 95 Am. Dec. 489; *Singer Mfg. Co. v. Holdford*, 86 Ill. 455, 29 Am. Rep. 43; *Wabash, etc., R. Co. v. Rector*, 104 Ill. 296; *Chicago, etc., R. Co. v. Flexman*, 9 Ill. App. 250; *Arasmith v. Temple*, 11 Ill. App. 39.

Indiana.—*Jeffersonville R. Co. v. Rogers*, 38 Ind. 116, 10 Am. Rep. 103; *American Express Co. v. Patterson*, 73 Ind. 434.

Kansas.—*Wheeler, etc., Mfg. Co. v. Boyce*, 36 Kan. 350, 59 Am. Rep. 571.

Kentucky.—*Sherley v. Billings*, 8 Bush (Ky.) 147; *Jacob v. Louisville, etc., R. Co.*, 10 Bush (Ky.) 263; *Louisville, etc., R. Co. v. Smith*, 2 Duv. (Ky.) 556; *Bowler v. Lane*, 3 Metc. (Ky.) 311; *Louisville, etc., R. Co. v. Ballard*, 85 Ky. 307, 7 Am. St. Rep. 600; *Memphis, etc., Packet Co. v. Nagel*, 97 Ky. 9.

Maine.—*Goddard v. Grand Trunk R. Co.*, 57 Me. 202, 2 Am. Rep. 39; *Hanson v. European, etc., R. Co.*, 62 Me. 84, 16 Am. Rep. 404.

Maryland.—*Baltimore, etc., R. Co. v. Blocher*, 27 Md. 277; *Baltimore, etc., Turnpike Road Co. v. Boone*, 45 Md. 344; *Philadelphia, etc., R. Co. v. Larkin*, 47 Md. 161, 28 Am. Rep. 442; *Baltimore, etc., R. Co. v. Barger*, 80 Md. 23, 45 Am. St. Rep. 319.

Massachusetts.—See *Hawes v. Knowles*, 114 Mass. 518, 19 Am. Rep. 383; *Levi v. Brooks*, 121 Mass. 501.

Mississippi.—*Vicksburg, etc., R. Co. v. Patton*, 31 Miss. 156, 66 Am. Dec. 552; *New Orleans, etc., R. Co. v. Hurst*, 36 Miss. 660, 74 Am. Dec. 785; *New Orleans, etc., R. Co. v. Burke*, 53 Miss. 200, 24 Am. Rep. 689; *New Orleans, etc., R. Co. v. Bailey*, 40 Miss. 395, 456; *Chicago, etc., R. Co. v. Scurr*, 59 Miss. 456, 42 Am. Rep. 373; *Pullman Palace Car Co. v. Lawrence*, 74 Miss. 782; *Southern Express Co. v. Brown*, 67 Miss. 260, 19 Am. St. Rep. 306.

Missouri.—*Perkins v. Missouri, etc., R. Co.*, 55 Mo. 201; *Doss v. Missouri, etc., R. Co.*,

59 Mo. 27, 21 Am. Rep. 371; *Canfield v. Chicago, etc., R. Co.*, 59 Mo. App. 354.

Nevada.—*Quigley v. Central Pac. R. Co.*, 11 Nev. 365, 21 Am. Rep. 757.

New Hampshire.—*Hopkins v. Atlantic, etc., R. Co.*, 36 N. H. 9, 72 Am. Dec. 287; *Belknap v. Boston, etc., R. Co.*, 49 N. H. 358. *North Carolina.*—*Durham v. Richmond, etc., R. Co.*, 108 N. Car. 404.

Ohio.—*Pittsburg, etc., R. Co. v. Slusser*, 19 Ohio St. 157; *Atlantic, etc., R. Co. v. Dunn*, 19 Ohio St. 162.

Pennsylvania.—*Lake Shore, etc., R. Co. v. Rosenzweig*, 113 Pa. St. 535; *Philadelphia Traction Co. v. Orbann*, 119 Pa. St. 44. *Compare*, however, the case of *Allegheny Valley R. Co. v. McLain*, 91 Pa. St. 442, holding that to maintain an action of trespass *vi et armis* against an employer it must appear that the particular injury or act of the employee was done by the employer's command or assent. But as exemplary damages are recoverable as well in case as in trespass (*Merrills v. Tariff Mfg. Co.*, 10 Conn. 384, 27 Am. Dec. 682; *Linsley v. Bushnell*, 15 Conn. 225, 38 Am. Dec. 79; *Fleet v. Hollenkemp*, 13 B. Mon. (Ky.) 219), perhaps the conflict, if any, between the Pennsylvania cases on the point under consideration is not serious.

South Carolina.—*Palmer v. Charlotte, etc., R. Co.*, 3 S. Car. 580, 16 Am. Rep. 750; *Hall v. South Carolina R. Co.*, 28 S. Car. 261; *Quinn v. South Carolina R. Co.*, 29 S. Car. 381; *Hart v. Charlotte, etc., R. Co.*, 33 S. Car. 427; *Rucker v. Smoke*, 37 S. Car. 377, 34 Am. St. Rep. 758; *Spellman v. Richmond, etc., R. Co.*, 35 S. Car. 475, 28 Am. St. Rep. 858.

Tennessee.—*Louisville, etc., R. Co. v. Garrett*, 8 Lea (Tenn.) 438, 41 Am. Rep. 640, R. R. Springer Transp. Co. v. Smith, 16 Lea (Tenn.) 498; *Nashville, etc., R. Co. v. Starnes*, 9 Heisk. (Tenn.) 52, 24 Am. Rep. 296.

Where Property Is Seized by One Member of a Firm in the prosecution of the firm's business, the other members of the firm are equally liable in exemplary damages at the suit of the owner of such property. *Robinson v. Goings*, 63 Miss. 500.

Liability for Malicious Attachment.—It has been held that if the attorney who procured the issuance and levy of an attachment knew that the property levied on did not belong to the execution debtor, and the transaction was attended by circumstances of aggravation, exemplary damages are recoverable against the creditor, in the discretion of the jury. *Jones v. Lamon*, 92 Ga. 529.

Rule Excluding Punitive Damages for Negligence.—It has been held that a private corporation cannot be liable in punitive damages merely for the gross negligence of its servants. *Illinois Cent. R. Co. v. Hammer*, 72 Ill. 347; though it is conceded in this case that if a master employs incompetent, drunken, or reckless servants, with a knowledge of their character, or, having employed them without such knowledge, retains them after learning

committed in the business of his principal or master is such as would have subjected the agent to exemplary damages had he been sued as principal, the principal will be responsible for like damages when sued for the misconduct of the agent;¹ or, as it has been otherwise expressed, the principal or master is in such cases liable precisely as if he were the original wrongdoer,² although personally and individually he may have been entirely blameless and innocent of anything deserving of punishment.³

Criticism of More Limited Rule. — The doctrine of exemplary damages, it has been held, might as well not be applied to a principal or master or employer at all as to limit its application to cases where the subordinate is directly or impliedly authorized or commanded by the former to commit a tortious act, or cases where such an act is directly or impliedly ratified after its commission.⁴

b. ACTS DONE WHILE OSTENSIBLY DISCHARGING DUTIES. — If the wrongful act of the agent is committed while ostensibly acting within the line of his functions, the principal will be held liable.⁵ The latter's employment, it is held, affords the agent the means and opportunity which he used while so employed in committing the wilful wrong. The agent's conduct, therefore, is attributable to the principal, though he may not have specially authorized the particular act or afterwards ratified it.⁶

c. NEED NOT SHOW NEGLIGENCE IN EMPLOYMENT OF INCOMPETENT SERVANT. — According to the doctrine of the authorities above stated, it is not necessary, in order to the liability of the principal, to show knowledge on his part of the habitual negligence or incompetence of the servant.⁷

d. DOCTRINE THAT PRINCIPAL IS LIABLE IN EXEMPLARY DAMAGES WHENEVER LIABLE FOR COMPENSATORY. — It will be observed that the authorities maintaining the rule of liability on the part of the master in exemplary damages for all acts done within the scope of the servant's authority or duties impose practically the same liability for exemplary damages as for compensatory.⁸ This lack of discrimination between the two is the point of attack of many of the opposing cases, as will be seen hereafter.

the fact or having full opportunity to learn it, the former will be liable in punitive damages for the negligence of the latter. But this case is in the particular first stated opposed to the weight of authority in *Illinois* (see *Singer Mfg. Co. v. Holdfodt* 86 Ill. 455, 29 Am. Rep. 43), as well as in other states. See cases above cited. As was well said in *Kansas City, etc., R. Co. v. Phillips*, 98 Ala. 168: "It has been too long and well settled to be now overturned that punitive damages may be awarded against the master for the acts and omissions of the servant, although the master, aside from the conduct of the servant, may be entirely blameless."

1. *Gasway v. Atlanta, etc., R. Co.*, 58 Ga. 216; *New Orleans, etc., R. Co. v. Bailey*, 40 Miss. 395; *Lake Shore, etc., R. Co. v. Rosenzweig*, 113 Pa. St. 535.

2. *New Orleans, etc., R. Co. v. Bailey*, 40 Miss. 395.

3. *Kansas City, etc., R. Co. v. Phillips*, 98 Ala. 168.

4. **Criticism of More Limited Rule.** — *Goddard v. Grand Trunk R. Co.*, 57 Me. 202, 2 Am. Rep. 39; *Quinn v. South Carolina R. Co.*, 29 S. Car. 337. In the latter case it was urged that the trial court erred in not limiting the defendant's liability in punitive damages to cases in which "the injury inflicted was caused by the wilful negligence of the company's servants, authorized or approved by the company, and showing criminal and reck-

less misconduct on the part of the company;" but the appellate court said: "If this were the rule, we may safely say that few, if any, railroad companies would ever be made liable, for surely there is no company in this enlightened age which would authorize in advance, or after the act approve, any wilful negligence of their employees by which personal injury was inflicted on their passengers."

5. *Singer Mfg. Co. v. Holdfodt*, 86 Ill. 459, 29 Am. Rep. 43; *Pullman Palace Car Co. v. Lawrence*, 74 Miss. 782.

6. *Fell v. Northern Pac. R. Co.*, 44 Fed. Rep. 248; *Nashville, etc., R. Co. v. Starnes*, 9 Heisk. (Tenn.) 52, 24 Am. Rep. 296.

7. *Southern Express Co. v. Brown*, 67 Miss. 260, 19 Am. St. Rep. 306.

In *Tennessee* the doctrine maintained in *Nashville, etc., R. Co. v. Starnes*, 9 Heisk. (Tenn.) 52, 24 Am. Rep. 296, to the effect that in order to render a corporation liable in exemplary damages for the malicious acts of its agents, if not authorized or ratified, there must have been some misconduct on the part of the corporation in the employment or retention of an incompetent or reckless servant, has been overruled. See *Louisville, etc., R. Co. v. Guinan*, 11 Lea (Tenn.) 98, 47 Am. Rep. 279; *Louisville, etc., R. Co. v. Garrett*, 8 Lea (Tenn.) 448, 41 Am. Rep. 640.

8. See *R. R. Springer Transp. Co. v. Smith*, 16 Lea (Tenn.) 498.

In the case of *Hacht v. Wabash R. Co.*, 119

c. **MUST BE WITHIN SCOPE OF AGENT'S AUTHORITY.** — In order to render the principal liable in exemplary damages for the acts of his agent, they must have been committed in the line of the agent's employment or the scope of his authority. Unless this is shown, it will be necessary to prove an express authority to do the particular act or a subsequent ratification of it.¹

What Is and What Is Not Within the Scope of the Agent's Authority depends upon general considerations, a discussion of which will be found under appropriate titles elsewhere.²

f. **GENERAL RULE OF EXCLUSION.** — Although it is difficult to lay down any rule of general application as to when a master will be held liable in exemplary damages for the acts of his servant, it may be stated as a general rule of exclusion that the master will never be held so liable where the servant would not be if the suit were against him directly.³

3. Rule Requiring Express Authority or Subsequent Ratification — *a.* **IN GENERAL.** — A doctrine having the sanction of many courts of the highest authority is that in order to render a principal responsible in punitive damages for the acts of an agent there must be express antecedent authority or subsequent ratification on the part of the former, or some misconduct on the part of the master or principal himself.⁴

Mo. 325, earlier cases on the subject are reviewed, and the conclusion is reached that the liability of a corporate principal for the act of its agent is just as broad for exemplary damages as for those which are merely compensatory. This case, it is true, was decided with reference to a particular statute, but the reasoning employed applies clearly to the general doctrine.

1. Baltimore, etc., Turnpike Road Co. v. Green, 86 Md. 161. And see Tolchester Beach Imp. Co. v. Steinmeier 72 Md. 313; Central R. Co. v. Brewer, 78 Md. 406; Kirk v. Garrett, 84 Md. 383.

Disregarding Principal's Instructions. — It has been held that where the defendant himself exercised due care and prudence and the damage occurred by reason of the neglect of his workmen to follow his directions, exemplary damages are not recoverable. Morford v. Woodworth, 7 Ind. 83. Nor are exemplary damages recoverable for excavations made by the defendant's servants, who were warned by the defendant, in removing soil from the defendant's lot, not to encroach on the plaintiff's property. Patterson v. Waldman, (Ky. 1898) 46 S. W. Rep. 17.

Where the Agents of a Steamship Company made unauthorized representations to the libellant, which induced him to take passage on a vessel infected with disease, it was held that punitive damages were not recoverable in an action against the principal. The Normannia, 62 Fed. Rep. 469.

2. See Such Titles as AGENCY, vol. 1, p. 930; **MASTER AND SERVANT**; also more specific titles, such as **FALSE IMPRISONMENT**, *post*; **FRAUD AND DECEIT**; **LIBEL AND SLANDER**; **MALICIOUS PROSECUTION**.

Illustration. — In accordance with the rule above laid down it has been held that a corporate employer is not liable for the malice of its clerks in testifying in a criminal proceeding, the giving of evidence as witnesses not being within the scope of their employment. Kutner v. Fargo, 20 Misc. Rep. (N. Y. Supreme Ct.) 207.

3. Hamilton v. Third Ave. R. Co., 53 N. Y. 25; Townsend v. New York Cent., etc., R. Co., 56 N. Y. 295.

4. Rule Requiring Express Authority or Subsequent Ratification — *California.* — Wardrobe v. California Stage Co., 7 Cal. 118, 68 Am. Dec. 231; Turner v. North Beach, etc., R. Co., 34 Cal. 594; Kline v. Central Pac. R. Co., 37 Cal. 400, 99 Am. Dec. 282; Wade v. Thayer, 40 Cal. 578; Mendelsohn v. Anaheim Lighter Co., 40 Cal. 657; Trabing v. California Nav., etc., Co., 121 Cal. 137.

District of Columbia. — Woodward v. Ragland, 5 App. Cas. (D. C.) 220; Redwood v. Metropolitan R. Co., 6 D. C. 302.

Louisiana. — Keene v. Lizardi, 8 La. 26; Hill v. New Orleans, etc., Co., 11 La. Ann. 292.

Missouri. — Rouse v. Metropolitan St. R. Co., 41 Mo. App. 298; McKeon v. Citizens' R. Co., 42 Mo. 79; Perkins v. Missouri, etc., R. Co., 55 Mo. 201. In this last case the court observed that the only way in which corporations can act in the commission of wrong or otherwise is by or through their agents; that the acts of the corporate agents, within the scope of their authority, are the acts of the corporation, and there can be no good reason why corporations should not be responsible for the acts of their agents in the discharge of their duties when performed in a wanton or malicious manner, just as if the act had been done by the corporation itself. Notwithstanding this reasoning, however, the court holds that there must be special authorization or ratification in order to render a corporate principal liable in exemplary damages. But see and compare the later case of Haehl v. Wabash R. Co., 119 Mo. 325, also Travers v. Kansas Pac. R. Co., 63 Mo. 421.

New Jersey. — Haines v. Schultz, 50 N. J. L. 481.

New York. — Donivan v. Manhattan R. Co., 1 Misc. Rep. (N. Y. C. Pl.) 368; Kutner v. Fargo, 20 Misc. Rep. (N. Y. Supreme Ct.) 207; Fisher v. Metropolitan El. R. Co., 34 Hun (N. Y.) 433; Muckle v. Rochester R. Co., 79

The Reason of This Rule is regarded by its supporters as the only one consistent with the fundamental theory of exemplary damages; that as such damages are awarded, not by way of compensation to the sufferer, but by way of punishment to the offender, and as a warning to others, they should be awarded only against a master who has actually participated in his servant's wrong, by express command or authority to do the act, or ratification and approval after its commission.¹ The malice of the servant must be "brought directly home" to the master,² or the master must be *particeps criminis* with his servant.³

Hun (N. Y.) 32; Higgins v. Watervliet Turnpike, etc., Co., 46 N. Y. 23, 7 Am. Rep. 293; Cleghorn v. New York Cent., etc., R. Co., 56 N. Y. 47, 15 Am. Rep. 375.

Oregon. — Sullivan v. Oregon R., etc., Co., 12 Oregon 392, 53 Am. Rep. 364.

Rhode Island. — Hagan v. Providence, etc., R. Co., 3 R. I. 88, 62 Am. Dec. 377; Staples v. Schmid, 18 R. I. 224.

Texas. — Western Union Tel. Co. v. Karr, 5 Tex. Civ. App. 60; Hays v. Houston, etc., R. Co., 46 Tex. 272; Galveston, etc., R. Co. v. Donahoe, 56 Tex. 162; Willis v. McNeill, 57 Tex. 465; Houston, etc., R. Co. v. Cowser, 57 Tex. 293; Strauss v. Dundon, (Tex. Civ. App. 1894) 27 S. W. Rep. 503; Trinity, etc., R. Co. v. O'Brien, (Tex. Civ. App. 1898) 46 S. W. Rep. 389.

West Virginia. — Downey v. Chesapeake, etc., R. Co., 28 W. Va. 732; Ricketts v. Chesapeake, etc., R. Co., 33 W. Va. 439, 25 Am. St. Rep. 901.

Wisconsin. — Milwaukee, etc., R. Co. v. Finney, 10 Wis. 388; Craker v. Chicago, etc., R. Co., 36 Wis. 657; Bass v. Chicago, etc., R. Co., 36 Wis. 463, 17 Am. Rep. 495; Hinckley v. Chicago, etc., R. Co., 38 Wis. 194; Bass v. Chicago, etc., R. Co., 42 Wis. 654, 24 Am. Rep. 437; Eviston v. Cramer, 57 Wis. 570; Mace v. Reed, 89 Wis. 440.

Rule Stated. — Though the act of an agent be wilful or malicious, or so grossly negligent, oppressive, or insulting as to bring the case within the rule authorizing exemplary damages if the suit had been brought against him, yet in order that the principal may be so liable it must be shown that the conduct of the agent was either previously authorized or subsequently ratified or adopted by the agent. Milwaukee, etc., R. Co. v. Finney, 10 Wis. 388. And see also the case of Sullivan v. Oregon R., etc., Co., 12 Oregon 392, 53 Am. Rep. 364, in which the doctrine that a corporation is liable in punitive damages for the acts of a servant as if the servant were the corporation itself is distinctly repudiated.

Evidence Admissible. — In a suit against a corporation to recover exemplary damages for the perpetration of a wilful trespass, the declaration of an employee of the defendant which indicate his own reckless indifference to consequences regarding the trespass are not admissible. International, etc., R. Co. v. Telephone, etc., Co., 60 Tex. 278.

Rule under Special Statute. — The "wilful act or omission" or "gross negligence of the defendant" for which exemplary as well as actual damages may be given under Rev. Stat. Texas, art. 2901, giving a recovery for death by wrongful act, must be the act or omission or negligence of the defendant himself, and not of his servant or agent, and, in case of a

corporation, that of an officer thereof or some one representing the corporation in its corporate capacity. Houston, etc., R. Co. v. Cowser, 57 Tex. 293.

Misconduct of Master Principal. — Lake Shore, etc., R. Co. v. Prentice, 147 U. S. 115; Fisher v. Metropolitan El. R. Co., 34 Hun (N. Y.) 433; Cleghorn v. New York Cent., etc., R. Co., 56 N. Y. 47, 15 Am. Rep. 375; Redwood v. Metropolitan R. Co., 6 D. C. 302.

Necessity for Dereliction of Principal. — Exemplary damages are not recoverable against a principal for the act of his agent unless it is shown that the former was derelict in connection with the offense of the agent. Redwood v. Metropolitan R. Co., 6 D. C. 302.

"Gross Misconduct." — For injuries by the negligence of a servant while engaged in the business of the master, within the scope of his employment, the latter is liable for compensatory damages; but for such negligence, however gross or culpable, he is not liable to be punished in punitive damages unless he is also chargeable with gross misconduct. Cleghorn v. New York Cent., etc., R. Co., 56 N. Y. 47, 15 Am. Rep. 375.

Cases of Malicious Attachment. — The malice, wantonness, or recklessness of the agent or attorney suing out the attachment cannot be visited on his principal unless the latter authorized or sanctioned the manner or malevolence of the act. City Nat. Bank v. Jeffries, 73 Ala. 191. Compare, however, with the doctrine announced in this case, that supported by the Alabama cases referred to in the next paragraph of this note.

Express Authority or Participation Not Presumed. — A principal is not responsible for the malice, vexation, or wantonness of his agent in suing out an attachment, unless he authorized or participated in it; and such authority or participation must be proved. It will not be inferred from a mere agency to collect the claim. Jackson v. Smith, 75 Ala. 97. Compare, however, with the doctrine of this case, Alabama G. S. R. Co. v. Frazier, 93 Ala. 45, 30 Am. St. Rep. 28; Alabama G. S. R. Co. v. Sellers, 93 Ala. 9, 30 Am. St. Rep. 17; Kansas City, etc., R. Co. v. Phillips, 98 Ala. 168.

1. Lake Shore, etc., R. Co. v. Prentice, 147 U. S. 107. And see Bell v. Midland R. Co., 10 C. B. N. S. 287, 100 E. C. L. 287; Philadelphia, etc., R. Co. v. Quigley, 21 How. (U. S.) 202; Milwaukee, etc., R. Co. v. Arms, 91 U. S. 489; Denver, etc., R. Co. v. Harris, 122 U. S. 597; Caldwell v. New Jersey Steamboat Co., 47 N. Y. 282.

2. Milwaukee, etc., R. Co. v. Finney, 10 Wis. 388.

3. Hagan v. Providence, etc., R. Co., 3 R. I. 88, 62 Am. Dec. 377, quoted and cited with approval in Lake Shore, etc., R. Co. v. Prentice.

No man should be punished, it is declared, for that of which he is not guilty,¹ or where he has committed a wrong by implication of law only.²

The Cases Requiring Express Antecedent Authority or Ratification squarely announce the doctrine that a master or principal may be liable in compensatory damages for the malicious tort of a servant or agent, though not in exemplary damages for the same wrong.³

b. EXCEPTION TO RULE — BUSINESS COMMITTED WHOLLY TO AGENT'S DISCRETION. — An exception to the rule above announced has been admitted in cases where the principal commits his business wholly to the discretion of an agent, without supervision or control, thereby evincing an intent to be bound by the acts of the latter without inquiry or investigation.⁴

c. EMPLOYMENT OR RETENTION OF INCOMPETENT SERVANT. — Under the rule holding a master liable for the acts of his servant done in the scope of his employment where there has been some misconduct on the part of the master, it seems to be sufficient to the latter's liability that he has employed or retained a servant of known incompetence, recklessness, or bad character.⁵

147 U. S. 115; *Staples v. Schmid*, 18 R. I. 224.

1. **Where the Proof Does Not Implicate the Principal**, and however wicked the servant may have been, the principal neither expressly nor impliedly authorizes or ratifies the act, and the criminality of the agent's act is as much against the principal as against any other member of society, it is quite enough that the principal should be liable in compensatory damages for the injury sustained in consequence of the wrongful act of a person acting as his servant. *Hagan v. Providence*, etc., R. Co., 3 R. I. 88, 62 Am. Dec. 377.

2. *Keene v. Lizardi*, 8 La. 26; *Rouse v. Metropolitan St. R. Co.*, 41 Mo. App. 298.

Exemplary Damages Not Recoverable Against One Liable Only by Relation. — In the case first cited the court said that it was true that juries sometimes very properly gave what is called smart money. They are often warranted in giving vindictive damages as punishment for outrageous conduct, but this is justifiable only in an action against the wrongdoer himself, and not against persons who, merely on account of their relation to the offender, are only consequentially liable for his acts, as a principal for the acts of his factor or agent.

3. **Liable in Compensatory Damages though Not for Exemplary.** — *Lake Shore*, etc., R. Co. v. *Prentice*, 147 U. S. 107; *Turner v. North Beach*, etc., R. Co., 34 Cal. 594; *Wade v. Thayer*, 40 Cal. 578; *Mendelsohn v. Anaheim Lighter Co.*, 40 Cal. 657; *Rouse v. Metropolitan St. R. Co.*, 41 Mo. App. 298; *Brayton, J.*, in *Hagan v. Providence*, etc., R. Co., 3 R. I. 88, 62 Am. Dec. 377; *Milwaukee*, etc., R. Co. v. *Finney*, 10 Wis. 388.

Although the corporate principal might be held liable in compensatory damages for the act of the agent, "still it does not follow that they are to be visited with damages by way of punishment, without proof that they directed the act to be done, or subsequently confirmed it. Such damages," the court observes, "are given by way of punishing the malice or oppression, and are graduated by the intent of the party committing the wrong. But in an action against a principal for the act of an agent, how can the question of their assessment be properly submitted to the jury, when

there is no evidence connecting the principal with such intent on the part of the agent? Clearly it cannot," is the conclusion. *Milwaukee*, etc., R. Co. v. *Finney*, 10 Wis. 388.

4. **Where Principal Leaves Business Entirely to Agent's Discretion.** — *Caldwell v. New Jersey Steamboat Co.*, 47 N. Y. 282; *Samuels v. Evening Mail Assoc.*, 75 N. Y. 604, reversing 9 Hun (N. Y.) 288; *Travers v. Kansas Pac. R. Co.*, 63 Mo. 421. And see *Kutner v. Fargo*, 20 Misc. Rep. (N. Y. Supreme Ct.) 209; *Cleghorn v. New York Cent.*, etc., R. Co., 56 N. Y. 48, 15 Am. Rep. 375.

5. **Where Incompetent Servant Employed or Retained.** — *Frink v. Coe*, 4 Greene (Iowa) 555, 61 Am. Dec. 141; *Nashville*, etc., R. Co. v. *Starnes*, 9 Heisk. (Tenn.) 52, 24 Am. Rep. 296; *Donivan v. Manhattan R. Co.*, 1 Misc. Rep. (N. Y. C. Pl.) 368; *Caldwell v. New Jersey Steamboat Co.*, 47 N. Y. 282; *Cleghorn v. New York Cent.*, etc., R. Co., 56 N. Y. 47, 15 Am. Rep. 375; *Sullivan v. Oregon R.*, etc., Co., 12 Oregon 392, 53 Am. Rep. 364; *Western Union Tel. Co. v. Karr*, 5 Tex. Civ. App. 60; *Downey v. Chesapeake*, etc., R. Co., 28 W. Va. 732; *Ricketts v. Chesapeake*, etc., R. Co., 33 W. Va. 439, 25 Am. St. Rep. 901.

Employment of Agent of Known Intemperate Habits. — The fact that an agent, charged with important and responsible duties towards the public, was a man of intemperate habits, which was known to a superior agent of the company, having the power to employ and discharge him and other subordinates, is competent in support of a claim for exemplary damages. *Cleghorn v. New York Cent.*, etc., R. Co., 56 N. Y. 47, 15 Am. Rep. 375. And see *Frink v. Coe*, 4 Greene (Iowa) 555, 61 Am. Dec. 141.

Acts of Agent Done in Spirit of Wanton Mischief. — If a principal, knowing of the reckless character of his agent, retains him in his employment, the former will be liable in exemplary damages for the acts of the latter done in a spirit of wanton sport or malice, when engaged about the business of his employment. *Nashville*, etc., R. Co. v. *Starnes*, 9 Heisk. (Tenn.) 52, 24 Am. Rep. 296.

"Gross Negligence." — Some cases, in their announcement of the rule, use the term "gross negligence" with reference to the conduct of

d. **RATIFICATION BY PRINCIPAL** — (1) *In General*. — Most if not all of the cases denying the liability in exemplary damages of a master or principal for the acts of a servant or agent merely done in the line of his employment concede such a liability as a result of subsequent ratification.¹

(2) *Slight Acts of Ratification Sufficient*. — A rule announced in the present connection is that slight acts of ratification on the part of the principal are sufficient.² It has been held, indeed, that a principal may be liable in exemplary damages without any act of express ratification, if the circumstances warrant the inference that he intended to assume the consequences of his agent's conduct without investigation or inquiry.³

(3) *Acceptance of Benefit of Agent's Act*. — There may be such a ratification on the part of the principal or master of the act of his agent or servant, by receiving and retaining the benefits thereof, as will render the former liable in exemplary damages therefor.⁴ Thus, if a principal, with knowledge of his agent's wanton and malicious conduct in seizing and carrying away the property of another, accepts the benefit of such trespass, punitive damages may properly be awarded in an action against the principal.⁵ But though property known to be mortgaged was wrongfully seized by the agents of the defendant, the latter will not be liable in exemplary damages for the retention of the property in good faith with the intention of testing the validity of the mortgage.⁶

(4) *Retention in Employment* — (a) **General Rule**. — It is held that retention of the servant by the master in his employment,⁷ or retention and promotion, with perhaps stronger reason,⁸ may operate as a ratification of the servant's

the master in the employment or retention of an incompetent servant which warrants exemplary damages. See *Frink v. Coe*, 4 Greene (Iowa) 555, 61 Am. Dec. 141; *Sullivan v. Oregon, R., etc., Co.*, 12 Oregon 392, 53 Am. Rep. 364.

1. **Principal's Ratification of Agent's Act** — *United States*. — *Kilpatrick v. Haley*, 66 Fed. Rep. 133; *Lake Shore, etc., R. Co. v. Prentice*, 147 U. S. 115.

Georgia. — *Gasway v. Atlanta, etc., R. Co.*, 58 Ga. 216.

Mississippi. — *Pullman Palace Car Co. v. Lawrence*, 74 Miss. 806.

Missouri. — *Rouse v. Metropolitan St. R. Co.*, 41 Mo. App. 298; *Perkins v. Missouri, etc., R. Co.*, 55 Mo. 201; *Malecek v. Tower Grove, etc., R. Co.*, 57 Mo. 17; *Travers v. Kansas Pac. R. Co.*, 63 Mo. 421.

New York. — *Donivan v. Manhattan R. Co.*, 1 Misc. Rep. (N. Y. C. Pl.) 368.

Rhode Island. — *Hagan v. Providence, etc., R. Co.*, 3 R. I. 88, 62 Am. Dec. 377; *Staples v. Schmid*, 18 R. I. 224.

Texas. — *International, etc., R. Co. v. Miller*, 9 Tex. Civ. App. 104.

West Virginia. — *Downey v. Chesapeake, etc., R. Co.*, 28 W. Va. 732; *Ricketts v. Chesapeake, etc., R. Co.*, 33 W. Va. 439, 25 Am. St. Rep. 901.

Wisconsin. — *Craker v. Chicago, etc., R. Co.*, 36 Wis. 676; *Bass v. Chicago, etc., R. Co.*, 42 Wis. 654, 24 Am. Rep. 437; *Mace v. Reed*, 89 Wis. 440.

Intent or Ratification — **Presumption of Former from Latter**. — In the case of *Haines v. Schultz*, 50 N. J. L. 481, the court said, with reference to the recovery of punitive damages against an employer for the act of his employee, that "it is the wrongful personal intention to

injure that calls forth the penalty. To this wrongful intent knowledge is an essential prerequisite. But in legal contemplation previous intent is presumed from ratification, and, *e converso*, proof of ratification must be made where a previous intent is not presumed."

2. **What Amounts to Ratification**. — *Rouse v. Metropolitan St. R. Co.*, 41 Mo. App. 298; *Perkins v. Missouri, etc., R. Co.*, 55 Mo. 201; *Travers v. Kansas Pac. R. Co.*, 63 Mo. 421; *Craker v. Chicago, etc. R. Co.*, 36 Wis. 676. And see *Edelmann v. St. Louis Transfer Co.*, 3 Mo. App. 503.

3. *Kutner v. Fargo*, 20 Misc. Rep. (N. Y. Supreme Ct.) 209.

4. **Acceptance of Benefit of Agent's Act**. — *Kilpatrick v. Haley*, 66 Fed. Rep. 133.

5. *Kilpatrick v. Haley*, 66 Fed. Rep. 133.

6. *Mackin v. Blythe*, 35 Ill. App. 216.

7. **Retention of Agent**. — *Woodward v. Ragland*, 5 App. Cas. (D. C.) 220; *Gasway v. Atlanta, etc., R. Co.*, 58 Ga. 216; *Goddard v. Grand Trunk R. Co.*, 57 Me. 227, 2 Am. Rep. 39; *Perkins v. Missouri, etc., R. Co.*, 55 Mo. 201; *Malecek v. Tower Grove, etc., R. Co.*, 57 Mo. 19; *Donivan v. Manhattan R. Co.*, 1 Misc. Rep. (N. Y. C. Pl.) 368; *Craker v. Chicago, etc., R. Co.*, 36 Wis. 676; *Bass v. Chicago, etc., R. Co.*, 42 Wis. 654, 24 Am. Rep. 437; *Downey v. Chesapeake, etc., R. Co.*, 28 W. Va. 732; *Ricketts v. Chesapeake, etc., R. Co.*, 33 W. Va. 439, 25 Am. St. Rep. 901.

8. **Retention and Promotion** — **Ratification Question for Jury**. — Where a corporation retained a servant in its service after notice of the tortious acts committed by him against a passenger for which the servant would be liable for punitive damages, and even promoted him to a position of more responsibility, it is a ques-

wrongful act. And although the principal or master might, under the law, be liable in exemplary damages for any act of his agent or servant done in the line of his employment without express authority or ratification, yet it seems to be held that ratification will, notwithstanding, go in aggravation of the damages.¹

(b) *Contrary Doctrine.* — It has been declared that to hold a master liable for vindictive damages by virtue of a ratification of his servant's tort, some affirmative act must be shown. Mere negation, or absence of action, as by retention of the agent or servant in his employment, cannot so operate.²

(5) *Defense of Agent's Act in Litigation.* — Some authorities have adverted to the attempt of the principal to justify the agent's act in litigation, as going to show ratification.³

(6) *Effect of Discharge of Agent.* — No case seems to have decided very clearly the effect on the principal's liability in exemplary damages of a discharge of the agent by the principal on account of the former's misconduct. It has been intimated, however, that such circumstance would go in mitigation of exemplary damages,⁴ and the opinion might be ventured that in jurisdictions where ratification is necessary and retention in employment may constitute ratification, a prompt discharge might relieve from exemplary damages altogether.⁵ But the discharge of a servant, to negative the idea of ratification of his acts, must be made under such circumstances as clearly to indicate a disapproval and disaffirmation of his wrongful conduct.⁶

c. *NECESSITY FOR NOTICE OF SERVANT'S MISCONDUCT* — (1) *In General.* — There can, in the nature of things, be no ratification by the master without notice of the servant's misconduct.⁷ Evidence, therefore, of the mere retention of a servant after the commission of the wrong complained of is never sufficient to authorize an inference of ratification on the part of the master, and so render the latter liable in exemplary damages, without proof also of his knowledge of the tortious nature of the servant's act.⁸

(2) *What Is Sufficient Notice.* — Notice of the servant's misconduct at the time of the institution of the action against the principal, or even thereafter,

tion for the jury in an action against the corporation whether it so ratified the acts of its servant as to render it liable in punitive damages. *Bass v. Chicago*, etc., R. Co., 42 Wis. 654, 24 Am. Rep. 437; *Downey v. Chesapeake*, etc., R. Co., 28 W. Va. 732; *Ricketts v. Chesapeake*, etc., R. Co., 33 W. Va. 439, 25 Am. St. Rep. 901.

1. *Goddard v. Grand Trunk R. Co.*, 57 Me. 227, 2 Am. Rep. 39; *Gasway v. Atlanta*, etc., R. Co., 58 Ga. 216.

2. *Edelmann v. St. Louis Transfer Co.*, 3 Mo. App. 503.

3. *Attempt to Justify Agent's Act in Litigation.* — *Woodward v. Ragland*, 5 App. Cas. (D. C.) 220; *Pullman Palace Car Co. v. Lawrence*, 74 Miss. 806.

What Evidence Should Show. — Evidence that the principal has retained the agent in his employ and has defended him in litigation resulting from his act is admissible to show ratification, but, it has been held, is of but little or no weight unless from its nature it tends to show that the principal who retained the agent or servant in his employ or defended him in the litigation participated in the motive which actuated the agent or servant in the commission of the wrongful act for which exemplary damages are claimed. *Woodward v. Ragland*, 5 App. Cas. (D. C.) 220.

4. *Dismissal of Agent.* — *Gasway v. Atlanta*,

etc., R. Co., 58 Ga. 216; *Western*, etc., R. Co. v. *Turner*, 72 Ga. 292, 53 Am. Rep. 842.

5. See *Western*, etc., R. Co. v. *Turner*, 72 Ga. 292, 53 Am. Rep. 842.

6. *Discharge by Operation of Arbitrary Rule.* — In the case of *Pullman Palace Car Co. v. Lawrence*, 74 Miss. 806, which was an action for damages against a sleeping-car company for an alleged wanton, malicious, and outrageous assault by one of its porters, it was held that although the porter had been discharged on account of the occurrence, yet as it was only by reason of a rule that every servant of the company who had a personal difficulty with a passenger, whether rightly or wrongly, must leave the service of the company, and as there had been not only no disavowal of the wrongful act of the porter, but the company made strenuous efforts to justify the act of its servant on the trial, there had been in effect a ratification of the servant's act so as to render the corporation liable.

7. *Principal's Knowledge of Servant's Misconduct.* — *Colvin v. Peck*, 62 Conn. 155; *Mackin v. Blythe*, 35 Ill. App. 216; *Malecek v. Tower Grove*, etc., R. Co., 57 Mo. 19; *Kutner v. Fargo*, 20 Misc. Rep. (N. Y. Supreme Ct.) 209; *Bass v. Chicago*, etc., R. Co., 42 Wis. 654, 24 Am. Rep. 437.

8. *Donivan v. Manhattan R. Co.*, 1 Misc. Rep. (N. Y. C. Pl.) 363.

has been held as effectual on the question of the principal's liability in exemplary damages as notice before the suit is begun.¹

Notice to Corporation. — It has been held that in order to constitute such notice to a corporation of the misconduct of a servant as that retention thereafter will amount to ratification of the servant's acts, it is not necessary that the agent of the corporation to whom this notice shall have been communicated should himself have the power to discharge the offending agent.² And it is likewise immaterial whether the agent to whom such notice was given believed the information or not.³

f. DOCTRINE THAT RATIFICATION IS INSUFFICIENT. — The position of some authorities has been that subsequent ratification alone is never sufficient to render a party liable in exemplary damages, upon the ground that no one can so assume a criminal liability.⁴

g. DOCTRINE OF THE FEDERAL COURTS. — The question of the liability of the principal in punitive damages for the acts of his agent has been held by the Supreme Court of the United States to be a question not of local law, but of general jurisprudence, upon which that court, in the absence of an express statute regulating the subject, would exercise its own judgment, uncontrolled by the decisions of the courts of the several states.⁵ The doctrine of the federal courts adopted accordingly is the one above set forth, that is, that a principal or master is not liable in exemplary damages for the acts of his agent or servant in the absence of express authority for or ratification of the act.⁶

1. The Filing and Service of a Duly Verified Complaint in an action against a corporation for the misconduct of its servants is notice of such misconduct, and where the servant is not only retained, but is subsequently promoted, such facts may be shown on the question of ratification. *Bass v. Chicago, etc., R. Co.*, 42 Wis. 654, 24 Am. Rep. 437.

2. Notice to the Conductor of a Train of a brakeman's tortious misconduct is such notice to the company as that its retention of the brakeman thereafter may amount to the ratification of his wrongful conduct. *Bass v. Chicago, etc., R. Co.*, 42 Wis. 654, 24 Am. Rep. 437.

3. *Bass v. Chicago, etc., R. Co.*, 42 Wis. 654, 24 Am. Rep. 437.

4. *Grund v. Van Vleck*, 69 Ill. 478; *Pardridge v. Brady*, 7 Ill. App. 645; *Arasmith v. Temple*, 11 Ill. App. 39. And see *Wilson v. Tumman*, 6 M. & G. 236, 46 E. C. L. 236; *The Amiable Nancy*, 3 Wheat. (U. S.) 546, *per Story*, J.

Ratification Insufficient — Explanation of Contrary Rule. — Numerous cases are found said the court in *Pardridge v. Brady*, 7 Ill. App. 645, holding that exemplary damages may be awarded against a corporation for the wrongful acts of its servants and employees while ostensibly discharging duties within the scope of the corporate purposes; but these decisions are not based upon the ground of a subsequent ratification, but upon the principle that, as a corporation can act only through its agents, it must be considered to be constructively present and commanding the act done. In such cases the act of the agent is deemed the act of the corporation itself, and the effect of a subsequent ratification of a previously unauthorized act is not involved.

5. Federal Courts Not Bound by Local Decisions. — *Lake Shore, etc., R. Co. v. Prentice*, 147 U. S. 116; *Woodward v. Ragland*, 5 App. Cas. (D. C.) 230.

In the case of *Pullman Palace Car Co. v. Lawrence*, 74 Miss. 805, it was said, however, that the very case above cited (*Lake Shore, etc., R. Co. v. Prentice*, 147 U. S. 101), having been carried into the Supreme Court from the Northern District of Illinois, was decided in reliance upon the following Illinois cases: *Grund v. Van Vleck*, 69 Ill. 478; *Becker v. Dupree*, 75 Ill. 167; *Rosenkrans v. Barker*, 115 Ill. 331, 56 Am. Rep. 169.

It was also held in the case of *Pullman Palace Car Co. v. Lawrence*, 74 Miss. 805, *supra*, that the foregoing cases were not in point and did not support the position of the United States Supreme Court; they are all cases, it was said, in which punitive damages were sought to be recovered against a private person on account of the act of an agent charged with a single specific duty, where the agent, without any authority, did that which he was not directed to do.

6. Doctrine of Federal Courts. — *Lake Shore, etc., R. Co. v. Prentice*, 147 U. S. 116; *The Amiable Nancy*, 3 Wheat. (U. S.) 558; *Redwood v. Metropolitan R. Co.*, 6 D. C. 302.

The Owners of a Privateer, the officers and crew of which have made an illegal seizure under such circumstances as to constitute a gross and wanton outrage, are not liable in exemplary damages. *The Amiable Nancy*, 3 Wheat. (U. S.) 558. In this case Mr. Justice Story, delivering the opinion of the court, observed that "it is to be considered that this is a suit against the owners of the privateer, upon whom the law has, from motives of policy, devolved a responsibility for the conduct of the officers and crew employed by them, and yet, from the nature of the service, they can scarcely ever be able to secure to themselves an adequate indemnity in cases of loss. They are innocent of the demerit of this transaction, having neither directed it nor countenanced it, nor participated in it in the slightest degree. Under such circumstances we are of opinion

VIII. RULE OF EXEMPLARY DAMAGES AS APPLIED TO CORPORATIONS —

1. Right to Recover. — There is no reason why a corporation may not recover exemplary damages.¹ But a corporation cannot recover damages, sometimes miscalled exemplary, which are, more accurately, for mental injuries, or a sense of wrong and insult.²

2. Liability for Exemplary Damages — a. IN GENERAL. — There is no doubt that a corporation may be liable in punitive damages,³ and the general rule is that these artificial bodies are liable in the same manner and to the same extent that a natural person is for the acts of servants or agents.⁴ Or, as the

that they are bound to repair all the real injuries and personal wrongs sustained by the libelants, but they are not bound to the extent of vindictive damages. While the government of the country shall choose to authorize the employment of privateers in its public wars, with the knowledge that such employment cannot be exempt from occasional irregularities and improper conduct, it cannot be the duty of courts of justice to defeat the policy of the government by burdening the service with a responsibility beyond what justice requires, with a responsibility for unliquidated damages, resting in mere discretion, and intended to punish offenders."

1. Right of Corporations to Recover Exemplary Damages. — *International, etc., R. Co. v. Telephone, etc., Co.*, 69 Tex. 277.

2. International, etc., R. Co. v. Telephone, etc., Co., 69 Tex. 277. In this case the court seems to confuse exemplary or punitive damages proper with compensatory damages for mental suffering. It was further observed that while a corporation could not recover any of the latter sort of damages, "having no mind to suffer," there are other elements of injury besides a "sense of wrong or insult" which offer a legal basis for exemplary damages, such, for example, "as loss of credit and expense of litigation." It is believed that there is no principle or authority for the proposition that expense of litigation or loss of credit is a basis for the allowance of exemplary damages. True, in some states, expenses of litigation may be considered in cases where exemplary damages are recoverable, and in others a more liberal allowance of compensatory damages is indulged in such cases. Perhaps the court in the case under consideration meant something like this.

3. Corporations Liable for Exemplary Damages. — *Fell v. Northern Pac. R. Co.*, 44 Fed. Rep. 248; *Denver, etc., R. Co. v. Harris*, 122 U. S. 597; *Jefferson County Sav. Bank v. Eborn*, 84 Ala. 529; *Seaboard Mfg. Co. v. Woodson*, 98 Ala. 378; *St. Louis, etc., R. Co. v. Dalby*, 19 Ill. 353; *Pullman Palace Car Co. v. Reed*, 75 Ill. 125, 20 Am. Rep. 232; *Toledo, etc., R. Co. v. Harmon*, 47 Ill. 298, 95 Am. Dec. 489; *Singer Mfg. Co. v. Holdfodt*, 86 Ill. 455, 29 Am. Rep. 43; *Pullman Palace Car Co. v. Lawrence*, 74 Miss. 782; *Kolzem v. Broadway, etc., R. Co.*, 1 Misc. Rep. (N. Y. C. Pl.) 148; *Lake Shore, etc., R. Co. v. Rosenzweig*, 113 Pa. St. 535.

Stated Classification of Decisions. — In the case of *Kutner v. Fargo*, 20 Misc. Rep. (N. Y. Supreme Ct.) 207, *Dugro, J.*, said: "The decisions in this country upon the question of the liability of a corporation in exemplary dam-

ages for the wilful or malicious acts of its agents are divided into three classes. One holds the corporation never liable; another holds the corporation liable if the wrongful act was done by a servant acting within the scope of his authority; a third recognizes the liability if the wrongful act was within the scope of the employment and was previously authorized or subsequently ratified by the corporation. The New York decisions and those of the United States Supreme Court seem to incline to the third class."

4. United States. — *Lake Shore, etc., R. Co. v. Prentice*, 147 U. S. 109. And see *Carlisle First Nat. Bank v. Graham*, 100 U. S. 699; *Salt Lake City v. Hollister*, 118 U. S. 256; *Denver, etc., R. Co. v. Harris*, 122 U. S. 597; *Philadelphia, etc., R. Co. v. Quigley*, 21 How. (U. S.) 202.

Colorado. — *Western Union Tel. Co. v. Eyer*, 2 Colo. 162.

Georgia. — *Gasway v. Atlanta, etc., R. Co.*, 58 Ga. 216; *Western Union, etc., R. Co. v. Turner*, 72 Ga. 292, 53 Am. Rep. 842.

Illinois. — *Toledo, etc., R. Co. v. Harmon*, 47 Ill. 298, 95 Am. Dec. 489; *Chicago, etc., R. Co. v. Dickson*, 63 Ill. 151, 14 Am. Rep. 114; *Singer Mfg. Co. v. Holdfodt*, 86 Ill. 455, 29 Am. Rep. 43; *Chicago, etc., R. Co. v. Flexman*, 9 Ill. App. 250.

Indiana. — *American Express Co. v. Patterson*, 73 Ind. 430.

Kansas. — *Wheeler, etc., Mfg. Co. v. Boyce*, 36 Kan. 350, 59 Am. Rep. 571.

Kentucky. — *Bowler v. Lane*, 3 Metc. (Ky.) 311; *Louisville, etc., R. Co. v. Mahony*, 7 Bush (Ky.) 235; *Sherley v. Billings*, 8 Bush (Ky.) 147.

Maine. — *Goddard v. Grand Trunk R. Co.*, 57 Me. 202, 2 Am. Rep. 39.

Maryland. — *Baltimore, etc., R. Co. v. Blocher*, 27 Md. 277; *Philadelphia, etc., R. Co. v. Larkin*, 47 Md. 155, 28 Am. Rep. 442.

Mississippi. — *New Orleans, etc., R. Co. v. Bailey*, 40 Miss. 395; *Memphis, etc., R. Co. v. Whitfield*, 44 Miss. 466, 7 Am. Rep. 699.

Missouri. — *Rouse v. Metropolitan St. R. Co.*, 41 Mo. App. 298; *Perkins v. Missouri, etc., R. Co.*, 55 Mo. 201; *Malecek v. Tower Grove, etc., R. Co.*, 57 Mo. 17; *Travers v. Kansas Pac. R. Co.*, 63 Mo. 421; *Graham v. Pacific R. Co.*, 66 Mo. 536.

New York. — *Caldwell v. New Jersey Steamboat Co.*, 47 N. Y. 282.

Ohio. — *Pittsburg, etc., R. Co. v. Slusser*, 19 Ohio St. 157; *Atlantic, etc., R. Co. v. Dunn*, 19 Ohio St. 162; *Passenger R. Co. v. Young*, 21 Ohio St. 518, 8 Am. Rep. 78.

Pennsylvania. — *Pennsylvania R. Co. v. Vandiver*, 42 Pa. St. 365, 82 Am. Dec. 520.

rule has been otherwise expressed, a corporation is liable in exemplary damages for the tortious acts of its agents or servants within the scope of their authority in all cases where natural persons acting for themselves, guilty of like tortious acts, would be liable to such damages.¹

b. DOCTRINE THAT RULE IS SPECIALLY APPLICABLE TO CORPORATIONS. — In some cases the rule of punitive damages has been held especially applicable and salutary in its operation as affecting corporations,² though it has been said also that the logical difficulty of imputing the actual malice or fraud of an agent to his principal is perhaps less when the principal is a natural person than when a corporation.³

3. Liability of Corporate Principal — *a.* IN GENERAL. — As the liability of a corporate principal is practically the same as that of a natural principal, the entire subject, with an exception hereafter adverted to, has been treated in a preceding section.⁴

b. RULE REQUIRING EXPRESS AUTHORITY, RATIFICATION, OR MISCONDUCT OF PRINCIPAL. — This rule, above discussed in its general application, as applied to corporations requires that the act of authorization or ratification or misconduct by which the principal is rendered liable should proceed from the managing officials or governing body of the corporation.⁵

Tennessee. — *Haley v. Mobile, etc., R. Co.*, 7 Baxt. (Tenn.) 239; *Louisville, etc., R. Co. v. Garrett*, 8 Lea (Tenn.) 438, 41 Am. Rep. 640; *R. R. Springer Transp. Co. v. Smith*, 16 Lea (Tenn.) 498.

Texas. — *Hays v. Houston, etc., R. Co.*, 46 Tex. 272.

1. *Atlantic, etc., R. Co. v. Dunn*, 19 Ohio St. 162. See especially the observations of Walton, J., in *Goddard v. Grand Trunk R. Co.*, 57 Me. 202, 2 Am. Rep. 39.

2. See *Baltimore, etc., Turnpike Road Co. v. Boone*, 45 Md. 344; *Goddard v. Grand Trunk R. Co.*, 57 Me. 224, 2 Am. Rep. 39; *Louisville, etc., R. Co. v. Ballard*, 85 Ky. 307, 7 Am. St. Rep. 600.

3. *Field, J.*, in *Lothrop v. Adams*, 133 Mass. 471, 43 Am. Rep. 528. But the foundation of the imputation is not, as it is here also pointed out, that it is inferred that the principal actually participated in the malice or fraud, but the act having been done for his benefit by his agent acting in the scope of his employment in his business, it is just that he should be held responsible for it in damages.

4. See *supra*, this title, *Liability of Principal for Act of Agent*.

5. **Rule Requiring Express Authority, etc. — As Applied to Corporations.** — *Lake Shore, etc., R. Co. v. Prentice*, 147 U. S. 107; *Philadelphia, etc., R. Co. v. Quigley*, 21 How. (U. S.) 202; *Cleghorn v. New York Cent., etc., R. Co.*, 56 N. Y. 44, 15 Am. Rep. 375; *Sullivan v. Oregon R., etc., Co.*, 12 Oregon 392, 53 Am. Rep. 364; *Brayton, J.*, in *Hagan v. Providence, etc., R. Co.*, 3 R. I. 91, 62 Am. Dec. 377; *Hays v. Houston, etc., R. Co.*, 46 Tex. 272. And see *Houston, etc., R. Co. v. Cowser*, 57 Tex. 293.

Rule Stated. — The governing officers of a corporation may properly be treated as so far representing the corporation and identified with it that any wanton, malicious, or oppressive intent in doing wrongful acts in behalf of the corporation, to the injury of others, may be treated as the intent of the corporation itself. But the case of a subordinate agent or

servant is different, and the corporate principal will not be affected by the former's unlawful and criminal intent so that exemplary damages may be recovered. *Lake Shore, etc., R. Co. v. Prentice*, 147 U. S. 107.

Illustration. — In the case of *Denver, etc., R. Co. v. Harris*, 122 U. S. 597, the defendant corporation, by an armed force of several hundred men, acting as its agents and employees, and organized and commanded by its vice-president and assistant general manager, attacked with deadly weapons the employees of another company in the possession of another railroad, and forcibly drove them out, and in so doing fired upon and injured one of them, who brought an action against the defendant corporation. The jury were instructed that they were not limited to compensatory damages, but could give punitive or exemplary damages, if it was found that the defendant acted with bad intent, and in pursuance of an unlawful purpose forcibly to take possession of the railroad occupied by the other company, and in so doing inflicted violence on the plaintiff. This instruction was held proper, not because any evil intent on the part of the agents of the defendant corporation could of itself make the corporation responsible for exemplary or punitive damages, but upon the single ground that the evidence clearly showed that the corporation by its governing officers participated in and directed all that was planned and done.

Criticism of This Rule. — In the case of *Palmer v. Charlotte, etc., R. Co.*, 3 S. Car. 599, 16 Am. Rep. 750, it was said with reference to *Philadelphia, etc., R. Co. v. Quigley*, 21 How. (U. S.) 202, that the latter case holds that exemplary damages are allowed against a corporation (for the malicious publication of a libel) where an act is done under authority of its board of directors; but that as directors can be regarded in no other light than as agents of the corporation, it is impossible to avoid the conclusion that the case in question upholds the general proposition that a corporation may be held responsible in exemplary

IX. SURVIVAL OF LIABILITY AND RIGHT TO RECOVER. — As a general rule, exemplary damages are not recoverable against the personal representative of a decedent, for the reason that the person whose act is deserving of punishment is beyond the range of human chastisement.¹ There would seem no reason on principle, however, for denying the right to recover such damages to the representative of a decedent where the right of action survives, and such is the doctrine of some cases.²

Death by Wrongful Act. — Whether or not exemplary damages are recoverable in statutory actions for death by wrongful act depends upon the terms and construction of the statute under which the action is brought.³

X. EVIDENCE — 1. Generally. — As the motive and intent of the defendant are most material in an action where punitive damages are sought, any evidence which tends legitimately to a disclosure thereof is admissible.⁴ Thus,

damages for the malicious acts of its agents done in the course of its business.

1. *Sheik v. Hobson*, 64 Iowa 146; *Edwards v. Ricks*, 30 La. Ann. 926; *Hewlett v. George*, 68 Miss. 703; *Ripley v. Miller*, 11 Ired. L. (33 N. Car.) 247; *Wright v. Donnell*, 34 Tex. 291; *McWilliams v. Bragg*, 3 Wis. 424.

Rule Stated. — In the case of *Sheik v. Hobson*, 64 Iowa 146 where the question was as to the right to recover punitive damages against the personal representative of the wrongdoer, the court said, with reference to the decedent: 'So far as he was concerned, the punitive power of the law ceased when he died. To allow exemplary damages now would be to punish his legal and personal representatives for his wrongful acts but the civil law never inflicts vicarious punishment.'

Survival of Right to Damages for Mental Suffering. — In the case of *Ripley v. Miller*, 11 Ired. L. (33 N. Car.) 247, where the doctrine was announced that the right to recover punitive damages did not survive against the personal representative of the wrongdoer, the court seems to have regarded punitive or exemplary damages to be the same as damages for insult, indignity, or injury to the feelings. But this is a wrong view of the matter, for such damages are compensatory, according to the weight of authority *Murphy v. Hobbs*, 7 Colo. 547, 49 Am. Rep. 366; *McKinley v. Chicago, etc., R. Co.*, 41 Iowa 319, 24 Am. Rep. 748; *Parkhurst v. Masteller*, 57 Iowa 474; *Root v. Sturdivant*, 70 Iowa 55; *Baltimore, etc., Turnpike Road Co. v. Boone*, 45 Md. 344; *Philadelphia, etc., R. Co. v. Larkin*, 47 Md. 161, 28 Am. Rep. 442; *Hamilton v. Third Ave. R. Co.*, 35 N. Y. Super. Ct. 118; *Craker v. Chicago, etc., R. Co.*, 36 Wis. 657. And this being so, although punitive damages do not survive, as stated, yet damages for mental suffering may be recovered against the party's executor or administrator. *Hewlett v. George*, 68 Miss. 703.

2. *Murphy v. New York, etc., R. Co.*, 29 Conn. 496; *Whitcomb v. Cook*, 38 Vt. 477; *Earl v. Tupper*, 45 Vt. 275; *Bradley v. Andrews*, 51 Vt. 525.

A Surviving Partner May Recover Exemplary Damages for the wrongful conversion of partnership property; but personal matters which affect only the deceased, it has been held, cannot be given in evidence, although they might have been properly admitted in aggravation of the damages during the latter's lifetime. *Bohm v. Dunphy*, 1 Mont. 333.

3. For a full discussion of this question see the title *DEATH BY WRONGFUL ACT*, vol. 8, p. 924.

4. **Evidence of Defendant's Motive.** — *Ware v. Cartledge* 24 Ala. 622, 60 Am. Dec. 489; *Redfield v. Redfield*, 75 Iowa 435; *Currier v. Swan*, 63 Me. 323; *Wallace v. Finch*, 24 Mich. 255; *Henry v. Hug*, 76 Mo. 342; *Millard v. Brown*, 35 N. Y. 297; *Fuller v. Redding*, 16 Misc. Rep. (N. Y. Supreme Ct.) 634; *Voltz v. Blackmar*, 64 N. Y. 440; *Day v. Holland*, 15 Oregon 464; *Devine v. Rand*, 38 Vt. 625; *Camp v. Camp*, 59 Vt. 667.

Rule Stated — All Circumstances to Be Shown. — Where exemplary or punitive damages are claimed, all the circumstances immediately connected with the transaction tending to exhibit or explain the motive of the defendant are admissible in evidence. *Andrews, J.*, in *Voltz v. Blackmar*, 64 N. Y. 440.

Illustration. — As fence viewers have no official authority to establish a disputed boundary line, their establishment of one is merely an award on an oral submission, or a parol contract; and hence in an action of trespass for building a fence on the plaintiff's land, evidence is not admissible in favor of the defendant, as bearing on the question of the location of the division line, to show that the fence viewers established a line and that the defendant then built his share of the fence at the plaintiff's request; but such evidence is admissible on the question of good faith, motive, and intent as affecting, therefore, exemplary damages. *Camp v. Camp*, 59 Vt. 667.

Persuasion by Third Parties. — A defendant in an action of trespass *vi et armis* for false imprisonment may offer evidence to prove that he was persuaded by others to make an affidavit upon which an illegal arrest was made, to show the animus by which he was actuated, in order to avoid punitive damages. *Roth v. Smith*, 41 Ill. 314.

Evidence of Malice — What Is Sufficient. — It has been held that continuing the maintenance of a sewer pipe discharging sewage on the premises of another, after one verdict and judgment for damages for the nuisance, is such wilfulness and malice as subject the wrongdoer to exemplary damages, without further evidence of express malice. *Paddock v. Somes*, 51 Mo. App. 320.

Evidence in Cases of Negligence. — In the case of *Millard v. Brown*, 35 N. Y. 297, where damages were sought for alleged gross negligence, the trial court excluded evidence to the effect

it has been held, the information on which a defendant acts, and which induced the act complained of, whether true or false, is original and material evidence.¹ The plaintiff, on the one hand, may introduce any evidence which properly shows malice on the part of the defendant or from which an inference of malice might properly be drawn by the jury.² The defendant, on the other, is entitled to the benefit of any circumstance warranting the conclusion that he acted innocently and without malice, or under the honest belief that he had a right to do the act complained of.³ Thus, in an action for an alleged malicious trespass to realty, the defendant may give in evidence a decree in his favor of an inferior court for the premises in question, though appealed from.⁴ And the defendant may also show, to disprove malice, that he acted under the impulse of sudden passion or alarm.⁵

2. Defendant's Acts Before and After Act Complained of. — It has been held that evidence of other acts of the defendant than those alleged and for which damages are sought, both preceding as well as following the particular acts, is admissible if so connected with the particular acts as tending to show the defendant's disposition, intention, or motive in the commission of the particular acts for which damages are claimed.⁶

3. Evidence of Criminal Prosecution. — As has already been seen, some cases hold that evidence of the defendant's conviction on a criminal charge is admissible in evidence in a civil action in mitigation of damages.⁷

4. Pendency of Other Civil Actions. — In an action for damages for injuries

that the excavation into which the plaintiff had fallen and thus sustained the injuries complained of had been made on the defendant's own premises for the purpose of erecting a store. This was held to have been error, the court observing that in actions where the right of the jury to give exemplary damages is conceded, as in the case of gross negligence or recklessness, it is always proper to inquire into the conduct of the defendant, so as to enable the jury to determine whether the case is one which calls for such damages. If the plaintiff may enhance the damages by showing circumstances of aggravation, the defendant should be permitted to give such evidence as he has tending to explain the circumstances which are relied on to aggravate the damages. The defendant should have been allowed to show the object of the excavation and the circumstances under which it had been left open. This was proper evidence to enable the jury to determine the character and degree of the defendant's negligence, and whether it warranted exemplary damages.

1. *Livingston v. Burroughs*, 33 Mich. 511.

In an action of tort by a husband and wife against the proprietors of a retail dry-goods establishment and two of their employees, the superintendent of the store and the detective, for the malicious arrest by the detective of the female plaintiff upon the charge of theft, and the search of her person, it is competent, as bearing upon the question of punitive damages, and in mitigation thereof, for the superintendent to testify as to information given by a clerk who, at his request, made an examination after the arrest, for the purpose of ascertaining whether or not the article said to have been stolen was actually missing. *Woodward v. Ragland*, 5 App. Cas. (D. C.) 220.

2. *Currier v. Swan* 63 Me. 323. And see cases cited in preceding notes

3. *Redfield v. Redfield*, 75 Iowa 435; *Henry v. Hug*, 76 Mo. 342; *Millard v. Brown*, 35 N. Y. 207; *Voltz v. Blackmar*, 64 N. Y. 440; *Day v. Holland*, 15 Oregon 464; *Camp v. Camp*, 59 Vt. 667.

Acceptance by Letter — Delay in Transmission — Defendant's Good Faith. — In an action for trespass upon lands, it appeared in evidence that the defendant had by letter accepted an offer received by mail from the plaintiff to sell the lands; that the letter of acceptance, owing to an unavoidable delay of the mail, was not received by the plaintiff until the lands had been sold to a third person, and that all the acts of trespass were committed after the mailing of the letter, and before the defendant had notice of the sale to another. It was held that such circumstances were admissible to show that the defendant had acted in good faith, and in the belief that the acceptance of the offer would secure him the legal title to the land, and if so his case was not within the operation of a statute awarding, in certain cases, punitive damages for trespass on lands. *Wallace v. Finch*, 24 Mich. 255.

4. *Day v. Holland*, 15 Oregon 464.

5. *Andrews, J.*, in *Voltz v. Blackmar*, 64 N. Y. 440. See also, *infra*, this section, *Provocation*.

6. *Ware v. Cartledge*, 24 Ala. 622, 60 Am. Dec. 489; *Devine v. Rand*, 38 Vt. 625.

Successive Acts of Negligence. — Where there are successive acts of negligence on the part of the employees of the defendant corporation, resulting ultimately in injury to a passenger, the jury may, in determining the degree of culpability of the defendant, look to the chain of causation of the wrong done for which they are to fix the amount of damages. *Kansas City, etc., R. Co. v. Sanders*, 88 Ala. 203.

7. See *supra*, this title, *General Principles Regulating — Where Act of Defendant Punishable — Criminally*.

from an act which has caused injury to a number of persons, evidence of the pendency of other actions has been held inadmissible, though sought to be introduced on the theory that the defendant would probably also be punished for his wrongful act in other proceedings.¹

5. Advice of Counsel. — The fact that the defendant acted on the advice of counsel in the commission of the act complained of may be considered on the question of exemplary damages;² and where the only evidence of malice is the presumption which arises from the mere doing of an unlawful act, if it is shown that the defendant acted in good faith and on advice of counsel exemplary damages are not recoverable.³ But the advice of counsel that the defendant had the right to do the act complained of will not protect him from exemplary damages if it is done in a wanton and offensive manner, and in fact maliciously.⁴

Advice of One Not an Attorney. — Where a party acted on the advice of one whom he supposed to be a licensed attorney, and learned in the law, but who in fact was not, such fact was held admissible in evidence.⁵ But the advice of one who the defendant knew was not an attorney, but who sometimes advised neighbors for pay, has been held inadmissible on the question of punitive damages.⁶

6. Provocation — *α. IN GENERAL.* — As exemplary damages are given for and graduated according to the malice of the defendant, evidence of provocation is always admissible.⁷ Proof of provocation goes in mitigation of

1. *Kansas City, etc., R. Co. v. Sanders*, 98 Ala. 293.

2. **Effect of Advice of Counsel.** — *City Nat. Bank v. Jeffries*, 73 Ala. 183; *Selden v. Cashman*, 20 Cal. 56, 81 Am. Dec. 93; *The Mascotte*, 72 Fed. Rep. 684; *Cochrane v. Tuttle*, 75 Ill. 361; *Bohm v. Dunphy*, 1 Mont. 333; *Erie R. Co. v. Ramsey*, 3 Lans. (N. Y.) 178; *Bonesteel v. Bonesteel*, 30 Wis. 511. See generally the title *ADVICE OF COUNSEL*, vol. 1, p. 894.

Damages for Malicious Attachment. — If a creditor living in another state intrusts a claim against his debtor to a reputable attorney for collection, and that attorney informs him that there exists a ground for suing out an attachment, and he therefore orders an attachment issued, and, at the attorney's request, furnishes resident sureties to make the bond, in the absence of other knowledge or information vexatiousness and malice cannot be imputed to the creditor so as to warrant the recovery of punitive damages against him. But this rule would not apply, it was held, if the creditor had actual knowledge of the facts relied on as ground for attachment, and such facts were insufficient, and in truth no ground for attachment existed. *City Nat. Bank v. Jeffries*, 73 Ala. 183.

3. *Selden v. Cashman*, 20 Cal. 56, 81 Am. Dec. 93; *The Mascotte*, 72 Fed. Rep. 684; *Bohm v. Dunphy*, 1 Mont. 333; *Erie R. Co. v. Ramsey*, 3 Lans. (N. Y.) 178; *Bonesteel v. Bonesteel*, 30 Wis. 511; *Cochrane v. Tuttle*, 75 Ill. 361.

4. *Jasper v. Purnell*, 67 Ill. 358.

Must Be Good Faith in Laying Facts Before Counsel and Following Advice. — In an action for damages for a wrongful attachment the trial court was asked by the defendant to charge the jury that if they found from the evidence that in suing out the attachment he (the defendant) stated all the facts to his attorney, or

his attorney was acquainted with all the facts, and he (the defendant) acted under the advice of his attorney in suing out said attachment, then they could not assess exemplary damages. This charge was held to have been properly refused as being defective in premitting all inquiry as to whether the defendant was diligent in ascertaining the truth of the facts laid before counsel and as to his good faith in acting on the advice when given. *Trammell v. Ramage*, 97 Ala. 666; *Baldwin v. Walker*, 94 Ala. 514. And see *Steed v. Knowles*, 79 Ala. 446.

5. *Murphy v. Larson*, 77 Ill. 172.

6. *Livingston v. Burroughs*, 33 Mich. 511.

7. **Evidence of Provocation — General Rule —** *England.* — *Fraser v. Berkeley*, 7 C. & P. 621, 32 E. C. L. 658. And see *Finnerty v. Tipper*, 2 Campb. 77.

United States. — *Cushman v. Waddell*, 1 Baldw. (U. S.) 59. And see *Cushman v. Ryan*, 1 Story (U. S.) 100.

Arkansas. — *Ward v. Blackwood*, 41 Ark. 295, 48 Am. Rep. 41.

California. — *Bundy v. Maginess*, 76 Cal. 532; *Badostain v. Graziade*, 115 Cal. 425.

Illinois. — *Chicago, etc., R. Co. v. Randolph*, 65 Ill. App. 208. And see *Farwell v. Warren*, 70 Ill. 28.

Iowa. — *Ireland v. Elliott*, 5 Iowa 478, 68 Am. Dec. 715.

Kentucky. — *Rochester v. Anderson*, 1 Bibb (Ky.) 428; *Waters v. Brown*, 3 A. K. Marsh. (Ky.) 559.

Maryland. — *Philadelphia, etc., R. Co. v. Larkin*, 47 Md. 155, 28 Am. Rep. 442; *Baltimore, etc., R. Co. v. Barger*, 80 Md. 23, 45 Am. St. Rep. 319.

Massachusetts. — See *Child v. Homer*, 13 Pick. (Mass.) 503; *Avery v. Ray*, 1 Mass. 12.

Michigan. — See *Newman v. Stein*, 75 Mich. 402.

exemplary damages, and may relieve from liability for such damages altogether if the provocation has been sufficient and the act of the defendant not disproportionate thereto.¹

Mutual Combat. — For injuries received in combat engaged in by mutual consent, neither party is liable in exemplary damages.²

b. WHERE DEFENDANT'S ACT DISPROPORTIONATE TO PROVOCATION —

(1) *In General.* — If the defendant's act is wholly disproportionate to the provocation received, evincing malice and wantonness beyond that which might reasonably be attributed thereto, there may be a recovery in exemplary damages.³ Thus, where a man, in retaliation for a kick, assaulted a woman with violence much in excess of that which would have been adequate for his own defense, it was held that exemplary damages might be recovered;⁴ and so, too, where the defendant violently assaulted the plaintiff, who had committed a trespass on the property of the former, after the latter's removal from the defendant's premises, and while in the custody of an officer of the law.⁵ It has been held, indeed, that the retaliation may be so disproportionate and excessive as to subject the party to the same liability to exemplary damages as if he had been the original wrongdoer.⁶

Minnesota. — Crosby v. Humphreys, 59 Minn. 92.

New York. — Maynard v. Beardsley, 7 Wend. (N. Y.) 560, 22 Am. Dec. 595; Keyes v. Devlin, 3 E. D. Smith (N. Y.) 518; Andrews, J., in Voltz v. Blackmar, 64 N. Y. 440; Kiff v. Youmans, 86 N. Y. 324, 40 Am. Rep. 543.

North Carolina. — Barry v. Inglis, Tayl. (1 N. Car.) 121; White v. Barnes, 112 N. Car. 323.

Pennsylvania. — Robison v. Rupert, 23 Pa. St. 523; Rhodes v. Rodgers, 151 Pa. St. 634.

Wisconsin. — Barnes v. Martin, 15 Wis. 240, 82 Am. Dec. 670; Morely v. Dunbar, 24 Wis. 183; Wilson v. Young, 31 Wis. 574; Brown v. Swineford, 44 Wis. 282, 28 Am. Rep. 582; Nichols v. Brabazon, 94 Wis. 549.

1. *United States.* — Cushman v. Waddell, 1 Baldw. (U. S.) 59.

Arkansas. — Ward v. Blackwood, 41 Ark. 300, 48 Am. Rep. 41.

California. — Badostain v. Graziade, 115 Cal. 425.

Illinois. — Chicago, etc., R. Co. v. Randolph, 65 Ill. App. 208. And see Johnson v. Von Kettler, 66 Ill. 63; Drohn v. Brewer, 77 Ill. 283.

Maryland. — Philadelphia, etc., R. Co. v. Larkin, 47 Md. 155, 28 Am. Rep. 442.

Minnesota. — Crosby v. Humphreys, 59 Minn. 92.

New Jersey. — See Bullock v. Delaware, etc., R. Co., 61 N. J. L. 550.

New York. — Keyes v. Devlin, 3 E. D. Smith (N. Y.) 518; Andrews, J., in Voltz v. Blackmar, 64 N. Y. 440; Kiff v. Youmans, 86 N. Y. 324, 40 Am. Rep. 543.

North Carolina. — White v. Barnes, 112 N. Car. 323.

Pennsylvania. — Robison v. Rupert, 23 Pa. St. 523; Rhodes v. Rodgers, 151 Pa. St. 634.

Wisconsin. — Barnes v. Martin, 15 Wis. 240, 82 Am. Dec. 670; Morely v. Dunbar, 24 Wis. 183; Wilson v. Young, 31 Wis. 574; Nichols v. Brabazon, 94 Wis. 549.

Rule Stated. — If an assault and battery was the consequence of a sudden heat resulting from provocation first offered by the plaintiff, and not of a design for his injury deliberately formed, and if the force used was not so dis-

proportionate to the provocation as to repel the inference that it was induced thereby, then no exemplary damages should be awarded. Badostain v. Graziade, 115 Cal. 429.

Illustration — Assault on Servant for Neglect of Duty. — An employer who, in a fit of passion, assaults his servant for neglect of duty thereby commits a breach of the peace and an actionable wrong; but if, making a reasonable allowance for the infirmities of human temper, the defendant has a reasonable excuse arising from the provocation or fault of the servant, though not sufficient to justify the act done, then damages ought not to be assessed by way of punishment, but the circumstances of mitigation should be considered. Ward v. Blackwood, 41 Ark. 295, 48 Am. Rep. 41.

Forcible Retaking by Owner. — Where the owner of property attempts to take it by force from one who came into possession of it in a manner not illegal, the latter, in resisting such attempt, will not be held liable in exemplary damages unless guilty of excessive force and actuated by malicious motives. Barnes v. Martin, 15 Wis. 240, 82 Am. Dec. 670.

If the Plaintiff, in Company with Other Persons, was guilty of making a great noise and disturbance around the defendant's house, and refused to withdraw or cease when requested, such circumstances will go in mitigation of the damages suffered by the plaintiff in consequence of the forcible means adopted by the defendant to suppress the nuisance. Robison v. Rupert, 23 Pa. St. 523.

2. Badostain v. Graziade, 115 Cal. 425; Shay v. Thompson, 59 Wis. 540, 48 Am. Rep. 538.

3. **Defendant's Act Disproportionate to the Provocation** — Gaither v. Blowers, 11 Md. 536; Philadelphia, etc., R. Co. v. Larkin, 47 Md. 155, 28 Am. Rep. 442; Crosby v. Humphreys, 59 Minn. 92; White v. Barnes, 112 N. Car. 323; Barnes v. Martin, 15 Wis. 240, 82 Am. Dec. 670; Nichols v. Brabazon, 94 Wis. 549; Morely v. Dunbar, 24 Wis. 187. And see Cushman v. Ryan, 1 Story (U. S.) 100.

4. Nichols v. Brabazon, 94 Wis. 549.

5. White v. Barnes, 112 N. Car. 323.

6. Philadelphia, etc., R. Co. v. Larkin, 47 Md. 155, 28 Am. Rep. 442. But it would cer-

(2) *Mere Fact of Unnecessary Force.* — The mere fact that the defendant has employed more force than necessary to defend himself or vindicate his rights is not sufficient to charge him in exemplary damages.¹

c. FROM WHOM PROVOCATION MUST PROCEED. — Such provocation as will relieve from exemplary damages may, it has been held, proceed from the acts of third persons, as well as from those of the plaintiff himself.²

d. TIME WHEN PROVOCATION OCCURRED. — To entitle the defendant to give in evidence circumstances of provocation in mitigation of damages, their occurrence must have been so recent and immediate as to induce a presumption that the defendant's act was committed under the immediate influence of the excitement and passion excited thereby.³ Thus, threats made by the plaintiff against the defendant a month before, and not shown to have been communicated to the defendant prior to the battery complained of, are not admissible in mitigation of damages.⁴ And where, in an action for an alleged malicious tort to the person, the defendant by way of defense averred that his conduct was provoked by an insulting speech made by the plaintiff *eo instanti*, evidence is inadmissible in behalf of the defendant of provocative acts of the plaintiff committed prior to the time of the assault.⁵

e. RATIONALE OF RULE ADMITTING EVIDENCE OF PROVOCATION. — The doctrine that evidence of provocation proceeding from the plaintiff is admissible in mitigation of punitive damages is, it has been said, a matter of 'malice against malice, the malice of the plaintiff precluding him from recovery for the malice of the defendant provoked by his own.'⁶ And in other cases a further consideration is adverted to — the propriety of denying to a party damages occasioned by his own misconduct.⁷

tainly seem that the provocation, however slight in proportion to the defendant's conduct, should be considered by the jury, and such effect attributed thereto in the assessment of damages as the circumstances would seem to warrant.

1. Chicago, etc., R. Co. v. Randolph, 65 Ill. App. 208; Kiff v. Youmans, 86 N. Y. 324, 40 Am. Rep. 543.

2. Robison v. Rupert, 23 Pa. St. 523. And see Reed v. Bias, 8 W. & S. (Pa.) 189.

3. *Time of Provocation.* — Bundy v. Maginess, 76 Cal. 532; Huftalin v. Misner, 70 Ill. 55; Ireland v. Elliott, 5 Iowa 478, 68 Am. Dec. 715; Rochester v. Anderson, 1 Bibb (Ky.) 428; Gaither v. Blowers, 11 Md. 536; Maynard v. Beardsley, 7 Wend. (N. Y.) 560, 22 Am. Dec. 595; Lee v. Woolsey, 19 Johns. (N. Y.) 319, 10 Am. Dec. 230; Keyes v. Devlin, 3 E. D. Smith (N. Y.) 518; Barry v. Inglis, Tayl. (1 N. Car.) 121. And see Child v. Homer, 13 Pick. (Mass.) 503; Avery v. Ray, 1 Mass. 12.

4. Gaither v. Blowers, 11 Md. 536.

5. Bundy v. Maginess, 76 Cal. 532.

6. Ryan, C. J., in Brown v. Swineford, 44 Wis. 282, 28 Am. Rep. 582. And see Johnson v. McKee, 27 Mich. 471.

Where Motive Constitutes a Basis for Increasing the Damages of the plaintiff above those actually sustained, it should also, under proper circumstances, constitute the basis for reducing them below the same standard. If malice in the defendant is to be punished by the imposition of additional damages, or smart money, then malice on the part of the plaintiff, by which he provoked the injury complained of, should be subject to like punishment, which, in his case, can be inflicted only by withholding the damages to which he

would otherwise be entitled. The law will not scrutinize the motives of one party to the transaction and inflict punishment upon him for his malicious conduct, and not punish the other for the same thing. The law makes an allowance for the infirmities of men when smarting under the sting of gross and immediate provocation. Morely v. Dunbar, 24 Wis. 187. And see also the case of Robison v. Rupert, 23 Pa. St. 523, wherein the court said in the same connection: "The rule ought to be, and is, practically mutual. Malice and provocation in the defendant are punished by inflicting damages exceeding the measure of compensation, and in the plaintiff by giving him less than that measure. This principle is illustrated by numerous cases."

To Disprove Malice the Defendant May Show that he acted under the impulse of sudden passion or alarm excited by the conduct of the plaintiff. Andrews, J., in Voltz v. Blackmar, 64 N. Y. 440.

7. Robison v. Rupert, 23 Pa. St. 523; Morley v. Dunbar, 24 Wis. 187.

Where a Person Voluntarily Puts Himself in a Position to Receive the Injuries Complained of, in order to make a test case of his rights with the intention of afterwards bringing an action if he conceives them to have been violated, exemplary damages have been held not recoverable. Cincinnati, etc., R. Co. v. Cole, 29 Ohio St. 126, 23 Am. Rep. 729. And similarly it has been held that where a plaintiff by his own conduct induced the defendant to commit the trespass complained of, punitive damages should not be awarded. Farwell v. Warren, 70 Ill. 28. This latter case was held to involve something analogous to the doctrine of estoppel.

7. Financial Condition of Parties — a. EVIDENCE OF DEFENDANT'S WEALTH — GENERAL RULE. — In cases involving the doctrine of punitive damages it is very generally held that evidence of the defendant's wealth and pecuniary ability is admissible.¹

Rationale of Rule. — The reason of the rule admitting evidence of the defendant's wealth and pecuniary ability rests in the consideration that a pecuniary mulct which would operate as a sufficient punishment to a man of small means would be inadequate in the case of a person of great wealth, and what would be a proper penalty in the latter case would be excessive and immoderate in the former.² The rule admitting such evidence is indeed, it has been said, "a fair corollary" of the rule of exemplary damages.³

b. CONTRARY DOCTRINE. — Though the weight of authority is as above stated, the rule admitting evidence of the defendant's wealth is not universal.⁴

c. SEVERAL DEFENDANTS. — In an action against two or more defendants the pecuniary ability of one should not be considered by the jury in determin-

1. Evidence of Defendant's Financial Condition — United States. — *Brown v. Evans*, 8 Sawy. (U. S.) 488.

Colorado. — *Courvoisier v. Raymond*, 23 Colo. 113.

Connecticut. — *Bennett v. Hyde*, 6 Conn. 24; *Case v. Marks*, 20 Conn. 248.

Georgia. — *Coleman v. Allen*, 79 Ga. 648, 11 Am. St. Rep. 449.

Illinois. — *McNamara v. King*, 7 Ill. 432; *Grable v. Margrave*, 4 Ill. 372, 38 Am. Dec. 88; *Hosley v. Brooks*, 20 Ill. 115, 71 Am. Dec. 252; *Toledo, etc., R. Co. v. Smith*, 57 Ill. 517; *Mullin v. Spangenberg*, 112 Ill. 140.

Iowa. — See *Karney v. Paisley* 13 Iowa 89.

Kentucky. — *Jacobs v. Louisville, etc., R. Co.*, 10 Bush (Ky.) 263.

Maine. — *Webb v. Gilman*, 80 Me. 177; *Goddard v. Grand Trunk R. Co.*, 57 Me. 221, 2 Am. Rep. 39; *Humphries v. Parker*, 52 Me. 502.

Maryland. — *Sloan v. Edwards*, 61 Md. 89.

Minnesota. — *McCarthy v. Niskern*, 22 Minn. 99; *Pack v. Small*, 35 Minn. 465.

Mississippi. — *Bell v. Morrison*, 27 Miss. 68; *Whitfield v. Westbrook*, 40 Miss. 311; *Pullman Palace-Car Co. v. Lawrence*, 74 Miss. 782.

Missouri. — *Buckley v. Knapp*, 48 Mo. 152; *Eagleton v. Kabrich*, 66 Mo. App. 231; *Beck v. Dowell*, 111 Mo. 506, 33 Am. St. Rep. 547.

New Hampshire. — *Symonds v. Carter* 32 N. H. 458; *Knight v. Foster*, 39 N. H. 576; *Cram v. Hadley*, 48 N. H. 191; *Belknap v. Boston, etc., R. Co.*, 49 N. H. 358.

New York. — *Fry v. Bennett*, 4 Duer (N. Y.) 247; *Lewis v. Chapman*, 19 Barb. (N. Y.) 252. And see *McConnell v. Hampton*, 12 Johns. (N. Y.) 235; *Bump v. Betts*, 23 Wend. (N. Y.) 86.

North Carolina. — *Adcock v. Marsh*, 8 Ired. L. (30 N. Car.) 360; *Johnson v. Allen*, 100 N. Car. 131.

Ohio. — *Stevens v. Handly*, *Wright (Ohio)* 121; *Roberts v. Mason*, 10 Ohio St. 277; *Hayner v. Cowden*, 27 Ohio St. 292, 22 Am. Rep. 303; *Smith v. Pittsburg, etc., R. Co.*, 23 Ohio St. 10. And see *Alpin v. Morton*, 21 Ohio St. 536.

Oregon. — See *Hencky v. Smith*, 10 Oregon 353, 45 Am. Rep. 143.

Pennsylvania. — *McBride v. McLaughlin*, 5 Watts (Pa.) 375.

South Carolina. — *Rowe v. Moses*, 9 Rich. L. (S. Car.) 423, 67 Am. Dec. 560.

Tennessee. — *Dush v. Fitzhugh*, 2 Lea (Tenn.) 307.

Vermont. — *Rea v. Harrington*, 58 Vt. 181.

Virginia. — *Harman v. Cundiff*, 82 Va. 239.

Wisconsin. — *Birchard v. Booth*, 4 Wis. 67;

Barnes v. Martin, 15 Wis. 240, 82 Am. Dec. 670; *Meibus v. Dodge*, 38 Wis. 300, 20 Am. Rep. 6; *Winn v. Peckham*, 42 Wis. 493; *Brown v. Swineford*, 44 Wis. 282, 28 Am. Rep. 582; *Lavery v. Crooke*, 52 Wis. 612, 38 Am. Rep. 768; *Hare v. Marsh*, 61 Wis. 435; *Spear v. Hiles*, 67 Wis. 350; *Draper v. Baker*, 61 Wis. 450, 50 Am. Rep. 143; *Spear v. Sweeney*, 88 Wis. 545.

Defendant's Wealth Not Sole Consideration. — The jury are not to consider alone, it has been held, what the defendant is able to pay. They should also consider what the plaintiff ought to receive. *Holmes v. Holmes*, 64 Ill. 294.

Wealth Not Presumed in Absence of Evidence — Corporate Defendant. — The wealth of a corporate defendant should not be presumed by the jury in the absence of evidence to that effect, nor under such circumstances, should the court instruct that the pecuniary ability of the defendant may be considered. *Toledo, etc., R. Co. v. Smith*, 57 Ill. 519.

2. *Toledo, etc., R. Co. v. Smith*, 57 Ill. 517; *Goddard v. Grand Trunk R. Co.*, 57 Me. 221, 2 Am. Rep. 39; *Bell v. Morrison*, 27 Miss. 68; *Buckley v. Knapp*, 48 Mo. 152; *Fry v. Bennett*, 4 Duer (N. Y.) 257; *Hayner v. Cowden*, 27 Ohio St. 292, 22 Am. Rep. 303; *Birchard v. Booth*, 4 Wis. 67. And see *Smith v. Wunderlich* 70 Ill. 426. See also cases cited in the note immediately preceding.

3. *Cole, J.*, in *Birchard v. Booth*, 4 Wis. 67.

4. *Hunt v. Chicago, etc., R. Co.*, 26 Iowa 364; *Guengerech v. Smith*, 34 Iowa 348; *Willis v. McNeill*, 57 Tex. 476. And see *Bailey v. Bailey*, 94 Iowa 606. Compare *Karney v. Paisley*, 13 Iowa 89.

Evidence of the Financial Ability of the Defendant is inadmissible to aggravate the damages, even though the case is one in which exemplary damages may be allowed. *Guengerech v. Smith*, 34 Iowa 348. *Beck, C. J.*, dissented in this case, holding such evidence admissible for the reasons stated *supra*, this section and subsection, paragraph *Rationale of Rule*.

ing the damages to be assessed jointly.¹ Thus, in an action against a corporation and one of its employees for damages for injuries sustained through the alleged negligence of the latter, it is error to receive evidence of the wealth of the corporation for the purpose of enhancing the damages to be assessed against both defendants.²

d. HOW DEFENDANT'S WEALTH MAY BE SHOWN. — As a general rule, it is only the defendant's actual wealth and not his mere reputation for wealth which the jury should consider in assessing punitive damages.³ To establish this, the assessor's books, or a certified abstract thereof containing the returns of the assessment for taxation of the lands and personal property of the defendant, will be admissible in evidence,⁴ and likewise evidence of the number and size of the defendant's flocks and herds,⁵ or the emoluments received in a salaried position.⁶

Evidence of Wealth of Deceased Relative. — It has also been held that evidence of the wealth of a deceased relative of the defendant, whose heir the latter was, is competent as tending to prove his financial condition.⁷

e. DEFENDANT'S LACK OF MEANS IN REBUTTAL. — Where it is competent for the plaintiff to prove the wealth of the defendant to increase the damages it is equally competent for the defendant to show a lack of it to diminish them.⁸ Nor, it has been held, can a defendant be deprived of this right by the omission of the plaintiff to offer any proof on that point or make any claim for damages on that ground, as the waiving of the privilege by the one is no reason for denying it to the other.⁹ On the other hand, this has been denied, and the rule laid down that such proof is not admissible on the part of the defendant as original evidence.¹⁰

f. PECUNIARY CONDITION OF PLAINTIFF. — It has been held that evi-

1. *In Case of Several Defendants.* — Toledo, etc., R. Co. v. Smith, 57 Ill. 517; Chicago City R. Co. v. Henry, 62 Ill. 142; Smith v. Wunderlich, 70 Ill. 426. In this last case there were three defendants sued jointly in trespass, one of whom it appeared was worth five hundred thousand dollars and another ten or fifteen thousand. The trial court instructed the jury that they should take into consideration the pecuniary ability of each individual defendant to pay punitive or exemplary damages, in determining the amount of such damages. This was held to be a subversion of the very reason upon which the inquiry into the pecuniary circumstances of the defendant could alone be justified, as it subjected defendants of widely different means to the same measure of punishment, and, it was observed, the jury had evidently, from the amount of the verdict, administered the punishment so as to be felt by the wealthiest of the defendants.

2. Chicago City R. Co. v. Henry, 62 Ill. 142.

3. Johnson v. Smith, 64 Me. 554.

Size of Defendant's Family. — On the question of the pecuniary resources of the defendant, it has been held that evidence of the size of his family and the number of persons dependant on him for support was admissible. McNamara v. King, 7 Ill. 432.

Where the Wealth of a Corporation Defendant Was Admissible for the purpose of assessing punitive damages it was held that the defendant might be asked the amount of the entire paid-up capital stock of the company; what were its liabilities; what were the assets of the company; what was the surplus over and above all liabilities; what dividends had been paid stockholders for five years past, and how

they were paid. Pullman Palace Car Co. v. Lawrence, 74 Miss. 808.

4. Buckley v. Knapp, 48 Mo. 152; Womack v. Circle, 29 Gratt. (Va.) 201.

5. Webb v. Gilman 80 Me. 177.

6. **Where Defendant Receives Salary.** — In the case of Brown v. Swineford, 44 Wis. 282, 28 Am. Rep. 582, which was an action of damages for assault and battery alleged to have been committed by the employee of a railroad company, the court said that it might have been shown that he received large emoluments from his position in the railroad company, and possibly, that the railroad had assumed the appellant's tort and the payment of the judgment.

7. Binford v. Young, 115 Ind. 174.

8. **Evidence in Rebuttal.** — Johnson v. Smith, 64 Me. 553; Mullin v. Spangenberg, 112 Ill. 140.

Defendant's Poverty Never a Bar to Exemplary Damages. — But the fact of the defendant's poverty should never be admitted in bar of exemplary damages in a case for their allowance. Stout v. Prall, 1 N. J. L. 93.

9. Johnson v. Smith, 64 Me. 553; Rea v. Harrington, 58 Vt. 181. In the case of Stout v. Prall 1 N. J. L. 93, while it does not distinctly appear from the report of the case whether the evidence of the defendant's poverty was introduced in rebuttal or as original evidence by the defendant, the inference to be drawn is that it was introduced by the defendant in the first instance; in fact, the court refers to the "plea of defendant's poverty." See also Barnes v. Martin, 15 Wis. 240, 82 Am. Dec. 670.

10. Mullin v. Spangenberg, 112 Ill. 140.

dence of the pecuniary condition of the plaintiff is admissible in an action for personal injuries where the circumstances authorize exemplary damages.¹ From an examination of the cases, however, this evidence seems to have been considered rather on the theory of compensation than punishment.² But evidence that the defendant supposed that on account of the plaintiff's poverty the trespass could be committed with impunity is admissible as having a bearing on the defendant's motive and malice.³

g. SOCIAL POSITION AND FINANCIAL CONDITION OF BOTH PARTIES. — By some authorities the rule has been laid down broadly that where exemplary damages are sought to be recovered, the jury is entitled to consider the social position, financial condition, and general surroundings of both parties so that in the light of all the circumstances a proper punishment may be imposed.⁴

h. CONFLICT OF CASES. — Some little conflict on the question of admissibility of evidence of the defendant's wealth seems to have originated in cases where the defendant's rank and influence in society are material in determining

1. Evidence of Plaintiffs Financial Condition. — *Grable v. Margrave*, 4 Ill. 372, 38 Am. Dec. 88; *Arasmith v. Temple*, 11 Ill. App. 39. And see *Chicago v. O'Brennan*, 65 Ill. 163; *Gaither v. Blowers*, 11 Md. 536; *Beck v. Dowell*, 111 Mo. 506, 33 Am. St. Rep. 547.

2. In *Grable v. Margrave*, 4 Ill. 372, 38 Am. Dec. 88, which was an action for the seduction of the plaintiff's daughter, the trial court admitted evidence to show that the plaintiff was a poor man, and it was held on appeal that no error had been committed in admitting evidence showing the pecuniary condition of the plaintiff. Such evidence, it was said, did not go to the jury for the purpose of exciting their prejudices in favor of the plaintiff because he was a poor man, but to enable them to understand fully the effect of the injury upon him, and to give him such damages as his peculiar condition in life and circumstances entitled him to receive. And a similar consideration seems to have influenced the court in *Gaither v. Blowers*, 11 Md. 536, which was an action for damages for assault and battery. The trial court having admitted evidence for the plaintiff, with a view of increasing his damages, that he was a laboring man and had a wife and children to support, the Supreme Court said in support of the ruling: "This is good sense and is sustained by the decisions in most of the states. An injury done to a person not dependent on manual labor for the support of himself and family is in no wise as great as one to a person so situated."

3. *Reed v. Davis*, 4 Pick. (Mass.) 217.

What Not Sufficient Evidence of Malice — Illustration. — It has been held, however, that evidence that the contractor engaged to construct the defendant's railway, and its agent to locate the right of way through timber land belonging to the plaintiff, while engaged in its location, made inquiries as to the plaintiff's character, and whether he had money and could fight a lawsuit, does not show such malice or wantonness in the construction of its road by the defendant as to make it liable to the plaintiff in punitive damages. *Waters v. Greenleaf-Johnson Lumber Co.*, 115 N. Car. 648.

4. All Circumstances to Be Considered. — *Huckle v. Money*, 2 Wils. 206; *Bell v. Morrison*, 27 Miss. 68; *Buckley v. Knapp*, 48 Mo. 152; *Dailey v. Houston*, 58 Mo. 361; *Bump v. Betts*, 23 Wend. (N. Y.) 85; *Heneky v. Smith*,

10 Oregon 352, 45 Am. Rep. 143. And see *Burkett v. Lanata*, 15 La. Ann. 337.

The rule of exemplary damages can be properly and effectively applied only by taking into consideration all the circumstances, whether of aggravation or mitigation, of the grievance complained of, the situation of the parties as to wealth, character and influence, and awarding such damages, in view of all these circumstances, as will both render reparation to the plaintiff and act as an adequate punishment to the defendant. *Handy, J.*, in *Bell v. Morrison*, 27 Miss. 68.

Social and Commercial Position of Parties. — In an action for assault and battery, one of the errors assigned was that the trial court improperly told the jury that in the estimation of damages they might take into consideration the condition in life of the plaintiffs and their pursuits and the nature of their business. But the court held that there was no doubt that in estimating the damages in such cases the jury might properly take into consideration the pecuniary condition of the parties, their position in society, and all other circumstances tending to show the vindictiveness or atrocity or the lack of such elements as tending to characterize the wrong complained of. *Dailey v. Houston*, 58 Mo. 361.

The case of *McNamara v. King*, 7 Ill. 432, is very frequently cited as an authority on this point. It was an action of trespass for damages for assault and battery, in which the court permitted the plaintiff to prove that he was a poor man with a large family, and that the defendant was a wealthy man with no children and but a small family, and it was said that the condition in life and circumstances of the parties were proper subjects for the consideration of the jury in estimating the damages; that they might take into consideration the pecuniary resources of the defendant, and might give exemplary damages, not only to compensate the plaintiff, but to punish the defendant, according to the circumstances of the case. In the case of *Bump v. Betts*, 23 Wend. (N. Y.) 85, a somewhat similar principle seems to have been applied, as the court in deciding on the question of excessive damages pointed to the fact that the defendant was a man of great wealth and that the plaintiff was a poor young man just starting in life.

Contract to Marry. — In an action for a breach

the extent of the injury, as the effect of the words spoken in slander. Many cases hold that evidence of the defendant's wealth is admissible as tending to show rank and influence,¹ while others deny it on the ground that it is erroneous to presume the latter from the former.² As a result of this, some authorities deny that evidence of the defendant's pecuniary condition may be considered to show his ability to pay, but only his rank and influence in society, though the case involves punitive damages,³ while others lay down a general rule excluding evidence of the defendant's pecuniary ability as tending to show the extent of the injury, in terms broad enough to include all cases, as well those involving exemplary damages as those which do not.⁴

i. BREACH OF CONTRACT TO MARRY. — Actions for damages for the breach of contracts to marry are, as has been seen, exceptions to the rule against exemplary damages in actions *ex contractu*. In cases of this nature evidence of the defendant's wealth and social position is held admissible.⁵ In such actions, however, evidence of the defendant's wealth and social position would also have a bearing on the question of actual damages, as tending, in a sense, to show the extent of the plaintiff's loss by reason of the breach of contract complained of.⁶

8. Rule of Reasonable Doubt. — Although, as has been seen, the rule of exemplary damages is penal in policy,⁷ the rule of evidence of "reasonable doubt" in a criminal prosecution has no application to the civil suit.⁸ A pre-

of promise of marriage the jury may consider the social rank and condition of the parties. *Goodall v. Thurman*, 1 Head (Tenn.) 209. See also the title *BREACH OF PROMISE OF MARRIAGE*, vol. 4, p. 882.

1. Conflict of Authorities. — *Bennett v. Hyde*, 6 Conn. 24; *Binford v. Young*, 115 Ind. 174; *Guengerech v. Smith*, 34 Iowa 348; *Alpin v. Morton*, 21 Ohio St. 545; *Womack v. Circle*, 29 Gratt. (Va.) 201.

2. Ware v. Cartledge, 24 Ala. 622, 60 Am. Dec. 489; *Morris v. Barker*, 4 Harr. (Del.) 520; *Palmer v. Haskins*, 28 Barb. (N. Y.) 90.

Evidence of Wealth Not Admissible to Show Rank and Influence. — In the case of *Ware v. Cartledge*, 24 Ala. 622, 60 Am. Dec. 489, it was denied that evidence of the defendant's wealth is admissible for the purpose of showing his rank and influence in society. "That wealth," it is said, "often forms one element in fixing a man's position and elevation in society, may be conceded to be very generally true; but that this alone confers high rank, and gives extensive personal and social influence, is disproved by our daily observation. Its possessors are often found among the most despised and least influential among us; while, on the other hand, rank, influence and power are all combined in persons of very inconsiderable estate."

3. Doctrine that Evidence of Defendant's Wealth Is Not Admissible to Show Ability to Pay. — In the case of *Womack v. Circle*, 29 Gratt. (Va.) 192, it was held that evidence of the defendant's wealth was admissible, not for the purpose of showing his ability to pay a judgment against him, but to show his social rank and influence in the community. In this case, however, the question of punitive damages does not seem to have been distinctly raised, although the action was of a nature which frequently, if not usually, involves punitive damages, being for assault and battery, false imprisonment, and malicious prosecution. But the case was cited in *Harman v. Cundiff*

82 Va. 246, where the question of punitive damages was directly involved and discussed, to support the proposition that in such cases evidence of the defendant's wealth was only admissible to show his rank and influence in society. These two cases illustrate the confusion that has arisen in the authorities with reference to a consideration of the defendant's wealth. Where compensatory damages alone are sought or recoverable, the defendant's wealth may be considered only in cases where, as showing his social position and influence, the extent of the injury, or rather the defendant's ability to injure, may be determined; but on the question of punitive damages it is believed that evidence of the defendant's wealth is admissible on the sole ground that from it the jury may determine what amount will be necessary to punish, adequately but not immoderately. See cases cited in preceding notes.

4. Ware v. Cartledge, 24 Ala. 625, 60 Am. Dec. 489.

5. Breach of Promise to Marry. — *Douglas v. Gausman*, 68 Ill. 170; *Guengerech v. Smith*, 34 Iowa 348; *McPherson v. Ryan*, 59 Mich. 33; *Tamke v. Vangness*, (Minn. 1898) 75 N. W. Rep. 217; *Goodall v. Thurman*, 1 Head (Tenn.) 209. See generally the title *BREACH OF PROMISE OF MARRIAGE*, vol. 4, p. 882.

6. Guengerech v. Smith, 34 Iowa 348; *Tamke v. Vangness*, (Minn. 1898) 75 N. W. Rep. 217.

7. Rule of Reasonable Doubt. — See *supra*, this title *General Principles Regulating — Object and Theory of Exemplary Damages*.

8. St. Ores v. McGlashen, 74 Cal. 148; *Elliott v. Van Buren*, 33 Mich. 49, 20 Am. Rep. 668. In the former case the trial court was asked to charge the jurors that exemplary damages were not awardable unless they should be satisfied beyond a reasonable doubt that the assault and battery complained of was maliciously committed by the defendant. This instruction was refused, and the Supreme Court held properly so, in which connection it

ponderance of evidence is all that is necessary.¹

9. Burden of Proof. — The burden of proof is, of course, upon the plaintiff to establish such aggravating circumstances as warrant the imposition of punitive damages.²

XI. RESPECTIVE FUNCTIONS OF COURT AND JURY — 1. Exemplary Damages as Matter of Right. — It is laid down as a general rule in many cases that exemplary damages are never recoverable as of right,³ and that whether or not such damages are recoverable rests always in the discretion of the jury.⁴

2. Extent and Limits of Jury's Discretion. — The rule that the question of exemplary damages is one for the jury in the exercise of their discretion has been held to apply though it was established in point of fact that elements existed which would, according to the general rule of exemplary damages, warrant such an assessment.⁵ It has been held, therefore, to be erroneous to instruct the jury that in any state of facts it is their duty to award exemplary damages,⁶ or that they should,⁷ will,⁸ ought to,⁹ or must¹⁰ do so; or that if they

was said: "The instruction does not embody the law as applicable to civil cases. A preponderance of evidence is all that is necessary to warrant a finding in such cases, and the rule that prevails in criminal cases, and which requires evidence to satisfy the mind beyond a reasonable doubt, has no place here. It follows that the instruction was properly refused." See the title REASONABLE DOUBT.

1. *St. Ores v. McGlashen*, 74 Cal. 148.

2. *Western, etc., R. Co. v. Turner*, 72 Ga. 292, 53 Am. Rep. 842.

3. Exemplary Damages — Not a Matter of Right. — *Hawk v. Ridgway*, 33 Ill. 473; *Wabash, etc., R. Co. v. Rector*, 104 Ill. 296; *Sheik v. Hobson*, 64 Iowa 146; *Thill v. Pohlman*, 76 Iowa 638; *Louisville, etc., R. Co. v. Brooks*, 83 Ky. 129, 4 Am. St. Rep. 135; *Webb v. Gilman*, 80 Me. 188; *Southern R. Co. v. Kendrick*, 40 Miss. 374, 90 Am. Dec. 332; *New Orleans, etc., R. Co. v. Burke*, 53 Miss. 200, 24 Am. Rep. 689; *Nicholson v. Rogers*, 129 Mo. 136; *Jerome v. Smith*, 48 Vt. 230, 21 Am. Rep. 125; *Boardman v. Goldsmith*, 48 Vt. 403; *Snow v. Carpenter*, 49 Vt. 426; *Robinson v. Superior Rapid Transit R. Co.*, 94 Wis. 345.

4. Discretion of Jury — United States. — *Barry v. Edmunds*, 116 U. S. 563.

Alabama. — *Kansas City, etc., R. Co. v. Phillips*, 98 Ala. 159.

Colorado. — *Kinney v. Williams*, 1 Colo. 192.

Connecticut. — *Pratt v. Pond*, 42 Conn. 318.

District of Columbia. — *Huber v. Teuber*, 3 MacArthur (D. C.) 484, 36 Am. Rep. 110.

Georgia. — *Dye v. Denham*, 54 Ga. 224.

Illinois. — *Mansur-Tebbetts Implement Co. v. Smith*, 65 Ill. App. 319; *Hawk v. Ridgway*, 33 Ill. 473; *Wabash, etc., R. Co. v. Rector*, 104 Ill. 296; *Harrison v. Elv*, 120 Ill. 83.

Iowa. — *Sheik v. Hobson*, 64 Iowa 146.

Kentucky. — *Kentucky Cent. R. Co. v. Gastineau*, 83 Ky. 119; *Louisville, etc., R. Co. v. Brooks*, 83 Ky. 129, 4 Am. St. Rep. 135.

Maine. — *Johnson v. Smith*, 63 Me. 553.

Maryland. — *Baltimore, etc., Turnpike Road Co. v. Boone*, 45 Md. 344; *Smith v. Thompson*, 55 Md. 5, 39 Am. Rep. 409.

Mississippi. — *New Orleans, etc., R. Co. v. Burke*, 53 Miss. 200, 24 Am. Rep. 689; *Chicago, etc., R. Co. v. Scurr*, 59 Miss. 456, 42 Am. Rep. 373.

Missouri. — *Nicholson v. Rogers*, 129 Mo.

136; *Carson v. Smith*, 133 Mo. 606; *Graham v. Pacific R. Co.*, 66 Mo. 536.

New York. — *Bergmann v. Jones*, 94 N. Y. 51. And see *Samuels v. Evening Mail Assoc.*, 75 N. Y. 604.

North Carolina. — *Wylie v. Smitherman*, 8 Ired. L. (30 N. Car.) 236; *Gilreath v. Allen*, 10 Ired. L. (32 N. Car.) 67; *Johnson v. Allen*, 100 N. Car. 151.

Pennsylvania. — *Nagle v. Mullison*, 34 Pa. St. 48.

Rhode Island. — *Kenyon v. Cameron*, 17 R. I. 124.

South Carolina. — *Samuels v. Richmond, etc., R. Co.*, 35 S. Car. 493, 28 Am. St. Rep. 883; *Hall v. South Carolina R. Co.*, 28 S. Car. 261. And see *Epstein v. Brown*, 21 S. Car. 599; *Emory v. Hazard Powder Co.*, 22 S. Car. 484, 53 Am. Rep. 730.

Tennessee. — *Louisville, etc., R. Co. v. Guinan*, 11 Lea (Tenn.) 98, 47 Am. Rep. 279; *Byram v. McGuire*, 3 Head (Tenn.) 530; *Ferguson v. Moore*, 98 Tenn. 342.

Vermont. — *Devine v. Rand*, 38 Vt. 625.

Wisconsin. — *Robinson v. Superior Rapid Transit R. Co.*, 94 Wis. 345.

See generally the title QUESTIONS OF LAW AND FACT.

Statutory Exception to Rule. — Under the *Iowa Civil Damage Act* it is held that punitive damages are recoverable as a matter of right, where the requisite elements exist. *Fox v. Wunderlich*, 64 Iowa 187, *Thill v. Pohlman*, 76 Iowa 638.

5. *Hawk v. Ridgway*, 33 Ill. 473; *Wabash, etc., R. Co. v. Rector*, 104 Ill. 296; *Harrison v. Ely*, 120 Ill. 83; *Louisville, etc., R. Co. v. Brooks*, 83 Ky. 129, 4 Am. St. Rep. 135; *Kentucky Cent. R. Co. v. Gastineau*, 83 Ky. 119; *New Orleans, etc., R. Co. v. Burke*, 53 Miss. 200, 24 Am. Rep. 689; *Wylie v. Smitherman*, 8 Ired. L. (30 N. Car.) 236.

6. *Hawk v. Ridgway*, 33 Ill. 473; *New Orleans, etc., R. Co. v. Burke*, 53 Miss. 200, 24 Am. Rep. 689; *Ferguson v. Moore*, 98 Tenn. 342.

7. *Louisville, etc., R. Co. v. Brooks*, 83 Ky. 129, 4 Am. St. Rep. 135.

8. *Carson v. Smith*, 133 Mo. 606.

9. *Kentucky Cent. R. Co. v. Gastineau*, 83 Ky. 119.

10. *Huber v. Teuber*, 3 MacArthur (D. C.) 484, 36 Am. Rep. 110.

find a given state of facts the plaintiff is entitled to recover such damages.¹ And so carefully is the discretion of the jury guarded in this particular, it has been declared, that an instruction several times repeated which seemed to invite the jury to give punitive damages was erroneous.²

Conflict of Cases. — But on the extent of the jury's discretion the authorities are not agreed further than that the existence of the elements requisite to the allowance of exemplary damages is, in general, a question for the jury.³ Instructions that if the jury find the wrong to have been committed under circumstances which warrant exemplary damages, they ought⁴ or it would be proper⁵ for them to award such damages, have been approved; and in one or two instances the courts seem to have carried the principle still further.⁶

3. Where No Evidence Warranting Exemplary Damages. — If there is no evidence warranting punitive damages, the court may charge that such damages are not recoverable;⁷ and, indeed, it is error to submit the question of puni-

1. *Harrison v. Ely*, 120 Ill. 83; *Wabash, etc., R. Co. v. Rector*, 104 Ill. 296; *Kenyon v. Cameron*, 17 R. I. 122.

2. *Mansur-Tebbetts Implement Co. v. Smith*, 65 Ill. App. 319. And see *Browning v. Jones*, 52 Ill. App. 606.

The Court Fulfills Its Function when it instructs the jurors that if they find a certain state of facts the case is one in which exemplary damages may, in their discretion, be allowed. *Kenyon v. Cameron*, 17 R. I. 124.

3. *Bennett v. Salisbury*, 78 Fed. Rep. 769, 45 U. S. App. 636; *Kansas City, etc., R. Co. v. Phillips*, 98 Ala. 159; *Western Union Tel. Co. v. Cunningham*, 99 Ala. 314; *Richmond, etc., R. Co. v. Greenwood*, 99 Ala. 501; *Chicago, etc., R. Co. v. Scurr*, 59 Miss. 456, 42 Am. Rep. 373; *Towle v. Blake*, 48 N. H. 92; *Allinger v. Mail Printing Assoc.*, (Supreme Ct.) 20 N. Y. Supp. 763, 66 Hun (N. Y.) 626.

Existence of Aggravating Circumstances Question for Jury. — In the case of *Hawk v. Ridgway*, 33 Ill. 473, where the judgment was reversed for error in the charge of the trial court, it was said: "Whether the trespass is committed under circumstances of aggravation is a question for the consideration of the jury. If this instruction [the one for which the error was assigned] was understood by the jury, as it most likely was, as requiring them to assess vindictive damages, as it took from their consideration all question of aggravation, we think that it virtually told them that they should find such damages. That question should have been left to their determination." And where the jurors, in addition to being told that they were "at liberty" to find exemplary damages, were also instructed that the case at bar was one of those cases where such damages could be allowed, it was held error. *Pickett v. Crook*, 20 Wis. 358. This case involved gross negligence, and the instruction was held erroneous on the ground that the question of gross negligence or wanton misconduct on the part of the defendant was assumed by the court, and not left to the consideration of the jury at all.

4. Charge that Jury "Ought" to Give. — It has been held not to be error to instruct the jurors that if they find the facts which warrant punitive damages, they not only may, but ought to, assess damages of such nature. Even though the jurors are instructed that they may give punitive damages, inasmuch as

the power is granted upon grounds of public policy and the community at large has an interest in its exercise, the instruction should be interpreted, if not that they must, at least that upon proper facts they ought to, exercise the power. *Hooker v. Newton*, 24 Wis. 292. In the case of *Knight v. Foster*, 39 N. H. 576, the court said: "In case of actual malice the jury may award exemplary damages — what the plaintiff ought to receive and the defendant ought to pay;" and with reference to this case *Paine, J.*, in *Hooker v. Newton*, 24 Wis. 292, said, with considerable force of logic: "If, in such cases, the plaintiff ought to receive such damages and the defendant ought to pay them, it certainly cannot be adding anything to tell the jury that they ought to give them."

5. "Proper" to Give. — In the case of *Platt v. Brown*, 30 Conn. 336, the trial court instructed the jurors that if, in determining the amount of damages, they found a gross and wilful fraud on the part of the defendant, they were at liberty, and it would be proper, for them to give exemplary or vindictive damages. This was held not to have been error.

6. Instruction Outright to Give Exemplary Damages. — It has been held that where the requisite elements for the allowance of punitive damages are shown in evidence, it is not improper for the court to instruct the jury upon finding such facts to give exemplary damages. *Mayer v. Duke*, 72 Tex. 445. See also in this connection the case of *Buckley v. Knapp*, 48 Mo. 152, in which the court charged the jurors that in the event that they should find a certain state of facts they should assess damages exemplary and compensatory, in such amount as they might deem proper under a view of the whole case. This instruction was held not to be error, although it is proper to observe that it does not seem to have been attacked as improperly abridging the discretion of the jury.

Plaintiff "Entitled" to Exemplary Damages. — In the case of *Hodgson v. Millward*, 3 Grant's Cas. (Pa.) 406, the court said that if the injury was wanton and malicious the plaintiff was "entitled to exemplary damages." This was not, however, it should be noted, the language of the trial court, but of the appellate tribunal.

7. In Cases Where There Is No Evidence Warranting Exemplary Damages — *Alabama*. — *Columbus, etc., R. Co. v. Bridges*, 86 Ala. 448, 11 Am. St. Rep. 58.

tive damages to the determination of the jury in the absence of evidence of any requisite element for the application of the rule.¹

But Although the Question of Punitive Damages Has Been Erroneously Submitted to the jury, the judgment will not be reversed for that reason if it appears that no injury resulted thereby to the complaining party.²

4. Amount of Recovery — *a. RULE OF DISCRETION OF JURY — IN GENERAL.* — The amount of recovery of exemplary damages is peculiarly within the discretion of the jury,³ whether it be or be not regarded as wholly discretionary

California. — *Selden v. Cashman*, 20 Cal. 56, 81 Am. Dec. 93.

Illinois. — *Chicago v. Martin*, 49 Ill. 241 95 Am. Dec. 590; *Illinois Cent. R. Co. v. Welch*, 52 Ill. 183, 4 Am. Rep. 593.

Mississippi. — *Chicago, etc., R. Co. v. Scurr*, 59 Miss. 456, 42 Am. Rep. 373. And see *Whitfield v. Whitfield*, 40 Miss. 352.

Missouri. — *Kennedy v. North Missouri R. Co.*, 36 Mo. 351.

New Jersey. — *Bullock v. Delaware, etc., R. Co.*, 61 N. J. L. 550.

North Carolina. — *Thomas v. Southern R. Co.*, 122 N. Car. 1005.

Pennsylvania. — *Rose v. Story*, 1 Pa. St. 190, 44 Am. Dec. 121; *Heil v. Gianding*, 42 Pa. St. 493, 82 Am. Dec. 537; *Amer v. Longstreth*, 10 Pa. St. 145; *Lake Shore, etc., R. Co. v. Rosenzweig*, 113 Pa. St. 535; *Philadelphia Traction Co. v. Orbann*, 119 Pa. St. 37. And see *Pittsburgh Southern R. Co. v. Taylor*, 104 Pa. St. 306, 49 Am. Rep. 580.

Texas. — *Bradshaw v. Buchanan*, 50 Tex. 492.

Rule Stated. — In all actions for damages where the proof fails to show anything that will warrant an imputation of wilfulness, recklessness, or rudeness it is the duty of the court to inform the jury, when requested to do so, that it cannot inflict punitive damages. Not to do so, in a case free from doubt, would be an abdication of judicial authority, and a permission to the jury to violate the settled principles of the law. *Chicago, etc., R. Co. v. Scurr*, 59 Miss. 456, 42 Am. Rep. 373.

1. *United States.* — *Milwaukee, etc., R. Co. v. Arms*, 91 U. S. 489.

Alabama. — *Louisville, etc., R. Co. v. Hall*, 87 Ala. 708, 13 Am. St. Rep. 84.

Iowa. — *Paine v. Chicago, etc., R. Co.*, 45 Iowa 569.

Kansas. — *Atchison, etc., R. Co. v. McGinnis*, 46 Kan. 109; *Chicago, etc., R. Co. v. O'Connell*, 46 Kan. 581.

Kentucky. — *Louisville, etc., R. Co. v. Law* (Ky. 1893) 21 S. W. Rep. 648; *Louisville, etc., R. Co. v. Sander*, (Ky. 1898) 44 S. W. Rep. 644.

Mississippi. — *Chicago, etc., R. Co. v. Scurr*, 59 Miss. 456, 42 Am. Rep. 373; *Chicago, etc., R. Co. v. Jarrett*, 59 Miss. 470.

Missouri. — *Lewis v. Jannoupoulo*, 70 Mo. App. 325; *State v. Jungling*, 116 Mo. 162.

New York. — *Hendricks v. Sixth Ave. R. Co.*, 44 N. Y. Super. Ct. 8.

Tennessee. — *East Tennessee, etc., R. Co. v. Lee*, 90 Tenn. 570.

See generally the title **QUESTIONS OF LAW AND FACT**.

The question to be decided, said the court, in *Caldwell v. New Jersey Steamboat Co.*, 47 N. Y. 282, is whether there was any view of

the facts which the jury would have been warranted in taking, which would justify a verdict for punitive damages. If there was, although the court might differ with them, the judgment should not for that reason be disturbed; but if not, the refusal of the trial court to exclude the question from the consideration of the jury was error.

Although the Facts Are in Dispute, yet if there is no disagreement on any circumstance materially bearing on the principle of exemplary damages the question may be for the court. *Chicago, etc. R. Co. v. Scurr*, 59 Miss. 456, 42 Am. Rep. 373.

2. *Taylor v. Carpenter*, 2 Woodb. & M. (U. S.) 1; *East Tennessee, etc., R. Co. v. Lee*, 90 Tenn. 570.

3. Amount of Recovery — Jury's Discretion — *United States.* — *Day v. Woodworth*, 13 How. (U. S.) 363; *Cooper v. Sun Printing, etc., Assoc.*, 57 Fed. Rep. 566; *Walker v. Smith*, 1 Wash. (U. S.) 152.

Alabama. — *Seaboard Mfg. Co. v. Wodson*, 98 Ala. 383; *Alabama G. S. R. Co. v. Frazier*, 93 Ala. 45, 30 Am. St. Rep. 28; *Mobile Furniture Commission Co. v. Little*, 108 Ala. 399.

Arkansas. — *Foster v. Pitts*, 63 Ark. 387.

Dakota. — *Bates v. Callender*, 3 Dakota 256.

District of Columbia. — *Flannery v. Baltimore, etc., R. Co.*, 4 Mackey (D. C.) 111.

Georgia. — *Bryan v. Acee*, 27 Ga. 87.

Illinois. — *Ously v. Hardin*, 23 Ill. 403; *Cutler v. Smith*, 57 Ill. 252; *Doremus v. Hennessy*, 62 Ill. App. 391; *Farwell v. Warren*, 70 Ill. 28.

Iowa. — *Collins v. Council Bluffs*, 35 Iowa 432; *Ward v. Ward*, 41 Iowa 686; *Fox v. Wunderlich*, 64 Iowa 187; *Sheik v. Hobson*, 64 Iowa 146; *Root v. Sturdivant*, 70 Iowa 55; *Thill v. Pohlman*, 76 Iowa 638; *Reizenstein v. Clark*, 104 Iowa 287.

Kansas. — *Titus v. Corkins*, 21 Kan. 722.

Kentucky. — *Chiles v. Drake*, 2 Metc. (Ky.) 151, 74 Am. Dec. 406; *Louisville, etc., R. Co. v. Ballard*, 85 Ky. 307, 7 Am. St. Rep. 600.

Maine. — *Webb v. Gilman*, 80 Me. 177.

Michigan. — *Brushaber v. Stegemann*, 22 Mich. 266. And see *Ross v. Leggett*, 61 Mich. 445, 1 Am. St. Rep. 608.

Minnesota. — *McCarthy v. Niskern*, 22 Minn. 90; *Peck v. Small*, 35 Minn. 465.

Mississippi. — *Bell v. Morrison*, 27 Miss. 68; *New Orleans, etc., R. Co. v. Hurst*, 36 Miss. 660, 74 Am. Dec. 785; *Chicago, etc., R. Co. v. Scurr*, 59 Miss. 456, 42 Am. Rep. 373; *Pullman Palace Car Co. v. Lawrence*, 74 Miss. 782.

Missouri. — *Goetz v. Ambs*, 27 Mo. 28; *Cannfield v. Chicago, etc., R. Co.*, 59 Mo. App. 354.

New York. — *Tillotson v. Cheetham*, 3 Johns. (N. Y.) 56, 3 Am. Dec. 459; *McConnell v. Hampton*, 12 Johns. (N. Y.) 235; *Voltz v. Blackmar*, 64 N. Y. 440.

with them to allow any damages by way of punishment and example.¹

No Fixed Standard of Measurement. — The standard of measurement of such damages cannot, in the nature of things, be a fixed one, as the degree of punishment to be inflicted must depend upon the circumstances of each case.² It has been held improper, therefore, for the trial court to indicate an amount for which exemplary damages might be found by the jury.³

b. NOT WITHIN ARBITRARY DISCRETION. — The amount of recovery is not, however, within the arbitrary discretion of the jury. The damages should be assessed in the exercise of a sound, honest, and intelligent discretion, in the light of the facts disclosed by the evidence.⁴

c. RATIO BETWEEN EXEMPLARY AND COMPENSATORY DAMAGES. — In some jurisdictions the rule has been announced that the exemplary damages must bear a reasonable proportion to the compensatory damages suffered,⁵ but no fixed ratio is declared.⁶

5. Excessive and Inadequate Damages. — The General Rule is that an award of exemplary damages by a jury will not be disturbed as excessive or inadequate unless its amount, considered in connection with the facts, is indicative of passion, prejudice, or corruption on the part of the jury,⁷ or perverseness or

North Carolina. — *Wylie v. Smitherman*, 8 Ired. L. (30 N. Car.) 236; *Ripley v. Miller*, 11 Ired. L. (33 N. Car.) 247.

Ohio. — *Schneider v. Hosier*, 21 Ohio St. 98.

Oklahoma. — See *Atchison, etc., R. Co. v. Chamberlain*, 4 Okla. 542.

Tennessee. — *Goodall v. Thurman*, 1 Head (Tenn.) 209. And see *Ferguson v. Moore*, 98 Tenn. 342.

Texas. — *Graham v. Roder*, 5 Tex. 141; *Willis v. McNeill*, 57 Tex. 465; *International, etc., R. Co. v. Telephone, etc., Co.*, 69 Tex. 277; *Mayer v. Duke*, 72 Tex. 445; *Lister v. Campbell*, (Tex. Civ. App. 1898) 46 S. W. Rep. 876.

Virginia. — *Borland v. Barrett*, 76 Va. 128, 44 Am. Rep. 152.

Wisconsin. — *Rogers v. Henry*, 32 Wis. 327.

Canada. — *Silver v. Dominion Tel. Co.*, 14 Nova Scotia 17.

1. *Fox v. Wunderlich*, 64 Iowa 187; *Thill v. Pohlman*, 76 Iowa 638.

2. Mr. Justice Grier, in *Day v. Woodworth*, 13 How. (U. S.) 363; *McNamara v. King*, 7 Ill. 427. And see *Grable v. Margrave*, 4 Ill. 372, 38 Am. Dec. 88; *Reed v. Davis*, 4 Pick. (Mass.) 216; *Lincoln v. Saratoga, etc., R. Co.*, 23 Wend. (N. Y.) 425.

No Measurement but Discretion of Jury. — In the case of *New Orleans, etc., R. Co. v. Hurst*, 36 Miss. 660, 74 Am. Dec. 785, the court said, with reference to the amount of the verdict for punitive damages, that the law in such cases furnished the jurors with "no legal rule of measurement save their discretion."

3. *Lister v. Campbell*, (Tex. Civ. App. 1898) 46 S. W. Rep. 876.

4. *Foster v. Pitts*, 63 Ark. 387; *Titus v. Corkins*, 21 Kan. 722; *Jones v. Turpin*, 6 Heisk. (Tenn.) 181. And see *Kutner v. Fargo*, 20 Misc. Rep. (N. Y. Supreme Ct.) 207.

Damages Should Be Commensurate to Nature of Offense. — In the case of *Burkett v. Lanata*, 15 La. Ann. 337, the court said: "Exemplary damages should, nevertheless, be commensurate to the nature of the offense, having due regard to the standing of the parties; and when extravagant damages are allowed they will be reduced to their proper standard." And see *Fitzgerald v. Boulat*, 13 La. Ann. 116;

McGary v. Lafayette, 4 La. Ann. 440. See also the case of *Jones v. Turpin*, 6 Heisk. (Tenn.) 181, where it was held that a charge to the jury, "you may give what is called vindictive damages, that is, such damages as will satisfy the highly excited feelings of the party injured," was erroneous, and that while the jury may give vindictive damages, such damages are not to be measured by the "highly excited feelings" of the plaintiff, but should be such as a reflecting and dispassionate jury, investigating and weighing the charge out of which the civil suit grows and its attending circumstances, may conclude are proper and right.

5. *Houston, etc., R. Co. v. Nichols*, (Tex. 1882) 9 Am. & Eng. R. Cas. 361; *Mobile, etc., R. Co. v. Ashcraft*, 48 Ala. 15; *International, etc., R. Co. v. Telephone, etc., Co.*, 69 Tex. 277; *Willis v. McNeill*, 57 Tex. 465.

6. Verdicts where the exemplary damages bore to the compensatory damages the proportion of fifty to one, *International, etc., R. Co. v. Telephone, etc., Co.*, 69 Tex. 277; twelve to one, *Willis v. McNeill*, 57 Tex. 465; and four to one, *Houston, etc., R. Co. v. Nichols*, (Tex. 1882) 9 Am. & Eng. R. Cas. 361, respectively, have been held excessive.

7. Excessive or Inadequate Damages — When Finding of Jury Disturbed — United States. — *Walker v. Smith*, 1 Wash. (U. S.) 152.

District of Columbia. — *Flannery v. Baltimore, etc., R. Co.*, 4 Mackey (D. C.) 111.

Georgia. — *Bryan v. Acee*, 27 Ga. 87.

Illinois. — *McNamara v. King*, 7 Ill. 432; *Cutler v. Smith*, 57 Ill. 252; *Farwell v. Warren*, 70 Ill. 28.

Iowa. — *Collins v. Council Bluffs*, 35 Iowa 432.

Maine. — *Goddard v. Grand Trunk R. Co.*, 57 Me. 224, 2 Am. Rep. 39.

Mississippi. — *Bell v. Morrison*, 27 Miss. 68.

Missouri. — *Goetz v. Ambs*, 27 Mo. 28.

New York. — *Kiff v. Youmans*, 20 Hun (N. Y.) 123, 86 N. Y. 324, 40 Am. Rep. 543.

Tennessee. — *Goodall v. Thurman*, 1 Head (Tenn.) 209.

Texas. — *Graham v. Roder*, 5 Tex. 141; *Willis v. McNeill*, 57 Tex. 465; *Mayer v. Duke*, 72 Tex. 445.

gross error, or unless the jury have assessed exemplary damages in a case where the evidence fails to show any one of the requisite elements to the recovery of such damages.¹

It Is Not Sufficient that the amount of damages assessed is greater or less than in the opinion of the court should have been given,² or than the judge would have consented to if on the jury.³ It should rather appear that the feelings of the jurors had been so excited, or their passions so inflamed, as to mislead their judgments and induce them to give a verdict so excessive in amount as that their own calm and deliberate reflection would not approve it.⁴

It May, However, Be Stated as a Brief General Rule on this subject that a verdict should be set aside to prevent injustice⁵ or if an abuse of discretion on the part of the jury is made to appear.⁶

6. Elements of Recovery — Costs and Expenses of Litigation — a. IN GENERAL — CONFLICT OF CASES. — Whether or not costs and expenses of litigation, beyond the regularly taxed costs, are recoverable, where the case involves the rule of punitive damages, is a question upon which there is some contrariety of opinion.

b. AFFIRMATIVE DOCTRINE. — According to some authorities expenses of litigation in excess of the regular costs, including attorney's fees, are recover-

Virginia. — *Borland v. Barrett*, 76 Va. 128, 44 Am. Rep. 152.

Wisconsin. — *Rogers v. Henry*, 32 Wis. 327.

Where Amount of Verdict Outrageous and Manifestly Excessive. — According to the language of some cases, to justify the court in setting aside a verdict on the ground of excessiveness the damages ought to appear outrageous, or manifestly to exceed the injury, and to be such as all mankind would at once pronounce unreasonable and as to induce the court to believe that the jury must have acted from prejudice or partiality or have been influenced by some improper considerations.* *Thompson, C. J., in M'Connell v. Hampton*, 12 Johns. (N. Y.) 234.

It May Be Stated as a General Rule that whenever a verdict appears to the court to be largely in excess of a sum which would include compensation to the plaintiff for all his damages, those not susceptible of pecuniary measurement as well as those which may be so estimated, and a just punishment to the defendant, it will be set aside. *McCarthy v. Niskern*, 22 Minn. 90.

Doctrine that There Must Be "Unreasonable" Passion. — In the case of *Bump v. Betts*, 23 Wend. (N. Y.) 85, which was an action for damages for the malicious suing out of an attachment on a judgment already paid, the court refused to set aside the verdict for excessiveness because, it was said, though the damages were undoubtedly large, "it is impossible for us to pronounce that they are so disproportionate as, under the circumstances of the case, to indicate corruption or unreasonable passion in the jury. That the jury should have been somewhat transported with indignation by the view which we think they had a right to take of this matter, is highly probable; a consequence which the defendants could hardly escape, were we to send the cause down and order it retried."

Not Necessary that Jury Should Have Acted Corruptly. — It is not necessary, in order to warrant the setting aside of a verdict, that the

court should believe that the jury acted corruptly. *Thompson, C. J., in M'Connell v. Hampton*, 12 Johns. (N. Y.) 234.

1. Rule Stated by Mr. Justice Story. — In the case of *Whipple v. Cumberland Mfg. Co.*, 2 Story (U. S.) 661, Mr. Justice Story said that a verdict should not be set aside unless the court can clearly see that the jury has committed some gross and palpable error, or has acted under some improper bias, influence, or prejudice, or has totally mistaken the rules of law by which the damages are to be regulated; that is, unless the verdict is so excessive or outrageous, with reference to all the circumstances of the case, as to demonstrate that the jurors have acted against the rules of law, or have suffered their passions, their prejudices, or their perverse disregard of justice to mislead them, it should not be disturbed.

Perverseness and Gross Error. — A new trial will not be granted on the ground that the damages are excessive unless the court is satisfied that the verdict is the result of perverseness and gross error, and sufficient to show that the jury acted under the influence of improper motives or misconception. *Ously v. Hardin*, 23 Ill. 403.

Exemplary Damages Allowed Where None Recoverable. — Where it appears that the amount of the verdict could not have been arrived at but by the allowance of exemplary damages when the circumstances do not justify such damages, the verdict will not be permitted to stand. *Eisenhart v. Ordean*, 3 Colo. App. 102.

2. McNamara v. King, 7 Ill. 432.

Even Though the Court Should Be of the Opinion that the Verdict Is Greater, Even Much Greater, than it would have awarded, the judgment of the court should not be substituted for that of the jury. *Goddard v. Grand Trunk R. Co.*, 57 Me. 224, 2 Am. Rep. 39.

3. Silvery v. Dominion Tel. Co., 14 Nova Scotia 17.

4. Thompson, C. J., in M'Connell v. Hampton, 12 Johns. (N. Y.) 234.

5. McCarthy v. Niskern, 22 Minn. 90.

6. Schneider v. Hosier, 21 Ohio St. 98.

able where exemplary damages may be given.¹

c. REQUISITES TO RECOVERY — (1) *Necessity for Actual Payment.* — The cases maintaining the affirmative of the question do not, it is believed, require that the attorney's fee or other expenses shall have actually been paid, provided the party has rendered himself liable to pay them.²

(2) *Reasonableness.* — Some of the authorities in stating the rule refer with approval to the recovery of such fees as are reasonable and necessary, thereby implying that these circumstances are requisite to recovery.³

(3) *Evidence of Amount.* — It has been held unnecessary and unusual, though not erroneous, to introduce evidence of the amount of the expense of litigation actually incurred by the plaintiff.⁴ Some cases maintain the rather anomalous doctrine that though expenses of litigation beyond the taxed costs are recoverable only when elements exist warranting an assessment of punitive damages, yet damages for these particular items will be regarded as compensatory in nature.⁵ Under these circumstances it might be supposed that some evidence of amount would be deemed proper.⁶ But it has been held, on the contrary, that such evidence is even inadmissible, as tending to the introduction of collateral issues⁷ — a position, however, as has been seen, that is not free from conflict.⁸

(4) *Discretion of Jury.* — The allowance of damages for attorney's fees and expenses of litigation in excess of the taxed costs has been held to be a matter of discretion with the jury.⁹

1. Rule Allowing Recovery for Expenses of Litigation, etc. — *England.* — *Sandback v. Thomas*, 1 Stark. 306, 2 E. C. L. 121; *Haddan v. Mills*, 4 C. & P. 486, 19 E. C. L. 487.

United States. — Mr. Justice Story in *Boston Mfg. Co. v. Fiske*, 2 Mason (U. S.) 119. Compare *Arcambel v. Wiseman*, 3 Dall. (U. S.) 306.

Alabama. — *Marshall v. Betner*, 17 Ala. 832. And see *Trammell v. Ramage*, 97 Ala. 666.

Connecticut. — *Linsley v. Bushnell*, 15 Conn. 235, 38 Am. Dec. 79; *Ives v. Carter*, 24 Conn. 392; *Dibble v. Morris*, 26 Conn. 416; *Platt v. Brown*, 30 Conn. 336; *Welch v. Durand*, 36 Conn. 182, 4 Am. Rep. 55; *Dalton v. Beers*, 38 Conn. 529; *Bennett v. Gibbons*, 55 Conn. 450; *Wynne v. Parsons*, 57 Conn. 73. And see *Beecher v. Derby Bridge, etc., Co.*, 24 Conn. 491.

Indiana. — *Ziegler v. Powell*, 54 Ind. 174.

Kansas. — *Titus v. Corkins*, 21 Kan. 722; *Winstead v. Hulme*, 32 Kan. 568. And see *Tyler v. Safford*, 31 Kan. 608.

Louisiana. — See *Eatman v. New Orleans Pac. R. Co.*, 35 La. Ann. 1018; *Massie v. Baily*, 33 La. Ann. 485.

Mississippi. — *New Orleans, etc., R. Co. v. Allbritton*, 38 Miss. 242, 75 Am. Dec. 98.

Ohio. — *Finney v. Smith*, 31 Ohio St. 529, 27 Am. Rep. 524; *Stevenson v. Morris*, 37 Ohio St. 10, 41 Am. Rep. 481; *Peckham Iron Co. v. Harper*, 41 Ohio St. 100; *Roberts v. Mason*, 10 Ohio St. 278.

Texas. — See *International, etc., R. Co. v. Telephone, etc., Co.*, 69 Tex. 277.

Rule Stated — Attorney's Fees. — In cases where malice is the gist of the action, and vindictive damages are recoverable, fees paid to counsel in defending against the wrongful act of the defendant, if reasonable and necessarily incurred, may be proved and considered by the jury in the assessment of damages. *Marshall v. Betner*, 17 Ala. 832.

In Cases of Wanton and Malicious Injury the

jury is allowed to take into consideration the expenses of the suit in which redress is sought as a natural and proximate consequence of the injury; for as the law provides no definite rule for damages in such a case, the jury is at liberty in the exercise of its discretion, to consider the actual extent of the injury. *St. Peter's Church v. Beach*, 26 Conn. 365.

Statutory Rule. — By statute in *Georgia* (Code 1895, § 3796), it is provided that "if the defendant has acted in bad faith, or has been stubbornly litigious, or has caused the plaintiff unnecessary trouble and expense," the jury may allow the expenses of litigation as part of the damages. See *Guernsey v. Shellman*, 59 Ga. 797; *Mosely v. Sanders*, 76 Ga. 293. Such damages, it has been held, are not punitive or vindictive, under the code, but "stand by themselves." *Mosely v. Sanders*, 76 Ga. 293.

2. *Ziegler v. Powell*, 54 Ind. 174.

3. *Marshall v. Betner*, 17 Ala. 832; *New Orleans, etc., R. Co. v. Allbritton*, 38 Miss. 242, 75 Am. Dec. 98.

4. *Titus v. Corkins*, 21 Kan. 722.

No Evidence of Amount. — In the case just cited it was held that where the circumstances warrant exemplary damages the jury may, in estimating such damages, take into consideration the probable and reasonable expenses of litigation, although there may be no testimony as to the amount thereof.

5. *Roberts v. Mason*, 10 Ohio St. 278; *Finney v. Smith*, 31 Ohio St. 529, 27 Am. Rep. 524; *Stevenson v. Morris*, 37 Ohio St. 10, 41 Am. Rep. 481; *Peckham Iron Co. v. Harper*, 41 Ohio St. 100.

6. *Parkhurst v. Masteller*, 57 Iowa 474; *Titus v. Corkins*, 21 Kan. 722.

7. *Stevenson v. Morris*, 37 Ohio St. 10, 41 Am. Rep. 481.

8. See *Wynne v. Parsons*, 57 Conn. 73; *Titus v. Corkins*, 21 Kan. 722.

9. *Stevenson v. Morris*, 37 Ohio St. 10, 41 Am. Rep. 481.

d. NEGATIVE RULE. — Other cases, however, declare that such elements of recovery beyond the taxed costs cannot be considered,¹ on the ground that a different rule would open the door for the admission of various expenses and losses incidental to the prosecution of rights in courts of justice, inaugurating a radical departure from the principles of the common law.²

EXEMPLIFICATION. (See also the titles EXECUTION AND PROOF OF DOCUMENTS, vol. II, p. 583; NOTARY PUBLIC; SECONDARY EVIDENCE. And see ATTESTATION, vol. 3, p. 273; AUTHENTICATION, vol. 3, p. 516; COPY, vol. 7, p. 506; EXAMINE, vol. II, p. 553. As to the exemplification of foreign laws, see the title FOREIGN LAWS. As to the exemplification of deeds or judgments of another state, see the titles JUDGMENTS AND DECREES; RECORDS. As to the exemplification of records, see the title RECORDS. As to the exemplification of private statutes and statutes of another state, see the title STATUTES. As to the authentication of deeds, see the title ACKNOWLEDGMENTS, vol. I, p. 483.) — An exemplification is a copy of the record under the great seal, or under the seal³ of the particular court where the record remains.⁴ It is a perfect copy of a record or office book so far as relates to the matter in question.⁵ An exemplification under the great seal was obtained at the common law by removing the record into the Court of Chancery by a certiorari, where the great seal was kept, and a literal transcript of the record was then transmitted by mittimus. Such an exemplification was sufficient, even on an issue *nul tiel record*; but an exemplification under the seal of a particular court would not be sufficient on such an issue in *England*. In the *United States*, however, the great seal being in possession of the secretary of state, a different course prevails, and an exemplification under the seal of a particular court is sufficient on an issue *nul tiel record*.⁶ It may be demanded as of common right for any use the party may think fit to make of it; and after a demand of it has been made, it has been said that the proper officer might be punished for refusing to make it out.⁷ An exemplification of letters patent, granted by the United States or a state, is conclusive evidence of the grant of authority.⁸

EXEMPT — EXEMPTION. (See also the titles EXEMPTIONS FROM EXECUTION, *post*; EXEMPTIONS FROM TAXATION, *post*.) — An exemption is defined to be an immunity or freedom from any service, charge, burden, taxes, etc., to

1. Rule Denying Recovery of Expenses of Litigation, etc. — *Grace v. Morgan*, 2 Bing. N. Cas. 534, 29 E. C. L. 409; *Sinclair v. Eldred*, 4 Taunt. 10; *Day v. Woodworth*, 13 How. (U. S.) 369; *Guernsey v. Shellman*, 59 Ga. 797; *Harris v. Finberg*, 46 Tex. 79; *Earl v. Tupper*, 45 Vt. 275; *Hoadley v. Watson*, 45 Vt. 289, 12 Am. Rep. 197. And see *Patton v. Garrett*, 37 Ark. 605.

Rule Stated. — As punitive damages are awarded as a punishment to the defendant, for his malice, wantonness, or oppression, this cannot be measured by the expenses of the plaintiff in prosecuting his suit, nor should their amount be taken as a necessary element thereof. *Day v. Woodworth*, 13 How. (U. S.) 369.

2. *Harris v. Finberg*, 46 Tex. 79. In this case, however, which was an action for wrongful attachment, it was intimated that the plaintiff might without impropriety be allowed his attorney's fee for dissolution of the attachment, but not in the prosecution of his claim for damages for the wrongful suing out thereof.

3. Seal. (See also the title SEAL.) — The seal

of the court may be affixed by merely making the impression of the seal on the paper; the use of wax or a paper wafer is not essential. *Hunt v. Hunt*, (N. J. 1887) 9 Atl. Rep. 600.

And it would seem that the seal must be the seal of a court which is recognized by the county where the *exemplification* is sought to be introduced. *Schaben's Case*, 6 Ct. of Cl. 230.

4. *Greenl. on Ev.*, § 501.

5. *Bouv. Law Dict.*; *Dickinson v. Chesapeake, etc.*, R. Co., 7 W. Va. 390, 413.

6. *Greenl. on Ev.*, § 501 *et seq.*; *Vail v. Smith*, 4 Cow. (N. Y.) 71; *Pepoon v. Jenkins*, 2 Johns. Cas. (N. Y.) 119.

7. *Rex v. Brangan*, 1 Leach C. C. 27; *Stone v. Crocker*, 24 Pick. (Mass.) 88. See also *The People v. Poyllon*, 2 Cai. (N. Y.) 202.

8. *U. S. v. Arredondo*, 6 Pet. (U. S.) 728. See generally the titles PATENTS; PUBLIC LANDS; STATE LANDS.

And such an *exemplification* is admissible in evidence though the patent be signed only with the initials of the President and the commissioner of patents. *Briggs v. Holmstrom*, 72 Mo. 337.

which others are subject.¹ An exempt is one not liable to service.²

1. Koenig *v.* Omaha, etc., R. Co., 3 Neb. 380. See also Long *v.* Converse, 91 U. S. 112.

"The word *exempt* may be taken to mean precluded from being chargeable." Rex *v.* Leeds, etc., Canal Co., 5 East 325.

A Dispensation and an Exemption differ in sound only; for a dispensation is properly to license a person to do a thing which he can do, but is by law penally prohibited from doing. An exemption is properly to license a man or men not to do a thing which they are penally by a law precepted to do. Thomas *v.* Sorrell, Vaughan 349.

Deduct and Exempt.—In State *v.* Eureka Consol. Min. Co., 8 Nev. 23, the court said: 'According to Webster, 'to deduct' may mean the same thing as 'to exempt;' and whatever is deducted under the provisions of the statute is *ipso facto* exempted or freed from the burden of taxation."

Exemption of Jurors—A Privilege and Not a Disqualification. (See also the title JURY AND JURY TRIAL.)—A statute exempted persons over seventy from serving as jurors. It was held that the statute was to be understood as granting a privilege, and not creating a disability as to persons over seventy years. Green *v.* State, 59 Md. 128. See, to the same effect, Breeding *v.* State, 11 Tex. 258; State *v.* Quimby, 51 Me. 395; State *v.* Wright, 53 Me. 328; Fellow's Case, 5 Me. 333.

So in People *v.* Rawn, 90 Mich. 379, in construing a similar statute, the court held that as exemption meant an immunity or privilege, and that a person exempt from jury service was not thereby disqualified. See also Glassinger *v.* State, 24 Ohio St. 206.

Rights and Privileges—Exemption.—In Wilson *v.* Gaines, 9 Baxt. (Tenn.) 546, it was held that the word *exemption* was not comprehended within the words "rights and privileges," as applied to a corporation claiming a right of exemption from taxation by virtue of a section of its charter conferring upon it the rights and privileges of a like corporation, which latter corporation was, by express terms of its charter, exempt from taxation.

But in Louisville, etc., R. Co. *v.* Gaines, 3 Fed. Rep. 279, it was held that where one railroad company was incorporated with the rights, powers, and privileges of a pre-existing company, the new company acquired an exemption from taxation guaranteed to the former, as the word "privilege" includes in its ordinary definition an exemption or immunity from taxation. See also Humphrey *v.* Pegues, 16 Wall. (U. S.) 244; Memphis, etc., R. Co. *v.* Gaines, 97 U. S. 697, 711; and see the title EXEMPTIONS (FROM TAXATION), *post*.

In State *v.* Betts, 24 N. J. L. 555, the court said: "The term 'privilege' includes in its ordinary definition an exemption from such burdens as others are subjected to, as the privilege of being exempt from arrest, or from taxation." See also PRIVILEGE.

2. Exempt—Military Law.—In State *ex rel.* Dawson, 39 Ala. 379, it was said: "An exempt is one who is 'free from any charge, burden, or duty;' 'not liable to,' etc. A 'detail,' on the contrary, is one who belongs to the army, but is only detached or set apart, for the time, to some particular duty or service, and who is liable at any time to be recalled to his place in the ranks."

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CROSS-REFERENCES.

For matters of PROCEDURE, see the title HOMESTEADS AND EXEMPTIONS, 10 ENCYCLOPÆDIA OF PLEADING AND PRACTICE, 55.

For other matters of SUBSTANTIVE LAW and EVIDENCE related to this subject, see the following titles in this work: ATTACHMENT, vol. 3, p. 181; EXECUTIONS, vol. 11, p. 604; GARNISHMENT; HOMESTEAD; IMPAIRMENT OF OBLIGATION OF CONTRACTS; INJUNCTIONS; SHERIFFS, MARSHALS, AND CONSTABLES; STATUTES.

I. SCOPE OF TITLE. — By exemption, as the term is used in this title, is meant the exemption of personal property from seizure and sale on execution, attachment, or other process, and the exemption of debts from garnishment or trustee process. The title covers exemptions at common law as well as under the statutes and constitutions of the different states.

Homestead Exemptions, as well as the exemption of real property not strictly a homestead, will be treated in another part of this work.¹ Many of the rules stated in this article and many of the cases cited are applicable to homestead exemptions, and many of the cases that will be cited in dealing with homestead exemptions are applicable here.²

II. EXEMPTIONS AT COMMON LAW — 1. No Exemption as a General Rule. — At common law, with very few exceptions, all a debtor's personal property was liable to be seized and sold on execution to pay his debts. He could claim none of it as exempt, though the effect might be to deprive him and his family of the very necessities of life.³ Further than this, his body might be taken on a writ of *capias ad satisfaciendum*, and he could be held in prison until payment of the debt, though it might be for the remainder of his life.⁴

2. Exceptions at Common Law. — The common law recognized no exception to this rule out of any consideration for the debtor or his family, but there were a few exceptions based on grounds of public policy.

a. PROPERTY ON THE PERSON OR IN ACTUAL USE. — In *England*, at common law, it was well settled that property on the person of a man, or in his actual manual possession and use, as a watch or money in his pocket, clothing on his back, tools and implements in his hands, or a horse while being ridden, could not be distrained for rent.⁵ And there are cases both in *England* and in the *United States* in which this doctrine has been extended so as to exempt such property from seizure on other process, including execution and attachment.⁶

1. Homestead Exemptions. — See the title **HOMESTEAD**.

2. Homestead and Chattel Exemptions Are of the Same Nature. — It was said by the *South Carolina* court: "The right of homestead exemption, and that to the exemption of personal property of the prescribed kinds, must be regarded as of the same nature and attended by the same general incidents, as they are both created by the same instrument for the accomplishment of the same purpose, and only differ in the respect that one relates to real and the other to personal property, which is unimportant in its bearing on the question of their nature." *Pender v. Lancaster*, 14 S. Car. 25, 37 Am. Rep. 720.

Statutes Including Chattels in "Homestead" Exemption. — In some states the statutes exempt a certain amount of property and allow the exemption to be claimed in either real or personal property or both, and whether it is claimed in the one or the other, the exemption is called a "homestead" exemption. Such is the case, for instance, in *Georgia*, *South Carolina*, and *Virginia*. The questions arising under these statutes, whether the exemption is claimed in real or personal property, will be dealt with under the title **HOMESTEAD**.

3. No Exemption, as a Rule, at Common Law. — *Green v. Palmer*, 15 Cal. 411, 76 Am. Dec. 492; *Richardson v. Buswell*, 10 Met. (Mass.) 506, 43 Am. Dec. 450; *Rue v. Alter*, 5 Den. (N. Y.) 119; *Dains v. Prosser*, 32 Barb. (N. Y.) 299; *State v. Dilliard*, 3 Ired. L. (25 N. Car.) 102, 38 Am. Dec. 708; *Bell v. Douglass*, 1 Yerg. (Tenn.) 397; *Hawkins v. Pearce*, 11 Humph.

(Tenn.) 44. See the title **EXECUTIONS**, vol. II, p. 604.

4. See the title **IMPRISONMENT FOR DEBT AND IN CIVIL ACTIONS**.

5. Property on the Person or in Manual Use — Distress for Rent. — It was said by Lord Coke that a horse which is being ridden by a man or woman, or an axe in a man's hand cutting wood, and the like, are for the time privileged, and cannot be distrained. Co. Litt. 47a. And see *Gorton v. Falkner*, 4 T. R. 565; *Storey v. Robinson*, 6 T. R. 139; *Simpson v. Hartopp*, Willes 512; *Fenton v. Logan*, 9 Bing. 676, 23 E. C. L. 416; *Read v. Burley*, Cro. Eliz. 549, 596; *Sunbolf v. Alford*, 3 M. & W. 253; *Abercrombie v. Alderson*, 9 Ala. 981; *Harris v. Canada Permanent Loan, etc., Co.*, 17 Can. L. T. 424. See also the title **DISTRESS**, vol. 9, p. 642.

6. Execution and Other Process. — In *Field v. Adames*, 12 Ad. & El. 649, 40 E. C. L. 147, it was held that a horse, cart, and other chattels could not be taken damage feasant, while they were in the actual possession and under the personal care of the owner, and were being then used by him. And in *Sunbolf v. Alford*, 3 M. & W. 248, both Lord Abinger and Parke, B., said that a man's clothes cannot be taken off his back in execution of a *fieri facias*.

In *Cooke v. Gibbs*, 3 Mass. 193, it was said by Parsons, C. J., that "a *fieri facias* at common law is issued against the goods and chattels of the debtor without any exception; but if the sheriff were to strip the debtor's wearing apparel from his body, he would be a tres-

The Reason for the doctrine is that a seizure under such circumstances would tend to provoke a breach of the peace.¹

Property in the Hands of a Person. — In several cases it has been held that this doctrine does not apply to property merely in the hands of a person, if not actually on his person, like a watch or money in his pocket, or a coat on his back;² but the *Massachusetts* court has decided otherwise.³

Decision Repudiating the Doctrine. — In *North Carolina* it has been held that the doctrine of the common law that property on the person of a debtor cannot be distrained for rent does not apply at all to seizure on execution.⁴

b. WEARING APPAREL NOT ON THE PERSON. — In a *New York* case it was expressly held that the necessary wearing apparel of every debtor is exempt at common law, though it may not at the time be on his person.⁵ This view is sustained by dicta to some extent,⁶ and there seems to have been no decision to the contrary.⁷

c. PROPERTY OF STATE, COUNTY, OR MUNICIPAL CORPORATION. — The common law does not permit the seizure on execution of the property of the

passer, for such apparel, when worn, is not liable to the execution."

In *Mack v. Parks*, 8 Gray (Mass.) 517, 69 Am. Dec. 267, an officer was held liable for attaching a watch upon a debtor's person.

In *Maxham v. Day*, 16 Gray (Mass.) 213, 77 Am. Dec. 409, it was held that a diamond pin could not be taken on a writ of replevin from the person of the owner, without his consent, even if worn by him for the sole purpose of keeping it beyond the reach of legal process.

And see *Bumpus v. Maynard*, 38 Barb. (N. Y.) 626; *Frazier v. Barnum*, 19 N. J. Eq. 316, 97 Am. Dec. 666.

Tools in Use by Servants. — In *Alabama* it was held, with respect to tools, that if the exemption is allowable in the case of an execution, it must be confined to the case of a debtor who uses the tools himself in his trade, and does not extend to one who employs others to work for him. *Abercrombie v. Alderson*, 9 Ala. 981.

1. Reason of Doctrine. — *Mack v. Parks*, 8 Gray (Mass.) 517, 69 Am. Dec. 267.

2. Cases Limiting the Doctrine to Property Actually on the Person and Not Merely in the Hand. — In *Green v. Palmer*, 15 Cal. 411, 76 Am. Dec. 492, it was held that an officer had a right to seize on execution, by force, a bag of gold coin which the debtor had in his hand. "The coin," said Field, C. J., "was contained in a bag, which was held by the plaintiff in his hand, and from its seizure thus situated the plaintiff could not claim any exemption, as he might perhaps do in reference to money upon his person. Thus situated, it was like a horse held by its bridle, subject to seizure under execution against its owner." See also *Bell v. Douglass*, 1 Yerg. (Tenn.) 397, where it was held that the tools of a mechanic may be levied on by virtue of an execution while he is using them. No cases are cited, however, nor is any reason given for the decision.

3. Decision to the Contrary. — In *Mack v. Parks*, 8 Gray (Mass.) 517, 69 Am. Dec. 267, the defendant, an officer, who had a writ against the plaintiff, got the latter's watch in his hand for the purpose of comparing its weight with that of his own. While so holding it, he told the plaintiff that he had the writ and must attach the watch, and on the plain-

tiff's refusing to take it off, took it by breaking the silk guard by which it was attached to the plaintiff's person. It was held that he was a trespasser.

4. Case Entirely Repudiating the Doctrine as Applied to Execution. — *State v. Dilliard*, 3 Ired. L. (25 N. Car.) 102, 38 Am. Dec. 708.

5. Necessary Wearing Apparel Not on the Person Exempt. — *Bumpus v. Maynard*, 38 Barb. (N. Y.) 626. In this case the debtor was not within the statute of exemption, because he was not a man of family, but the Supreme Court (Bacon, Allen, Mullin, and Morgan, JJ.) held that he could claim his necessary wearing apparel as exempt at common law and independently of the statute. Mullin, J., referred to the doctrine of the common law exempting wearing apparel in actual use on the person, and then went further and reasoned that the exemption extends to necessary wearing apparel not at the time on the person.

6. Dicta to the Same Effect. — See also Com. Dig., title Process, D 6, where it is said that an attachment against a party for disobedience of process, or in chancery formerly, when an attachment might go against a party who neglected to appear after service of subpoena, could not be levied on his apparel or on the horse which he rode, if he had other goods.

It was held by Lord Holt, in *Hardistey v. Barney*, Comb. 356, that upon fieri facias the sheriff may take anything but wearing apparel; "nay, if the party hath two gowns, he may take one of them."

In 2 Cowen's Treatise 521, Judge Cowen gave as his opinion that the exemption of wearing apparel existed at common law, and said that it still existed for aught he had seen to the contrary.

See also *Hendricks v. Lewis*, R. M. Charl. (Ga.) 105.

7. Decisions Apparently to the Contrary. — There are cases in which necessary wearing apparel has been held not to be exempt from execution, but they were decided on the ground that the debtor did not come within the statutes of exemption, and no question was raised as to the exemption at common law. See *Bowne v. Witt*, 19 Wend. (N. Y.) 475. And see *infra*, this title, *Property Exempt under the Statutes — Wearing Apparel, Cloth, etc.*

state,¹ or of a county,² or of a municipal corporation, like a city, town, or school district,³ if it is used for public purposes, and according to some of the cases, whether it is used for public purposes or not.⁴ This rule is changed by statutes in some jurisdictions, while in others it is expressly declared by statute.

d. PROPERTY OF QUASI-PUBLIC CORPORATION. — On grounds of public policy, the law does not permit the seizure and sale on execution of the property of a *quasi*-public corporation, like a railroad company, or a water or gas company, that is necessary to enable it to perform its duties to the public.⁵ This rule has been changed to some extent by statute.

e. PROPERTY IN CUSTODIA LEGIS. — At common law creditors cannot seize on execution or attachment property that is *in custodia legis*, as property held by a master in chancery, or by a receiver, or by a sheriff or other officer acting under direction of the court in a legal proceeding, or under valid process from a court.⁶

f. PROPERTY IN HANDS OF PUBLIC OFFICER. — Nor can property be so taken while it is in the hands of a public officer, acting in his official capacity.⁷

g. COMPENSATION OF PUBLIC OFFICERS AND EMPLOYEES. — It is well settled at common law that the salaries, fees, or other compensation due public officers or employees cannot be reached and subjected by their creditors in attachment or garnishment.⁸ There are a few decisions to the contrary, but

1. *Property of the State.* — *Mayrhofer v. Board of Education*, 89 Cal. 110, 23 Am. St. Rep. 451; *Carter v. State*, 42 La. Ann. 927, 21 Am. St. Rep. 404. See the title STATES.

2. *Property of County.* — *Emery County v. Burren*, 14 Utah 328, *Gilman v. Contra Costa County*, 8 Cal. 52, 68 Am. Dec. 290; *Police Jury v. Michel*, 4 La. Ann. 84. See the title COUNTIES, vol. 7, p. 964.

3. *Property of Municipal Corporation.* — *Curry v. Savannah*, 64 Ga. 290, 37 Am. Rep. 74; *Darling v. Baltimore*, 51 Md. 1; *Hitchcock v. Galveston Wharf Co.*, 50 Fed. Rep. 263, *Murphree v. Mobile*, 104 Ala. 332; *Ellis v. Pratt City*, 111 Ala. 629; *State v. Tiedemann*, 69 Mo. 306, 33 Am. Rep. 498. See the title MUNICIPAL CORPORATIONS.

4. See the cases above cited.

5. *Property of Quasi-public Corporation.* — See the title CORPORATIONS (PRIVATE), vol. 7, p. 854.

6. *Property in Custody of the Law.* — *Kingman First Nat. Bank v. Gerson*, 50 Kan. 582, (Kan. 1893) 32 Pac. Rep. 366; *Brady v. Johnson*, 75 Md. 445; *Grand Island Banking Co. v. Costello*, 45 Neb. 119; *Mantua Hall, etc., Co. v. Brookes*, 4 Pa. Dist. Rep. 5; *Ex p. Piedmont Mfg. Co.*, 34 S. Car. 554; *City Nat. Bank v. Merchants Nat. Bank*, 7 Tex. Civ. App. 584; *Ash v. Akin*, 2 Tex. Civ. App. 83. See, on this subject, the titles ATTACHMENT, vol. 3, p. 212; DISSEIZURE, vol. 9, p. 646; EXECUTIONS, vol. 11, p. 640; GARNISHMENT.

7. *Property in Hands of Public Officer.* — *Connolly v. Thurber-Whyland Co.*, 92 Ga. 651, citing 8 AM. AND ENG. ENCYC. OF LAW (1st ed.) 1132-1135; *Anthanissen v. Brunswick, etc., Steam Towing, etc., Co.*, 92 Ga. 409.

In *Connolly v. Thurber-Whyland Co.*, 92 Ga. 651 it was attempted to garnish a chief of police for money that came into his hands in his official capacity, and it was held that this could not be done. See the titles EXECUTIONS, vol. 11, p. 604; GARNISHMENT; MUNICIPAL CORPORATION.

8. *Compensation Due Public Officers and Employees Exempt at Common Law* — *Alabama.* —

Mobile v. Rowland, 26 Ala. 498; *Pruitt v. Armstrong*, 56 Ala. 306.

Colorado. — *Lewis v. Denver*, 9 Colo. App. 328; *Troy Laundry, etc., Co. v. Denver*, (Colo. App. 1898) 53 Pac. Rep. 256.

Georgia. — *Hightower v. Slaton*, 54 Ga. 108, 21 Am. Rep. 273; *McLellan v. Young*, 54 Ga. 399, 21 Am. Rep. 276; *Born v. Williams*, 81 Ga. 796.

Indiana. — *Wallace v. Lawyer*, 54 Ind. 501, 23 Am. Rep. 661.

Kentucky. — *Allen v. Russell*, 78 Ky. 105; *Tracy v. Hornbuckle*, 8 Bush (Ky.) 336; *Heilbronner v. Posey*, (Ky. 1898) 45 S. W. Rep. 505. The two later decisions, it would seem, in effect overruled *Speed v. Brown* 10 B Mon. (Ky.) 109, and *Rodman v. Musselman*, 12 Bush (Ky.) 357, 23 Am. Rep. 724, holding a contrary rule as to municipal officers, though such cases were not expressly referred to.

Louisiana. — *Chaudet v. De Jong*, 16 La. Ann. 399.

Maryland. — *Baltimore v. Root*, 8 Md. 95; *Keyser v. Rice*, 47 Md. 203, 28 Am. Rep. 448.

Michigan. — *School Dist. No. 4 v. Gage*, 39 Mich. 484, 33 Am. Rep. 421.

Minnesota. — *Roeller v. Ames*, 33 Minn. 132; *Sandwich Mfg. Co. v. Krake*, 66 Minn. 110; *Sexton v. Brown* (Minn. 1898) 75 N. W. Rep. 600; *Orme v. Kingsley*, (Minn. 1898) 75 N. W. Rep. 1123.

Missouri. — *Hawthorn v. St. Louis*, 11 Mo. 59, 47 Am. Dec. 141.

New York. — See *Waldman v. O'Donnell*, 57 How. Pr. (N. Y. C. Pl.) 215.

Pennsylvania. — *Rundle v. Scheetz*, 2 Miles (Pa.) 330; *Simons v. Whartenably*, 2 Clark (Pa.) 438, 4 Pa. L. J. 226; *Hutchinson v. Gormley*, 48 Pa. St. 270.

Tennessee. — *State Bank v. Dibrell* 3 Sneed (Tenn.) 379; *Memphis v. Laski*, 9 Heisk. (Tenn.) 511, 24 Am. Rep. 327; *Oliver v. Athey*, 11 Lea (Tenn.) 149; *Baird v. Rogers*, 95 Tenn. 492.

Texas. — *Sanger v. Waco*, 15 Tex. Civ. App. 424.

the doctrine is established by such an overwhelming weight of authority that they are entitled to little or no weight.¹

Reason for the Doctrine. — This exemption is not based upon any idea of benefit to the debtor, but upon the ground that to allow attachment or garnishment in such cases is against public policy as tending to injure the public service.²

Particular Officers. — This rule is not limited to any particular kind or class of public officers or servants, but extends to all, whether they be state officers,³ or officers of a county⁴ or of a municipal corporation like a city or town.⁵ By the better opinion it applies to public-school officers and teachers as well as to others.⁶ And it has been applied to the fees due jurors.⁷

Statutes subjecting municipal corporations or state or municipal officers to the process of garnishment do not change this rule, but apply only to money due to private individuals,⁸ for the rule is not based on the ground that municipal corporations are not subject to garnishment, but on the ground of public policy.⁹

Wisconsin. — See *Burnham v. Fond du Lac*, 15 Wis. 193.

Canada. — *Central Bank v. Ellis*, 20 Ont. App. 364; *Evans v. Hudon*, 22 L. C. Jur. 268; *Laclerc v. Caron*, 8 L. C. Rep. 287; *Fraser v. McArthur*, 12 Nova Scotia 498.

1. Decisions to the Contrary. — The contrary was held in *Speed v. Brown*, 10 B. Mon. (Ky.) 109, and *Rodman v. Musselman*, 12 Bush (Ky.) 354, 23 Am. Rep. 724, with respect to municipal officers. In the latter case it was said: "We see no sound public policy that this rule of law contravenes. The employees of the various towns and cities of this state number many thousands, and we see no reason why their wages should not be as liable to the payment of their debts as the wages of private employees. An exemption of the salaries of city and town employees from coercive appropriation to the payment of their debts would result in a denial of credit to them, and consequently in more injury than benefit." These decisions, it seems, were in effect overruled by *Allen v. Russell*, 78 Ky. 105, holding that, on grounds of public policy, a common-school teacher's wages were not subject to attachment; and *Heilbronner v. Posey*, (Ky. 1898) 45 S. W. Rep. 505, holding the same doctrine with respect to the salary of a county superintendent of schools.

In *Adams v. Tyler*, 121 Mass. 380, as counties were by statute subject to trustee process, it was held that a county was chargeable in such process for compensation due a messenger in charge of its court house, but the doctrine exempting the salary of a public officer from garnishment was not discussed or referred to.

2. Reason for This Doctrine. — *Lewis v. Denver*, 9 Colo. App. 328. And see the other cases cited in the note preceding.

As to the Assignment of Salaries of public officers and employees, and the common-law prohibition thereof on the ground of public policy — a doctrine closely allied to that exempting the salaries of public officers and employees from garnishment, and based upon substantially the same considerations — see the title *ASSIGNMENTS*, vol. 2, p. 1033.

3. State Officers — *Treasurer.* — *State Bank v. Dibrell*, 3 Sneed (Tenn.) 379.

Gauger of Oils. — *Hutchinson v. Gormley*, 48 Pa. St. 270.

Inspector of Customs. — *Rundle v. Scheetz*, 2 Miles (Pa.) 330.

Surveyor General. — *Sexton v. Brown*, (Minn. 1898) 75 N. W. Rep. 600.

4. County Officers — *Tax Assessor.* — *Pruitt v. Armstrong*, 56 Ala. 306.

Deputy Sheriff. — *Oliver v. Athey*, 11 Lea (Tenn.) 149.

County Auditor. — *Wallace v. Lawyer*, 54 Ind. 501, 23 Am. Rep. 661.

5. City Officers Generally. — *Baltimore v. Root*, 8 Md. 95; *Lewis v. Denver*, 9 Colo. App. 328; *Troy Laundry, etc., Co. v. Denver*, (Colo. App. 1898) 53 Pac. Rep. 256; *Memphis v. Laski*, 9 Heisk. (Tenn.) 511, 24 Am. Rep. 327; *Sanger v. Waco*, 15 Tex. Civ. App. 424.

Mayor. — *Roeller v. Ames*, 33 Minn. 132.

Assessor. — *Chaudet v. De Jong*, 16 La. Ann. 399.

Marshal. — *McLellan v. Young*, 54 Ga. 399, 21 Am. Rep. 276.

Policeman. — *Mobile v. Rowland*, 26 Ala. 498. *Contra*, by statute, *Montgomery v. Van Dorn*, 41 Ala. 505.

Fireman. — *Sandwich Mfg. Co. v. Krake*, 66 Minn. 110.

Police Magistrate. — *Central Bank v. Ellis*, 20 Ont. App. 364.

Employee on City Work. — *Born v. Williams*, 81 Ga. 796.

6. Superintendent of Schools. — *Heilbronner v. Posey*, (Ky. 1898) 45 S. W. Rep. 505.

Teacher in Public School. — *Hightower v. Slaton*, 54 Ga. 108, 21 Am. Rep. 273; *Allen v. Russell*, 78 Ky. 105; *Tracy v. Hornbuckle*, 8 Bush (Ky.) 336. And see *Fraser v. McArthur*, 12 Nova Scotia 498.

In *Seymour v. Over-River School Dist.*, 53 Conn. 502, it was held, contrary to the cases cited above, that a district-school teacher was not a public officer, within the law exempting the salaries of public officers from attachment.

7. Fees of Jurors. — *Simons v. Whartenaby*, 2 Clark (Pa.) 438, 4 Pa. L. J. 226.

8. Statutes Subjecting Municipal Corporations and Officers to Attachment and Garnishment. — *Pruitt v. Armstrong*, 56 Ala. 306; *Lewis v. Denver*, 9 Colo. App. 328; *Troy Laundry, etc., Co. v. Denver*, (Colo. App. 1898) 53 Pac. Rep. 256. See *Adams v. Tyler*, 121 Mass. 380 as apparently to the contrary.

9. Doctrine Not Based on Nonliability of State or Municipality to Garnishment. — *Roeller v. Ames*, 33 Minn. 132.

After Receipt by the Officer, his salary and property purchased therewith are like any other money or property, and are no longer exempt.¹

Earned Salary or Other Compensation. — In one case it has been held that this doctrine does not apply to the earned salary, fees, or other compensation of public officers or employees. But this is contrary to the overwhelming weight of authority.²

h. MILITARY EQUIPMENTS. — It seems that the equipments of a military man have been held exempt from seizure for his debts, as being necessary for the discharge of his duties to the public, even though provided at his own expense, and independently of any statute exempting them.³

III. STATUTORY AND CONSTITUTIONAL EXEMPTIONS — 1. In General — United States. — The harshness of the common law in respect to the seizure and sale of a debtor's property and seizure of his person has induced the legislatures of the various states not only to abolish or modify the law allowing imprisonment for debt,⁴ but also to exempt certain property of debtors, or property to a certain amount, from liability to seizure and sale for their debts.⁵ These statutes are known as the "Exemption Laws."

Canada. — Such statutes have also been enacted in Canada.

2. Constitutional Provisions. — In some states the matter of exemption of property from forced sale has been deemed so important that the people have not been content to leave it to the discretion of the legislature, but have embodied provisions for exemptions in the constitution. Some of these provisions are self-executing, and give a right of exemption, without requiring legislative action. Others merely direct the legislature to provide for exemptions by necessary legislation.⁶

1. No Exemption After Receipt by Officer. — *Blake v. Bolte*, 10 Misc. Rep. (N. Y. C. Pl.) 333.

2. Earned Salary or Other Compensation. — In *Thompson v. Cullers*, (Tex. Civ. App. 1896) 35 S. W. Rep. 412, it was held not to be contrary to public policy to allow garnishment of the earned fees of a public officer. But the contrary view was taken in *Sanger v. Waco*, 15 Tex. Civ. App. 424, where it was said, after stating the reason for the doctrine, as shown in a preceding note: "Whether an officer's compensation be fees or salary it is not collectible until the service is rendered; and if, when it falls due, it is subject to garnishment at the instance of creditors, the officer might not be free from the cares of making provision for his own support and that of his family during the term of office, because, as often as his compensation fell due, it might, by garnishment proceedings, be applied to the demands of creditors." And see the cases cited at the beginning of this subdivision, in which the rule is stated without qualification.

3. Military Equipments. — See *Wade v. Hussey*, 8 L. C. Rep. 511, where the sword of a lieutenant, though purchased by himself, was held exempt. See *infra*, this title. *Property Exempt under the Statutes — Arms and Accoutrements.*

4. Imprisonment for Debt Abolished. — See the various state constitutions and local statutes. And see the title IMPRISONMENT FOR DEBT AND IN CIVIL ACTIONS.

5. Statutes Exempting Property. — See the various local statutes.

6. Constitutional Provisions for Exemptions. — See the various state constitutions.

Whether Constitutional Provision Is Self-executing. — In *Indiana* the Constitution provides that "the privilege of the debtor to

enjoy the necessary comforts of life shall be recognized by wholesome laws, exempting a reasonable amount of property from seizure or sale for the payment of any debt or liability hereafter contracted." Bill of Rights, § 22; *Burns's Annot. Stat.* 1894, § 67; *Rev. Stat.* 1881, § 67. It has been held that this provision was not self-executing, but required the enactment of a statute to carry it out. *Green v. Aker*, 11 Ind. 223; *Moss v. Jenkins*, 146 Ind. 589; *Coppage v. Gregg*, 1 Ind. App. 113. And see *Noble v. Hook*, 24 Cal. 638; *Tuttle v. Strout*, 7 Minn. 465, 82 Am. Dec. 108; *Kelly v. Dill*, 23 Minn. 435.

In *Alabama*, on the other hand, a constitutional provision that "the personal property of any resident of this state, to the value of one thousand dollars, to be selected by such resident, shall be exempted from sale on execution, or other final process of any court," etc., has been held to be self-executing. See also *Brown v. Leitch*, 60 Ala. 313, 31 Am. Rep. 42; *Miller v. Marx*, 55 Ala. 322.

And in *Arkansas* the provision of the Constitution of 1868, that "the personal property of any resident of this state to the value of two thousand dollars, to be selected by such resident, shall be exempted from sale on execution or other final process of any court, issued for the collection of any debt contracted after the adoption of this constitution," was held to be self-executing. *In re Hezekiah*, 2 Dill. (U. S.) 551; *In re Handlin*, 3 Dill. (U. S.) 290. See also *Beecher v. Baldy*, 7 Mich. 488; *Martin v. Hughes*, 67 N. Car. 296; *Nickerson v. Crawford*, (Minn. 1898) 77 N. W. Rep. 292.

Generally as to When Constitutional Provisions are Self-executing, and when they require legislative action to render them effectual, see the title CONSTITUTIONAL LAW, vol. 6, p. 912.

3. Reason and Purpose of Exemption Laws.—The reasons which caused the enactment of the exemption laws are obvious. They were enacted partly to protect the debtor himself against want due to misfortune, but the chief reason was to protect his family against want due to his misfortune or improvidence.¹ This, as it has often been said by the courts, must be borne in mind in construing the statutes and ascertaining the intention of the legislature.²

IV. CONSTITUTIONALITY OF EXEMPTION LAWS — 1. Power of the Legislatures in General.—It is clearly within the power of the legislatures of the different states to enact laws exempting property from liability to seizure and sale to satisfy debts afterwards contracted, if they violate no express constitutional provision. And the courts have no power to review the discretion of the legislature as to the extent of the exemption.³

2. Constitutional Provisions and Limitations.—A state legislature, of course, can pass no law which is in conflict with the provisions of either the state or federal constitution. It follows that if a state constitution, as is the case in some states, expressly declares that certain property shall be exempt, the legislature cannot pass valid laws in any way impairing such right of exemption.⁴

When the Constitution Directs the Legislature to Enact Laws granting exemptions, its legislation, to be valid, must comply with the directions in all respects.⁵

Granting Larger Exemptions.—It has been held that the legislature cannot give a larger exemption than that given by the constitution, though there are decisions to the contrary.⁶ It cannot grant unreasonable exemptions, if the

1. Reason and Purpose of Exemption Laws.—*Alabama.*—Noland *v.* Wickham, 9 Ala. 169, 44 Am. Dec. 435.

Massachusetts.—Richardson *v.* Buswell, 10 Met. (Mass.) 506, 43 Am. Dec. 450.

Missouri.—Megehe *v.* Draper, 21 Mo. 510.

New York.—Woodward *v.* Murray, 18 Johns. (N. Y.) 400; Wilcox *v.* Hawley, 31 N. Y. 648; Griffin *v.* Sutherland, 14 Barb. (N. Y.) 456.

Texas.—Allison *v.* Brookshire, 38 Tex. 199. *Wisconsin.*—Connaughton *v.* Sands, 32 Wis. 387.

A statute of exemption, said Turner, J., in a Vermont case, "is properly a remedial statute, evidently intended to prevent families from being stripped of the last means of support, and left to suffer, or cast as a burden upon the public, and to rescue them from the hands of unfeeling creditors; and the better to enable such poor debtors to satisfy the just demands against them." Leavitt *v.* Metcalf, 2 Vt. 342, 19 Am. Dec. 718.

"The exemption was made for the benefit of the family, rather than its head, the debtor. Its object concerns a question of public policy. It is to keep together the wife and children, that the latter may be trained and educated to become useful members of society; to protect them against the dangers to which they would be exposed by being scattered, at a tender age, and to secure them the means of instruction and improvement." Griffin *v.* Sutherland, 14 Barb. (N. Y.) 456.

2. See *infra*, this title, *General Rules of Construction*.

3. Exemption Laws Within the Legislative Power.—See Duncan *v.* Barnett, 11 S. Car. 333, 32 Am. Rep. 476; Cox *v.* Ballentine, 1 Baxt. (Tenn.) 363; Alsup *v.* Jordan, 69 Tex. 300, 5 Am. St. Rep. 53.

4. Constitutional Provision for Exemption—Restriction on Legislative Power.—Tuttle *v.* Strout, 7 Minn. 465, 82 Am. Dec. 108; Martin

v. Hughes, 67 N. Car. 293. See the title HOMESTEAD.

In South Carolina the Act of 1870 (14 Stat. 380), allowing an exemption of personal property to the head of a family, whether he owns a homestead or not, was held not to be in conflict with the Constitution of 1868. Oliver *v.* White, 18 S. Car. 235.

5. Constitutional Requirements—Compliance by Legislature.—Tuttle *v.* Strout, 7 Minn. 465, 82 Am. Dec. 108; Coleman *v.* Ballandi, 22 Minn. 144.

"Personal Property"—Choses in Action.—When the constitution provides that the "personal property" of any resident of the state shall be exempt, not exceeding in value a specified sum, a statute exempting wages due laborers and mechanics not exceeding such sum is valid. It gives no right not granted by the constitution. And the same is true of other choses in action. Choses in action are personal property within the meaning of the constitution. Probst *v.* Scott, 31 Ark. 652; Winter *v.* Simpson, 42 Ark. 410; Birdsong *v.* Tuttle, 52 Ark. 91, 20 Am. St. Rep. 156.

6. Giving Larger Exemption.—In *South Carolina* it has been held that where a state constitution provides that certain specified articles of personal property shall be exempt, the legislature cannot exempt additional articles. Duncan *v.* Barnett, 11 S. Car. 333, 32 Am. Rep. 476, *explaining and distinguishing* Homestead Bldg., etc., Assoc. *v.* Enslow, 7 S. Car. 20.

In *North Carolina*, on the other hand, it has been held that where the constitution exempts property not exceeding a certain value, this is not a restriction on the power of the legislature to enlarge the exemption in the matter of value; that the legislature cannot reduce what the constitution provides, but that it may exempt more. Martin *v.* Hughes, 67 N. Car. 293.

See the title HOMESTEAD for conflicting decisions on this question.

constitution provides for reasonable ones only.¹

Exemptions with Respect to Particular Debts. — If the constitution provides for an exemption for all debts, the legislature cannot except certain debts,² or grant an exemption with respect to particular debts only.³ Nor can the legislature grant an exemption as against a debt which the constitution expressly excepts.⁴

The Repeal and Modification of Exemption Laws, and the effect of constitutional provisions on the power of the legislature in this respect, are dealt with in the section following.⁵

Special or Class Legislation. — The constitutional prohibition against special or class legislation applies, of course, to exemption laws as well as to laws on other subjects.⁶

Title of Acts and Unity of Subject-matter. — And exemption laws are within the constitutional provision that no act shall embrace more than one subject, which shall be expressed in its title.⁷ This provision, however, is sufficiently complied with if the title of an exemption law fairly expresses its subject-matter in general language. It need not amount to an analysis or complete abstract of its text.⁸

1. Unreasonable Exemption. — In *Minnesota* the legislature undertook to exempt from seizure, either for the debts of the insured or those of the beneficiary, insurance money payable by any mutual insurance company doing business in the state, without any limitation whatever as to amount, so that the only limit to the amount of insurance money attempted to be exempted was the aggregate capacity or power of all such companies doing business in the state to insure the life of one individual. In *In re How*, 59 Minn. 415, it was held that the amount thus exempted was unreasonable, and that the statute therefore was unconstitutional because in violation of the constitutional provision that "a reasonable amount of property" should be exempted from seizure or sale for the payment of any debt or liability, and that the amount of such exemption should be determined by law.

2. Exception of Certain Debts. — Thus under the Constitution of *Minnesota*, declaring that a reasonable amount of property should be exempt from seizure or sale for the payment of "any debt or liability," it was held that the legislature in exempting property could not except debts for wages due clerks, laborers, or mechanics. "The constitution," said the court, "makes no exception in favor of any particular class of persons, or kind of debts or liabilities, nor should we recognize the right of the legislature to make any such distinction. If one class of persons, or kind of debts or liabilities, may be excepted, all may be; and the constitutional provision might thus be rendered entirely nugatory." *Tuttle v. Strout*, 7 Minn. 465, 82 Am. Dec. 108.

3. Exemption with Respect to Particular Debts Only. — In *Michigan*, where the constitution declared that the personal property of every resident of the state, to consist of such property only as should be designated by law, should be exempted to the amount of not less than five hundred dollars from sale on execution or other final process of any court issued for the collection of any debt contracted after the adoption of the constitution, it was held that the legislature had no power to exempt certain property from levy and sale on execution upon a judgment for work, labor, or serv-

ices other than professional services. "Under this constitutional provision," said the court, "the power is given to the legislature to prescribe the kind of property which shall be exempt; but the constitution itself speaks upon the question of what debts the exemption shall be good as against, and provides that such property as shall be prescribed by the legislature shall be exempt as against all debts, not debts of a particular class, or all debts except a particular class." *Burrows v. Brooks*, 113 Mich. 307.

4. Exception of Debts by the Constitution. — *Dunker v. Chedic*, 4 Nev. 378.

5. Repeal or Modification. — See *infra*, this title, *Repeal or Modification of Exemption Laws*.

6. Special or Class Legislation. — In *Michigan* a statute exempting personal property not exceeding in value five hundred dollars from levy and sale under any execution issued upon a judgment for work, labor, or services other than professional services was held unconstitutional as special legislation. *Burrows v. Brooks*, 113 Mich. 307. See the title *STATUTES*.

Restrictions as to Nonresidents. — A statute restricting the right of exemption in favor of nonresident debtors and giving them a less exemption than is accorded to resident debtors is not unconstitutional as class legislation. *Pomeroy v. Beach*, 149 Ind. 511.

7. Title of Acts and Unity of Subject-matter. — *Tuttle v. Strout*, 7 Minn. 465, 82 Am. Dec. 108, and cases cited in the note following. For a full treatment of this provision of the constitution, see the title *STATUTES*.

8. Compliance with the Constitution. — For this reason, where the title of an act was "An Act to provide better protection for the earnings of laborers, servants, and other employees of corporations, firms, or individuals engaged in interstate business," it was held sufficient to cover provisions prohibiting creditors of such persons from disposing of their claims, or instituting or prosecuting any suit, in the state or elsewhere, for the purpose of avoiding the effect of the laws concerning exemptions, and also provisions making any person or corporation violating such prohibition liable to a criminal prosecution and fine, and liable to the injured employee for the amount of the claim

Retroactive Laws. — It was at one time thought that statutes of exemption operating retroactively, so as to exempt property from seizure and sale for debts, or to satisfy liens, contracted or imposed before their enactment, were not within the prohibition in the federal constitution against laws impairing the obligation of contracts, and many retroactive laws were enacted, and were sustained by the courts. It is now settled, however, by the decision of the Supreme Court of the United States, that such laws are within the prohibition and therefore unconstitutional.¹

V. REPEAL OR MODIFICATION OF EXEMPTION LAWS — 1. No Vested Right to Exemption. — Statutory exemption of a debtor's property from levy and sale for the payment of his debts is a mere privilege for the time being, dependent upon the will of the state, and not a vested right, and in the absence of constitutional restrictions the legislature may modify or wholly repeal exemption laws even as to existing property and debts.²

2. Obligation of Contracts. — Modification or repeal of an exemption law does not impair the obligation of any contract as to creditors, but on the contrary it enlarges their remedy. And it is not objectionable as impairing the obligation of contracts as regards the debtor, for there is no contract giving him an exemption.³

3. Effect of Constitutional Provisions for Exemptions. — When the legislature has enacted an exemption law in compliance with a constitutional direction to exempt a reasonable amount of property, it cannot afterwards repeal the law without at the same time substituting another reasonable one in its place.⁴ It may, however, either modify the law or substitute another, so long as it gives debtors a reasonable exemption.⁵

4. Effect of Repeal. — The repeal of an exemption law without a saving clause, after a debt has been contracted, leaves the debtor in precisely the same position as if there had never been such a law, except as to rights which have already vested by reason of a levy and a claim and setting apart of property as exempt, or other proceedings had under the statute.⁶

disposed of or sued upon, with all costs and expenses, and a reasonable attorney's fee. *Singer Mfg. Co. v. Fleming*, 39 Neb. 679, 42 Am. St. Rep. 613; *Bishop v. Middleton*, 43 Neb. 10.

It has also been held that this provision is not violated by an act entitled "An Act for a homestead exemption," and including an exemption of personal property. *Tuttle v. Strout*, 7 Minn. 465, 82 Am. Dec. 108.

And it has been held that the title "homestead exemption" embraced a provision in the act that a mortgage or other alienation of the homestead by the owner thereof, if a married man, should not be valid without his wife's signature. *Barton v. Drake*, 21 Minn. 209.

1. Retroactive Laws Unconstitutional. — *Gunn v. Barry*, 15 Wall. (U. S.) 610. See *infra*, this title, *Liabilities as Against Which Exemptions May Be Claimed*.

2. Power to Modify or Repeal Exemption Laws. — Thus, in *Georgia* it was held that a statute (Act February 27, 1874) providing that an exemption taken under section 2040 of the Code should be subject to the purchase money applied to exemptions laid off at any time after the passage of the act, though the debt on which the judgment was based was incurred before its passage. *Sparger v. Cumpton*, 54 Ga. 355; *Harris v. Glenn*, 56 Ga. 94. And see *Bramble v. State*, 41 Md. 435; *Bull v. Conroe*, 13 Wis. 233. See the title *HOMESTEAD*.

3. Impairment of Obligation of Contract. — *Sparger v. Cumpton*, 54 Ga. 355. See gener-

ally the title *IMPAIRMENT OF OBLIGATION OF CONTRACTS*.

4. Repeal and Modification of Law. — See *Bull v. Conroe*, 13 Wis. 233.

5. *Bull v. Conroe*, 13 Wis. 233; *Parker v. King*, 16 Wis. 223. And see *Noble v. Hook*, 24 Cal. 638.

6. Rights Vested by Proceedings under the Statute. — *Bramble v. State*, 41 Md. 435.

The distinction between this case and the cases at the beginning of this section is clearly pointed out by Brent, J., in the case just cited.

Saving Clause. — A statute of exemption amending a previous statute, by changing the amount of the exemption and expressly providing that it shall not affect debts incurred prior to its passage, does not so far repeal the prior statute as to prevent a debtor from claiming an exemption under it as against a debt contracted before the passage of the amendatory act. The provision of the amendatory act that it shall not apply to debts previously contracted is in effect a saving clause, leaving the amount of exemption against debts contracted before its passage unaffected, and to be determined under the pre-existing act. *Hawkins v. Mosher*, 8 Colo. App. 31.

The Colorado Act of 1894, exempting wages to the amount of sixty dollars, but providing that no debts incurred prior to March 1, 1894, should be affected thereby, did not impliedly repeal the Act of 1889, exempting fifty per cent. of the wages of the head of a family, earned during the thirty days preceding the

5. **What Constitutes a Repeal.** — The question whether or not a particular exemption law has been repealed, expressly or impliedly, depends upon the same considerations as determine whether any other law has been repealed.¹

VI. GENERAL RULES OF CONSTRUCTION — 1. **Intention of the Legislature.** — In the construction of statutes of exemption, as in the construction of other statutes, the primary object is to ascertain the intention of the legislature. When that is ascertained it must always govern. The courts cannot add to or detract from the provisions of the law, so long as the legislature has kept within its constitutional powers.² As to subordinate rules of construction the courts do not all agree.

2. **Strict Construction.** — Since the exemption laws, in so far as they exempt chattels from liability to seizure and sale for the satisfaction of debts, are in derogation of the common law, a few of the courts have held that they should be strictly construed, and that an exemption cannot be claimed unless the case comes strictly within the terms of the statute.³

3. **Liberal Construction.** — Most courts, however, have taken a different view of the exemption laws. They have considered the purpose of the statutes, and in view of the fact that they have been enacted on the ground of public policy, for the benevolent purpose of saving debtors and their families from want by reason of misfortune or providence, have held that such statutes are to be liberally construed, so as to carry out the intention of the legislature, notwithstanding the fact that they are in derogation of the common law; and that a claim of exemption should be sustained if within the reason and spirit

levy of an execution, as to debts contracted prior to the date mentioned; but the Act of 1889 remained in force as to debts contracted prior to that date. *Hawkins v. Mosher*, 8 Colo. App. 31.

1. **What Constitutes a Repeal.** — See the title STATUTES.

In *Russell v. Arnold*, 25 Ga. 625, it appeared that the legislature of *Georgia*, in 1845, had passed an act exempting the wages of certain employees. In 1856 a general statute relating to attachments and garnishment was enacted, and it expressly declared that "all acts and parts of acts upon the subject of attachments and garnishments" were thereby repealed. On the following day of the same session, however, another statute was enacted recognizing the existence of rights of exemption. It was held that the exemption law of 1845 was not repealed.

In *Minnesota*, Gen. Stat. 1878, § 310, declared: "No property hereinafter mentioned or represented shall be liable to attachment or sale on any final process issued from any court in this state." * * * Ninth. One sewing machine." The Act of 1895 provided that section 310 should be amended by adding to the ninth subdivision the following words, to wit, "one bicycle." The Act of 1897 provided that the ninth subdivision of section 310 should be amended so as to read as follows: "Ninth. One sewing machine and one typewriting machine." The court applied the rule that where an act provides that a prior statute "shall be amended so as to read as follows," the amendatory act is a substitute for the original statute and repeals all those parts of the prior act which are omitted, and it was held that after the passage of the Act of 1897 a bicycle was no longer exempt. *Shadewald v. Phillips*, (Minn. 1898) 75 N. W. Rep. 717.

2. **Intention of Legislature Governs** — *Illinois*.

— *Good v. Fogg*, 61 Ill. 451, 14 Am. Rep. 71.

Maine. — *Smith v. Chase*, 71 Me. 164.

Michigan. — *King v. Moore*, 10 Mich. 538.

New York. — *Hall v. Penney*, 11 Wend. (N. Y.) 44, 25 Am. Dec. 601; *Yates County Nat. Bank v. Carpenter*, 119 N. Y. 550, 16 Am. St. Rep. 855.

Tennessee. — *Merriman v. Lacefield*, 4 Heisk. (Tenn.) 211.

Texas. — *Alsop v. Jordan*, 69 Tex. 300, 5 Am. St. Rep. 53.

Vermont. — *Mundell v. Hammond*, 40 Vt. 641.

See the title STATUTES.

Province of Court and Jury. — The construction of exemption laws, like the construction of other statutes, is for the court and not for the jury. See *infra*, this title, *Enforcement and Protection of the Right — Questions of Law and Fact*.

3. **Strict Construction of Statutes** — *Louisiana*.

— *Guillory v. Deville*, 21 La. Ann. 686; *Crilly v. Sheriff*, 25 La. Ann. 219; *Boston Belting Co. v. Ivens*, 28 La. Ann. 695; *White v. Heffner*, 30 La. Ann. 1280.

Massachusetts. — *Buckingham v. Billings*, 13 Mass. 82.

Minnesota. — *Grimes v. Byrne*, 2 Minn. 106; *Temple v. Scott*, 3 Minn. 419.

New York. — *Rue v. Alter*, 5 Den. (N. Y.) 119.

Pennsylvania. — *Knabb v. Drake*, 23 Pa. St. 489, 62 Am. Dec. 352.

Some of these cases have been in effect overruled. See the cases cited in the note following.

The later cases in *Massachusetts*, *Minnesota*, and *New York* do not follow this view, but hold that such statutes should be liberally construed. See the cases cited in the note following.

of the law, though not strictly within its letter.¹

Construction of Provisos and Exceptions. — The rule that statutes of exemptions are to be liberally construed does not apply to provisos and exceptions in such statutes by which general allowance of property as exempt is qualified or

1. Liberal Construction Is the Rule — *United States*. — *In re Jones*, 2 Dill. (U. S.) 343.

Alabama. — *Watson v. Simpson*, 5 Ala. 233; *Noland v. Wickham*, 9 Ala. 169, 44 Am. Dec. 435; *Favers v. Glass*, 22 Ala. 621, 58 Am. Dec. 272; *Allman v. Gan*, 29 Ala. 240; *Kennedy v. Smith*, 99 Ala. 83.

Arizona. — *Wilson v. Lowry*, (Arizona 1898) 52 Pac. Rep. 777.

Arkansas. — See *Wassell v. Tunnah*, 25 Ark. 101.

California. — *Matter of McManus*, 87 Cal. 292, 22 Am. St. Rep. 250.

Colorado. — *Rutter v. Shumway*, 16 Colo. 95; *Martin v. Bond*, 14 Colo. 466.

Connecticut. — *Patten v. Smith*, 4 Conn. 450, 10 Am. Dec. 166; *Montague v. Richardson*, 24 Conn. 338, 63 Am. Dec. 173.

Idaho. — *Elliot v. Hall*, 2 Idaho 1142, 35 Am. St. Rep. 285.

Illinois. — *Good v. Fogg*, 61 Ill. 449, 14 Am. Rep. 71; *Finlen v. Howard*, 126 Ill. 259; *Washburn v. Goodheart*, 88 Ill. 229.

Indiana. — *Gregory v. Latchem*, 53 Ind. 449; *Kelley v. McFadden*, 80 Ind. 536; *Puett v. Beard*, 86 Ind. 172, 44 Am. Rep. 280; *Astley v. Capron*, 89 Ind. 167; *Butner v. Bowser* 104 Ind. 255; *Robinson v. Hughes*, 117 Ind. 293, 10 Am. St. Rep. 45; *Coppage v. Gregg*, 1 Ind. App. 112; *Green v. Simon*, 17 Ind. App. 360; *Eisenhauer v. Dill*, 6 Ind. App. 188, *citing* 7 AM. AND ENG. ENCYC. OF LAW (1st ed.) 130; *Pomeroy v. Beach*, 149 Ind. 511, *citing* 7 AM. AND ENG. ENCYC. OF LAW (1st ed.) 130, 131.

Iowa. — *Reynolds v. Haines*, 83 Iowa 342, 32 Am. St. Rep. 311; *Morgan v. Rountree*, 88 Iowa 249, 45 Am. St. Rep. 234; *Millington v. Laurer*, 89 Iowa 322, 48 Am. St. Rep. 385.

Kansas. — *Mallory v. Berry*, 16 Kan. 293.

Kentucky. — *Carrington v. Herrin*, 4 Bush (Ky.) 624.

Massachusetts. — *Richardson v. Buswell*, 10 Met. (Mass.) 506, 43 Am. Dec. 450; *Carruth v. Grassie*, 11 Gray (Mass.) 211, 71 Am. Dec. 707.

Michigan. — *Kenyon v. Baker*, 16 Mich. 373, 97 Am. Dec. 158; *Alvord v. Lent*, 23 Mich. 369; *Rosenthal v. Scott*, 41 Mich. 632.

Minnesota. — *Berg v. Baldwin*, 31 Minn. 541.

Missouri. — *State v. Dill*, 60 Mo. 433; *Megehe v. Draper*, 21 Mo. 510; *Mahan v. Scruggs*, 29 Mo. 282; *State v. Finn*, 8 Mo. App. 261.

Montana. — *Ferguson v. Speith*, 13 Mont. 487, 40 Am. St. Rep. 459.

Nebraska. — *State v. Carson*, 27 Neb. 501, 20 Am. St. Rep. 681.

New Hampshire. — *Peverly v. Sayles*, 10 N. H. 356.

New York. — *Carpenter v. Herrington*, 25 Wend. (N. Y.) 370, 37 Am. Dec. 239; *Wilcox v. Hawley*, 31 N. Y. 648; *Stewart v. Brown*, 37 N. Y. 350, 93 Am. Dec. 578; *Yates County Nat. Bank v. Carpenter*, 119 N. Y. 550, 16 Am. St. Rep. 855; *Griffin v. Sutherland*, 14 Barb. (N. Y.) 456; *Becker v. Becker*, 47 Barb. (N. Y.) 497; *Shaw v. Davis*, 55 Barb. (N. Y.) 389; *Eastman v. Caswell*, 8 How. Pr. (N. Y. Su-

preme Ct.) 75; *Robinson's Case*, 3 Abb. Pr. (N. Y. C. Pl.) 466.

North Carolina. — *Shepherd v. Murrill*, 90 N. Car. 208.

Oklahoma. — *Nelson v. Fightmaster*, 4 Okla. 38.

South Dakota. — *Noyes v. Belding*, 5 S. Dak. 603; *Linander v. Longstaff*, 7 S. Dak. 157.

Tennessee. — *Richardson v. Duncan*, 2 Heisk. (Tenn.) 220; *Webb v. Brandon*, 4 Heisk. (Tenn.) 285; *Byous v. Mount*, 89 Tenn. 362; *Collier v. Murphy*, 90 Tenn. 300, 25 Am. St. Rep. 698; *Searcy v. Short*, 1 Lea (Tenn.) 749.

Texas. — *Cobbs v. Coleman*, 14 Tex. 594; *Rodgers v. Ferguson*, 32 Tex. 533; *Allison v. Brookshire*, 38 Tex. 199; *Betz v. Maier*, 12 Tex. Civ. App. 219.

Vermont. — *Freeman v. Carpenter*, 10 Vt. 433, 33 Am. Dec. 210; *Webster v. Orne*, 45 Vt. 40.

Washington. — *Puget Sound Dressed Beef, etc., Co. v. Jeffs*, 11 Wash. 466, 48 Am. St. Rep. 885.

Wisconsin. — *Gilman v. Williams*, 7 Wis. 329, 76 Am. Dec. 219; *Connaughton v. Sands*, 32 Wis. 387; *Kuntz v. Kinney* 33 Wis. 510; *Cunningham v. Rodby*, (Wis. 1898) 77 N. W. Rep. 740.

Canada. — *Osler v. Muter*, 19 Ont. App. 94.

Statements of the Rule. — The statute "is remedial," said the *New York* court, "and should be liberally expounded to effect the humane object in view." *Carpenter v. Herrington*, 25 Wend. (N. Y.) 370, 37 Am. Dec. 240.

"The exemption laws are remedial and beneficent acts of legislation, and we are disposed to give them a liberal interpretation and to administer them in the benign spirit in which they were enacted." *Gilman v. Williams*, 7 Wis. 329, 76 Am. Dec. 219.

"In construing exemption statutes * * * they are not to be strictly construed, but such construction will be placed thereon as will carry out the obvious purpose of the legislature in enacting them — to protect the debtor." *Finlen v. Howard*, 126 Ill. 259.

"The statute in question is a remedial one and, being passed for a humane purpose, ought to be liberally expounded in favor of humanity, and in furtherance of the benevolent objects for which it was enacted. The interest of creditors does not, as has been claimed, require a greater strictness in its construction than the one we have adopted on the ground that they would otherwise be seriously affected in regard to the collection of their debts. The law was prompted by an enlightened view to the interest of creditors, as well as of debtors, and in our opinion our construction will advance the interests of both, while the narrow and rigid construction contended for would not operate generally for the benefit of either." *Montague v. Richardson*, 24 Conn. 338, 63 Am. Dec. 173.

Illustrations — Vegetables "Actually Provided for Family Use." — Thus, under a statute ex-

restricted, or by which some property is excluded, or by which it is declared that the statute shall not apply as against certain debts.¹

4. The Case Must Be Within the Spirit of the Law. — While the exemption laws are thus to be construed liberally, so as to carry out the benevolent policy of the legislature, debtors claiming their benefit must bring themselves at least within the spirit of their provisions.²

5. Construction of Statutes Together. — Under the familiar rules of construction, that a remedial statute shall be extended to later provisions by subsequent statutes, and that all acts *in pari materia* are to be taken together as if they were one law, it is clear that when there are several statutes of exemption in the same state, passed at different times, as is often the case, they are to be

empting "necessary vegetables actually provided for family use," it was held that potatoes not yet dug from the earth could be claimed as exempt, if they were planted and raised for family use. *Carpenter v. Herrington*, 25 Wend. (N. Y.) 370, 37 Am. Dec. 239.

"Necessary" Household Furniture. — And in *Montague v. Richardson*, 24 Conn. 338, 63 Am. Dec. 173, it was held that the word "necessary" in a statute exempting the necessary household furniture of a debtor, while it excludes superfluous articles and articles of luxury, fancy, and ornament, does not limit the exemption to such articles as are absolutely necessary to enable the debtor merely to live, but embraces such as are necessary to enable him to live in a convenient and comfortable manner.

Value of Property. — So where one statute exempted personal property to the value of sixty dollars, and a subsequent statute, in addition to this exemption, exempted among other articles a horse not exceeding one hundred dollars in value, it was held that a debtor could, under the two statutes together, claim as exempt a horse not exceeding one hundred and sixty dollars in value. *Good v. Fogg*, 61 Ill. 449, 14 Am. Rep. 71. "These statutes," said the court, "have not declared what shall be done in a case like the present, and we are left to ascertain the legislative intention by inference or interpretation. Seeing the intention and purpose that actuated the legislature in adopting these acts, we cannot doubt that had such a case occurred to them, they would have embraced it in the language of the law, because it is fully within its reason. Unless this claim is sanctioned, then we find a person with property not within the letter of either, but within the spirit and reason of both acts, who could have no benefit from their enactment. To hold that appellee cannot claim this property is to hold that he may be stripped of all the property of this class that the lawmaker intended he should hold. To permit him to retain it gives him the horse under the more recent statute, as it intended he should have, and it gives him, at the same time, the \$60 worth suited to his condition in life, under the prior law; and, notwithstanding it is but one horse, it is within the reason of the law, and is permissible under these enactments."

Animals, etc. — A number of very good illustrations of the liberal construction of exemption laws in determining what property may be claimed as exempt under that law will be

found under the section treating of the exemption of animals. See *infra*, this title, *Property Exempt under the Statutes — Animals, Vehicles, and Teams*.

Homestead Exemption Laws. — By the great weight of authority the same rule of construction applies to homestead exemption laws. Indeed, it applies with even greater reason, for lands of a debtor could not be taken on execution at common law, and such statutes, therefore, are not in derogation of the common law. See the title *HOMESTEAD*.

1. Construction of Provisos and Exceptions. — In reference to this point it was said by Bailey, P. J., in the appellate court of *Illinois*: "The general purview of the statute is to grant exemption of a certain amount of personal property belonging to debtors, from attachment, execution, and distress for rent. The fourth section creates an exception in favor of creditors whose judgments are for their wages as laborers or servants. It would seem that the same policy which dictates a liberal construction of the statute in furtherance of its general beneficial purpose would necessitate a restricted construction of an exception by which its operation is limited and abridged. But apart from this consideration, it seems to be a general rule of statutory construction that provisos and exceptions in statutes by which their generality is qualified or restrained, or by which something is excluded from their general provisions, are to be strictly construed." *Epps v. Epps*, 17 Ill. App. 196.

2. Case Must Be Within the Spirit of the Law. — See *Charles v. Lamberson*, 1 Iowa 435, 63 Am. Dec. 457; *King v. Moore*, 10 Mich. 538; *Ford v. Johnson*, 34 Barb. (N. Y.) 364; *Searcy v. Short*, 1 Lea (Tenn.) 749; *Carty v. Drew*, 46 Vt. 346.

"Courts are not * * * in any case, for whatever object, to strain the law beyond its fair and just meaning." *Rothschild v. Boelter*, 18 Minn. 361.

"The exemption laws of the state must be construed liberally in favor of the debtor, but the provisions of the several subdivisions of the exemption law must not, through a desire to be liberal to the debtor, be warped out of all harmony with each other, nor must such a construction be put upon any of its provisions as to render it uncertain and variable in its application, but it must be so construed as to give it a uniform application to each individual debtor as to all objects of the same class." *George v. Hunter*, 48 Kan. 651, 30 Am. St. Rep. 325.

construed together as one act, and not independently of each other.¹

6. Retroactive Operation. — Whether or not statutes of exemptions are to be construed as having a retroactive operation is considered in a subsequent section.²

VII. OPERATION OF STATUTES WITH RESPECT TO TERRITORIAL LIMITS — 1. The Statutes Affect the Remedy Only. — It has been repeatedly held that exemption laws affect the remedy only, and do not enter into and form a part of the contract between a debtor and his creditor, so as to give the debtor, for that reason, a right to set them up in any jurisdiction in which it may be sought to subject his property to the satisfaction of the debt.³

2. The Lex Fori Governs. — The general rule, therefore, is that the right of exemption is governed by the *lex fori* and not by the *lex loci contractus*.⁴

Result of This Rule. — It follows from this rule, that if property or a credit is exempt under the laws of the state in which proceedings are brought to subject it to the satisfaction of a debt, it may be claimed as exempt, though both the debtor and the creditor are residents of another state, and under its laws there is no right of exemption.⁵ On the other hand, if there is no right of exemption under the statutes of the state in which the proceedings are brought, the debtor cannot set up the exemption laws of another state, of which he is a resident, unless there is something in the rule of comity between states to require recognition of such laws. They have no extraterritorial operation *ex proprio vigore*.⁶

1. Construction of Different Statutes Together. — *Good v. Fogg*, 61 Ill. 449, 14 Am. Rep. 71; *Merriman v. Lacefield*, 4 Heisk. (Tenn.) 221; *Leavitt v. Metcalf*, 2 Vt. 342, 19 Am. Dec. 718. See the title **STATUTES**.

Applications of the Rule. — Thus, when an act exempts certain property and provides that any levying officer who seizes such property in contravention of the act shall be deemed guilty of a misdemeanor in office, and punished accordingly, and another statute is afterwards enacted, referring to the first, and exempting additional chattels, the two statutes are to be construed together as one act, and an officer levying on chattels exempted by the second act is subject to the penalty prescribed by the first. *State v. Haggard*, 1 Humph. (Tenn.) 390.

2. Retroactive Operation of Statutes. — See *infra*, this title, *Liabilities as Against Which Exemptions May Be Claimed*.

3. Exemption Laws Affect the Remedy Only —

Alabama. — *Boykin v. Edwards*, 21 Ala. 264.

Georgia. — *Kyle v. Montgomery*, 73 Ga. 337.

Illinois. — *Mineral Point R. Co. v. Barron*,

83 Ill. 365.

Iowa. — *Helfenstein v. Cave*, 3 Iowa 287;

Newell v. Hayden, 8 Iowa 140.

Kansas. — *Burlington, etc., R. Co. v. Thompson*, 31 Kan. 180, 47 Am. Rep. 497.

Pennsylvania. — *Morgan v. Neville*, 74 Pa.

St. 52.

West Virginia. — *Stevens v. Brown*, 20 W.

Va. 450.

Wisconsin. — *Commercial Nat. Bank v. Chi-*

cago, etc., R. Co., 45 Wis. 172.

4. The Lex Fori Governs. — *Newell v. Hay-*

den, 8 Iowa 140; *Burlington, etc., R. Co. v. Thompson*, 31 Kan. 180, 47 Am. Rep. 497.

And see the other cases cited in the notes following.

5. Property Exempt under Law of Forum. — *Newell v. Hayden*, 8 Iowa 140.

6. Property Exempt under Laws of Another State — *Alabama.* — *Boykin v. Edwards*, 21

Ala. 264; *East Tennessee, etc., R. Co. v. Kennedy*, 83 Ala. 462, 3 Am. St. Rep. 755. And see *Southern Suspender Co. v. Van Bories*, 91 Ala. 507.

Colorado. — *Atchison, etc., R. Co. v. Mag-*

gard, 6 Colo. App. 85.

Georgia. — See *Kyle v. Montgomery*, 73 Ga.

337.

Illinois. — *Mineral Point R. Co. v. Barron*,

83 Ill. 365; *Wabash R. Co. v. Dougan*, 142 Ill.

248, 34 Am. St. Rep. 74; *Roche v. Rhode*

Island Ins. Assoc., 2 Ill. App. 360.

Iowa. — *Leiber v. Union Pac. R. Co.*, 49

Iowa 688; *Broadstreet v. Clark*, 65 Iowa 670;

Lyon v. Callopy, 87 Iowa 567, 43 Am. St. Rep.

396.

Kansas. — *Burlington, etc., R. Co. v. Thompson*,

31 Kan. 180, 47 Am. Rep. 497.

Compare Kansas City, etc., R. Co. v. Cunn-

ingham, (Kan. App. 1898) 51 Pac. Rep. 972.

Kentucky. — *Stewart v. Thomson*, 97 Ky. 575;

Barker v. Brown, (Ky. 1896) 33 S. W. Rep.

833.

North Carolina. — *Balk v. Harris*, 122 N.

Car. 64.

Pennsylvania. — *Morgan v. Neville*, 74 Pa.

St. 52.

Tennessee. — *Carson v. Memphis, etc., R.*

Co., 88 Tenn. 646, 17 Am. St. Rep. 921.

West Virginia. — *Stevens v. Brown*, 20 W.

Va. 450.

And see the other cases cited in the notes following.

Statement of the Rule. — “The laws of a state have no extraterritorial force. This as a general proposition is unquestioned, and includes within its scope exemption as well as other laws. So, although the laws of Nebraska, where employer and employee reside, exempt laborers’ wages absolutely, it does not follow that the courts of another state will, in controversies pending before them, enforce the same exemption. On the contrary, the matter of exemption, being one affecting the rem-

3. Giving Effect to Foreign Statutes through Comity — As Against Resident Creditors. — The rule of comity between states clearly does not require the courts of a state, when proceedings are instituted by a resident creditor against a nonresident debtor, to give effect to the exemption laws of the state in which the debtor resides, and thus allow the exemption laws of other states to operate to the prejudice of its own citizens. And no doubt all of the courts would so hold.¹

As Against Nonresident Creditors. — And even when the creditor and debtor are both nonresidents, there seems to be no reason why the court should give effect to the exemption laws of the debtor's state, if the creditor is not a resident of that state, seeking to avoid its laws, but is a resident of some third state.²

Debtor and Creditor Residents of Same State. — In Some States the courts have gone further than this, and have held that the exemption laws of the state in which a debtor resides should not be recognized and given effect in another state in which attachment or garnishment proceedings have been instituted against him, though the creditor is a resident of the same state as the debtor, and has

edy, at least within certain limitations, is one controlled by the *lex fori*, and not by the *lex loci contractus*. Therefore, although both creditor and debtor reside within the limits of the same state, the exemption laws of that state do not control garnishee proceedings in another." *Burlington, etc., R. Co. v. Thompson*, 31 Kan. 180, 47 Am. Rep. 498.

Illustrations — Tangible Property. — In *Boykin v. Edwards*, 21 Ala. 261, a man owned a farm partly in Alabama and partly in Mississippi, but his residence was in Mississippi. One of his horses was attached in Alabama. It was held that he could not claim the horse as exempt under the *Alabama* statute, as it applied to residents only. See *infra*, this title, *Persons Entitled to Benefit of Exemption Laws — Residence and Citizenship*. And it was held that he could not claim it as exempt under the laws of *Mississippi*, where he resided, as those laws operated only in that state.

Wages. — In *Burlington, etc., R. Co. v. Thompson*, 31 Kan. 180, 47 Am. Rep. 497, it was held that a railroad company created under the laws of *Nebraska* and having its principal office in that state, but which had leased and was operating a line of railroad running into *Kansas*, where it employed agents upon whom process could be served, could be garnished in *Kansas* for a debt due for wages to an employee residing in *Nebraska*, where the wages were earned and were payable, and that a statute of *Nebraska* exempting such wages could not be set up to defeat the proceedings. In this case, however, the court expressly called attention to the fact that it did not appear that the creditor was a resident of *Nebraska*.

Other Cases on this point are referred to in the notes following, where it will be seen that under peculiar circumstances some of the courts have recognized and given effect to foreign exemption laws.

Bankruptcy Proceedings. — In the United States District Court for the western district of *Wisconsin*, Judge Hopkins held in bankruptcy proceedings that property exempt under the laws of *Wisconsin*, where the bankrupt resided, and where the petition in bankruptcy was filed, would be protected though situated

in another state, and not exempt under the laws of that state. In this case, at the time when the bankrupt filed his petition in *Wisconsin*, a team belonging to him, and exempt under the *Wisconsin* laws, was in the possession of an officer of the state of *Illinois*, where it was not exempt, by virtue of a writ of attachment sued out in that state. It was held that the bankrupt was entitled to claim the property as exempt, and that the court should protect this right. *In re Stevens*, 2 Biss. (U. S.) 373, 10 Am. L. Reg. N. S. 523, 5 Nat. Bankr. Reg. 298.

1. Interstate Comity — Proceedings by Resident Creditor — Alabama. — *Boykin v. Edwards*, 21 Ala. 261; *East Tennessee, etc., R. Co. v. Kennedy*, 83 Ala. 462, 3 Am. St. Rep. 755.

Colorado. — *Atchison, etc., R. Co. v. Maggard*, 6 Colo. App. 85.

Illinois. — *Roche v. Rhode Island Ins. Assoc.*, 2 Ill. App. 360; *American Cent. Ins. Co. v. Hettler*, 46 Ill. App. 416.

Iowa. — *Broadstreet v. Clark*, 65 Iowa 670; *Lyon v. Callopy*, 87 Iowa 567, 43 Am. St. Rep. 396.

Kansas. — *Burlington, etc., R. Co. v. Thompson*, 31 Kan. 180, 47 Am. Rep. 497. See *Williamson v. Kansas, etc., Coal Co.*, 6 Kan. App. 443.

Tennessee. — *Carson v. Memphis, etc., R. Co.*, 88 Tenn. 646, 17 Am. St. Rep. 921.

In a number of the cases above cited there is nothing to show that the creditor was not a resident of the state in which the proceedings were instituted, and for this reason the cases are cited in this place, though it is possible that he may have been a resident of the same state as the debtor.

2. As Against Nonresident Creditors. — Thus there can be little doubt that if a resident of *Missouri* should go into *Arkansas* and there attach property belonging to a debtor residing in *Kansas*, the courts of *Arkansas* would not allow the debtor to claim the property as being exempt under the laws of *Kansas*, and he could not maintain against the creditor in *Kansas* an action for damages on the theory of a wrongful attachment of the property. See *Williamson v. Kansas, etc., Coal Co.*, 6 Kan. App. 443.

instituted the proceedings for the purpose of evading its exemption laws.¹

In Other States, however, the courts have repudiated this view, and have held that the rule of comity between states will not permit a creditor residing in one state, or his assignee, to avail himself of the process of the courts of another state for the purpose of evading the exemption laws of his own state, and if he attempts to do so such laws should be recognized and effect given to them.²

1. Creditor Residing in Same State as Debtor —
Colorado. — See *Atchison, etc., R. Co. v. Maggard*, 6 Colo. App. 85.

Georgia. — *Harwell v. Sharp*, 85 Ga. 124, 21 Am. St. Rep. 149.

Illinois. — *Wabash R. Co. v. Dougan*, 142 Ill. 248, 34 Am. St. Rep. 74.

In *Mineral Point R. Co. v. Barron*, 83 Ill. 365, a railroad company was garnished in Illinois to reach wages due from it to the principal defendant. All the parties, including the railroad company, were residents of Wisconsin, but the company also did business in Illinois. It was held that the defendant could not claim the wages as exempt under the Wisconsin laws, as they had no operation beyond the limits of that state.

In *Mitchell v. Shook*, 72 Ill. 492, a resident of Indiana came temporarily into Illinois with property which was exempt under the laws of Indiana, and while so in Illinois the property was attached by a creditor who also resided in Indiana. It was held that the defendant could not claim the benefit of the Indiana exemption laws.

The rule has been changed by statute in Illinois. See the note following.

Iowa. — *Leiber v. Union Pac. R. Co.*, 49 Iowa 688; *Mooney v. Union Pac. R. Co.*, 60 Iowa 346.

Kentucky. — In this state the general doctrine that exemption laws have no extraterritorial force is recognized, and it seems to be here held that "the statute of exemption in one state cannot be applied in another state unless the creditor induces the removal of the property against the protest of the debtor, for the purpose of seeking a remedy denied him by the laws of the state where the parties live and the property is located." *Per Pryor, C. J.*, in *Barker v. Brown*, (Ky. 1896) 33 S. W. Rep. 833. And see *Stewart v. Thomson*, 97 Ky. 575, where the general doctrine is recognized.

Ohio. — See *Baltimore, etc., R. Co. v. May*, 25 Ohio St. 347.

Pennsylvania. — *Morgan v. Neville*, 74 Pa. St. 52.

West Virginia. — In this state it has been held as follows: "A citizen of the state of Ohio, having a valid debt against another citizen of that state, which cannot be collected by legal process there by reason of the exemption laws of that state, and which laws make it a misdemeanor for such creditor to assign, transfer, or send out of the state such debt for the purpose of having it collected by proceedings in attachment in courts outside of that state, with intent to deprive such resident debtor of personal earnings so exempt, when the person or corporation owing the money intended to be attached is within the jurisdiction of said state, has a right to bring an action and attach such earnings for such debt in the courts of this state, when the garnishee is a domestic

corporation of this state, and the attachment is served on such garnishee in the county where the action is brought, notwithstanding such creditor may have sent the claim to this state and instituted his action here for the purpose of evading the exemption laws of the state of Ohio. The courts of this state will not, through respect or comity to a sister state, recognize or enforce the exemption laws of such state." *Stevens v. Brown*, 20 W. Va. 451.

There Are Other Cases in which it seems to be held broadly that a debtor residing in one state cannot plead the exemption laws of that state in attachment or garnishment proceedings against him in another state, but there is nothing in the reports of these cases to show that the creditor was a resident of the same state as the debtor.

Alabama. — *Boykin v. Edwards*, 21 Ala. 261; *East Tennessee, etc., R. Co. v. Kennedy*, 83 Ala. 462, 3 Am. St. Rep. 755.

Illinois. — *Roche v. Rhode Island Ins. Assoc.*, 2 Ill. App. 360; *American Cent. Ins. Co. v. Hettler*, 46 Ill. App. 416.

Iowa. — *Broadstreet v. Clark*, 65 Iowa 670; *Lyon v. Callopy*, 87 Iowa 567, 43 Am. St. Rep. 396.

2. Doctrine Giving Effect to Foreign Exemption Laws —*United States*. — *Mason v. Beebee*, 44 Fed. Rep. 556.

Kansas. — In Kansas an exemption of wages has been allowed by the Supreme Court to a nonresident debtor as against a nonresident creditor instituting garnishment proceedings in the state, but the exemption was allowed, not under the laws of the other state, but under the laws of Kansas. The ruling was expressly restricted to the facts of the particular case. *Missouri Pac. R. Co. v. Maltby*, 34 Kan. 125; *Kansas City, etc., R. Co. v. Gough*, 35 Kan. 1, was to the same effect. *Compare Kansas City, etc., R. Co. v. Cunningham*, (Kan. App. 1898) 51 Pac. Rep. 972, where an exemption was allowed in Kansas under a Missouri statute to a resident of Missouri of wages earned by him in Missouri. *McElroy, J.*, said: "It seems to us that it is our duty, as well as a matter of comity between states, that we should recognize the right of exemption, and give effect to the exemption laws of the state of Missouri."

Michigan. — In *Drake v. Lake Shore, etc., R. Co.*, 69 Mich. 168, 13 Am. St. Rep. 382, the Supreme Court of Michigan held that garnishment proceedings could not be instituted in Michigan by a resident of Indiana to evade the exemption laws of Indiana by depriving a debtor residing in that state of wages exempted by its laws, where the wages were earned in Indiana and payable there, and the debtor had not been personally in Michigan and had no property there. And it was further held that this purpose could not be accomplished by assigning the claim to a citizen

4. Effect of Foreign Judgment or Proceeding.—The effect of garnishment proceedings in a state other than that of the principal defendant's residence, and of a judgment therein against the garnishee, upon the right of the principal defendant afterwards to maintain his action against the garnishee in the state of his residence, on the ground that the debt was exempt, is not clear, and the decisions on the question are conflicting. The courts have differed because of conflicting views as to the *situs* of debts for the purpose of giving jurisdiction of attachment and garnishment proceedings;¹ and some of the conflict in the decisions is due to conflicting views, as explained above, on the question whether the courts are bound to give effect to the exemption laws of other states. Decisions in the different states are given in the note below.²

of Michigan and having him institute the proceedings.

Mississippi.—There is dictum in a late Mississippi case to the same effect. Illinois Cent. R. Co. v. Smith, 70 Miss. 344, 35 Am. St. Rep. 651. Further, as to this case, see the next note following.

Nebraska.—In Wright v. Chicago, etc., R. Co., 19 Neb. 175, 56 Am. Rep. 747, it was said in effect in the syllabus by the court, though there is nothing to such effect in the opinion, that where a debt is contracted in another state, where the parties reside, and where it is exempt from garnishment, the exemption will follow the debt if the debtor comes into Nebraska and is there garnished by a resident of the other state. And this statement was repeated with approval in Chicago, etc., R. Co. v. Moore, 31 Neb. 629, 28 Am. St. Rep. 534.

In Singer Mfg. Co. v. Fleming, 39 Neb. 679, 42 Am. St. Rep. 613, it was held in effect that the courts of Iowa exceed their jurisdiction in allowing a Nebraska creditor to come into that state and defeat the exemption laws of Nebraska by attachment proceedings against a Nebraska debtor, and garnishment of wages earned and payable in Nebraska.

New York.—See Martin v. Central Vermont R. Co., 50 Hun (N. Y.) 347.

Wisconsin.—In Pierce v. Chicago, etc., R. Co., 36 Wis. 283, it was assumed that a railroad company existing under the laws of both Wisconsin and Illinois, which was indebted to a resident of Wisconsin for labor there performed, could set up in garnishment proceedings in Illinois, brought by Wisconsin creditors of the employee, the Wisconsin statute exempting such wages. But the question seems to have been regarded as an open one in Commercial Nat. Bank v. Chicago, etc., R. Co., 45 Wis. 180.

Statutory Provisions in Illinois.—In Illinois it is now expressly provided by statute that whenever in any proceedings in any court of this state to subject the wages due to any person to garnishment it shall appear that such person is a nonresident of the state of Illinois; that the wages earned by him were earned and payable outside the state of Illinois, the said person whose wages are so sought to be subjected to garnishment shall be allowed the same exemption as is at the time allowed to him by the law of the state in which he so resides. Act July 1, 1891, Laws 1891, p. 141. See Wabash R. Co. v. Dougan, 142 Ill. 248, 34 Am. St. Rep. 78.

1. Effect of Garnishment in Another State.—**Jurisdiction.**—There is a direct conflict in the

decisions as to whether the *situs* of a debt due by a nonresident to a nonresident is in the state in which the creditor resides, or whether it follows the debtor when he goes into another state so as to render the debtor liable to garnishment in the latter state in attachment proceedings against the creditor who is not found within the state. See the title GARNISHMENT. In some states the courts hold that there is a jurisdiction of the *res*—the debt—in such a case, and in these states the right of the creditor (principal debtor) to claim the debt as exempt under the laws of the state of his residence is defeated, unless such laws may be set up and given effect in the state in which the garnishment proceedings are instituted. Hannibal, etc., R. Co. v. Crane, 102 Ill. 249, 40 Am. Rep. 581; Mooney v. Union Pac. R. Co., 60 Iowa 346; Burlington, etc., R. Co. v. Thompson, 31 Kan. 180, 47 Am. Rep. 497; Howland v. Chicago, etc., R. Co., 134 Mo. 474. Other courts hold that the *situs* of the debt does not follow the debtor so as to give the courts of the other state jurisdiction. Central Trust Co. v. Chattanooga, etc., R. Co., 68 Fed. Rep. 692; Mason v. Beebe, 44 Fed. Rep. 556; Louisville, etc., R. Co. v. Dooley, 78 Ala. 524; Atchison, etc., R. Co. v. Maggard, 6 Colo. App. 85; Douglass v. Phenix Ins. Co., 138 N. Y. 209.

2. Conflicting Decisions in the Different States.—The courts of particular states have made such fine distinctions between their decisions and those of the other states, and some of the cases have turned on such a slight difference in facts, that no general citation of the cases is possible. The exact decisions must therefore be given, to be of any value at all.

Alabama.—In East Tennessee, etc., R. Co. v. Kennedy, 83 Ala. 462, 3 Am. St. Rep. 755, an action was brought in Tennessee against a resident of Alabama, and he was personally served with summons while temporarily in the state. Judgment was rendered against him. A railroad company existing under the laws of Tennessee, but also operating a line in Alabama, was garnished for wages due the debtor for services rendered in Alabama, and judgment was rendered against it as garnishee and was paid. It was held that this was a complete defense to an action by the debtor against the company in Alabama to recover the wages, though they were exempt under the laws of Alabama. It does not appear from the report of what state the creditor was a resident. And it should be noticed that there was personal service on the debtor in Tennessee.

5. Injunction Against Foreign Proceedings. — Even though it be held that the exemption laws have no extraterritorial operation, the courts of a state

Iowa. — In *Moore v. Chicago, etc., R. Co.*, 43 Iowa 385, an action was brought in Iowa by a resident of that state against a railroad company existing under the laws of Iowa, but operating a railroad both in Iowa and in Missouri, to recover wages which were due for work done in Iowa under a contract made there, and which were exempt under the Iowa laws. The company, to defeat the action, set up a judgment rendered against it as garnishee in proceedings brought in Missouri, where the wages were not exempt, by creditors of the plaintiff who were also residents of Iowa, and the judgment was held a complete bar. And it was so held, notwithstanding the only service on the plaintiff in the garnishment proceedings was by publication. The court based the decision on the ground that a judgment *in rem* rendered in one state by a court of competent jurisdiction is entitled to full faith and credit in the other states, and cannot be assailed in another state by a party to the record who claims the subject-matter of the judgment. The court also held that the company could not have successfully set up a right of exemption on behalf of the debtor, as the wages were not exempt in Missouri, and, further than this, that it would not have been bound to do so even if the wages had been there exempt.

Indiana. — It was held in effect in Indiana that under a statute of Missouri relating to attachment, and providing that when the defendant could not be summoned, and his property or effects should be attached by a justice, the justice might make an order requiring the plaintiff to give him notice by advertisement, no jurisdiction was conferred upon the justice by such notice where the only attachment of property was by garnishment of wages which were exempt under the laws of both Indiana and Missouri, and that the garnishee could not set up a judgment against him in Missouri to defeat an action against him in Indiana for such wages. *Terre Haute, etc., R. Co. v. Baker*, 122 Ind. 433.

Kansas. — In *Missouri Pac. R. Co. v. Sharritt*, 43 Kan. 387, 19 Am. St. Rep. 143, a resident of Kansas who had there performed labor for a railway which was created under the laws of Missouri, but which also operated a line in Kansas, brought an action against the company in Kansas to recover his wages. The wages were exempt under the laws of Kansas. To defeat the action, the railway company set up the fact that garnishment proceedings had been instituted against it in Missouri by a creditor of the plaintiff residing in Missouri, and that such proceedings were still pending. The court held that this was no defense.

In *Chicago, etc., R. Co. v. Sturm*, 5 Kan. App. 427, affirmed without opinion in 58 Kan. 818, the Court of Appeals of Kansas, northern department, purporting to follow the doctrine of the above case, held that an action could be maintained in Kansas by a resident employee of a railroad company operating a line in the state, to recover wages exempt under the laws of that state, notwithstanding the judgment

against the company as garnishee in Iowa where the wages were not exempt. See also *Chicago, etc., R. Co. v. Campbell*, 5 Kan. App. 423, 58 Kan. 818. The first-mentioned decision in effect overruled *Union Pac. R. Co. v. Baker*, 5 Kan. App. 253, in which a contrary decision was made by the earlier judges of that court.

Mississippi. — In *Illinois Cent. R. Co. v. Smith*, 70 Miss. 344, 35 Am. St. Rep. 651, it was held that wages due and payable in Mississippi by a railroad company doing business and resident in the state, to an employee residing there, under a contract made there, could not be garnished in another state by a creditor of the employee so as to defeat the right of the latter to claim them as exempt under the laws of Mississippi, and that the pendency of garnishment proceedings in another state against the company could not be set up to defeat an action to recover the wages brought by the employee against the company in Mississippi.

Missouri. — It has been held in Missouri that debts have no *situs*, and may be attached in any state other than that in which the attachment debtor is resident. *Wyeth Hardware, etc., Co. v. Lang*, 127 Mo. 242, 48 Am. St. Rep. 626 (*approving* on this point 54 Mo. App. 147).

And it is held, as following, that when a debt due in Missouri to a resident thereof, from a railroad company operating its road both in Missouri and in another state, is attached in the other state by a creditor also residing in Missouri, and the railroad company is there summoned as garnishee, the court of the other state has jurisdiction; that its decision in such proceedings, denying a claim of the debt as exempt, even if erroneous, is entitled under the Constitution of the United States to full faith and credit in Missouri, and a judgment against the company as garnishee and payment thereof bars a subsequent action by the debtor against the company in Missouri. *Howland v. Chicago, etc., R. Co.*, 134 Mo. 474.

Nebraska. — A decision in Nebraska is to the same effect as the *Iowa* decision referred to above. *Chicago, etc., R. Co. v. Moore*, 31 Neb. 629, 28 Am. St. Rep. 534.

New York. — In one of the lower courts of New York it was held that a creditor residing in New York could not deprive his debtor, also residing there, of his right to an exemption of wages under the New York laws, by going to Vermont and there attaching the same, the employer of the debtor being a Vermont corporation but also doing business in New York; and that a judgment of the Vermont court in such a proceeding was no bar to a subsequent action to recover the wages brought by the debtor against the employer in New York. *Martin v. Central Vermont R. Co.*, 50 Hun (N. Y.) 347.

Ohio. — In Ohio it was held that, in an action for wages against a railroad company owning and operating a railroad through the states of Ohio and West Virginia, it was a sufficient defense to show that the money sought to be recovered had been attached by

may enjoin a resident creditor from collecting his claim out of exempt property or earnings by proceedings in another state.¹

6. Action for Damages. — And some of the courts hold that a debtor may maintain an action for damages if his creditor, a resident of the same state, evades the exemption laws by proceedings in another state.²

7. Statutory Prohibition Against Evasion of Exemption Laws. — In several states statutes have been enacted to prohibit creditors from sending claims out of the state, or assigning them, or instituting proceedings in the state or elsewhere, for the purpose of avoiding the exemption laws of the state; and a creditor violating the statute is declared liable to a criminal prosecution, or to a penalty to be recovered by the debtor, or both.³ These stat-

process of garnishment issued by a West Virginia court in an action there prosecuted against the plaintiff by his creditors, though both the plaintiff and his creditors were residents of Ohio, and though the money was exempt in that state. Baltimore, etc., R. Co. v. May, 25 Ohio St. 347.

Pennsylvania. — In *Morgan v. Neville*, 74 Pa. St. 52, an action was brought in Pennsylvania to recover a debt for wages contracted in that state. The wages were exempt under the laws of that state. The defendant set up a payment made by him as garnishee of the plaintiff in an attachment suit brought in Maryland, wherein personal service was had on him, and a judgment was rendered against him by default. No service was made on the plaintiff, but the defendant gave him notice of the proceedings. All of the parties, including the garnishing creditor, were residents of Pennsylvania, but there was no evidence of collusion between the defendant and the garnishing creditor. Under these circumstances it was held that the Maryland court had jurisdiction of the *res*, that is, the debt; that the exemption laws of Pennsylvania had no effect in Maryland, and did not exempt the debt there; and that the judgment against the defendant as garnishee, and its payment, were a bar to the action against him in Pennsylvania.

Tennessee. — In *Carson v. Memphis, etc., R. Co.*, 88 Tenn. 646, 17 Am. St. Rep. 921, a resident of Alabama brought an attachment suit in that state against a resident of Tennessee who was employed in the latter state by a railroad company operating a road in both states, and garnished the company to reach wages due the debtor, and obtained a judgment, which was paid. This was held a bar to an action in Tennessee to recover the wages.

Wisconsin. — In *Pierce v. Chicago, etc., R. Co.*, 36 Wis. 283, a railroad corporation existing under the laws of both Wisconsin and Illinois was garnished in Illinois by residents of Wisconsin for the purpose of reaching wages due from it to an employee residing and working in Wisconsin, which wages were exempt under the laws of that state. The employee was served by publication only, and had no actual notice of the proceedings, and the company did not set up the right of exemption. Under these circumstances it was held that a judgment against the company as garnishee, and payment thereof, could not be set up to defeat an action by the employee in Wisconsin to recover his wages.

1. Injunction Against Proceedings in Another State. — See *infra*, this title, *Enforcement and Protection of the Right — Remedies on Denial, etc.*

2. Action Against Creditor for Damages. — See *infra*, *Enforcement and Protection of the Right — Remedies on Denial or Infringement of Right.*

3. Statutes Prohibiting Evasion of Exemption Laws. — Code Civ. Pro. Neb. § 531c, *et seq.* There are statutes in other states rendering a creditor liable to a penalty, to be recovered by the injured debtor, for sending a claim out of the state to evade the exemption laws, the penalty in some states being double or treble the amount of damages sustained. Act Pa. May 23, 1887, P. L. 164, 1 Bright. Purd. Dig. 834. And there are also statutes in other states rendering him liable to a criminal prosecution. Act Ill., July 1, 1891, Laws 1891, p. 141; Rev. Stat. Ind., 1896, §§ 2162, 2163.

Foreign Corporations. — The *Nebraska* statute above referred to applies to a foreign corporation having a place of business in Nebraska, if it makes a contract in the state, to be there performed, and afterwards institutes attachment proceedings in another state and appropriates to the satisfaction of its claim the wages of its debtor which are exempt in Nebraska. *Singer Mfg. Co. v. Fleming*, 39 Neb. 679, 42 Am. St. Rep. 613.

"Corporations Engaged in Interstate Business." — The expression in the title of the *Nebraska* act, "corporations * * * engaged in interstate business," construed with reference to the object of the act, means a corporation doing business and employing men in Nebraska, and having in another state such a *situs* as to permit of its being reached by process of garnishment there. *Bishop v. Middleton*, 43 Neb. 10.

Time of Assignment of Claim. — The *Nebraska* act, it has been held, applies to a case where the debt was incurred before the passage of the act, and was assigned in good faith to a third person after its passage, but where such third person thereafter again assigned it for the purpose of evading the exemption laws of the state. An assignment for the purpose of evading the effect of the exemption laws was unlawful before as well as after the passage of the act, and the act affects only the remedy. Its application to the case of debts prior to its passage does not, therefore, impair the obligation of contracts. *Bishop v. Middleton*, 43 Neb. 10.

"Sending" Claim Out of the State. — A creditor who himself takes a claim out of the state with intent to deprive his debtor of the benefit

utes have been held constitutional.¹

VIII. PERSONS ENTITLED TO BENEFIT OF EXEMPTION LAWS — 1. Residence and Citizenship — a. EXPRESS RESTRICTION TO RESIDENTS. — When the statute in express terms extends the right to an exemption to residents only, as is often the case, it is clear that nonresidents temporarily in the state cannot claim the benefit thereof.²

b. IN THE ABSENCE OF EXPRESS RESTRICTION. — Some courts, even when the statute is general in its terms, and is not expressly limited to residents, hold that it should nevertheless be construed as so limited, on the ground that it is the policy of the legislature thus to favor and protect those persons only who reside in the state.³ Other courts have taken a broader view, and have held that when the statute is general every person coming within its terms is entitled to claim the benefit of it, though he may be only temporarily in the state.⁴

of the exemption laws is guilty under a statute making it a criminal offense to "send" a claim out of the state, or "cause" it to be sent, for such a purpose. *State v. Dittmar*, 120 Ind. 54, 388.

1. Constitutionality of Such Statutes. — *Singer Mfg. Co. v. Fleming*, 39 Neb. 679, 42 Am. St. Rep. 613. See also *Bishop v. Middleton*, 43 Neb. 10. And see *supra*, this title, *Constitutionality of Exemption Laws*.

2. Express Restriction to Residents — Alabama. — *Allen v. Manasse*, 4 Ala. 554; *Boykin v. Edwards*, 21 Ala. 261; *McCrary v. Chase*, 71 Ala. 540.

Arkansas. — *Porter v. Navin*, 52 Ark. 352.

Florida. — *Post v. Bird*, 28 Fla. 1.

Indiana. — *Finley v. Sly*, 44 Ind. 269.

Iowa. — *Newell v. Hayden*, 8 Iowa 140; *Lyons v. Callopy*, 87 Iowa 567, 43 Am. St. Rep. 396.

Missouri. — *Stotesbury v. Kirtland*, 35 Mo. App. 148.

North Carolina. — *Jones v. Alsbrook*, 115 N. Car. 46. And see *Latta v. Bell*, 122 N. Car. 639.

Wisconsin. — See *Commercial Nat. Bank v. Chicago, etc.*, R. Co., 45 Wis. 172.

Necessity to Prove Residence. — Where a statute requires that the debtor shall be a resident of the state he must affirmatively show his residence so as to show that he is in condition to claim the exemption. *Post v. Bird*, 28 Fla. 1. In this case the evidence showed that the debtor was doing business in a certain county in Florida, and a bill of sale was introduced in evidence, executed by him and his wife, in which they were described as "of" such county. It seems to have been held that this was not sufficient to show that he was a resident of Florida.

Persons Coming into a State. — A debtor who comes into a state with the intention of residing there with his family is a resident of the state within the meaning of the exemption laws, though he has not yet occupied a dwelling house. *Chesney v. Francisco*, 12 Neb. 626.

3. Statutes Construed as Impliedly Limited to Residents — Georgia. — *Kyle v. Montgomery*, 73 Ga. 337.

Louisiana. — See *Lambeth v. Milton*, 2 Rob. (La.) 81.

Michigan. — *McHugh v. Curtis*, 48 Mich. 262.

Minnesota. — *Orr v. Box*, 22 Minn. 485.

Pennsylvania. — *Yelverton v. Burton*, 26 Pa. St. 351.

Tennessee. — *Hawkins v. Pearce*, 11 Humph. (Tenn.) 44; *Lisenbee v. Holt*, 1 Sneed (Tenn.) 42; *Carson v. Memphis, etc.*, R. Co., 88 Tenn. 646, 17 Am. St. Rep. 921; *Prater v. Prater*, 87 Tenn. 78, 10 Am. St. Rep. 623.

Homestead Exemption Laws. — *Prater v. Prater*, 87 Tenn. 78, 10 Am. St. Rep. 623. See the title **HOMESTEAD**.

4. Construed as Extending to Nonresidents — Illinois. — *Mineral Point R. Co. v. Barron*, 83 Ill. 365; *Wabash R. Co. v. Dougan*, 142 Ill. 248, 34 Am. St. Rep. 74; *Menzie v. Kelly*, 8 Ill. App. 259. Compare *Viele v. Koch*, 27 Ill. 129.

Kansas. — *Missouri Pac. R. Co. v. Maltby*, 34 Kan. 125; *Kansas City, etc.*, R. Co. v. Gough, 35 Kan. 1; *Zimmerman v. Franke*, 34 Kan. 650.

Maine. — *Everett v. Herrin*, 46 Me. 357, 74 Am. Dec. 455.

Michigan. — See, as bearing on the question, *Pettit v. Muskegon Booming Co.*, 74 Mich. 214.

Nebraska. — *Wright v. Chicago, etc.*, R. Co., 19 Neb. 175, 56 Am. Rep. 747. See also *People v. McClay*, 2 Neb. 7.

New Hampshire. — *Hill v. Loomis*, 6 N. H. 263.

Ohio. — *Sproul v. McCoy*, 26 Ohio St. 577; *State v. O'Brien*, 7 Ohio Cir. Dec. 386, 14 Ohio Cir. Ct. Rep. 300.

Oregon. — *Bond v. Turner*, (Oregon 1898) 54 Pac. Rep. 158.

Texas. — *Bell v. Indian Live-Stock Co.*, (Tex. 1889) 11 S. W. Rep. 344.

Vermont. — *Haskill v. Andros*, 4 Vt. 609, 24 Am. Dec. 645.

Wisconsin. — *Lowe v. Stringham*, 14 Wis. 222. See also *Hewett v. Allen*, 54 Wis. 584.

Particular Statutes. — In *Mineral Point R. Co. v. Barron*, 83 Ill. 365, the statute exempting the wages "of a defendant, being the head of a family, and residing with the same," was held to extend to a nonresident.

And in the late case of *Bond v. Turner*, (Oregon 1898) 54 Pac. Rep. 158, it was held that a statute exempting household goods "if owned by a householder, and in actual use or kept for use by and for his family," applies to nonresidents as well as residents.

Aliens. — And in one case a statute which was general in its terms, and not expressly limited to residents, was held to apply to an alien.¹

The Reason given for these decisions is either that the statutes are to be considered as intended to protect from want all persons coming within their terms,² or that, as a nonresident who comes within the state is subject to its laws, he should also be entitled to the benefits of its laws.³

c. CHANGE OF RESIDENCE AND ABSENCE FROM STATE. — When residence is necessary, a person clearly loses his right to claim property as exempt by absconding or removing from the state so as to lose his residence therein.⁴ Whether he can claim as exempt property levied upon, claimed, or set off to him as exempt before his removal, is not clear, and the decisions on the question are conflicting. The question must depend largely upon the language of the particular statute.⁵

Mere Intention to Remove from the state, though avowed, and though followed by preparations to move, does not affect a debtor's right to claim exemptions

1. **Aliens.** — *Haskill v. Andros*, 4 Vt. 609, 24 Am. Dec. 645, wherein it was held that the only cow of a resident of Canada, which had casually strayed into Vermont, could be claimed as exempt under a *Vermont* statute not in terms limited to residents.

2. **Reasoning of the Courts.** — "The statute," said the *Wisconsin* court in *Lowe v. Stringham*, 14 Wis. 222, "makes no discrimination between temporary and permanent residents, nor does it purport to confine its privileges to residents at all. It exempts certain articles of the debtor and his family. And we think it would be entirely inconsistent with the beneficent intentions of the statute, as well as with the dignity of a sovereign state, to say that the temporary sojourner, or even the stranger within our gates, was not entitled to its protection."

3. *Haskill v. Andros*, 4 Vt. 609, 24 Am. Dec. 645. See also *Bond v. Turner*, (Oregon 1898) 54 Pac. Rep. 158, where this case and the reasoning of the court therein were approved and followed.

4. **Removal from State and Loss of Residence** — *Alabama*. — *McCrary v. Chase*, 71 Ala. 540.

Indiana. — *Finley v. Sly*, 44 Ind. 266.

Louisiana. — See *Lambeth v. Milton*, 2 Rob. (La.) 81.

Michigan. — *McHugh v. Curtis*, 48 Mich. 262.

Minnesota. — *Orr v. Box*, 22 Minn. 485.

Missouri. — *Stotesbury v. Kirtland*, 35 Mo. App. 148.

North Carolina. — *Jones v. Alsbrook*, 115 N. Car. 46; *Latta v. Bell*, 122 N. Car. 639.

Pennsylvania. — *Yelverton v. Burton*, 26 Pa. St. 351.

An Abandoned Wife may be entitled to claim the exemption in such a case. See *infra*, this section, *Married Women*.

In *Michigan* it is held that the statute exempting household furniture is intended for the benefit of the debtor's wife and children as well as for the benefit of the debtor himself, and that his voluntary absence cannot deprive them of the right to claim the furniture as exempt from seizure for his debts. *Frechling v. Bressnahan*, 61 Mich. 540, 1 Am. St. Rep. 617.

Presumption of Continuance of Residence. — See *infra*, this title, *Enforcement and Protection of the Right — Presumption and Burden of Proof*.

5. **Removal After Levy, Claim, or Setting Off of Property as Exempt.** — In *Indiana*, where the statute exempts for the benefit of resident householders six hundred dollars (formerly three hundred dollars) worth of property, to be selected by the debtor after an inventory and appraisement, it has been held that when an execution defendant ceases to be a resident householder his right to claim any of his property as exempt ceases, and that an officer can seize and sell on execution property that has been set off to him as exempt while he was a resident householder. *Finley v. Sly*, 44 Ind. 266.

In *Alabama*, under a constitutional provision exempting "from sale on execution, or other process of any court," property of any resident of the state to the value of one thousand dollars, to be selected by such resident, and a statute exempting such an amount of property "from levy and sale under execution or other process," etc., and providing for a claim and contest, it was held that the right to an exemption out of personal property must be determined according to the state of facts existing when the execution was levied, and therefore, that where personal property levied on under an execution was claimed as exempt by the defendant in the execution, and the claim was contested, and at the time of levy and making the claim the defendant was a resident of the state, his subsequent removal from the state and acquisition of a residence in another state, and his residence there at the time of the trial of the contest, could not deprive him of his right to an exemption of the property levied on from the payment of the execution. *McCrary v. Chase*, 71 Ala. 540.

In *North Carolina*, on the other hand, under a constitutional provision exempting property of residents of the state, and a statutory provision in pursuance thereof that whenever the property of any resident of the state shall be levied upon, and the owner shall demand that the same, or any part thereof, shall be exempt "from sale under such execution," appraisers shall lay off the articles exempt, which articles shall be exempt from said levy, it has been held that the exemption is to be determined as of the time just before the sale, and that a person, therefore, who is a resident of the state at the time of a levy, but not at the

as a resident of the state,¹ unless, as is sometimes the case, it is expressly so provided.²

Temporary Absence. — Nor, by the weight of authority, does a mere temporary absence of a debtor, however protracted, defeat the right to the benefit of the exemption laws,³ even though it may be accompanied with an intention to

time of the sale, is not entitled to any exemption. *Jones v. Alsbrook*, 115 N. Car. 46. See also *Pate v. Harper*, 94 N. Car. 23.

1. Mere Intention to Remove Does Not Affect Right — *Alabama*. — *Herzfeld v. Beasley*, 106 Ala. 447. See also *Talmadge v. Talmadge*, 66 Ala. 199; *Bragg v. State*, 69 Ala. 204; *Caldwell v. Pollak*, 91 Ala. 353.

Illinois. — *Winslow v. Benedict*, 70 Ill. 120.

Kentucky. — *Anthony v. Wade*, 1 Bush (Ky.) 110; *Stirman v. Smith*, (Ky. 1888) 10 S. W. Rep. 131.

Michigan. — *Wood v. Bresnahan*, 63 Mich. 614.

Pennsylvania. — *Springer v. Lewis*, 22 Pa. St. 191.

2. Statutory Provisions to the Contrary. — In *Missouri* it is provided that "no property or wages declared by statute to be exempt from execution shall be attached, except in the case of a nonresident defendant, or of a defendant who is about to remove out of the state with intent to change his domicile." Rev. Stat. 1879, § 416; Rev. Stat. 1889, § 539. Under this provision, when a judgment has been recovered in an attachment proceeding brought on the ground that the defendant was about to remove from the state with intent to change his domicile, and an execution is issued thereon, the exempt property of the head of a family may be levied on and sold, though the defendant has not actually left the state. *State v. Kingsbury*, 33 Mo. App. 519. See also *State v. Laies*, 46 Mo. 108; *State v. Chaney*, 36 Mo. App. 513; *Stein v. Burnett*, 43 Mo. App. 477; *Hackett v. Gihl*, 63 Mo. App. 447.

"Starting" to Leave. — In *Iowa* the Code, § 3076, provides that where the debtor, if the head of a family, "has started" to leave the state, he shall only have certain property as exempt. In construing this provision the Supreme Court of that state held that there was a starting to leave the state where a debtor had avowed his intention to move out of the state, and had prepared his wagon to receive his household effects, and had boxed a part of them and removed them from the house. *Adams, C. J., and Rothrock, J., dissented* on the ground that such acts constituted mere preparation, and not a starting. *Graw v. Manning*, 54 Iowa 719.

3. Temporary Absence Does Not Defeat Exemption — *Alabama*. — *Herzfeld v. Beasley*, 106 Ala. 447.

Arkansas. — *Birdsong v. Tuttle*, 52 Ark. 91, 20 Am. St. Rep. 156.

Colorado. — *Wymond v. Amsbury*, 2 Colo. 213.

Indiana. — *Norman v. Bellman*, 16 Ind. 156; *Green v. Simon*, 17 Ind. App. 360.

Michigan. — *Erickson v. Drazkowski*, 94 Mich. 551. And see *Freehling v. Bresnahan*, 61 Mich. 540, 1 Am. St. Rep. 617.

New Hampshire. — *Rice v. Wadsworth*, 59 N. H. 100.

"The general rule is that a man can have

but one place of residence, and that, to lose his residence in one place, he must acquire residence in another place. Personal presence alone at another place does not determine the matter. He must remove without the intention of returning to his home, as such. He must remove to another place with the intent to make it his home." *Green v. Simon*, 17 Ind. App. 360.

Cases Qualifying This Rule — Actual and Legal Residence. — In some states this rule is not recognized to the full extent, but a distinction is made between domicile or legal residence and residence in fact, and it is held that a man who has left the state with his family and settled in another state may cease to be a resident of the state which he has left, within the meaning of the exemption laws, though there may be such an intention to return as will continue legal residence or domicile.

Missouri. — According to this view, it was held in *Stotesbury v. Kirtland*, 35 Mo. App. 148, that where a resident of Missouri had moved to Chicago and accepted a position there, and remained there for a year, without any plan of returning at any definite time, and his family had also left Missouri, and been away for two years, he was not entitled to the benefit of the Missouri exemption laws as a resident of the state, though he intended to return as soon as he could obtain satisfactory employment.

So, in *North Carolina*, under a constitutional provision exempting property of any "resident" of the state, it is held that the debtor, to be entitled to the exemption, must be an actual resident, and not merely have a constructive or legal domicile in the state. *Munds v. Cassidey*, 98 N. Car. 558; *Jones v. Alsbrook*, 115 N. Car. 46. See also *Fulton v. Roberts*, 113 N. Car. 421. "The benevolent provision," said the court in the case first cited, "is for our own citizens—those who have a residence among us—and must be construed as not embracing cases of mere domicile, where the rights incident to domicile may be retained until a domicile is obtained elsewhere."

"Resident Householder." — Temporary absence of a debtor and his family, even though it may not change his residence in law, may deprive him of the character of a "resident householder," and so defeat his claim of exemption, for under such a statute he must keep house in the state. *Ross v. Banta*, 140 Ind. 120. See *infra*, this section, *Head of a Family, Householder, etc.* — *Residence of Family and Change of Residence.*

Absconding Debtor. — In *Orr v. Box*, 22 Minn. 487, the Supreme Court of *Minnesota* said: "In case a debtor abscond from the state with the purpose of avoiding the service of process and all responsibility to its laws, and of placing himself permanently beyond their reach and influence, he must be regarded as voluntarily abandoning all claim to partici-

change his residence at some future time.¹

d. RESIDENCE OF WIFE. — The domicile of a wife, for the purpose of determining her right to the benefit of exemption laws requiring residence, as for most other purposes, is generally that of her husband, so that she may claim an exemption when her husband is a resident, though she be actually in another state.²

But There Are Exceptions to this rule.³ When a wife voluntarily absents herself under circumstances amounting to a wrongful abandonment of her husband, and permanently resides in another state, she loses her residence, and cannot claim the benefit of a statute which expressly or impliedly requires residence.⁴

e. "FAMILY IN THE STATE." — When a statute creates a right of exemption for the benefit of every family in the state, it does not extend to one who has no family, or whose family resides in another state.⁵ Under such a statute, however, the debtor need not necessarily reside in the state. It is sufficient if his family reside there.⁶

f. "CITIZENS" — UNNATURALIZED RESIDENTS. — Unless there is something to show a contrary intention, the term "citizen" in a statute giving an exemption to citizens of the state should be construed as equivalent to "resi-

pate in any of the personal benefits and privileges conferred by such laws upon those remaining subject to their jurisdiction. In the language of Woodward, J., in *Yelverton v. Burton*, 26 Pa. St. 351, 'refusing to remain within our jurisdiction to answer its liabilities, he ought not to be permitted to come within it to appropriate its bounties.' " In other states this decision would not be followed. Thus in *Indiana*, where an execution debtor had left his house where he resided with his family, for the purpose of avoiding a criminal prosecution, and, though at times seen in the county, his usual whereabouts were unknown, it was held that he could nevertheless claim an exemption under the statute giving a right of exemption to resident householders. *Norman v. Bellman*, 16 Ind. 156. And see *Green v. Simon*, 17 Ind. App. 360, where, under such a statute, the wife of a debtor was allowed to claim his exemptions, though he had absconded to avoid a criminal prosecution, and his whereabouts were unknown.

Express Provision — Leaving State with Intent to Defraud Creditors. — In *Washington* it is expressly provided that the property of a person who has left the state with intent to defraud his creditors shall not be exempt from execution or attachment. Under this statute the wife of a debtor who has absconded with intent to defraud his creditors cannot claim his property as exempt under a statute permitting the wife of a debtor, in his absence, to select as exempt such property as he might select if personally present. *Carter v. Davis*, 6 Wash. 327.

1. Intention to Change Residence at Some Future Time. — Residence in a state is not lost by going to another state and engaging in business there with the intention of ultimately residing there. "An intention to change residence at some future time is not a present change of residence." *Astley v. Capron*, 89 Ind. 178.

2. Domicil of Wife Ordinarily That of Husband. — *Prater v. Prater*, 87 Tenn. 78, 10 Am. St. Rep. 623. See the titles *DOMICIL*, vol. 10, p. 6; *HOMESTEAD*.

Wife Never in the State. — The mere fact that the wife has never been in the state, there having been no abandonment, does not prevent her domicile from being that of her husband in the state. *Lacey v. Clements*, 36 Tex. 661; *Clements v. Lacey*, 51 Tex. 157.

3. Exceptions to Rule — Husband in Another State. — It has been held that where a woman who is a resident of a state marries a man who is a resident of another state, but retains her actual residence in the state, her husband remaining out of the state, she is a resident of the state within the meaning of the exemption laws. *Fish v. Street*, 27 Kan. 270.

4. Abandonment of Husband by Wife. — *Prater v. Prater*, 87 Tenn. 78, 10 Am. St. Rep. 623; *Earle v. Earle*, 9 Tex. 630.

Forfeiture of Widow's Allowance. — See the title *ALLOWANCES*, vol. 2, p. 164.

5. Family in Another State. — *Allen v. Manasse*, 4 Ala. 554; *Keiffer v. Barney*, 31 Ala. 192; *Bonnel v. Dunn*, 29 N. J. L. 437.

Residence with Family. — It is also required by some of the statutes that the debtor shall reside with his family in the state. See *Schwartz v. Birnbaum*, 21 Colo. 21.

Elsewhere Treated. — As to the construction and effect of provisions like these, see *infra*, this section, *Head of a Family, Householder, etc.* — *Residence of Family and Change of Residence*.

6. Absence of Debtor. — It was so held in *Bonnel v. Dunn*, 29 N. J. L. 435, under a statute exempting property of "any debtor having a family residing" in the state. In this case a debtor who had lived in New Jersey absconded. It was held that his absence did not defeat the right of his family to the exemption. "The benefits of the act," it was said, "are not extended to the goods of every debtor with or without a family, nor are the goods exempt if he have a family residing in another state, and move here. If the debtor reside in another state, and has a family residing here in the possession of the goods, they are exempt to the extent prescribed by the act. The words 'residing in this state' qualify or relate to the family, not the debtor."

dent," and to include unnaturalized residents. And citizenship is not necessary to constitute one a resident within the meaning of the exemption laws.¹

g. TIME OF BECOMING A RESIDENT. — When a statute requires a debtor to be a resident of the state to entitle him to the benefit of the exemption laws, it is not necessary that he shall have been a resident at the time when the debt was contracted. It is sufficient if he is a resident at the time of the levy as against which the exemption is claimed.²

2. "Head of a Family," "Householder," etc. — *a.* IN GENERAL. — Some of the exemption laws are not in terms restricted to a person who is the head of a family, or a householder, housekeeper, etc., but are general in their language, and apply equally to persons who have no one at all dependent upon them for support. Very many of the statutes, however, are restricted by the use of one or the other of these terms. Whether or not such a status is necessary to entitle one to the benefits and privileges conferred by the law depends, of course, upon a construction of the particular statute under which the claim is made.³

Claiming Both as a Mechanic and as Head of a Family. — Under a statute exempting the tools and implements of a mechanic necessary for carrying on his trade,⁴ and also exempting in another provision certain property of any debtor who is the head of a family, a mechanic who is the head of a family may claim exemptions under both provisions.⁵

1. "Citizen" Equivalent to "Resident." — *McKenzie v. Murphy*, 24 Ark. 155. In this case it was said: "The word 'citizen' is often used in common conversation and writing as meaning only an inhabitant, a resident of a town, state, or county, without any implication of political or civil privileges;" and the court held that an unnaturalized resident of the state was entitled to an exemption under a statute giving the right to "every free white citizen of this state, male or female, being a householder." See also *Dawley v. Ayers*, 23 Cal. 108; *People v. McClay*, 2 Neb. 7; *Cobbs v. Coleman*, 14 Tex. 594.

2. Time of Becoming a Resident. — *Gray v. Putnam*, 51 S. Car. 97.

3. Construction of Particular Statutes. — In *McLarty v. Tibbs*, 69 Miss. 357, the material part of the statute before the court for construction (Code Miss. 1880, § 1244) was as follows: "The following property shall be exempt from seizure under execution or attachment, to wit: First, the tools of a mechanic, necessary for carrying on his trade. Second, the agricultural implements of a farmer, necessary for two male laborers. * * * Eighth, all globes, books, and maps, used by the teachers of schools, academies, and colleges. Also the following property of each head of a family, to wit: two work horses or mules [and certain other specified property], and the wages of every laborer or mechanic, to the amount of one hundred dollars, shall be exempt from garnishment or other legal process." It was held that the last clause was controlled by the words "each head of a family," and that the exemption of wages, therefore, could be claimed only by a laborer or mechanic who was the head of a family.

A statute giving a right of exemption to "every citizen or head of a family" extends the right as well to single men or individuals as to married men or heads of families. It means "every individual independent of and

not properly connected with a family as one of its members, and every head of a family." *Cobbs v. Coleman*, 14 Tex. 594.

A statute exempting beds, bedsteads, bedding, and household utensils "of any debtor, necessary for himself, his wife, and children," applies to an unmarried man. *Brown v. Wait*, 19 Pick. (Mass.) 470, 31 Am. Dec. 154.

Implied Restriction to Head of Family. — In *Gunn v. Gudehus*, 15 B. Mon. (Ky.) 447, the court construed the exemption laws as limited to debtors having a family, though not so limited in terms, as it was considered that the previous statutes showed such an intention on the part of the legislature. And see *Seaton v. Marshall*, 6 Bush (Ky.) 429, 99 Am. Dec. 683.

Exemption "for Use of Family." — When a statute exempts property "for the use of every family in this state," it is not intended for the benefit of every debtor, but only for the benefit of debtors who have families, and whose families reside in the state. *Allen v. Manasse*, 4 Ala. 554; *Abercrombie v. Alderson*, 9 Ala. 981.

Such a statute does not extend to a married woman residing in the state, but who has no children or other persons dependent upon her, and whose husband is a nonresident. *Keifer v. Barney*, 31 Ala. 192. Nor does it extend to a debtor residing in the state, and having a family in another state. *Allen v. Manasse*, 4 Ala. 554.

Nonsupport of Family. — In *Texas*, under a statute exempting a horse and wagon for the benefit of every family in the state, it has been held that the horse and wagon of a person having a wife and children are exempt, although for a year he has not lived with his wife nor contributed to her support. *Rogers v. Fox*, 4 Tex. App. Civ. Cas., § 85.

4. Claiming Both as a Mechanic and as Head of a Family. — See *infra*, this section, *Persons Engaged in Particular Occupations — Mechanics*; and *infra*, this title, *Property Exempt under the Statutes — Tools, Implements, Instruments, etc.*

5. *Harrison v. Martin*, 7 Mo. 286.

b. ACTUAL EXISTENCE OF FAMILY NECESSARY. — The policy and intent of the statutes, when limited to householders and heads of a family, is to exempt certain property because the support of a family, great or small, is cast upon the head thereof, and the family, therefore, must have an actual existence, as distinguished from one that exists theoretically only.¹

c. "HOUSEHOLDER." — The term "householder" is sometimes used in the exemption laws instead of the term "head of a family." This term has been defined to mean a person owning or holding and occupying a house,² but in most states it has been held to mean more than this. It has reference to persons having a family to provide for, and is virtually synonymous with "head of a family."³

d. WHAT CONSTITUTES A "FAMILY" AND THE "HEAD" OF A FAMILY, ETC. — A "family" has been defined to be "a collection of persons living together under one head,"⁴ but this definition is too broad. It would include collections of persons which have repeatedly been held not to constitute a

1. *Actual Existence Distinguished from Existence in Theory Only.* — *Per* Seevers, J., in *Linton v. Crosby*, 56 Iowa 389, 41 Am. Rep. 107. For this reason it was held in this case that when a man has no children and lives separate and apart from his wife, boarding, and neither contributing nor being asked to contribute to her support, he is not the head of a family within the meaning of the exemption laws.

2. *"Householder" Defined.* — *Pearson v. Miller*, 71 Miss. 379, 42 Am. St. Rep. 470.

"He is to be deemed a householder upon whom rests the duty of supporting the members of his family or household." *Bunnell v. Hay*, 73 Ind. 452.

In *Graham v. Crockett*, 18 Ind. 119, it was held that an unmarried man who kept house with his sister, and who directed and controlled the affairs of the household, each of them owning some personal property, and both by their labor contributing to the household expenses, was a householder.

In *Ross v. Banta*, 140 Ind. 120, it was held that to be a householder a man must keep house, and, therefore, that a person who had removed to another state on government service, taking with him his family and part of his household goods, was not a "resident householder," though he had such an intention to return that he continued to be a resident.

3. *Restricted Meaning.* — In *Aaron v. State*, 37 Ala. 106, it was said that "the term 'householder' is defined by Mr. Webster to mean 'the master or chief of a family; one who keeps house with his family;'" and that it "means something more than the mere occupancy of a room or house. It implies in its term the idea of a domestic establishment — of the management of a household." In *Nelson v. State*, 57 Miss. 286, 34 Am. Rep. 444, it was decided that a householder is any head or chief of a domestic establishment which he keeps together and provides for, but that he need not be the actual occupant of a house. In both of these cases the statute before the court was one requiring jurors to be householders; but the term as used in the exemption laws has been defined in the same way.

In *Bowne v. Witt*, 19 Wend. (N. Y.) 475, the court said that "householder," in a statute exempting wearing apparel, meant "the head, master, or person who has the charge of and

provides for a family." And again in *Woodward v. Murray*, 18 Johns. (N. Y.) 400, it was said that "'household' means 'a family living together,' and a 'householder' 'a master of a family.'" See also *Griffin v. Sutheiland*, 14 Barb. (N. Y.) 456; *Fink v. Fraenkle*, 20 Civ. Pro. Rep. (N. Y. City Ct.) 4c2; *Chamberlain v. Darrow*, 46 Hun (N. Y.) 48.

In *Calhoun v. Williams*, 32 Gratt. (Va.) 18, 34 Am. Rep. 759, it was held that an unmarried man who was keeping house and had his farm hands living with him, but who had no other persons dependent upon him living with him, was not a householder within the meaning of the homestead exemption law. See, to the same effect, under the chattel exemption laws, *Peterson v. Bingham*, 13 Wash. 178, *cit- ing* 9 AM. AND ENG. ENCYC. OF LAW (1st ed.) 783.

Members of Family. — The term "householder" does not apply to subordinate members or inmates of the household. Therefore an adult residing with his stepmother and transacting her business is not a householder within the meaning of a statute exempting wearing apparel of "any person being a householder." *Bowne v. Witt*, 19 Wend. (N. Y.) 475.

Visitors. — A person residing as a visitor or by sufferance in the house of another is not a householder. *Veile v. Koch*, 27 Ill. 129.

Evidence — Reputation. — That a person is or is not a householder cannot be proved by reputation. *Eastman v. Caswell*, 8 How. Pr. (N. Y. Supreme Ct.) 75.

Other Decisions on the question as to who is a householder will be found in the following pages. See *infra*, this section, *Obligation to Support and Condition of Dependence; Living Together and Keeping House — Separation of Family and Absence of Head; Residence of Family and Change of Residence*, etc.

4. *Definition of "Family."* — *Pearson v. Miller*, 71 Miss. 379, 42 Am. St. Rep. 470.

"The word 'family,' as used in the exemption laws, we think embraces a collective body of persons, generally relatives and servants — a household, living together in one house or curtilage — and does not embrace separate individuals who have no common home." *Zimmerman v. Franke*, 34 Kan. 650. See also *Homestead Cases*, 31 Tex. 677, 98 Am. Dec. 553.

family within the meaning of the exemption laws. The term, as used in these laws, means something more than this. According to the weight of authority, it means a collection of persons living together under one head, under such circumstances or conditions that the head is under a legal or moral obligation to support the other members, and the other members are dependent upon him for support.¹

Collection of Persons — Number of Members. — All of the courts will no doubt agree that there must be a collection of persons under one head, and that one person alone cannot be a family.² But no specific number of persons is required. Two are sufficient, as husband and wife, or parent and child.³

Children Not Necessary. — To constitute a family it is not necessary that there shall be children. The family may consist of husband and wife alone.⁴

Widowers and Widows. — On the other hand, it is not necessary that there shall be husband and wife. A widower or widow supporting a child may be the head of a family.⁵

Unmarried Persons. — And under some circumstances an unmarried man or woman may occupy such a position.⁶

e. OBLIGATION TO SUPPORT AND CONDITION OF DEPENDENCE — (1) In General. — It is very generally held that, to constitute one the head of a family within the purpose and intent of the exemption laws, there must be at least a condition of dependence on the part of the other members upon the head, and a legal or moral obligation on the part of the head to support them, and that a mere aggregation of individuals is not enough.⁷ There are a few decisions

Homestead Exemption Laws. — The question as to who is the head of a family arises also under the homestead exemption laws. The decisions under those laws are also generally applicable to the laws exempting chattels. See the title **HOMESTEAD**.

1. Condition of Dependence — *United States*, — *Bailey v. Comings*, 16 Nat. Bankr. Reg. 382, 2 Fed. Cas. No. 733.

Iowa, — *Whalen v. Cadman*, 11 Iowa 226.

Kentucky, — *Carter v. Adams*, (Ky. 1887) 4 S. W. Rep. 36.

Mississippi, — *Hill v. Franklin*, 54 Miss. 632.

Missouri, — *Murdock v. Dalby*, 13 Mo. App. 41.

Virginia, — *Calhoun v. Williams*, 32 Gratt. (Va.) 18, 34 Am. Rep. 759.

Conflicting Decisions. — The definition given in the text is supported by the great weight of authority, but it will not apply in all the states. On some points there is a direct conflict in the decisions. Thus in some states it is held that to constitute one the head of a family, within the meaning of the exemption laws, there must be such a relation between him and the persons whom he supports as to make it his legal obligation to support them, as distinguished from a mere moral obligation. And on the other hand there are decisions in which neither a legal nor a moral obligation to support is required. See *infra*, this section, *Obligation to Support and Condition of Dependence*.

There is also a direct conflict of opinion as to whether a living together is necessary. See *infra*, this section, *Living Together and Keeping House*.

2. Collections of Persons under One Head Necessary. — See *Poor v. Hudson Ins. Co.*, 2 Fed. Rep. 438.

3. No Particular Number Necessary. — See *Poor v. Hudson Ins. Co.*, 2 Fed. Rep. 438; *Kitchell v. Burgwin*, 21 Ill. 45.

4. Husband and Wife Alone. — "Having a wife is having 'a family.'" *Kitchell v. Burgwin*, 21 Ill. 40. And see *Whitehead v. Tapp*, 69 Mo. 415; *Cox v. Stafford*, 14 How. Pr. (Saratoga County Ct.) 521.

5. Widows. — *Weed v. Dayton*, 40 Conn. 293; *McHugh v. Curtis*, 48 Mich. 262. See *infra*, this section, *Widows and Deserted or Divorced Wives*.

Widowers. — *Sallee v. Waters*, 17 Ala. 482; *Tyson v. Reynolds*, 52 Iowa 431. See *infra*, this section, *Widowers and Deserted or Divorced Husbands*.

6. Unmarried Persons. — *Ellis v. White*, 47 Cal. 73; *Arnold v. Waltz*, 53 Iowa 706, 36 Am. Rep. 248. See *infra*, this section, *Unmarried Persons*.

7. Dependence and Obligation to Support. — *Allen v. Manasse*, 4 Ala. 556.

"We deduce from the authorities," said the *Texas* court, "the following general rules to determine when the relation of a family, as contemplated by law, exists: 1. It is one of social status, not of mere contract. 2. Legal or moral obligation on the head to support the other members. 3. Corresponding state of dependence on the part of the other members for this support." *Roco v. Green*, 50 Tex. 483.

Illustrations. — In *Whalen v. Cadman*, 11 Iowa 226, it was held that an unmarried man with whom his brother and his brother's wife lived, and who furnished the necessities for housekeeping and living, he and his brother working a farm together, and the brother's wife keeping house, was not the head of a family.

And in *Carter v. Adams*, (Ky. 1887) 4 S. W. Rep. 36, it was held that a widower who keeps house, and has boarding with him two married daughters and their husbands, cannot be considered as having a family, within the meaning of a statute exempting property of a housekeeper with a family.

in conflict with this view,¹ but it is sustained by the overwhelming weight of authority.

(2) *Doctrine Requiring Legal Obligation to Support.* — Some of the courts have gone further than this, and have held that a person, to be the head of a family, must be under a legal obligation to support its members; that the relation of husband and wife or that of parent and child must exist, and that a mere moral obligation is not enough to give him this status.²

(3) *Doctrine that Moral Obligation Is Sufficient.* — Most of the courts, however, do not recognize this doctrine, but hold that a mere moral or natural obligation to support and a condition of dependence are sufficient.³

Adopted Children. — In *In re Lambson*, 2 Hughes (U. S.) 233, it was held that the adoption of another's child by an unmarried person, and the maintenance of a household, did not constitute such person the head of a family so as to entitle him to the benefit of the exemption laws of *South Carolina*.

And in *Hill v. Franklin*, 54 Miss. 632, it was held that a widower, without children, who sheltered an informally adopted daughter and her husband, was not for this reason the head of a family.

But in *Bunnell v. Hay*, 73 Ind. 452, it was held that a widower who employed a family to keep house for him and his adopted daughter, who was dependent upon him for support, was a resident householder.

1. **Decisions to the Contrary.** — In *Tyson v. Reynolds*, 52 Iowa 431, a widower with whom his son and his son's wife lived, paying no board or other compensation, was held to be the head of a family. "A family" said the court, "is 'the collective body of persons who live in one house, under one head or manager.' The relation existing between such persons must be of a permanent and domestic character, not abiding together temporarily as strangers. There need not, of necessity, be dependence or obligation growing out of the relation." For other conflicting cases see the title **HOMESTEAD**.

2. **Legal Obligation Held Necessary** — *United States*. — See *In re Lambson*, 2 Hughes (U. S.) 233.

Alabama. — *Sallee v. Waters*, 17 Ala. 482.

Georgia. — *Dendy v. Gamble*, 64 Ga. 528; *Calhoun v. McLendon*, 42 Ga. 405.

New York. — *Blake v. Bolte*, 9 Misc. Rep. (N. Y.) 714, (City Ct.) 30 N. Y. Supp. 209.

Ohio. — *Riley v. Hitzler*, 49 Ohio St. 651.

Applications of This Doctrine. — According to this view, it was held, in *Dendy v. Gamble*, 64 Ga. 528, that a brother supporting his indigent sister and her children, who lived with him and who were dependent upon him, was not the head of a family within the meaning of the homestead exemption laws. Compare *Marsh v. Lazenby*, 41 Ga. 153; *Blackwell v. Broughton*, 56 Ga. 390.

And in *Riley v. Hitzler*, 49 Ohio St. 651, it was held that a debtor residing with his widowed mother and invalid brother, and supporting them, was not the head of a family within a statute exempting three months' earnings to every debtor having a family.

Statutory Duty to Support Parent. — When a statute requires a man to support his indigent parents, an unmarried man whose indigent father or mother lives with him, and is sup-

ported by him, is the head of a family within the meaning of the exemption laws. *Marsh v. Lazenby*, 41 Ga. 153.

3. **Moral or Natural Obligation to Support Sufficient** — *United States*. — *Bailey v. Comings*, 16 Nat. Bankr. Reg. 382, 2 Fed. Cas. No. 733.

Iowa. — *Whalen v. Cadman*, 11 Iowa 226; *Parsons v. Livingston*, 11 Iowa 104, 77 Am. Dec. 135; *Tyson v. Reynolds*, 52 Iowa 431.

Kentucky. — *McMurray v. Shuck*, 6 Bush (Ky.) 111, 99 Am. Dec. 662.

Missouri. — *Wade v. Jones*, 20 Mo. 75, 61 Am. Dec. 584; *Spengler v. Kaufman*, 46 Mo. App. 649.

South Carolina. — *Moyer v. Drummond*, 32 S. Car. 165, 17 Am. St. Rep. 850, citing 7 Am. AND ENG. ENCYC. OF LAW (1st ed.) 804.

Tennessee. — *Ex p. Brien*, 2 Tenn. Ch. 33.

Wisconsin. — *Connaughton v. Sands*, 32 Wis. 387.

Unmarried Man Supporting Sisters or Brothers.

— According to this doctrine it was held in *Wade v. Jones*, 20 Mo. 75, 61 Am. Dec. 584, that an unmarried man who kept house and supported his widowed sister and her children, the sister keeping house for him, was the head of a family and entitled as such to claim the chattel exemption. "It is not necessary," said the court, "that the relation of husband and wife, or father and child, or mother and child, should exist in every case to constitute a family. The man who controls, supervises, and manages the affairs about the house is the head of a family, and such a man need not necessarily be a husband or a father." See also *Seymour v. Cooper*, 26 Kan. 539.

And in *McMurray v. Shuck*, 6 Bush (Ky.) 111, 99 Am. Dec. 662, it was held that an unmarried man who, after the death of his parents, kept house and supported an unmarried sister and two brothers, all of whom were under twenty-one years of age, and were dependent upon him, was a housekeeper, and entitled to the benefit of a statute exempting provisions for the benefit of the family. *Duncan v. Frank*, 8 Mo. App. 286, is to the same effect.

In *Moyer v. Drummond*, 32 S. Car. 165, 17 Am. St. Rep. 850, a brother who kept house and supported his sister was held to be the head of a family, though the house belonged to the sister, the rental value thereof being insufficient for her maintenance.

In *North Dakota* the statute expressly declares that "every person" is the head of a family "who has residing on the premises with him or her, and under his or her care and maintenance, either * * * a minor brother or sister or the minor child of a de-

(4) *Contract Relation*—(a) *In General*.—It is well settled that an aggregation of individuals sustaining a mere contract relation towards each other is not a family within the meaning of the exemption laws.¹ The family relation is “a relation of status, and not merely a relation of contract.”²

(b) *Master and Servants*.—For this reason it has repeatedly been held that a person who lives in a house with servants only is not entitled to the benefit of the exemption laws as the head of a family. The relation of master and servant, being a mere contract relation, does not give him such a status.³ The same construction has been placed upon the term “householder” in a statute of exemption.⁴

(c) *Persons Keeping Boarders*.—For the same reason a person who keeps boarders is not for that reason the head of a family, if she has no person dependent

ceased brother or sister,” or “an unmarried sister or any other of the relatives mentioned in this section who have attained the age of majority and are unable to take care of or support themselves.” Rev. Codes, § 3625. And it has been held to include an unmarried man who has residing with him, and under his care and maintenance, a married adult brother who is unable to take care of or support himself. *Webster v. McGauvran*, (N. Dak. 1899) 78 N. W. Rep. 80.

Unmarried Son Supporting Mother.—In *State v. Kane*, 42 Mo. App. 253, an unmarried man who supported his mother, who lived with him and kept house for him, was held to be the head of a family. See also *Seymour v. Cooper*, 26 Kan. 539.

Unmarried Woman Supporting Nieces.—And in *Arnold v. Waltz*, 53 Iowa 706, 36 Am. Rep. 248, it was held that an unmarried woman keeping house, and there bringing up two children of her deceased sister, was the head of a family, though she had taken no steps to adopt them formally.

Father Supporting Adult Daughter.—In *Georgia* a legal obligation is required, and yet in *Blackwell v. Broughton*, 56 Ga. 390, a man was held to be the head of a family where he supported his widowed adult daughter and her children, who lived with him and were dependent upon him for support. Compare, however, *Dendy v. Gamble*, 64 Ga. 528.

As Against Judgment in Favor of Wife for Maintenance.—This rule was qualified in *Spengler v. Kaufman*, 46 Mo. App. 644, in the case of a man having a wife living whom he failed to support, and it was held that while a man who lives with and supports his mother and sisters is ordinarily to be regarded as the head of a family within the meaning of the exemption laws, he is not to be so considered when he seeks to claim an exemption as against a judgment for maintenance recovered against him by his wife, since the allowance of the exemption under such circumstances would be a perversion of the statute and defeat the intention of the legislature. See also *Spengler v. Kaufman*, 43 Mo. App. 5.

1. Mere Contract Relation Not Enough.—*Whalen v. Cadman*, 11 Iowa 226; *Murdock v. Dalby*, 13 Mo. App. 41. And see the cases cited in the notes following.

2. Murdock v. Dalby, 13 Mo. App. 41.

It has been held, therefore, that the fact that a family lives in the house with the owner of a farm, under a special arrangement for work-

ing the farm on shares, does not make such owner the head of a family. *Bailey v. Comings*, 16 Nat. Bankr. Reg. 382, 2 Fed. Cas. No. 733.

3. Master and Servant—As a “Family.”—In *Race v. Oldridge*, 90 Ill. 250, 32 Am. Rep. 27, it was held that a widow who kept a boarding house, and who had living with her a female friend and female servants, besides the boarders, was the head of a family within the meaning of the *Illinois* exemption laws. This case, however, is opposed to the great weight of authority.

In *Murdock v. Dalby*, 13 Mo. App. 41, it was held that a widow residing in her house with no other persons save her employees and servants was not the head of a family. “The word ‘family,’” said the court, “as now used, implies that the persons constituting the group which is so designated are related to each other in some degree more or less direct, by blood or affinity. The relation is obviously a relation of status, and not merely a relation of contract.”

In *Calhoun v. Williams*, 32 Gratt. (Va.) 18, 34 Am. Rep. 759, it was held that a single man, who kept house, but who had no other person living with him except servants or employees, was not the head of a family or householder within the exemption law of *Virginia*. See also *In re Lambson*, 2 Hughes (U. S.) 233; *Calhoun v. McLendon*, 42 Ga. 405; *McMurray v. Shuck*, 6 Bush (Ky.) 111, 99 Am. Dec. 662; *Whaley v. Whaley*, 50 Mo. 577; *Garaty v. Du Bose*, 5 S. Car. 493; *Roco v. Green*, 50 Tex. 483.

4. “Householder.”—In *Van Vechten v. Hall*, 14 How. Pr. (Saratoga County Ct.) 436, an unmarried man keeping house was held to be a “householder,” within the meaning of a statute of exemption, though there was no one living with him except boarders and servants, and he had no one dependent upon him. *Kelley v. McFadden*, 80 Ind. 536, is to substantially the same effect.

There are decisions in other states, however, which hold in effect that the term “householder,” as it is used in the exemption laws, is synonymous with the expression “head of a family,” and that one who has no person dependent upon him for support, and who has servants only living with him, is not a householder, though he may keep house. *Calhoun v. Williams*, 32 Gratt. (Va.) 18, 34 Am. Rep. 759 (referred to in the note preceding). See also *supra*, this section, *Householder*.

upon her for support.¹ It is otherwise, of course, if she also has living with her a child whom she supports.²

f. LIVING TOGETHER AND KEEPING HOUSE—(1) *Doctrine Requiring Maintenance of Home*.—It has been held that to constitute one the head of a family or a householder within the meaning of the exemption laws he must keep house or maintain a home, and that the mere fact that he has a child or other persons dependent upon him for support, and supports them, is not enough.³

(2) *Contrary Doctrine*.—The weight of authority, however, seems to be against this view. There are a number of cases in which a person supporting dependent children or relatives has been regarded as within the statutes, both as a householder and as the head of a family, though he did not keep house, and though he and those who were dependent upon him lived in different places.⁴

(3) *Boarding and Living Apart*.—Thus it has been held that the fact that a family boards, instead of keeping house, does not destroy the family relation, and that it can make no difference in such a case that the members board at different houses.⁵

(4) *Several Families in the Same House*.—That several families live together in the same house, as boarders, or otherwise, and take their meals at a common table, does not prevent each from being a separate family, and the head of each the head of a family.⁶

(5) *Dwelling and Eating in Different Places*.—It is not necessary that the members of a family shall dwell and eat in the same house. They may live in one house and take their meals in another, or at a restaurant or hotel.⁷

(6) *Separation of Family and Absence of Head*.—To entitle a person to an exemption as a householder or the head of a family, the family need not be

1. *Persons Keeping Boarders*.—Weed v. Dayton, 40 Conn. 293; Carter v. Adams, (Ky. 1887) 4 S. W. Rep. 36. Compare, as contra, Race v. Oldridge, 90 Ill. 250, 32 Am. Rep. 27; Van Vechten v. Hall, 14 How. Pr. (Saratoga County Ct.) 436.

2. Weed v. Dayton, 40 Conn. 293.

3. *Cases Requiring Maintenance of Home—Head of Family*.—Searcy v. Short, 1 Lea (Tenn.) 749; Zimmerman v. Franke, 34 Kan. 650; Gibson v. Gross, (Kan. App. 1898) 54 Pac. Rep. 796; Pearson v. Miller, 71 Miss. 379, 42 Am. St. Rep. 470.

In Jones v. Gray, 3 Woods (U. S.) 494, it was held that an unmarried man who lived in one town, but did not keep house, and supported by his contributions his mother and unmarried sister in another town, was not entitled to the exemptions allowed by the laws of Georgia to the head of a family.

4. *Cases Not Requiring Maintenance of Home*.—See Seaton v. Marshall, 6 Bush (Ky.) 429, 99 Am. Dec. 683; Roberts v. Moudy, 30 Neb. 683, 27 Am. St. Rep. 426. And see Robinson's Case, 3 Abb. Pr. (N. Y. C. Pl.) 466.

Householder.—In Astley v. Capron, 89 Ind. 167, it was held that a householder, in the sense of a statute exempting property from execution, is not necessarily a housekeeper, but that it is sufficient if he be the head of a family to whose support he contributes.

Head of a Family.—In State v. Finn, 8 Mo. App. 261, it was held that a husband is the head of a family though his wife and children are temporarily absent from the state, and he has ceased to keep house.

Family in Another State.—And in Pettit v.

Muskegon Booming Co., 74 Mich. 214, it was held that a man residing in Michigan, and supporting a family in Canada out of his wages, was entitled to the benefit of a statute of Michigan exempting the wages of "a householder having a family." See also Chesney v. Francisco, 12 Neb. 626; People v. McClay, 2 Neb. 9.

5. *Families Boarding*.—Sallee v. Waters, 17 Ala. 482; Astley v. Capron, 89 Ind. 167; Bachman v. Crawford, 3 Humph. (Tenn.) 213, 39 Am. Dec. 163. See also Seaton v. Marshall, 6 Bush (Ky.) 429, 99 Am. Dec. 683.

Boarding and Living Apart.—In Sallee v. Waters, 17 Ala. 482, a widower with one child, who was dependent upon him for support, was held to be the head of a family, though he did not keep house, but he and the child boarded at different houses in the same town. "It is not necessary," said the court, "that the family should live together; it is the relation and the dependence on that relation, and not the aggregation of the individuals, that constitutes a family." See *in fra*, this section, *Separation of Family and Absence of Head*.

Householder.—The fact that a person is boarding temporarily, and that his household goods are stored, does not deprive him of the character of a householder, if he intends to resume housekeeping. Cantrell v. Conner, 51 How. Pr. (N. Y. C. Pl.) 45; Griffin v. Sutherland, 14 Barb. (N. Y.) 456.

6. *Several Families Living in the Same House*.—Wade v. Jones, 20 Mo. 75, 61 Am. Dec. 584; Bachman v. Crawford, 3 Humph. (Tenn.) 213, 39 Am. Dec. 163.

7. *Dwelling and Eating at Different Places*.—See Poor v. Hudson Ins. Co., 2 Fed. Rep. 438.

kept together as a unit continuously, nor need he always remain with the family. Temporary separation of the family, either by the absence of a member or by the absence of the head, however protracted, will not dissolve the family relation or break up the household.¹

g. **WIDOWS AND DESERTED OR DIVORCED WIVES.** — A widow who has living with her and supports a child or children is a householder or head of a family within the meaning of the exemption laws.² But by the weight of authority it is otherwise if she is living alone and has no one dependent upon her for a support; and it can make no difference in such a case that she once had others living with her and dependent upon her.³ An abandoned wife may be the head of a family.⁴ And the same is true of a divorced wife, if she has the custody of children and supports them.⁵

Allowance to Widows and Children. — There are statutes in many states providing for the setting apart of property as exempt to the widow and children of a deceased debtor. These statutes are treated in another part of this work.⁶

h. **WIDOWERS AND DESERTED OR DIVORCED HUSBANDS.** — A widower or a deserted or divorced husband may be a householder or the head of a family if he has a child or children dependent upon him for support.⁷ But a

1. Temporary Separation of Family. — *Bailey v. Comings*, 16 Nat. Bankr. Reg. 382, 2 Fed. Cas. No. 733; *Astley v. Capron*, 89 Ind. 167; *Norman v. Bellman*, 16 Ind. 156; *Bunnell v. Hay*, 73 Ind. 452; *Seaton v. Marshall*, 6 Bush (Ky.) 429, 99 Am. Dec. 683; *Carrington v. Herrin*, 4 Bush (Ky.) 624; *Pearson v. Miller*, 71 Miss. 379, 42 Am. St. Rep. 470; *State v. Finn*, 8 Mo. App. 261; *Robinson's Case*, 3 Abb. Pr. (N. Y. C. Pl.) 466; *Cantrell v. Conner*, 51 How. Pr. (N. Y. C. Pl.) 45; *Griffin v. Sutherland*, 14 Barb. (N. Y.) 456.

Permanent Abandonment of Family. — In *Woodward v. Murray*, 18 Johns. (N. Y.) 400, it seems to have been held that a permanent abandonment will not have this effect. See *infra*, this section, *Widows and Deserted or Divorced Wives*.

2. Widows — Connecticut. — *Weed v. Dayton*, 40 Conn. 293.

Iowa. — See *Whalen v. Cadman*, 11 Iowa 226.

Michigan. — *McHugh v. Curtis*, 48 Mich. 262.

New York. — *Brigham v. Bush*, 33 Barb. (N. Y.) 596; *Cantrell v. Conner*, 51 How. Pr. (N. Y. C. Pl.) 45.

South Dakota. — See *Linander v. Longstaff*, 7 S. Dak. 157.

Tennessee. — *Bachman v. Crawford*, 3 Humph. (Tenn.) 213, 39 Am. Dec. 163; *Ex p. Brien*, 2 Tenn. Ch. 33.

Widow Living with Her Father. — It can make no difference that she lives in her father's house and is supported by him. *Bachman v. Crawford*, 3 Humph. (Tenn.) 213, 39 Am. Dec. 163.

Second Marriage. — The fact that a widow marries a second husband, who lives with her upon the farm left by her deceased husband, does not deprive her of the status of a householder so as to defeat her claim of a cow belonging to her, as exempt, where she continues, after her second marriage, to provide for her infant children by her deceased husband. *Brigham v. Bush*, 33 Barb. (N. Y.) 596.

Continuance of Exemption for Benefit of Family. — In *New York* it has been held that, under a statute exempting certain property to every householder, property which is exempt in the

lifetime of a judgment debtor continues exempt after his death for the benefit of his widow and minor children. The decision was based upon the ground that the law was intended not only for the benefit of the debtor, but also for the benefit of his family. *Becker v. Becker*, 47 Barb. (N. Y.) 497.

3. Widow Living Alone. — *Emerson v. Leonard*, 96 Iowa 311. "There cannot be a head of a family," said the court in this case, "when there is no family. It is not material that there was once a family, if it has ceased to exist. The exemption is to the resident of this state who is — not to one who has been, but is not — the head of a family. The statute refers to a present, not to a past, condition." See also *Kidd v. Lester*, 46 Ga. 231; *Murdoch v. Dalby*, 13 Mo. App. 41.

There is a decision in *Tennessee* in conflict with this view. In *Collier v. Latimer*, 8 Baxt. (Tenn.) 420, 35 Am. Rep. 711, it was held that a widow who remained in possession of her husband's farm and carried it on for eleven years after his death, as her only means of support, was entitled to the benefit of the exemption law, as the head of a family engaged in agriculture, though her children were married and had left her, and she had rented the farm and stock, reserving and occupying for herself only one room in the house.

4. Abandoned Wife. — See *infra*, this section, *Married Women*.

5. Divorced Wife. — See *Roberts v. Moudy*, 30 Neb. 683, 27 Am. St. Rep. 426.

6. Allowance to Widow and Children. — See the title **ALLOWANCES**, vol. 2, p. 156.

7. Widowers — Alabama. — *Sallee v. Waters*, 17 Ala. 482.

Indiana. — *Bunnell v. Hay*, 73 Ind. 452.

Iowa. — *Tyson v. Reynolds*, 52 Iowa 431.

Kentucky. — *Seaton v. Marshall*, 6 Bush (Ky.) 429, 99 Am. Dec. 683.

New Hampshire. — *Barney v. Leeds*, 51 N. H. 253.

New York. — *Cox v. Stafford*, 14 How. Pr. (Saratoga County Ct.) 519; *Robinson's Case*, 3 Abb. Pr. (N. Y. C. Pl.) 466.

Abandoned Husband. — It has been held under

widower (and the same would be true of a divorced husband) is not a householder nor the head of a family if he has no child or other person dependent upon him, though he continues to live in the dwelling house and keeps house after the death of his wife.¹

2. **MARRIED WOMEN** — **General Rule.** — Primarily, where both husband and wife are living, the husband is the head of the family, and so long as he occupies this relation it cannot be occupied also by the wife.²

Wife May Be the Head of the Family. — Conditions may exist, however, as where the husband is absent or disabled, and the wife supports the family, which

the homestead exemption laws, and the same would be true under the chattel exemption laws, that the fact that a wife has deserted her husband and is living apart from him does not destroy his status as the head of a family. *Brown v. Brown*, 68 Mo. 388; *Whitehead v. Tapp*, 69 Mo. 415.

And it has further been held that it makes no difference that the wife has gone to live in another state, and that the husband is illicitly living with another woman. *Whitehead v. Tapp*, 69 Mo. 415.

Divorced Husband. — In *Roberts v. Moudy*, 30 Neb. 683, 27 Am. St. Rep. 426, it was held that the fact that a man had been divorced from his wife, and the custody of the children given to her, did not destroy his status as the head of a family, nor his right to an exemption as such, where he continued to furnish the means for the children's support.

1. **Widowers Without Children or Other Dependents.** — *Chamberlain v. Darrow*, 46 Hun (N. Y.) 48.

The fact that the wife of a widower's adult son, residing a few miles distant, comes weekly to his house, and does baking, washing, and such things as are necessary to put the house in order, bringing her children, and usually remaining over night, and sometimes two nights, does not make him a householder or head of a family. *Chamberlain v. Darrow*, 46 Hun (N. Y.) 48.

Householder. — Some of the courts have held that a widower who continues to keep house after the death of his wife is a householder, though he may have no one at all dependent upon him. *Kimbrel v. Willis*, 97 Ill. 494, 12 Cent. L. J. 211; *Silloway v. Brown*, 12 Allen (Mass.) 30; *Myers v. Ford*, 22 Wis. 139.

2. **Husband Primarily the Head of the Family.** — *Clinton v. Kidwell*, 82 Ill. 429, cited in *Temple v. Freed*, 21 Ill. App. 238; *John V. Farwell Co. v. Martin*, 65 Ill. App. 55.

A married woman residing in the state, who has no children, and whose husband is a nonresident, cannot claim an exemption under a statute giving a right of exemption to a resident head of a family. *Keiffer v. Barney*, 31 Ala. 192.

In *Minnesota*, the statute (Gen. Stat. 1894, § 5459, subd. 7) provides that "the provisions for the debtor and his family necessary for one year's support, either provided or growing," shall not be liable to attachment or sale on any final process issued from any court in the state. In *Boelter v. Klossner*, (Minn. 1898) 77 N. W. Rep. 4, it was held, in construing this statute, that where a husband and his wife were living together with their children on the wife's farm, and were supporting the family by their joint labors in cultivating the farm and caring

for the household, and neither had any other farm, or any grain except such as was raised thereon, the wife could claim therefrom corn raised on the farm as provisions allowed by the statute.

Claim by Both Husband and Wife. — In *Indiana* the constitution declares that the privilege of debtors to enjoy the necessary comforts of life shall be recognized by wholesome laws exempting a reasonable amount of property from seizure or sale for the payment of debts, and in pursuance thereof a statute was enacted declaring exempt an amount of property not exceeding in value three hundred dollars, "owned by any resident householder." The amount has since been raised to six hundred dollars. Rev. Stat. 1881, § 703. In *Crane v. Waggoner*, 33 Ind. 83, the court held that, under this statute, where a husband and wife were living together, and property belonging to the wife was levied on under an execution on a judgment in which she was the real debtor, and all the property owned by the husband did not amount to three hundred dollars, the wife could claim an exemption to the extent necessary to make, with the husband's property, such an amount. "It will be observed," said the court, "that the clause of the bill of rights cited extends this protection to the 'debtor,' and that the act itself is intended to be a fulfilment of the duty therein imposed upon the legislature. The language of the law must therefore be construed with regard to the declared object and purpose to be accomplished, and effect given so far as reasonably can be to the constitutional declaration. The plain intent is to preserve a home or support for the family, and not for its head as distinguished from its members."

Since this decision a statute has been enacted in *Indiana* expressly declaring that "a married woman who is a resident of this state, whether a householder or not, shall be entitled to the same exemption of property from seizure or sale for the payment of any debt or liability contracted by her, as householders are under the constitution and laws of this state, to be claimed and selected in the same manner." Rev. Stat. 1881, § 5124. In *Junker v. Hustes*, 113 Ind. 524, it was held that a judgment against a husband and his wife cannot be set off against a judgment held by them, where they make due claim of exemption, as the right of the wife to claim exemption is as clear under the statute above quoted as that of her husband.

**Some Statutes Extend to Married Women with-
out** requiring that they shall be the heads of families. These are treated in another place. See *infra*, this section, subdiv. 4, *Married Women*.

will place the wife instead of the husband in that relation, and entitle her to claim from her separate estate, for the benefit of herself and those whom she supports and maintains, the property which the statutes exempt to the head of a family.¹

Abandoned Wife. — When a husband absconds and abandons his wife, and she continues to carry on the household and support the family, she is the head of the family, and may, as such, claim her own property as exempt.² Or she may maintain a claim of exemption that her husband might have made,³ unless under the particular statute the right of exemption has been lost by reason of the husband's conduct.⁴

Statutory Provisions. — In some states there are express statutory provisions allowing a wife to claim the exemptions to which her husband is entitled, if he has absconded, or is absent, or if he neglects to assert the claim.⁵

1. Married Woman the Head of a Family. — In *Fish v. Street*, 27 Kan. 270, a woman who was a resident of Kansas married a man in Missouri who had never been and did not become a resident of Kansas, and who perhaps had no home anywhere. Afterwards she did not live with him, but continued to be a resident in fact of Kansas, where she carried on a business, and kept house with a younger sister. It was held that she was both a resident of Kansas and the head of a family, within the meaning of the exemption laws of Kansas.

Wife Supporting Husband and Family. — In *South Dakota*, where a statute (Comp. Laws, § 2587) expressly declared the husband to be the head of the family, but another section of the statute (Comp. Laws, § 2588) made it the legal duty of a wife to support her husband when he had no separate property, and was unable, from infirmity, to support himself, it was held that a married woman supporting her infirm husband from the proceeds of a mercantile business owned and carried on by her could claim her property as exempt as the head of the family. *Linander v. Longstaff*, 7 S. Dak. 157.

And in other states there have been similar decisions, without regard to any statute making it the duty of a wife to support her husband. *Temple v. Freed*, 21 Ill. App. 238; *Schaller v. Kurtz*, 25 Neb. 655; *State v. Houck*, 32 Neb. 525.

Where property levied upon consisted of household goods, such as bedding, dishes, bedclothing, etc., belonging to the wife, and by the departure of her husband for temporary or permanent purposes the maintenance and support of the family had devolved upon the wife, she was held to be entitled to the exemption as the head of the family. *Hamilton v. Fleming*, 26 Neb. 240.

In *Kentucky* a statute exempts to "persons with a family" sufficient provisions to sustain the family for one year, or other property in lieu thereof not exceeding a certain amount; and it has been held that the exemption may be claimed by a married woman who supports the other members of the family, and without whose exertions and means they would have no support. *Wilson v. Wilson*, (Ky. 1897) 42 S. W. Rep. 404.

Decisions to the Contrary. — In *Georgia*, where a statute declares the husband to be the head of the family, it has been decided that a wife living with her husband cannot be the head of

a family so as to be entitled to claim an exemption as such, though her husband is unable to work, and she supports him and their children. *Neal v. Sawyer*, 62 Ga. 352; *Johnson v. Little*, 90 Ga. 781; *Sparks v. Shelnett*, 99 Ga. 629. In that state, however, there are other statutes under which exemptions may be claimed by married women. See *infra*, this section, subdiv. 4. *Married Women*.

Presumption and Burden of Proof. — To entitle a married woman to claim the benefit of the exemption laws as to her separate property as the head of a family, she must clearly show that she, and not her husband, is the head of a family, the presumption being that he is the head. It is not enough, where she lives with her husband, to show that she owns the premises on which they live, and the property thereon, and that she has children by a former husband living with her. *Clinton v. Kidwell*, 82 Ill. 429, cited in *Temple v. Freed*, 21 Ill. App. 238.

Nor is it enough to show that she carries on business on her own account, and that her husband works for her therein, but it must be shown that he had abdicated or forfeited his headship and control of the family, and that she has assumed the same. *John V. Farwell Co. v. Martin*, 65 Ill. App. 55.

2. Abandoned Wife — Claim of Separate Property. — *Nash v. Norment*, 5 Mo. App. 545; *Hamilton v. Fleming*, 26 Neb. 240. See also *Kenley v. Hudelson*, 99 Ill. 493, 39 Am. Rep. 31.

3. Claim of Husband's Property. — *Frazier v. Syas*, 10 Neb. 115, 35 Am. Rep. 466; *State v. Wilson*, 31 Neb. 462. And see *Woodward v. Murray*, 18 Johns. (N. Y.) 400.

Under a statute exempting property for the benefit of every family in the state, a wife residing with her family in the state, and whose husband has absconded and is residing in another state, is entitled to the exemption. *Bonnel v. Dunn*, 28 N. J. L. 153.

4. Loss of Right by Conduct of Husband. — *Michigan*. — *Betz v. Brenner*, 106 Mich. 87; *Miller v. Miller*, 97 Mich. 151.

Missouri. — *State v. Chaney*, 36 Mo. App. 513.

Washington. — *Carter v. Davis*, 6 Wash. 327. See *infra*, this section, subdiv. 4. *Married Women*.

5. Statute Covering Neglect or Abandonment by Husband. — The rights of the wife in such cases do not depend upon her being the head of the family, and these statutes therefore are

j. UNMARRIED PERSONS. — An unmarried person, with no one dependent upon him, is not a householder nor the head of a family, though he may keep house and have servants.¹ But unmarried persons, whether men or women, may be the heads of families if they have children or other relatives dependent upon them for support.²

k. GUARDIAN OF MINOR CHILDREN. — In *Georgia* the exemption laws are extended to guardians of minor children.³

l. RESIDENCE OF FAMILY AND CHANGE OF RESIDENCE. — Some statutes of exemption expressly require that the family for whose benefit they are intended shall reside in the state.⁴ In the absence of such a requirement it has been held that if the debtor resides in the state, and supports a family, it is immaterial where his family resides.⁵

Moving from Place to Place Within the State. — Statutes creating exemptions in favor of the head of a family, a resident householder, etc., do not require that the family shall be stationary, but the right attaches as well when it is moving from place to place within the state.⁶

more properly considered in another place. See *infra*, this section, subdiv. 4. *Married Women*.

1. Unmarried Persons Without Dependents. — See *Barnes v. Rogers*, 23 Ill. 350; *Woodworth v. Comstock*, 10 Allen (Mass.) 425; *Peterson v. Bingham*, 13 Wash. 178.

Householder. — An unmarried person may be a householder. *Abell v. Riddle*, 75 Ind. 345; *Graham v. Crockett*, 18 Ind. 119.

2. Unmarried Persons with Dependents. — *Revalk v. Kraemer*, 8 Cal. 72, 68 Am. Dec. 304; *McMurray v. Shuck*, 6 Bush (Ky.) 111, 99 Am. Dec. 662; *Wade v. Jones*, 20 Mo. 75, 61 Am. Dec. 584. See *supra*, this section, *Obligation to Support and Condition of Dependence*.

Unmarried Women. — In *Arnold v. Waltz*, 53 Iowa 706, 36 Am. Rep. 248, an unmarried woman who had taken charge of and was supporting her deceased sister's children was held to be the head of a family, and entitled to claim exemptions as such.

Unmarried Women with Bastard Children. — An unmarried woman who has the custody of and supports a bastard child is entitled to the benefit of the exemption laws as the head of a family. *Ellis v. White*, 47 Cal. 73.

3. Guardian of Minor Children. — The Constitution of *Georgia* in force in 1877 declared that "each head of a family or guardian or trustee of a family of minor children shall be entitled to a homestead of realty to the value of two thousand dollars in specie, and personal property to the value of one thousand dollars in specie." It was held in *Rountree v. Denard*, 59 Ga. 629, 27 Am. Rep. 401, *citing Code*, § 5135, that a guardian of one minor child was as much within the provision as the guardian of more than one child would be. For present statutes see *Code of 1895*, § 2827 *et seq.*

4. Residence of Family. — Thus, in *Alabama*, under a statute creating a right of exemption for the benefit of every family in the state, it has been held that a debtor residing in the state, but whose family resides in another state, cannot claim the benefit of the statute. *Allen v. Manasse*, 4 Ala. 554.

And so it has been held under a similar statute in *New Jersey*. *Bonnel v. Dunn*, 29 N. J. L. 435.

But if a debtor's family resides in the state, the statute applies though the debtor resides

in another state. *Bonnel v. Dunn*, 29 N. J. L. 435.

In *Kansas* a statute exempts earnings of a debtor when "necessary for the use of a family supported wholly or partly by his labor." Code Civ. Pro., 1897, § 508. Under this statute the family need not reside in the state.

Under a statute giving a right of exemption to all "married persons or persons who have to provide for the entire support of a family in the state," an exemption cannot be claimed where neither the debtor nor his family resides within the state. *Commercial Nat. Bank v. Chicago, etc.*, R. Co., 45 Wis. 172. See *supra*, this section, *Residence and Citizenship*.

5. In the Absence of Statutory Requirement. — Thus, in *Pettit v. Muskegon Booming Co.*, 74 Mich. 214, it was held that a debtor residing in Michigan, and supporting out of his wages a family residing in Canada, could claim the benefit of the *Michigan* statute exempting the wages of "a householder having a family," nothing being said in the statute as to the residence of the family. See to the same effect *Stirman v. Smith*, (Ky. 1888) 10 S. W. Rep. 131; *People v. McClay*, 2 Neb. 9; *Chesney v. Francisco Co.*, 12 Neb. 626.

In *Indiana* it has been held that a "householder" must keep house, that a "resident householder" must keep house in the state, and that the latter term does not embrace one who has left the state and is keeping house with his family in another state, though his absence may be only temporary, so that he remains a resident of the state. *Ross v. Banta*, 140 Ind. 120.

6. Moving Within the State. — It was thus decided in *Davis v. Allen*, 11 Ala. 164, where a statute exempted certain property "for the use of every family in this state."

So in *Anthony v. Wade*, 1 Bush (Ky.) 110, it was held that a man does not cease to be a housekeeper within the meaning of the exemption law while moving within the state.

Nor under such circumstances does a person cease to be a "resident householder." *Mark v. State*, 15 Ind. 98. See also *Norman v. Bellman*, 16 Ind. 156; *O'Donnell v. Segar*, 25 Mich. 367; *Bonnel v. Dunn*, 28 N. J. L. 155, *reversed on other grounds* in 29 N. J. L. 435; *Woodward v. Murray*, 18 Johns. (N. Y.) 400.

In *Oregon* the statute expressly exempts the

Intention to Remove from the State. — Intention to remove from the state, though avowed, and though accompanied by preparation, and even by moving within the state, does not divest a person of his status as a resident having a family in the state, or as a resident householder.¹

iii. TIME OF ACQUIRING STATUS. — When a statute allows an exemption for the benefit of the head of a family, a debtor, to be entitled to an exemption, need not have been the head of a family at the time when the debt was contracted. It is sufficient if he has such a status at the time of the levy as against which the exemption is claimed.²

Marriage After Issue or Levy of Execution or Attachment. — In several states it has been held that a man may claim property as exempt on the ground that he is a householder or the head of a family, though he may not have married and acquired such a status until after the issue or levy of an execution or attachment.³ Most of the courts, however, in which the question has arisen, have held that after a creditor has acquired a lien by the levy of an execution or attachment, he has a vested right which cannot be defeated by the subsequent marriage and change of status of the debtor.⁴

3. Persons Engaged in Particular Occupations — *a. IN GENERAL.* — In many states there are statutes exempting property for the benefit of persons engaged in a particular employment, trade, or business, as "mechanics," "laborers," "farmers," "teamsters," "physicians," etc. When the statute is so restricted a person can claim the exemption only when he is engaged in the specified occupation.⁵ Even when a statute uses general terms, it may

household goods of a householder, in actual use or kept for use by and for his family, or when being removed from one habitation to another on a change of residence. *Hill's Annot. Laws*, § 282, subdiv. 4; *Bond v. Turner*, (Oregon 1898) 54 Pac. Rep. 158.

1. Intention to Remove from State. — *Davis v. Allen*, 11 Ala. 165; *Astley v. Capron*, 89 Ind. 167; *Anthony v. Wade*, 1 Bush (Ky.) 110; *Springer v. Lewis*, 22 Pa. St. 191.

2. Time of Acquiring Status as Head of a Family. — *Gray v. Putnam*, 51 S. Car. 97.

3. Marriage After Levy of Execution or Attachment — Cases Allowing Exemption. — *Watson v. Simpson*, 5 Ala. 233; *Robinson v. Hughes*, 117 Ind. 293, 10 Am. St. Rep. 45. See *Trotter v. Dobbs*, 38 Miss. 198; *Irwin v. Lewis*, 50 Miss. 363.

Acquisition of Status After Sale. — But acquisition of a status as a householder or head of a family after the sale of property under an execution does not give one a right to the benefit of the exemption law so as to support an action to set aside the sale. To maintain such an action he must have been a householder or the head of a family at the time of the sale. *Kingen v. Stroh*, 136 Ind. 610.

4. Cases Denying Exemption. — *Pender v. Lancaster*, 14 S. Car. 25, 37 Am. Rep. 720.

Homestead Exemptions. — This question has generally arisen under the homestead exemption laws. See the title **HOMESTEAD**. The decisions under these laws, however, are applicable to the laws exempting chattels. See *Pender v. Lancaster*, 14 S. Car. 25, 37 Am. Rep. 720.

5. Persons in Particular Occupations — *Georgia.* — *Kyle v. Montgomery*, 73 Ga. 337.

Iowa. — *Tyler v. Coulthard*, 95 Iowa 705.

Massachusetts. — *Wilson v. Elliot*, 7 Gray (Mass.) 69.

Minnesota. — *Wildner v. Ferguson*, 42 Minn. 112, 18 Am. St. Rep. 495.

Mississippi. — *Whitcomb v. Reid*, 31 Miss. 567, 66 Am. Dec. 579.

Tennessee. — *Story v. Walker*, 11 Lea (Tenn.) 515, 47 Am. Rep. 305.

Wisconsin. — *Beviitt v. Crandall*, 19 Wis. 581. And see the other cases specifically cited in the following notes.

Statutes Not So Limited. — The statutes are not always restricted to persons engaged in particular occupations, but often apply to any who may own the property exempted. It is sometimes a nice question whether there was an intention on the part of the legislature so to restrict the statute.

In *Knapp v. Bartlett*, 23 Wis. 68, 99 Am. Dec. 109, it was held that Rev. Stat., c. 134, § 31, subdiv. 7, was for the benefit of any judgment debtor, and was not restricted to farmers, and that it therefore exempted the horse of a physician. And see *Humphrey v. Taylor*, 45 Wis. 251, 30 Am. Rep. 738, where this statute was held to exempt a mower owned by a person who was not a farmer. For the present statute in *Wisconsin* see Stat. 1898, § 2982, subdiv. 6.

In *Burgess v. Everett*, 9 Ohio St. 425, a statute declaring that any resident of the state, not the owner of a homestead, might hold as exempt "mechanical tools, or a team and farming utensils," was held not to be restricted to mechanics and farmers, but to extend also to the team of a teamster.

In *Missouri* a statute exempted to each head of a family certain animals and implements used by farmers, and working animals of a certain value. A subsequent statute provided that "each head of a family, at his election, in lieu of the property mentioned" in the above statute, might select and hold exempt any other property, real, personal, or mixed, not exceeding in value a certain sum. In *State v. Farmer*, 21 Mo. 160, it was held that it was the intention of the second statute to ex-

appear that the legislature intended to confine the benefit of the law to particular persons, and if such is the case the intention of the legislature must govern.¹

b. "MECHANICS." — A "mechanic" is "any skilled worker with tools; one who has learned a trade; a workman whose occupation consists in the systematic manipulation and constructive shaping or application of materials."² And it is in this sense that the term is used in the statutes exempting the tools of a mechanic.³

Persons Not Included. — By what seems to be the better opinion, the term "mechanic" does not include persons engaged in the learned professions, as a surgeon or dentist,⁴ though there is a decision to the contrary in the case of

tend the exemption to all heads of families, and not merely to such as might own property exempted by the first statute.

When a statute simply exempts absolutely certain animals or vehicles, etc., without restriction as to persons engaged in any particular occupation, any person owning them may claim them as exempt, without regard to their use or his occupation. *Wilhite v. Williams*, 41 Kan. 288, 13 Am. St. Rep. 281; *Tipton v. Pickens*, 1 Swan (Tenn.) 25.

Under a statute exempting "necessary household furniture, and working tools and team, owned by any person being a household or having a family for which he provides," the team of any debtor necessary in his business, as of a physician, for example, is exempt. *Wheeler v. Cropsey*, 5 How. Pr. (N. Y. Supreme Ct.) 288.

In *Robert v. Adams*, 38 Cal. 383, 99 Am. Dec. 413, it was held that a statute exempting "the farming utensils and implements of husbandry of the judgment debtor; also two oxen, or two horses, or two mules, and their harness, four cows, one cart or wagon, and food for such oxen, horses, cows, or mules, for one month," was intended to apply only to farmers, and exempted only animals used in farming. See also *Murphy v. Harris*, 77 Cal. 194.

But in *Young v. Bell*, 1 Kan. App. 265, it was held that a statute exempting to every resident head of a family "two cows, ten hogs, one yoke of oxen, and one horse or mule; or, in lieu of one yoke of oxen and one horse or mule, a span of horses or mules, twenty sheep, and the wool from the same, either in the raw material or manufactured into yarn or cloth," exempted the animals therein specified, regardless of their use or of the debtor's occupation. See also *Wilhite v. Williams*, 41 Kan. 288, 13 Am. St. Rep. 281; *Nuzman v. Schooley*, 36 Kan. 177.

1. **General Terms Limited by Policy and Intent of Statute.** — In *Massachusetts* the statute exempted the tools and implements, materials, stock, and fixtures of a debtor necessary for carrying on his trade or occupation, not exceeding a certain value. In *Wilson v. Elliot*, 7 Gray (Mass.) 69, the court held that this statute, though general in its terms, was intended only for the benefit of "those to whom, on account of their peculiar pursuits and avocations, tools and implements are essential to make their labor available, and to enable them to complete the work which they undertake to perform," and that it, therefore, did not exempt the stock of goods, scales, and measures, horse, wagon, and harness of a shopkeeper.

See also *Smith v. Gibbs*, 6 Gray (Mass.) 298; *Gibson v. Gibbs*, 9 Gray (Mass.) 62; *Reed v. Neale*, 10 Gray (Mass.) 242.

In *Ohio* the statute declared that "it shall be lawful for any resident of Ohio, being the head of a family, and not the owner of a homestead, to hold exempt from execution or sale as aforesaid, mechanical tools, or a team and farming utensils, not exceeding three hundred dollars in value, in addition to the amount of chattel property now by law exempt." In *Burgess v. Everett*, 9 Ohio St. 425, it was held that, notwithstanding the words "any resident," the statute should be construed as limited to persons using the property mentioned to make their living.

"Other Persons." — See *infra*, this section, "Other Persons," "Other Laborer," etc.

2. "Mechanic" Defined. — *Century Dict.*

3. *Whitcomb v. Reid*, 31 Miss. 567, 66 Am. Dec. 579.

A House and Sign Painter is a mechanic, within a statute exempting wages. *Waite v. Franciolo*, 90 Tenn. 191.

Master Mechanic. — A statute exempting "the tools of a mechanic" exempts the tools of all mechanics who personally work with their own tools and with their hands, whether they are master workmen or journeymen. *Parkerson v. Wightman*, 4 Strobb. L. (S. Car.) 363; *Matter of Robb*, 99 Cal. 202, 37 Am. St. Rep. 48.

Traveling as a Salesman, in the interest of a factory, does not deprive one of his character as a mechanic, where he travels only a part of the time, and the rest of the time works in the factory with tools and with his own hands. *Willis v. Morris*, 66 Tex. 628, 59 Am. Rep. 634.

Skill in Trade. — The skill or want of skill of a person in the trade at which he works does not affect his right to claim his tools as exempt. Thus, in *Bliss v. Vedder*, 34 Kan. 57, 55 Am. Rep. 237, a person who owned and used printing tools and implements, and was in fact engaged in the printing business, was held entitled to claim such tools and implements as exempt, though he had previously been engaged in another business, and was not a practical printer.

And in *Miller v. Weeks*, 46 Kan. 307, a person who in fact worked as a tinner was allowed his tinner's tools, though he had previously been a hardware merchant, and had just begun business as a tinner, and was not skilled in all branches of the work.

4. **Dentist or Surgeon Not a Mechanic.** — *Whitcomb v. Reid*, 31 Miss. 567, 66 Am. Dec. 579. See also *Demers v. O'Connor*, 10 Quebec L.

dentists.¹ It does not include persons engaged in the liberal arts and similar occupations, as artists in painting or sculpture, and photographers,² or architects, draughtsmen, abstractors of titles, etc.,³ or mere capitalists and owners of machinery and factories.⁴

c. "LABORERS." — It may be laid down as a general rule that statutes giving to "laborers" or a "laboring man or woman" the right to claim wages or other property as exempt are to be construed as having reference to such persons only as perform manual or menial services, and such as are responsible for no independent action, but do a day's work or a stated job under the direction of a superior.⁵

Manual Labor. — Any person performing manual labor for another, subject to his direction and control, is a "laborer" within the meaning of the statute.⁶ But by the weight of authority the term does not include persons performing services other than manual labor.⁷

Particular Occupations. — It has been held, though not without some conflict, that the term "laborer" does not include overseers and superintendents,⁸

R. Super. Ct. 371, 7 Quebec L. R. Super. Ct. 216.

1. In *Maxon v. Perrott*, 17 Mich. 332, 97 Am. Dec. 191, the instruments of a dentist were held exempt under a statute as "mechanical tools."

2. A **Photographer** was held not to be a mechanic in *Story v. Walker*, 11 Lea (Tenn.) 515, 47 Am. Rep. 305. Compare, however, *Davidson v. Hannon*, 67 Conn. 312, read in the light of *Atwood v. De Forest*, 19 Conn. 513, *Seeley v. Gwillim*, 40 Conn. 106, and *Enscoe v. Dunn*, 44 Conn. 93, 26 Am. Rep. 430.

3. **Architects, Draughtsmen, Abstractors of Titles, etc.** — In *Leinau v. Albright*, 10 Pa. Co. Ct. Rep. 171, 28 W. N. C. (Pa.) 165, it was held that an architect's draughtsman was not a mechanic.

And in *Tyler v. Coulthard*, 95 Iowa 705, it was held that the term did not include an abstractor of titles.

4. **Capitalists and Owners of Factories.** — See *Parkerson v. Wightman*, 4 Strobb. L. (S. Car.) 363. And see *infra*, this section, "Trade."

But a person who himself works with tools and with his own hands is a mechanic within the meaning of the exemption laws, notwithstanding the fact that he owns and superintends the factory in which he works, and also employs others to work in it. *Willis v. Morris*, 66 Tex. 628, 59 Am. Rep. 634. See also *Seeley v. Gwillim*, 40 Conn. 106.

5. "Laborers" Defined — *England*. — *Riley v. Warden*, 2 Exch. 59.

Georgia. — *Oliver v. Macon Hardware Co.*, 98 Ga. 249.

Minnesota. — *Wildner v. Ferguson*, 42 Minn. 112, 18 Am. St. Rep. 495.

Nebraska. — *Henderson v. Nott*, 36 Neb. 154, 38 Am. St. Rep. 720.

New York. — *Wakefield v. Fargo*, 90 N. Y. 213.

Oregon. — *Johnston v. Barrills*, 27 Oregon 251, 50 Am. St. Rep. 717.

Virginia. — *Farinholt v. Luckhard*, 90 Va. 936, 44 Am. St. Rep. 953.

Wisconsin. — *Lang v. Simmons*, 64 Wis. 529.

Analogous Cases. — The same question arises under the statutes making stockholders in a corporation liable for debts due by the corporation to "laborers;" statutes relating to

mechanics' liens; and statutes preferring debts due laborers from an insolvent corporation. See the titles **INSOLVENCY AND BANKRUPTCY; MECHANICS' LIENS; STOCK AND STOCKHOLDERS**.

Elsewhere in This Article is considered the question who is a laborer within the meaning of exemption laws excepting from their operation debts for wages due laborers. The cases there cited are also in point here. See *infra*, this title, *Liabilities as Against Which Exemptions May Be Claimed*.

6. **Manual Laborers.** — The following persons perform manual labor, and have been held to be within the statutes:

Painters. — *Moore v. McCown*, 64 Ga. 617.

Locomotive Engineers. — *Sanner v. Shivers*, 76 Ga. 335.

A Mail Carrier employed by a person to carry the United States mail, though he uses his own horse and vehicle in doing so. *Farinholt v. Luckhard*, 90 Va. 936, 44 Am. St. Rep. 953.

Owner and Driver of Oil Wagon. — A statute in *Iowa* provided that a debtor being the head of a family might hold as exempt certain property, including a horse and team, wagon, or other vehicle, "by the use of which the debtor, if a physician, public officer, farmer, teamster, or other laborer, habitually earns his living." In *Consolidated Tank-Line Co. v. Hunt*, 83 Iowa 6, 32 Am. St. Rep. 285, it was held that the term "other laborer" in this statute included a person who was the head of a family, and who earned his living by selling oil at retail from a wagon, which was driven sometimes by himself and sometimes by his minor son, and that it made no difference that he also sometimes made small sales of oil from his storeroom. Compare *Brusie v. Griffith*, 34 Cal. 302, 91 Am. Dec. 695.

7. **Services Not Manual.** — *Kyle v. Montgomery*, 73 Ga. 337.

8. **Overseers and Superintendents.** — By the weight of authority, though there are some decisions to the contrary, statutes exempting wages or other property for the benefit of "laborers," "day laborers," etc., do not apply to overseers and superintendents, who merely superintend and direct work, and do not themselves perform manual work. In *Caraker v. Mathews*, 25 Ga. 571, the Supreme

agents and salesmen who act independently and go about selling goods on salary or commission,¹ commercial travelers,² railroad conductors,³ draughtsmen,⁴ civil engineers,⁵ officers of corporations,⁶ professional men,⁷ factors and brokers,⁸ or school teachers.⁹

Clerks, Bookkeepers, etc. — Whether clerks, bookkeepers, stenographers, etc., in stores and offices are to be regarded as laborers within the meaning of laws exempting wages due to laborers, is not clear, and the decisions on the question are conflicting.¹⁰

Court of *Georgia* held that a man employed by the year as an overseer but paid daily or weekly, was within a statute exempting the daily, weekly, or monthly wages of journeymen mechanics and "day laborers." *Benning, J., dissented.* This decision was disapproved, though not overruled, in the later case of *Kyle v. Montgomery*, 73 Ga. 337, and it was there held that a "boss" or director of an entire department of an extensive factory, employing and discharging the hands who work under him, to the number of one hundred and fifty, who receives a monthly salary of one hundred dollars, although payable at the end of every two weeks, and who is not required to do manual labor, but is expected, from his skill and intellectual fitness, to direct the work of the operatives under him, is not to be regarded as a journeyman mechanic or day laborer, within the meaning of the statute which exempts from garnishment the daily, weekly, or monthly wages of such persons.

1. Agents, Salesmen, etc. — In *Wildner v. Ferguson*, 42 Minn. 112, 18 Am. St. Rep. 495, it was held that the term "laboring man" in a statute exempting wages did not embrace an agent employed on a weekly salary to sell goods by sample, and driving about for that purpose with his own horse and buggy. See also, as bearing on this point, *Epps v. Epps*, 17 Ill. App. 196; *Weems v. Delta Moss Co.*, 33 La. Ann. 973.

2. Commercial Travelers. — In *Briscoe v. Montgomery*, 93 Ga. 602, 44 Am. St. Rep. 192, it was held that a commercial traveler, employed to sell goods for his employer, was not a "day laborer" within the meaning of a statute exempting wages, though employed and paid by the day. See also *Jones v. Avery*, 50 Mich. 326. Compare *Deering v. Ruffner*, 32 Neb. 845, 29 Am. St. Rep. 473, which seems to be to the contrary.

3. A Railroad Conductor, employed on either a passenger or freight train, and who has the charge and management of the train, passenger baggage, condition of the track, and the train hands, but who is not employed to perform any manual labor, is not a day laborer within the meaning of a statute exempting the wages of day laborers, though his wages are payable monthly and are subject to deduction for loss of time. *Miller v. Dugas*, 77 Ga. 386, 4 Am. St. Rep. 99.

4. An Architect's Draughtsman was held not to be a laborer in *Leinaw v. Albright*, 10 Pa. Ct. Rep. 171, 28 W. N. C. (Pa.) 165.

5. A Civil Engineer, even though he may do some manual work, is not a laborer within the meaning of the exemption laws, where his chief duties are to lay out and superintend the work of others, to make surveys, and to inspect and pass upon materials used in the work. *McPherson v. Stroup*, 100 Ga. 228.

6. Officers of Corporations. — A statute exempting "wages of laborers" does not exempt the salary of the president of a railroad company. *South, etc., Alabama R. Co. v. Falkner*, 49 Ala. 115.

7. Professional Men, as lawyers, physicians, etc., are not laborers in the sense in which the term is used in the exemption laws. *Weymouth v. Sanborn*, 43 N. H. 171, 80 Am. Dec. 141.

8. A Factor or Broker has been held not to be a laborer within the meaning of the statutes exempting wages. *Hamberger v. Marcus*, 157 Pa. St. 133, 37 Am. St. Rep. 719.

9. Teachers. — In *Hightower v. Slaton*, 54 Ga. 108, 21 Am. Rep. 273, it was said, though not decided, that a school teacher is a laborer within the meaning of a statute exempting the wages of "journeymen, mechanics, and day laborers." The better opinion, however, and actual decision, are to the contrary. *Schwacke v. Langton*, 12 Phila. (Pa.) 402, 35 Leg. Int. (Pa.) 145.

10. Clerk, Bookkeepers, etc. — The *New York* court, in a leading case, held that a statute making stockholders liable for debts of the corporation and for wages to laborers had reference only to employees performing manual labor, and did not include an employee of a corporation who kept the account of receipts and disbursements and, in the absence of the superintendent, had charge and control of the business. *Wakefield v. Fargo*, 90 N. Y. 213. This case was cited by the *Minnesota* court as authority in construing exemption laws using the term "laborers." *Wildner v. Ferguson*, 42 Minn. 112, 18 Am. St. Rep. 495. See also *Epps v. Epps*, 17 Ill. App. 196.

Other courts, while considering such statutes as applying only to employees engaged in doing manual labor, have construed this term more broadly, and have held that bookkeepers and clerks in stores and offices could be regarded as performing manual labor, so as to bring them within the spirit and intent of the statute. Thus, in *Claghorn v. Saussy*, 51 Ga. 576, it was held that such a statute exempted the monthly wages of a forwarding clerk in the employment of a railroad company, the evidence showing that his services in the performance of his duties were such as to require at his hands, if not actual manual labor in the common acceptance of the term, certainly labor somewhat of that character. See *Briscoe v. Montgomery*, 93 Ga. 602, 44 Am. St. Rep. 192.

And in *Williams v. Link*, 64 Miss. 641, a clerk in a mercantile house was held to be a "laborer" within the meaning of the *Mississippi* statute exempting wages. "The 'laborer' whose wages * * * are exempt," said the court, "is 'one who subsists by physical toil, in distinction from one who

Contractors. — The term "laborers" does not apply to contractors who do no manual work themselves but merely furnish the labor and services of others, or who perform work, under a contract, independently and not under the direction and control of the other party.¹

Time and Mode of Payment of Wages. — The mere fact that an employee's wages are payable monthly, weekly, or even daily, or that they are subject to deduction for loss of time, does not make him a "day laborer" or "laborer" within the meaning of the exemption laws.²

d. "CLERKS" AND "EMPLOYEES." — The Term "Clerk" is used in some of

subsists by professional skill.' Where physical toil is the main ingredient of services rendered, although directed and made more valuable by skill, the person performing them is a laborer within the meaning of the statute." See to the same effect *Butler v. Clark*, 46 Ga. 466 (receiving and shipping clerk); *Lamar v. Chisholm*, 77 Ga. 306 (clerk and bookkeeper); *Abrahams v. Anderson*, 80 Ga. 570, 12 Am. St. Rep. 274 (bookkeeper, stenographer, and private secretary).

In *Oliver v. Macon Hardware Co.*, 98 Ga. 249, where the question was whether a clerk was a laborer within the meaning of the exemption laws, it was said in the syllabus by the court: "Primarily, a clerk in a mercantile establishment is not a 'laborer,' in the sense in which that word is used in section 1974 of the code, even though the proper discharge of his duties may include the performance of some amount of manual labor. If the contract of employment contemplated that the clerk's services were to consist mainly of work requiring mental skill or business capacity, and involving the exercise of his intellectual faculties, rather than work the doing of which properly would depend upon a mere physical power to perform ordinary manual labor, he would not be a 'laborer.' If, on the other hand, the work which the contract required the clerk to do was, in the main, to be the performance of such labor as that last above indicated, he would be a 'laborer.' In any given case, the question whether or not a clerk is entitled, as a laborer, to enforce a summary lien against the property of his employer, must be determined with reference to its own particular facts and circumstances."

1. Independent Contractors Furnishing Labor of Others. — In *Henderson v. Nott*, 36 Neb. 154, 38 Am. St. Rep. 720, a person had agreed with another to manufacture brick for him at a certain price per thousand. He was to hire the laborers and pay them their wages, keep the machinery in repair, feed the team furnished by the other party, and furnish the oil for the machinery. It was held that he was a contractor, and not a laborer in the common acceptance of the term, and that he was not within either the words or spirit of a statute exempting laborers' wages.

In *Heard v. Crum*, 73 Miss. 157, 55 Am. St. Rep. 520, a person who had contracted to build a house for a certain sum, and who employed laborers to work under him, was held not to be a laborer so as to render the contract price exempt under a statute exempting "the wages of every laborer." "He was a contractor," said the court, "and the sum agreed to be paid was the price of his contract, not wages"

within the meaning of the statute. See to the same effect *Riley v. Warden*, 2 Exch. 59; *Johnston v. Barrills*, 27 Oregon 251, 50 Am. St. Rep. 717; *Heebner v. Chave*, 5 Pa. St. 115; *Lang v. Simmons*, 64 Wis. 529.

A Shoemaker who makes a pair of boots upon the written order of a customer is an independent contractor, and not within a statute exempting laborers' wages. *Fox v. McClay*, 48 Neb. 820.

Blacksmith. — The same is true of a blacksmith. Debts due to him from customers for work done by him in carrying on an independent business for himself as the proprietor of a blacksmith shop are not exempt from process of garnishment, under a statute exempting the daily, weekly, or monthly wages of a journeyman mechanic or day laborer. *Tatum v. Zachry*, 86 Ga. 573.

A Master Carpenter who employs others to labor for him on work which he has contracted to do, and who merely supervises their work, is not a laborer. See *Smith v. Brooke*, 49 Pa. St. 147.

Proprietor of Threshing Machine, Hay Press, etc. — A person who owns or hires a machine for threshing or pressing hay, etc., and goes from place to place operating it wherever he can find employment, is a contractor, and not a farm laborer. *Wilson v. Gibson*, 10 Pa. Co. Ct. Rep. 191.

Livery-stable Keeper. — The keeper of a livery stable, doing no manual labor himself, but merely hiring out teams and furnishing drivers, would not come within a statute for the benefit of "laborers." But a person who is engaged in the livery business is a laborer within a statute exempting a team by which a laborer habitually earns his living, if he himself uses a team and thereby habitually earns his living. *Root v. Gay*, 64 Iowa 399.

Mere Employment and Supervision of Other Laborers by a person who is himself employed to perform manual labor, and who does himself perform such labor, does not deprive him of the character of a laborer. Thus, it has been held that a miner who is employed to work in a coal mine at getting out coal, at a certain price per ton, and who himself works, is a laborer within the meaning of a statute exempting wages, though he also has charge of a chamber in the mine, and employs other laborers to work with him and under him, and pays them a certain price per day. *Pennsylvania Coal Co. v. Costello*, 33 Pa. St. 241.

2. Time and Mode of Payment of Wages. — *Miller v. Dugas*, 77 Ga. 386, 4 Am. St. Rep. 90; *Briscoe v. Montgomery*, 93 Ga. 602, 44 Am. St. Rep. 192.

the statutes exempting salary or wages. It is a broader term than "laborer."¹ It has reference, however, to employees in stores and business offices, and does not include independent contractors.²

The Term "Employee," which is used in some statutes, is also a broader term than "laborer," and includes superintendents, etc.³

e. "TEAMSTERS."—A "teamster," within the meaning of a statute exempting the horses and wagon by which a teamster habitually earns his living, is a person who is engaged with his own team in the business of hauling freight for other persons for a consideration, and who habitually earns his living thereby. Every one who drives a team is not necessarily a teamster in the sense of the statute. He must be engaged in that business.⁴ He himself need not, however, necessarily drive, nor need he be engaged in the business continually.⁵

1. "Clerks."—The Century Dictionary defines the term "clerk" as follows: "One who is employed in an office, public or private, or in a shop or warehouse, to keep records or accounts; one who is employed by another as a writer or amanuensis. * * * In the United States, an assistant in business, whether or not a keeper of accounts; especially, a retail salesman."

2. Independent Contractors.—Thus, in *Brierre v. Creditors*, 43 La. Ann. 423, it was held that a person engaged under a contract to make sales of goods dealt in by a firm in a particular state, under an agreement by which he was to receive one-half of the profits and bear one-half of the losses of the business done, was not a "clerk" within the meaning of a statute exempting the salaries of clerks.

That a person employed on a salary and commissions to sell goods is not a "clerk," see *Weems v. Delta Moss Co.*, 33 La. Ann. 973.

3. "Employees."—In *Moore v. Heaney*, 14 Md. 558, it was held that a person who had agreed, for the consideration of a certain per cent. on the entire amount of cost of a building, to erect, superintend, and otherwise direct the erection of the building, was an employee within the meaning of a statute exempting "the wages or hire of a laborer or other employee in the hands of the employers."

4. Teamster Defined.—*Brusie v. Griffith*, 34 Cal. 302, 91 Am. Dec. 695.

In *Elder v. Williams*, 16 Nev. 416, the trial court had instructed the jury that "to be a teamster, within the meaning of the law and of the statute concerning exemptions, a man need not necessarily drive his team. In the sense of the statute one is a teamster who is engaged with his own team or teams in the business of teaming; that is to say, in the business of hauling freight for other parties for a consideration, by which he habitually supports himself and family, if he has one," and the instruction was held to be correct.

Again, in *Dove v. Nunan*, 62 Cal. 399, it was held that a statute exempting the horses of a teamster by which he habitually earned his living did not apply to persons who were engaged in business as coal dealers, and used a team in hauling coal and wood for their coal yard to the place where they retailed it, and also used it in hauling coal and other commodities for other people for hire, expending the receipts therefrom in their support.

Livery-stable Keepers.—It has been held that

a livery-stable keeper, though he may drive his own team in carrying persons about, is not a teamster within the meaning of the exemption laws. *Edgecomb v. His Creditors*, 19 Nev. 149.

But in a case in *Iowa*, where the statute exempted the team by the use of which a debtor, being "a physician, * * * teamster, or other laborer," habitually earned his living, it was held that the team of a person engaged in the livery business was exempt, if he used it, and thereby habitually earned his living. *Root v. Gay*, 64 Iowa 399.

5. Oil-tank Wagon—Son Driving.—Thus, it has been held that a person who owns an oil-tank wagon and earns his living by selling oil therefrom at retail is a "teamster" within the meaning of a statute exempting a horse and vehicle by the use of which a debtor, "if a physician, public officer, farmer, teamster, or other laborer, habitually earns his living," and it makes no difference that the wagon is sometimes driven by his minor son, or that sometimes he makes small sales of oil from his storeroom. *Consolidated Tank-Line Co. v. Hunt*, 83 Iowa 6, 32 Am. St. Rep. 255.

Intention to Use Team Habitually—Actual Use.—"If a person abandons one employment and procures a team, or a part of a team, intending to complete it, for the purpose of using the same in good faith to earn for himself a livelihood, that is such an habitual use of the team in contemplation of the statute, as to exempt the same from levy, whether the party claiming the benefit of the exemption law has had an opportunity of using the property much or little. He must make a beginning; and if his new character as teamster is shown, the property which he honestly intends to use in that capacity to earn for himself a living should be as effectually shielded from levy and sale during that period as if he had used it for a whole year." *Bevan v. Hayden*, 13 Iowa 122.

Hauling Outside the State.—A teamster may do hauling or team work outside the state without forfeiting his rights under the exemption law. Therefore, evidence that one claiming an exemption as a teamster used the team on trips beyond the limits of the state is admissible to show that he had habitually used the team for the support of himself and family. *Whicher v. Long*, 11 Iowa 48.

"Other Laborers."—See *infra*, this section, "Other Person," "Other Laborer," etc.

f. "FARMERS" AND PERSONS "ENGAGED IN AGRICULTURE." — Statutes have been enacted in some states exempting property of "farmers" or of persons "engaged in agriculture."

A "Farmer," within the meaning of such a statute, is any one who earns his living by farming. He need not own a farm, nor have one leased, nor need he be doing any specified thing as a farmer on the particular day on which an execution is levied on his property.¹

A Person Is "Engaged in Agriculture" when he derives the support of himself and family, in whole or in part, from the tillage of the fields. He must cultivate something more than a garden, though it may be much less than a farm.²

g. PEDDLERS. — In some states there are statutes exempting the team or other property of a peddler.³

h. PROFESSIONAL MEN. — It has been seen that professional men are not entitled to the benefit of exemption laws using the term "mechanic" or the term "laborer."⁴ It is otherwise, however, if the statute is general, as where it uses the term "debtors," without specifying the occupation.⁵ In some states there are statutes applying in express terms to lawyers, physicians, etc.⁶

1. "Farmers." — *Hickman v. Cruise*, 72 Iowa 528, 2 Am. St. Rep. 256; *Pease v. Price*, 101 Iowa 57. In this latter case it was held that a debtor could claim his exemption as a farmer under the *Iowa* statute, though he had temporarily stopped farming and was living in town and had sought other employment there, and though he had offered to sell some of his farming implements, if he intended to resume farming.

Removal from Farm to Farm. — One who is actually engaged in farming up to the time of his moving does not lose his right of exemption to a team, dependent upon his occupation as a farmer, while moving from one farm in the state to another to resume the same occupation. *O'Donnell v. Segar*, 25 Mich. 367.

Carrying On Other Business. — To be entitled to an exemption of implements or animals as a farmer, a person need not devote his time exclusively to that occupation. If he derives his support mainly from cultivating a farm on which he and his family reside, he may claim the benefit of the statute, though he also carries on other business not connected with the farm. *McCue v. Tunstead*, 65 Cal. 506. And see *Garrett v. Patchin*, 29 Vt. 248, 70 Am. Dec. 414.

2. Persons "Engaged in Agriculture." — A *Pennsylvania* statute exempted certain property owned by any person "actually engaged in the science of agriculture." In *Springer v. Lewis*, 22 Pa. St. 191, it appeared that the plaintiff was a tailor by trade, but that he gave up this trade temporarily and moved to property consisting of a tavern house and about forty acres of land; that he there kept a tavern and boarding house, but also farmed part of the land, letting out the rest on shares, and raised the usual variety of crops. After the farming season was over he again engaged in his trade as a tailor. It was held that under these circumstances he was entitled to the benefit of the statute.

Intention to Remove from the state does not defeat the right to the exemption under such a statute, so long as the intention is not carried out. *Springer v. Lewis*, 22 Pa. St. 191.

Gardening Not Agriculture. — In *Simons v. Lovell*, 7 Heisk. (Tenn.) 510, the plaintiff lived on and cultivated as a garden a one-acre lot in a town, raising thereon cabbages, potatoes, roasting ears, etc. In addition to this he was a butcher by trade, and a day laborer. Under a statute exempting five head of sheep in the hands of the head of a family "engaged in agriculture," he claimed as exempt sheep which he had bought for the purpose of butchering. It was held that he was not engaged in agriculture, and was not entitled to the benefit of the statute.

3. Peddlers. — A husband who is simply engaged in delivering bread to the customers of his wife, and in collecting and receiving the proceeds of sales, the bread and business being owned by the wife, is not a peddler within the meaning of a statute exempting property of a peddler by which he habitually earns a living. *Stanton v. French*, 83 Cal. 194.

If a debtor customarily and generally uses a team in the business of peddling, he can claim it as exempt as a peddler under a statute exempting such property of a peddler if he habitually earns his living by its use, though he may also do odd jobs with the team for hire. *Stanton v. French*, 91 Cal. 274, 25 Am. St. Rep. 174. See generally the title HAWKERS AND PEDDLERS.

4. Professional Men. — See *supra*, this section, "*Mechanics*;" "*Laborers*."

5. Under a statute exempting the earnings of a "debtor" for personal services a physician may claim as exempt money due him for professional services. The statute is not restricted to mechanics and laborers. *McCoy v. Cornell*, 40 Iowa 457.

6. Lawyers. — Under a statute exempting from execution the instruments and books of a lawyer, a person who has been admitted to practice and who earns his living in part by legal work for others in his office, by drawing legal papers, giving legal advice, etc., is entitled to claim his law books and office furniture as exempt, though he combines other business with his law business, as real estate, loans, insurance, etc., and though he does not advertise himself as a lawyer, and does not

i. "TRADE." — Some of the courts, in construing the word "trade" in statutes exempting the property of persons engaged in trade, give it a restricted definition, and hold that it embraces only mechanical pursuits.¹ Most courts, however, construe it in a broad sense as embracing all occupations in business except the learned professions and those that pertain to the liberal arts and the pursuit of agriculture.²

j. "BUSINESS" AND "OCCUPATION." — In some states the word "business" is used instead of or in addition to the word "trade," and in some the word "occupation" is used. These are broader terms than "trade" and denote any employment or occupation in which a person is engaged to procure a living.³

appear in court. *Equitable L. Assur. Soc. v. Goode*, 101 Iowa 160.

In *Kansas* the library of a lawyer, though he is not the head of a family, is exempt by express statutory provision. See *Taylor v. Winnie*, 59 Kan. 16.

1. **Restricted Sense of "Trade."** — In *Connecticut* it has been held that in a statute exempting "implements of the debtor's trade," the word "trade" is to be taken as meaning "the business of a mechanic, strictly speaking, as the business of a carpenter, blacksmith, silversmith, printer, or the like," and that it does not apply to implements used by others than mechanics. *Atwood v. De Forest*, 19 Conn. 513; *Seeley v. Gwillim*, 40 Conn. 106; *Enscoe v. Dunn*, 44 Conn. 93, 26 Am. Rep. 430. According to this construction the first two cases just cited hold that such a statute does not extend to implements of a manufacturer who is not a mere mechanic. And the third case holds that it does not exempt the implements of a person engaged in carting coal, that is, a teamster or carrier. With these cases, however, compare *Davidson v. Hannon*, 67 Conn. 312, wherein the statute was held applicable to a photographer.

In *Richie v. McCauley*, 4 Pa. St. 471, it was held that a statute exempting necessary tools of a "tradesman" had reference only to "mechanics of limited means and circumstances," business, as contradistinguished from the class usually denominated manufacturers. And in *In re Whetmore, Deady* (U. S.) 585, the business of a contractor was held not to be a trade.

Person Both a Mechanic and a Manufacturer. — That one is both a mechanic and a manufacturer does not, under the doctrine excluding manufacturers from the benefit of the statute exempting tools and implements of trade, prevent him from claiming as exempt the implements personally used by him in his character as a mechanic. And, on the other hand, the fact that he is carrying on a trade will not extend the provisions of the statute to articles employed by him as a manufacturer merely. *Seeley v. Gwillim*, 40 Conn. 106. See also *Willis v. Morris*, 66 Tex. 628, 59 Am. Rep. 634.

2. **"Trade" in a Broad Sense — England.** — *Chartered Mercantile Bank v. Wilson*, 3 Exch. Div. 108.

United States. — *U. S. v. The Brig Eliza*, 7 Cranch (U. S.) 113; *May v. Sloan*, 101 U. S. 231.

Kansas. — *Matter of Pinkney*, 47 Kan. 89.
Louisiana. — See *Farmers'*, etc., *Bank v. Franklin*, 1 La. Ann. 393.

Mississippi. — *Whitcomb v. Reid*, 31 Miss. 567, 66 Am. Dec. 579, citing Webster's Dictionary.

Texas. — *Betz v. Maier*, 12 Tex. Civ. App. 219.

"The word 'trade,'" said Judge Story, in *The Schooner Nymph*, 1 Sumn. (U. S.) 516, "is often, and indeed generally, used in a broader sense, as equivalent to occupation, employment or business, whether manual or mercantile. Whenever any occupation, employment, or business is carried on for the purpose of profit or gain, or a livelihood, not in the liberal arts or in the learned professions, it is constantly called a 'trade.'"

Illustrations — Insurance Agents. — According to this view, it has been held that the term "trade" in the exemption laws includes an insurance agent. *Betz v. Maier*, 12 Tex. Civ. App. 219.

Learned Professions — Dentists. — In *Whitcomb v. Reid*, 31 Miss. 567, 66 Am. Dec. 579, it was held that a dentist did not carry on "trade" within the meaning of a statute exempting the tools of one carrying on a trade.

Physicians, Surgeons, and Lawyers. — The dictum and reasoning of the court in the case above referred to, as well as all the definitions of the term "trade," also exclude lawyers and physicians or surgeons.

In *Canada* a statute (Code Civ. Pro., art. 556), exempting "tools and implements or other chattels ordinarily used by the debtor in his trade" was held not to exempt the professional implements of a physician and surgeon, or other member of the liberal professions, as the word "trade" does not apply to the liberal professions. *Demers v. O'Connor*, 10 Quebec L. R. Super. Ct. 371, 7 Quebec L. R. Super. Ct. 216.

3. **"Business."** — *Goddard v. Chaffee*, 2 Allen (Mass.) 395, 79 Am. Dec. 796. In this case it was held that a musician making his living for the most part by playing in a band could claim his musical instrument as exempt under a statute exempting the implements of a debtor necessary for carrying on his "trade or business."

Occupation. — In *In re Whetmore, Deady* (U. S.) 585, Judge Deady held that the business of a contractor (in this case a house carpenter) was not an "occupation" within the meaning of a statute exempting tools and implements. But manifestly the decision cannot be supported. See *Dailey v. May*, 5 Mass. 313; *Wood v. Bresnahan*, 63 Mich. 614; *Richards v. Hubbard*, 59 N. H. 158, 47 Am. Rep. 188; *Parshley v. Green*, 58 N. H. 271. And see

4. "PROFESSION." — The term "profession" is sometimes used in a restricted sense, as applying only to the learned professions, as law, medicine, etc. But it also has been given a broader meaning as embracing any occupation or employment, not mechanical or agricultural or the like, to which one devotes himself. And it has been construed in the latter sense in the exemption laws.¹

5. "OTHER PERSON," "OTHER LABORER," ETC. — The words "other person," "other laborer," etc., in a statute exempting property of any person engaged in specified occupations, "or other person," etc., do not necessarily include all persons not specially enumerated. They include such persons only as are within the spirit and general intent of the statute.² And under the rule *noscitur a sociis* they are generally, though not necessarily, restricted to persons of the same kind as those enumerated. The question must necessarily be determined by a construction of particular statutes.³

fra, this title, *Property Exempt under the Statutes—Tools, Implements, Instruments, etc.*

1. "Profession." — According to this view it has been held that an insurance agent is entitled to the benefit of a statute exempting "all tools, apparatus, and books belonging to any trade or profession." Though the statute used both terms, "trade" and "profession," the court was of opinion that either term embraced such an occupation. *Betz v. Maier*, 12 Tex. Civ. App. 219. See also *Farmers', etc., Bank v. Franklin*, 1 La. Ann. 393.

In *In re Whetmore*, *Deady* (U. S.) 585, however, the business of a contractor was held not to be a "profession" within the meaning of a statute exempting tools and implements.

2. "Other Person." — A statute in *Minnesota* declared that "the tools and instruments of any mechanic, miner, or other person, used and kept for the purpose of carrying on his trade or business, and, in addition thereto, stock in trade not exceeding four hundred dollars in value," should be exempt. In *Grimes v. Bryne*, 2 Minn. 89, the court held that this provision was intended to comprehend a class of citizens who earn their livelihood by the use of tools and instruments, in whole or in part, and not to include all persons indifferently who might own tools or a stock in trade, and that the term "other person," therefore, did not apply to a merchant so as to exempt his stock in trade. See to the same effect *Guptil v. McFee*, 9 Kan. 30; *McAbe v. Thompson*, 27 Minn. 134; *Prosser v. Hartley*, 35 Minn. 340; *Hillyer v. Remore*, 42 Minn. 254. And see the title *STATUTES*.

And in *Bevitt v. Crandall*, 19 Wis. 581, under a similar statute, it was held that the term "other person" did not include a judgment debtor who was a farmer, as farmers' tools and implements were exempted by another subdivision of the statute.

3. *Other Persons or Laborers Ejusdem Generis.* — *Edgcomb v. His Creditors*, 19 Nev. 149. In this case a statute exempted two horses and their harness and one cart or wagon, by the use of which "a cartman, huckster, peddler, teamster, or other laborer" habitually earned his living. The court held that the term "other laborer" was limited to other laborers *ejusdem generis* with those named, under the rule that "language, however general in its form, when used in connection with a particular subject-matter must be presumed to be

used in subordination to that matter, and should be construed and limited accordingly," and that the statute, therefore, did not apply to a livery-stable keeper, though he constantly drove his own team in carrying people about. See also *Dove v. Nunan*, 62 Cal. 399.

Teamster or "Other Laborer." — The words "other laborer" in a statute exempting a horse and wagon by which a teamster or other laborer habitually earns his living, mean one who labors by and with the aid of a team. *Brusie v. Griffith*, 34 Cal. 302, 91 Am. Dec. 695. See *Consolidated Tank-Line Co. v. Hunt*, 83 Iowa 6, 32 Am. St. Rep. 285.

Evident Intention of Legislature to the Contrary. — This rule, like other rules for the construction of statutes, must yield when a contrary intention on the part of the legislature appears. "The purpose of this rule," said the *Colorado* court, "as of all rules of construction, is to aid in discovering and defining the intent of a statute, and is in no sense arbitrary in its character. It must, in all cases, yield to the higher principle of interpretation, to wit, that 'statutes must be interpreted according to the intent and meaning, and not always according to the letter.'" *Martin v. Bond*, 14 Colo. 466.

In *Kansas* a statute declared: "The following property only shall be exempt from attachment and execution, when owned by any person residing in this state, other than the head of a family: * * * Third, the necessary tools and instruments of any mechanic, miner, or other person, used and kept for the purpose of carrying on his trade or business, and in addition thereto, stock in trade as provided in the last section." In *Davidson v. Sechrist*, 28 Kan. 324, it was held that the statute applied to an insurance agent and abstractor of titles, and that an iron safe, a set of abstracts, and a cabinet and table used by him in his business were exempt. See also *Bliss v. Vedder*, 34 Kan. 57, 55 Am. Rep. 237, where the same statute was held applicable to the publisher of a weekly newspaper; and *White v. Gemeny*, 47 Kan. 741, 27 Am. St. Rep. 320, where it was held applicable to a hotel keeper. And see *Wilhite v. Williams*, 41 Kan. 288, 13 Am. St. Rep. 281.

Under a statute exempting "the tools and instruments of any mechanic, miner, or other person, used and kept for the purpose of carrying on his trade; and in addition thereto, stock in trade" not exceeding a certain sum

m. SEVERAL TRADES OR OCCUPATIONS. — Under a statute exempting a debtor's tools and implements of trade, or other property necessary for carrying on his trade or business, not exceeding in value a certain sum, a person engaged in several occupations, all of which are covered by the exemption laws, may claim as exempt the tools or other property used in either of them, if their value does not exceed the specified amount.¹ And, by the weight of authority, unless the statute in terms applies to a single business only, he may claim the tools or other property used in more than one business if the value of all is within such amount.²

"Principal" Business. — There are statutes in some states exempting the tools, implements, etc., necessary to enable a person to carry on the business in which he is "wholly or principally" engaged.³ Such a statute, when a person is engaged in two or more occupations, is to be construed as referring to the one on which he chiefly relies for a livelihood, and which engrosses most of his time and attention throughout the year.⁴ He need not devote any par-

in value, any person who uses tools and instruments in the trade or business by which he earns his livelihood is entitled to the exemption. The statute is not limited to mechanics and miners. *McAbe v. Thompson*, 27 Minn. 134. And see *Grimes v. Bryne*, 2 Minn. 89.

And under a statute exempting "the tools and implements, or stock in trade, of any mechanic, miner, or other person, used or kept for the purpose of carrying on his trade or business," not exceeding a certain sum in value, it has been held that a merchant is entitled to claim the exemption from his stock in trade. *Wicker v. Comstock*, 52 Wis. 315. See to the same effect *Martin v. Bond*, 14 Colo. 466; *Watson v. Lederer*, 11 Colo. 577.

1. Several Trades or Occupations. — *McCue v. Tunstead*, 65 Cal. 506; *Patten v. Smith*, 4 Conn. 450, 10 Am. Dec. 166; *Seeley v. Gwillim*, 40 Conn. 106; *Equitable L. Assur. Soc. v. Goode*, 101 Iowa 160; *Baker v. Willis*, 123 Mass. 194, 25 Am. Rep. 61; *Springer v. Lewis*, 22 Pa. St. 191; *Garrett v. Patchin*, 29 Vt. 248, 70 Am. Dec. 414. See also *Bliss v. Vedder*, 34 Kan. 57, 55 Am. Rep. 237; *Jenkins v. McNall*, 27 Kan. 532, 41 Am. Rep. 422; *Willis v. Norris*, 66 Tex. 628, 50 Am. Rep. 634. Compare *Simons v. Lovell*, 7 Heisk. (Tenn.) 510.

2. Exemption in More than One Occupation. — Thus, in *Pierce v. Gray*, 7 Gray (Mass.) 67, it was held that a person who was engaged in the ice business, and whose tools in that business were exempt, could also hold as exempt his tools for farming and gardening.

And again in *Eager v. Taylor*, 9 Allen (Mass.) 156, under a statute exempting materials and stock of a debtor necessary for carrying on "his trade or business," not exceeding one hundred dollars in value, a person whose original trade was painting, but who was also engaged in making and repairing carriages, and in making harness, was allowed to claim property used in all of these occupations, the whole not exceeding one hundred dollars in value.

See also *Nichols v. Porter*, 7 Tex. Civ. App. 302; *Harrison v. Martin*, 7 Mo. 286.

Rule in Wisconsin — **Doubling Exemption.** — It has been held in Wisconsin, however, under a statute exempting "the tools and implements, or stock in trade, of any mechanic, miner, or other person, used and kept for the purpose of

carrying on his trade or business," if not exceeding a certain sum in value, that a person cannot double his exemption by carrying on more than one trade or business, as by being both a mechanic and a miner at the same time. *Bevitt v. Crandall*, 19 Wis. 581; *Knapp v. Bartlett*, 23 Wis. 68, 99 Am. Dec. 109. And see *Jenkins v. McNall*, 27 Kan. 532, 41 Am. Rep. 422.

Saddle and Harness Making is only one trade within the meaning of a statute exempting all tools and apparatus belonging to any trade. *Nichols v. Porter*, 7 Tex. Civ. App. 302.

3. Principal Business. — See *Morrill v. Seymour*, 3 Mich. 64; *Coville v. Bentley*, 76 Mich. 248, 15 Am. St. Rep. 312; *Jenkins v. McNall*, 27 Kan. 532, 41 Am. Rep. 422.

The Michigan Statute exempts "the tools, implements, materials, stock, apparatus, team, vehicle, horses, harness, or other things to enable any person to carry on the profession, trade, occupation, or business in which he is wholly or principally engaged, not exceeding in value two hundred and fifty dollars." How. Annot. Stat. Mich., 1882, § 7686, par. 8.

Business Incidental to Principal Business. — Anything, said the *Michigan* court, in *Stewart v. Welton*, 32 Mich. 56, that can fairly be said to pertain to, and form a part of, the business in which the debtor is wholly or principally engaged, comes within the purview of such a statute. And it was held that a person whose business was blacksmithing could, during his leisure time, manufacture wagons, whiffletrees, etc., for sale, and claim the same as exempt. For the same reason it was held in *Fischer v. McIntyre*, 66 Mich. 681, that a tailor could claim as exempt masquerade suits made up by him during dull seasons in his trade, and kept for renting out.

4. Productiveness of Several Occupations is not the test. Such a statute came before the *Michigan* court for construction in *Smalley v. Masten*, 8 Mich. 529, 77 Am. Dec. 467, where a person who was engaged both in farming and in business as a tailor claimed a span of horses and wagon as exempt. A judgment in his favor was reversed because of the admission of evidence to show that the business of farming paid him most. "The words 'principally engaged,'" said the court, "are not to be construed with reference to the productiveness or profit of one kind of business over

ticular amount of time to his business.¹

n. TIME OF INQUIRY AS TO TRADE OR OCCUPATION. — The time to which the inquiry as to a debtor's occupation or employment relates, for the purpose of determining his right to an exemption, is the time when the property claimed as exempt was levied upon.²

o. SUSPENSION OR ABANDONMENT OF TRADE OR OCCUPATION. — A mechanic, farmer, or other person engaged in a particular trade or occupation does not lose the right to claim the benefit of the exemption laws by reason of his having temporarily suspended such trade or occupation, if he intends to return to it when he has the opportunity.³ But it is otherwise if he abandons it permanently.⁴

p. UNLAWFUL TRADE OR OCCUPATION. — Statutes exempting property to enable a person to carry on his trade or business are not to be construed as exempting property kept or used by a person in carrying on an unlawful trade or business.⁵

4. Married Women — *a.* IN GENERAL. — Where the disabilities of married women with respect to their property have been removed by statute, they may be entitled to the benefit of exemption laws to the same extent as a man or a *feme sole*. If the statute is general in its terms, as where it gives the right of exemption to "any person," it is to be construed as extending to married women, so as to entitle them to claim exemptions out of their separate property, unless there is something to show that the legislature intended to exclude

another, where two or more occupations are followed at the same time, but with reference to the occupation or business on which the party chiefly relies for a livelihood, and that engrosses the most of his time and attention; not for a day, or week, or month, but through the year. We therefore think the court erred in allowing the plaintiff below, who is the defendant in error, to prove which of his two occupations, tailoring or farming, would be likely to bring him in the most. A new business, embarked in as an experiment merely, might temporarily produce more, and require more personal attention, than the old, and yet the latter be one's principal occupation, because most relied on or looked to for a livelihood, and the one that would be held on to if compelled to abandon either."

Property Used in Both Occupations. — Where a man who had been a merchant, but had quitted that business, was engaged in settling up his old matters, and also in doing a small amount of farming, and used a horse and wagon in both occupations, it was held that they were exempt as being used in either. *Kenyon v. Baker*, 16 Mich. 373, 97 Am. Dec. 158.

1. Time Devoted to Business. — It is "not necessary that the business which a person is engaged in must necessarily be extensive, or occupying most of his time. Whatever may be a person's avocations, and whether his business be light and allowing intervals, or heavy and unrelenting, the business, such as it is, should be protected under the law." *Kenyon v. Baker*, 16 Mich. 373, 97 Am. Dec. 158.

2. Time of Inquiry as to Occupation. — *Springer v. Lewis*, 22 Pa. St. 191. And see *O'Donnell v. Segar*, 25 Mich. 367.

3. Mere Suspension of Trade or Occupation does not defeat the right to exemption. *Caswell v. Keith*, 12 Gray (Mass.) 351; *Harris v. Haynes*,

30 Mich. 140; *Springer v. Lewis*, 22 Pa. St. 191.

4. Permanent Abandonment of Trade or Occupation. — Thus a person who has given up farming cannot claim as exempt a team or other articles exempted to farmers. *Miller v. Miller*, 97 Mich. 151. And a person who has permanently ceased to work with his tools and has engaged in a mercantile business cannot claim exemptions as a mechanic. *Willis v. Morris*, 66 Tex. 628, 59 Am. Rep. 634. See also *Atwood v. De Forest*, 19 Conn. 513; *Davis v. Wood*, 7 Mo. 162; *Norris v. Hoitt*, 18 N. H. 196. Compare *Wood v. Bresnahan*, 63 Mich. 614.

In *Wisconsin* a statute provided that "all books, maps and plats, and other papers kept or used by any person for the purpose of making abstracts of title to land," should be exempt from seizure or sale on execution. It was held that it was necessary under this statute that the books or papers should be kept or used for the purpose specified in the statute, and that a set of abstract books and papers were not exempt where the owner had absconded before they were seized on attachment, without any intention of returning and using them again. *Spence v. Rambusch*, 99 Wis. 676.

Where a statute exempts tools, apparatus, and books belonging to any trade or profession, the library of a professional man is not exempt after he has permanently abandoned his profession. *Cooper v. Pierce*, 74 Tex. 526. See also *Lambeth v. Milton*, 2 Rob. (La.) 81.

5. Unlawful Occupation. — This question arose and was thus decided in *Walsch v. Call*, 32 Wis. 159. In that case the plaintiffs had been engaged in keeping a saloon for the sale of intoxicating liquors, without having procured the license required by law, and it was held that no part of their stock in trade was exempt

them.¹ The rights of a married woman as the head of a family have been elsewhere considered.²

b. CLAIM IN HUSBAND'S PROPERTY — ABSENCE OF HUSBAND. — In some states it is expressly provided by statute that a married woman whose husband has absconded or absented himself may claim the exemption to which he would be entitled if present.³ And there are decisions to this effect even

under a statute exempting generally "the tools and implements, or stock in trade, of any mechanic, miner, or other person, used and kept for the purpose of carrying on his trade," not exceeding a certain value.

1. Married Women — Colorado Statute. — In *Scott v. Mills*, 7 Colo. App. 155, where a statute permitted married women to carry on business on their own account, contract obligations therein, and sue and be sued, as if sole, and the exemption law provided that working animals of any "person not being the head of a family, used and kept for the purpose of carrying on his trade or business," should be exempt from levy and sale on execution or attachment, it was held that a married woman carrying on business on her own account could claim as exempt a horse used by her therein, and that her rights in this respect were not affected by the fact that her husband was also entitled to exemptions as the head of a family. See also *Martin v. Bond*, 14 Colo. 466.

Married Woman Not the Head of a Family — Ohio Statute. — In Ohio a statute provides that when a married woman sues or is sued, like proceeding shall be had, and judgment rendered and enforced, as if she were unmarried, and her property and estate shall be liable for the judgment against her, "but she shall be entitled to the benefits of all exemptions to heads of families." *Bates's Rev. Stat. Ohio*, 1897, § 5319. Construing this statute, the Supreme Court of Ohio has held that it does not require a married woman to be the head of a family to be entitled to the exemption; and that the same exemption that is allowed by law to the head of a family may be claimed by a married woman who is living apart from her husband, and who has no child living with or supported by her. *Kimmel v. Paronto*, 52 Ohio St. 468.

"Persons" Supporting Dependent Females — Georgia Statute. — In Georgia there is a constitutional provision extending the benefit of the exemption laws to any "person having the care and support of dependent females of any age, who is not the head of a family." Under this provision it has been held that a married woman, having the care and support of dependent daughters, is entitled to the benefit of the law with respect to her separate property, though she lives with her husband, the husband being physically unable to work and support his family. *Johnson v. Little*, 90 Ga. 781; *Sparks v. Shelnett*, 99 Ga. 629.

2. Rights as Head of Family. — See *supra*, this section, "Head of a Family," "Householder," etc. — *Married Women*.

3. Absence of Husband. — See *State v. Dill*, 60 Mo. 433; *State v. Creech*, 18 Wash. 186.

In *Iowa* it is provided that "when a debtor absconds and leaves his family, such property as is exempt to him * * * shall be exempt in the hands of his wife and children, or either

of them." *Code* 1897, § 4016; *Code* 1873, § 3078. This gives the wife of an absconding debtor substantially the same rights with respect to his exempt property as he would have. *Wagh v. Bridgeford*, 69 Iowa 334; *Malvin v. Christoph*, 54 Iowa 562. To bring the wife of a debtor within this statute it is not necessary that he shall have deserted his family, or left without their knowledge or consent. It is enough if he has absconded to escape from the jurisdiction or avoid the process of the courts. *Malvin v. Christoph*, 54 Iowa 562.

Community Property. — In the state of *Washington*, where a husband deserts his wife, or is temporarily absent, she may claim an exemption in her exempt community property which has been seized on execution against her husband, and may have the exemption set apart for the benefit of herself and her family; and she may apply for a writ of mandamus to compel the officer to release such property to her. *State v. Creech*, 18 Wash. 186.

Wife Without Children. — Under a statute providing that when the head of the family shall die, desert, or not reside with the same, "the family" shall be entitled to and receive the benefit and privileges conferred by the exemption laws upon the head of the family residing with the same, a deserted wife without children may claim the benefit of the law. *Berry v. Hanks*, 28 Ill. App. 51.

Loss or Forfeiture of Exemptions by Conduct of Husband. — The right to claim an exemption may, under particular statutes, be forfeited or lost by reason of the conduct of the husband, so as to defeat the wife's claim. Thus in *Michigan* it has been held that as the right of the husband to claim his stock in trade as exempt under the Michigan laws may be waived, released, or abandoned by him, the exemption cannot be claimed by the wife of an absconding debtor. *Betz v. Brenner*, 106 Mich. 87. See also *Miller v. Miller*, 97 Mich. 151, where it was held that the wife of a person who had given up his business as a farmer and had absconded could not claim his team as exempt.

Debtor Absconding with Intent to Defraud Creditors. — In *Washington* it is expressly provided by statute that the property of a person who has left the state with intent to defraud his creditors shall not be exempt from execution or attachment. And it is there held that the wife of a debtor who has absconded with such intent cannot claim his property as exempt in his behalf, under a provision permitting a wife in the absence of her husband to select such property as exempt as he might select if present. *Carter v. Davis*, 6 Wash. 327.

Attachment Against Nonresident Debtor. — And it has been held in *Missouri* that, as a nonresident debtor is not entitled to any exemption as against an attachment under the Missouri statutes, the wife of a debtor whose property has been attached on the ground of his non-

in the absence of such an express provision.¹ Her rights under such circumstances as the head of a family have already been shown.²

Failure of Husband to Assert Claim. — There are also provisions allowing a wife to claim the exemptions to which her husband is entitled on his failure or refusal to make the claim.³

Title to Property Not Affected. — Such statutes as these do not change or affect the title to the property. It remains the property of the husband, and the wife merely has the right to the possession of it as against his creditors.⁴

5. Aged and Infirm Persons. — In *Georgia* an exemption is allowed by the constitution to every "aged or infirm person" who is not the head of a family, of realty or personalty, or both, to the value in the aggregate of sixteen hundred dollars.⁵

6. Partners and Tenants in Common. — Whether an exemption can be claimed in partnership property or property owned in common depends, not upon the status of the person, but on the character of the ownership of the property. The question is considered in a subsequent section.⁶

7. "Debtor" and "Defendant." — If the statute in terms gives the right of exemption to "debtors" and "defendants" only, no person can claim property as exempt unless he occupies this position.⁷

residence cannot claim an exemption under a statute of that state allowing the wife of a debtor who "has absconded or absented himself from his place of abode" to make the same claims for exemptions as he might make if present. Her rights, it was said, are no greater than those of the husband whose representative she is. *State v. Chaney*, 36 Mo. App. 513.

1. In the Absence of Express Provision. — In *New Jersey* it was held that when a right of exemption is given to debtors having a family, and is intended for the benefit of the family as well as of the debtor himself, the wife or other head of the family of an absconding or absent debtor may claim the exemption for him, even when there is no express statutory provision to that effect. *Bonnel v. Dunn*, 29 N. J. L. 435.

In *Ohio* the Act of April 9, 1869 (66 Ohio Laws, 48, 50), allowed any resident of Ohio, being the head of a family, and not the owner of a homestead, to hold exempt from levy and sale personal property not exceeding five hundred dollars in value, "to be selected by such person, his agent or attorney." In *Regan v. Zeeb*, 28 Ohio St. 483, it was held that the act was intended to protect the debtor's family, as well as the debtor himself, and that a wife could claim as exempt property of her husband levied upon to satisfy an execution against him.

2. As Head of Family. — See *supra*, this section, "Head of a Family," "Householder," etc. — *Married Women*.

3. Claim by Wife on Neglect of Husband. — See Rev. Stat. Mo., 1889, § 4908; Comp. Laws S. Dak., 1887, § 5133; *Lindsey v. Dixon*, 52 Mo. App. 291; *Meyer v. Beaver*, 9 S. Dak. 168.

Wife of Partner. — Where there is such a provision as this, and also a statute allowing a firm to claim an exemption in the partnership property, the wife of a partner may assert such claim if her husband fails or refuses to do so. *Noyes v. Belding*, 5 S. Dak. 603.

4. Title to Property. — *Steele v. Leonori*, 28 Mo. App. 675. It was said in this case that a

statute which should attempt to change the title of the property from the husband to the wife without any adjudication or forfeiture would be invalid.

Sale or Conversion of Property by Wife. — Where specific articles are exempted, and are claimed and turned over to the wife under such a statute, she has a right to the specific articles only. If she "elects to sell them or to cause them to be sold, she must be understood as selling the property of her husband, whether with or without his authority. In either event, the proceeds of the sale become the property of the husband, and not the property of the wife. The specific articles set apart to her having thus become transmuted into money, this money is not * * * protected from a new levy by a creditor of the husband, even under the same attachment." *Steele v. Leonori*, 28 Mo. App. 675.

5. Aged and Infirm Persons. — Const. Ga., art. 9, § 1 (Civ. Code, 1895, § 5912). In *Allen v. Pearce*, 101 Ga. 316, it was held that while the term "aged" as applied to human beings is not for all purposes susceptible of a precise definition, and while it is not practicable arbitrarily to fix the period of life at which the condition of being aged can be said to have certainly begun, it is safe to hold that a man sixty-six years old is entitled to the exemption of his property from levy and sale under that clause of the constitution. And it was held that this is true although the debtor may be a hale and hearty man.

6. Partners and Tenants in Common. — See *infra*, this title, *Property Exempt under the Statutes — Property Owned in Common; Partnership Property*.

7. "Debtor" — "Defendant." — The *Pennsylvania* Act of 1849 (Brightly's *Purd. Dig.*, p. 831) declares that property to the value of three hundred dollars, exclusive of all wearing apparel of "the defendant" and his family, owned by or in possession of any "debtor" shall be exempt from levy and sale on execution, or by distress for rent. Under this act it has been held that a person, to be entitled to

8. Joint Debtors. — It has been held that joint debtors or defendants cannot claim the benefit of the exemption law as against an execution issued against them jointly and levied upon property owned by them in common.¹ But if such an execution is levied on the individual property of one or both, he, or each of them, may claim his exemption.²

9. Right of Exemption as a Personal Privilege. — It has repeatedly been held that the right of exemption is a personal privilege of the debtor, and that if he does not claim it no other person can claim it for him, but this doctrine is subject to some exceptions, and there is some conflict of opinion as to its application.³

IX. PROPERTY EXEMPT UNDER THE STATUTES — 1. In General. — Very generally the statutes specify the articles which a debtor may claim as exempt, or the kind of property, and in such a case a claim of exemption cannot be maintained unless the property is within the statute; but, as was shown in a preceding section, the statutes are to be liberally construed in determining what property the legislature intended to exempt.⁴ Frequently the statutes

claim the exemption as against an execution, must be the debtor or defendant. Therefore the purchaser of land subject to the lien of a judgment against his vendor, or a terretenant as he is called, cannot claim an exemption out of the proceeds of a sale on execution under the judgment. He is neither debtor nor defendant within the meaning of the law. *Eberhart's Appeal*, 39 Pa. St. 509, 80 Am. Dec. 536.

Nor can a subtenant or assignee, not recognized as such by the landlord, claim the benefit of the statute as against a distress for rent, where the goods are levied on as belonging to the original lessee, for neither the relation of landlord and tenant nor that of a debtor and creditor exists between him and the landlord. *Rosenberger v. Hallowell*, 35 Pa. St. 369.

1. Joint Debtors or Defendants. — It was so held in *Pennsylvania*, in a case of distress for rent, where the statute used the word "debtor" and "defendant" in the singular. *Bonsall v. Comly*, 44 Pa. St. 442; *Hawley v. Hampton*, 160 Pa. St. 18.

2. Spade v. Bruner, 72 Pa. St. 57.

3. Right of Exemption a Personal Privilege. — *Young v. Short*, 3 Manitoba L. Rep. 302; *Mickles v. Tousley*, 1 Cow. (N. Y.) 114; *Sherrible v. Chaffee*, 17 R. I. 195, 33 Am. St. Rep. 863. See *infra*, this title, *Waiver, Forfeiture, and Estoppel; Enforcement and Protection of the Right*.

Purchasers from Debtors. — There is a direct conflict of opinion as to whether a purchaser of exempt property can set up the fact that it is or was exempt in the hands of the seller, when the latter's creditors seek to subject it to the satisfaction of their claims, on the ground that there was no change of possession, or that the sale was for any other reason fraudulent as to them. Some of the courts hold that he cannot assert the seller's right of exemption, on the ground that such right is personal to the debtor and is not vendible or assignable. See *Sherrible v. Chaffee*, 17 R. I. 195, 33 Am. St. Rep. 863. Other courts have taken a different view. In *Redfield v. Stocker*, 91 Iowa 383, for example, it was held that the purchaser of property which was absolutely exempt in the hands of the seller might set up the exemption, though the seller failed to do so, when the property was levied upon as the property of the seller because of the retention of the

possession by him. The sale, said the court, carried all the rights which the seller had in the property, including the privilege of exemption from execution for the payment of his debts. See to the same effect *Waugh v. Bridgeford*, 69 Iowa 334.

For a further consideration of this question see *infra*, this title, *Sales and Other Transfers, and Incumbrances*; and see the title FRAUDULENT SALES AND CONVEYANCES.

Mortgagees. — There is the same conflict in the decisions on the question whether a mortgagee of exempt property may assert the mortgagor's right of exemption when the property is seized at the instance of the mortgagor's creditors on the ground that the mortgagor retained possession of the property, or that the mortgage was fraudulent as against them. Some courts hold that he cannot do so. *Sherrible v. Chaffee*, 17 R. I. 195, 33 Am. St. Rep. 863. And see *Edmondson v. Hyde*, 2 Sawy. (U. S.) 205. Others hold the contrary. See *infra*, this title, *Sales and Other Transfers, and Incumbrances*.

Purchasers of Encumbered Land — Claim Out of Proceeds of Sale. — On the ground that the right of exemption is personal and not vendible or assignable, it was held in *Eberhart's Appeal*, 39 Pa. St. 509, 80 Am. Dec. 536, that a purchaser of land which was encumbered by a judgment could not claim out of the proceeds of a sale of the land under the judgment an exemption that might have been claimed by the vendor.

Defense in Action by Officer for Taking Property from His Possession. — In *Connaughton v. Sands*, 32 Wis. 387, a constable levied an execution in favor of A on property of B which was exempt. Afterwards the sheriff seized the property in an action of replevin by B, and the constable brought an action against him. It was held that he might defend on the ground that the property was exempt from execution, as it is held in *Wisconsin* that an officer has no right to maintain an action except so far as is necessary to relieve himself from all the obligations devolving on him to all parties interested in his levy. See *Main v. Bell*, 27 Wis. 519.

4. Property Exempt under the Statutes — Exemption of Specific Article. — See *supra*, this title, *General Rules of Construction*.

exempt property generally, to a certain amount, and allow the debtor to select what he may see fit to hold.

2. Household Goods, Furniture, etc. — *a.* IN GENERAL. — In most of the states the exemption laws expressly exempt household furniture, utensils, family library, etc.¹ The term "household furniture," it has been said, applies only to those vessels, utensils, or goods which are designed for use in the family as instruments of the household, and for conducting and managing household affairs.²

b. "NECESSARY" HOUSEHOLD FURNITURE. — Generally the statutes expressly limit the exemption to such articles as may be necessary for the debtor and his family.³

Need Not Be Indispensable. — In such a case the articles, to be exempt, need not be indispensable, but such articles are exempt as are necessary to enable the debtor to live in a comfortable and convenient manner.⁴

"When a class of property is exempt," said the *Vermont* court, "such as 'suitable apparel, bedding, tools, arms, and articles of household furniture; such as may be necessary for upholding life,' the courts take care that the beneficial purposes of the legislature are carried into execution, and give the statute the most liberal construction. But when a specific article is exempt, the court cannot extend the statute by construction to another and different article." *Carty v. Drew*, 46 Vt. 346. See also *Stanton v. French*, 91 Cal. 274, 25 Am. St. Rep. 174, specifically referred to *infra*, this section, *Tools, Implements, Instruments, etc.*

1. Family Library. — In *Robinson's Case*, 3 Abb. Pr. (N. Y. C. Pl.) 466, it was held that a surgeon having a family could claim his medical books under a statute exempting the "family library."

2. Household Furniture — Defined. — In *Towns v. Pratt*, 33 N. H. 345, 66 Am. Dec. 726, it was held that a statute exempting household furniture did not exempt a trunk and a cabinet box. *Compare Rasure v. Hart*, 18 Kan. 340, 26 Am. Rep. 772.

Musical Instruments — Piano. — According to the better opinion, the term "household furniture" in the exemption laws does not include musical instruments, as a piano, for "the object of the exemption laws was not to surround the debtor with all possible pleasures and enjoyments at the expense of his creditors, but simply to postpone the claims of justice to those of mercy, by leaving him what the constitution describes as the 'necessary comforts of a home.'" *Tanner v. Billings*, 18 Wis. 163, 86 Am. Dec. 755.

In *Kehl v. Dunn*, 102 Mich. 581, 47 Am. St. Rep. 561, a piano was held not to be exempt under a statute exempting "all household goods, furniture, and utensils, not exceeding in value two hundred and fifty dollars." See also *Dunlap v. Edgerton*, 30 Vt. 224.

In *Texas*, however, under a statute exempting "all household and kitchen furniture," without requiring that it should be necessary, and without limitation as to value, it was held that a piano kept and used for the purpose of instructing the children of the family in music was exempt. *Alsup v. Jordan*, 69 Tex. 300, 5 Am. St. Rep. 53.

A Clock may fall within the term "household furniture." *Willson v. Ellis*, 1 Den. (N. Y.) 462; *Leavitt v. Metcalf*, 2 Vt. 342, 19 Am.

Dec. 718. See also *Hitchcock v. Holmes*, 43 Conn. 528.

A Watch, it has been held, worn by the debtor, is not exempt as household furniture. *Brown v. Edmonds*, 5 S. Dak. 509; *Rothschild v. Boelter*, 18 Minn. 361. And see *Gooch v. Gooch*, 33 Me. 535. As was said in the case last cited, however, a watch not worn on the person, but kept in the house in the place of a clock, would be exempt. See also *Bitting v. Vandenburg*, 17 How. Pr. (N. Y. Super. Ct.) 80; *Leavitt v. Metcalf*, 2 Vt. 342, 19 Am. Dec. 718.

Bags. — In *Shaw v. Davis*, 55 Barb. (N. Y.) 389, it was said that bags were not bedding, but in that case the bags were not used as bedding.

3. "Necessary" Furniture. — When the statute exempts "necessary" household furniture, without expressing the purpose for which the necessity must exist, it implies the purpose of the support of the debtor's family, and means the same thing as a statute exempting "household furniture necessary for supporting life," etc. *Montague v. Richardson*, 24 Conn. 338, 63 Am. Dec. 173. And see *Davlin v. Stone*, 4 Cush. (Mass.) 359.

Keeping House Need Not Be Necessary. — A statute exempting the beds, bedsteads, bedding, and household utensils of any debtor, necessary for himself, his wife, and children, does not require that it shall be necessary for the debtor to keep house, to entitle him to the exemption. It is sufficient if he is in fact a housekeeper. *Brown v. Wait*, 19 Pick. (Mass.) 470, 31 Am. Dec. 154. It was therefore held in this case that the right of an unmarried man to the benefit of the statute, where he kept house, could not be defeated on the ground that as he had no family it was not necessary for him to keep house.

Time as to Which Inquiry Is Made. — When a statute exempts necessary household furniture, the necessity is to be determined as of the time when the property is levied upon and claimed as exempt, and not as of the time when the statute was enacted. *Montague v. Richardson*, 24 Conn. 338, 63 Am. Dec. 173.

4. Articles Need Not Be Indispensable to Be Necessary. — *Montague v. Richardson*, 24 Conn. 338, 63 Am. Dec. 173. See also *Sims v. Reed*, 12 B. Mon. (Ky.) 53; *Hitchcock v. Holmes*, 43 Conn. 528; *Davlin v. Stone*, 4 Cush. (Mass.) 359; *Leavitt v. Metcalf*, 2 Vt.

Superfluities, Ornaments, etc. — Superfluities, however, and articles of luxury, fancy, and ornament, are excluded.¹

c. USE BY DEBTOR AND HIS FAMILY. — Some of the statutes expressly require that household furniture, etc., to be exempt, shall be kept and used by the debtor and his family.² Whether such a requirement should be implied

342, 19 Am. Dec. 718; *Clark v. Averill*, 31 Vt. 512, 76 Am. Dec. 131; *Crocker v. Spencer*, 2 D. Chip. (Vt.) 68, 15 Am. Dec. 652. And see *Alsop v. Jordan*, 69 Tex. 300, 5 Am. St. Rep. 53.

Two early *New York* cases seem to be in conflict with this view. In *Willson v. Ellis*, 1 Den. (N. Y.) 462, under a statute exempting necessary household furniture, it was said that a debtor claiming an article as exempt was bound to show "that the article was necessary, and not merely that it was convenient." And in *Van Sickler v. Jacobs*, 14 Johns. (N. Y.) 434, under a statute exempting necessary cooking utensils, it was held that a debtor claiming cooking utensils taken on execution "must show affirmatively, and certainly, that the cooking utensils were, in fact, necessary," and that it was not enough to show that they might be useful.

A Cooking Stove is exempt as an article of household furniture necessary for upholding life. *Crocker v. Spencer*, 2 D. Chip. (Vt.) 68, 15 Am. Dec. 652; *Hart v. Hyde*, 5 Vt. 328.

A Range may be exempt under such a statute. *Montague v. Richardson*, 24 Conn. 338, 63 Am. Dec. 173.

Clocks. — "A clock," said the *New York* court, "may fall within the description of 'household furniture,' but whether 'necessary' for a householder or one who provides for a family is a question of fact and not of law. The jury found that it was not necessary for the plaintiff, as he was situated; and that finding must be regarded as decisive of that question." *Willson v. Ellis*, 1 Den. (N. Y.) 462.

On the other hand, in *Leavitt v. Metcalf*, 2 Vt. 342, 19 Am. Dec. 718, the judge in the court below charged the jury that if a timepiece which had been seized on execution was the only one in the debtor's house it was exempt, and the instruction was held proper under a statute exempting such "articles of household furniture as may be necessary for upholding life."

An expensive clock is not exempt under such a statute, though it may be the only one the debtor has. *Hitchcock v. Holmes*, 43 Conn. 528.

Number of Beds. — In *Haswell v. Parsons*, 15 Cal. 266, 76 Am. Dec. 480, six beds were held exempt as household furniture, though a smaller number would have accommodated the debtor and his family. "It would be a very narrow construction of the statute," said the court, "to limit the exemption to the number required for immediate and constant use."

Under a statute exempting beds, etc., necessary for the debtor, his wife and children, and containing a proviso limiting the exemption to one bed for every two persons in the family, it was held in *Glidden v. Smith*, 15 Mass. 170, that two beds only were exempt where the debtor's family consisted of himself and wife and three young sons, as the latter might well occupy one bed, though it would be otherwise if the children were of different sexes.

Furniture for Servants and Visitors. — Under a statute exempting to a debtor and his family such household furniture as is essential to their personal comfort, a debtor may claim as exempt the furniture necessary for his domestic servants and also such as may be reasonably necessary for visitors. *Weed v. Dayton*, 40 Conn. 293.

Furniture for Boarders. — Mere boarders are no part of the family within the meaning of such statutes. "Furniture used by them for a compensation, and useful to the debtor himself only as a means of profit, is not protected." *Weed v. Dayton*, 40 Conn. 293. See also *Myers v. Esray*, 8 Pa. Co. Ct. Rep. 281; *Heidenheimer v. Blumenkron*, 56 Tex. 308. And see *Vanderhorst v. Bacon*, 38 Mich. 669, 31 Am. Rep. 328, to the effect that keeping boarders by a debtor does not deprive him of the right to claim as exempt the furniture used for his family.

That furniture was originally purchased for the purpose of keeping a boarding house does not defeat the right to claim it as exempt, if it is not used for such purpose, but is used by the debtor and his family, at the time when it is levied upon. *Vanderhorst v. Bacon*, 38 Mich. 669, 31 Am. Rep. 328.

1. Articles of Luxury, Fancy, and Ornament Excluded. — *Montague v. Richardson*, 24 Conn. 338, 63 Am. Dec. 173; *Hitchcock v. Holmes*, 43 Conn. 528; *Daylin v. Stone*, 4 Cush. (Mass.) 359; *Dunlap v. Edgerton*, 30 Vt. 224.

Illustrations. — According to this doctrine, it was held in *Hitchcock v. Holmes*, 43 Conn. 528, that a statute exempting household furniture necessary for supporting life did not exempt four sets of lace curtains and fixtures of the value of one hundred and seventy-two dollars, nor a pier glass of the value of one hundred and twenty-five dollars, nor a clock with a glass globe over it of the value of fifty dollars.

A Piano is not within a statute exempting articles of household furniture "necessary for upholding life." *Dunlap v. Edgerton*, 30 Vt. 224. Indeed, as has been already shown, the better opinion is that a piano is not household furniture at all within the meaning of the exemption laws. See the note at the beginning of this subdivision.

Statute Not Requiring Necessity. — The *Texas* statute before the court in the case of *Alsop v. Jordan*, 69 Tex. 300, 5 Am. St. Rep. 53, did not in terms require household furniture to be necessary in order to be exempt, but exempted "all household and kitchen furniture;" and it was held that this exempted a piano. The statute, it was said, embraced "a supply of necessary, convenient, or ornamental articles" with which a residence is equipped, and the legislature did not intend to limit the exemption to mere necessities. See, however, the cases to the contrary in the note at the beginning of this subdivision.

2. Use by Debtor and Family. — See *Fletcher v. Staples*, 62 Minn. 471.

when not expressed is not clear, and the decisions are conflicting.¹

Actual Use at Time of Levy. — In order that furniture may be exempt it need not necessarily be in actual use at the time when it is levied upon.²

Furniture in Storage. — It is exempt though in storage, if it is stored during a mere temporary absence, and there is an intention to return and use it again.³

3. Provisions, Forage, Crops, etc. — In some of the states there are statutes exempting provisions, forage, crops, grain, etc., for the use of debtors and their families, or for their stock.

a. PROVISIONS. — A statute exempting provisions⁴ for the debtor and his family does not exempt provisions kept for sale⁵ or for others than the debtor

1. Furniture in Hotels, Restaurants, and Boarding Houses. — In *Rasure v. Hart*, 18 Kan. 340, 26 Am. Rep. 772, the statute under consideration exempted, in addition to certain articles, "all other household furniture," not exceeding a certain sum in value. It was held that it exempted all furniture owned by the debtor, if it did not exceed such sum in value, though it was not at all necessary for the personal use of the debtor and his family, but was kept merely for the use of boarders and guests for hire. See also *Vanderhorst v. Bacon*, 38 Mich. 669, 31 Am. Rep. 328.

On the other hand, in *Heidenheimer v. Blumenkron*, 56 Tex. 308, where the statute exempted "all household and kitchen furniture," without limitation as to value, and without expressly requiring that it should be necessary for the use of the debtor and his family, or used by them, it was held, notwithstanding the general terms of the statute, that it did not exempt "any other than furniture for the family, such as might be on hand and used by it," and that "household and kitchen furniture used in hotels and restaurants, beyond that which is used by the family," was not exempt. See to the same effect *Dodge v. Knight*, (Tex. 1891) 16 S. W. Rep. 626.

In the later case of *Mueller v. Richardson*, 82 Tex. 361, the court drew a distinction between hotel and restaurant keepers and persons in private houses taking boarders incidentally for the purpose of support, and held that a widow with one child, occupying an eight-room house, and incidentally taking boarders to support herself and child, could claim as exempt the furniture used by her boarders. But the decision as to hotel and restaurant keepers in *Heidenheimer v. Blumenkron*, 56 Tex. 308, was adhered to.

2. Actual Present Use Not Necessary. — *Haswell v. Parsons*, 15 Cal. 266, 76 Am. Dec. 480; *Weed v. Dayton*, 40 Conn. 293; *Clark v. Averill*, 31 Vt. 512, 76 Am. Dec. 131.

3. Furniture Exempt While in Storage. — *Weed v. Dayton*, 40 Conn. 293.

4. Provisions. — Cotton, or other crop or property, is not exempted under a statute exempting provisions because of the fact that it was produced by labor performed under sustenance afforded by exempt provisions. *Butler v. Shiver*, 79 Ga. 172.

The Word "Flour" in a statute exempting "all necessary meat, fish, flour, and vegetables" provided for family use, has been held to include Indian-corn meal. *Lashaway v. Tucker*, 61 Hun (N. Y.) 6, Merwin, J., *dissenting*.

But Wheat is not exempt under a statute ex-

empting necessary "flour and vegetables actually provided for family use," for wheat is not flour. *Salsbury v. Parsons*, 36 Hun (N. Y.) 12.

A Milch Cow is not exempt under a statute exempting "provisions." See *Wilson v. McMillan*, 80 Ga. 733.

The Bags used to contain vegetables are not exempt. See *Shaw v. Davis*, 55 Barb. (N. Y.) 389.

Corn, if kept on hand by a debtor for the use of his family, is within a statute exempting all such "provisions" as may be on hand for family use. *Atkinson v. Gatcher*, 23 Ark. 101. And see *Cochran v. Harvey*, 88 Ga. 352.

Necessary "Corn and Grain" for Debtor and Family. — A statute exempting a debtor's "corn and grain, necessary and sufficient for the sustenance of himself and his family," is intended to exempt such grain only as is suitable for food for himself and family, and does not extend the exemption "to those species of grain which may by sales or exchanges indirectly contribute to the same end, when, by their nature and the general custom of the community in which the debtor lives, they are unsuitable to be used in the making of bread, and are not so designed by the owner. Hence, to entitle the debtor to the exemption, the corn and the grain in themselves must be necessary for the object expressed." *Blake v. Baker*, 41 Me. 78. It was held, therefore, in this case, that such a statute, though it exempted wheat, did not exempt oats not intended to be used for human food.

A statute exempting corn and grain necessary for the sustenance of the debtor and his family does not exempt a barrel of flour purchased by the debtor, and manufactured from grain of which he was never the owner. *Tucker v. Lane*, 23 Me. 537. In connection with this case, the report of which is somewhat blind, see *Blake v. Baker*, 41 Me. 78.

Adult Children. — In *Michigan* the exemption from execution of six months' provision for a householder and his family was held to be for the benefit of those of his children who are over age as well as those who are under, if they have no home elsewhere than with their father. *Stilson v. Gibbs*, 53 Mich. 280.

Butter from Exempt Cow. — As to the exemption of butter from an exempt cow, see *infra*, this section, *Proceeds and Product of Exempt Property*.

5. Provisions Kept for Sale. — In *Nash v. Farrington*, 4 Allen (Mass.) 157, under a statute exempting the necessary provisions "procured and intended for the use of the family," it was held that provisions procured and kept both for the purpose of sale and for the use of

and his family.¹ But they need not be obtained in any particular way, nor, by the weight of authority, need they be in present condition for use, or even gathered.² The statutes generally require that provisions, to be exempt, shall be "necessary" for the sustenance of the debtor and his family.³

Supplying Want of One Kind of Property from Excess of Another.—When a statute exempts grain, provisions, etc., to a certain amount, or so much as may be necessary to support the debtor and his family for a certain period, and the

the debtor's family, and not set apart or claimed at the time to be held for the latter use, were not exempt. See to the same effect, under similar statutes, *State v. Conner*, 73 Mo. 572; *Robnett v. Doyle*, 2 Ohio Dec. (Reprint) 391, 2 West. L. M. (Ohio) 585.

Even where a statute exempting "provisions" does not expressly require that they be provided for family use, such a requirement is generally to be implied, and the statute is not to be construed as exempting meat and other articles of food kept by a debtor for sale in his business. *Bond v. Tucker*, 65 N. H. 165.

Food Prepared by a Restaurant Keeper for his boarders and customers is not exempt under a statute exempting necessary provisions for the use of a debtor and his family for a certain period. *Coffey v. Wilson*, 65 Iowa 270.

Intention to Sell or Exchange.—But it has been held that the fact that a debtor is taking his vegetables to market, to exchange them there for articles of prime necessity in his family, or even to obtain the means to pay his taxes, does not deprive him of the right to insist that they were in fact actually provided for family use and are exempt from seizure and sale under execution against him. *Shaw v. Davis*, 55 Barb. (N. Y.) 389.

1. Provisions for Servants, etc.—Thus, under a statute exempting provisions for the benefit of the family, no allowance can be made for servants or farm hands. As was said by the *Kentucky* court: "It was not the intention of the legislature to provide for the support of operatives hired by the debtor to prosecute his business, either in cultivating a farm or the performance of other service." *M'Murray v. Shuck*, 6 Bush (Ky.) 111, 99 Am. Dec. 662.

2. Ungathered Vegetables and Crops.—In *Carpenter v. Herrington*, 25 Wend. (N. Y.) 370, 37 Am. Dec. 239, the statute under construction exempted the "necessary vegetables actually provided for family use," and it was held that potatoes or other vegetables, to be exempt, need not have been dug from the ground, but that it was sufficient if they had been planted and were being raised for the use of the family.

And in *Mulligan v. Newton*, 16 Gray (Mass.) 211, it was held that a statute exempting "provisions necessary, procured, and intended for the use of the family of the debtor," extended to corn, potatoes, and cabbages planted and raised by the debtor for the use of his family, and ripe for harvest, though not severed from the soil.

And see *Cochran v. Harvey*, 88 Ga. 352, where the word "provisions" in the sections of the *Georgia* Constitution (Code Ga., 1895, §§ 5212, 5214) giving a debtor the right to waive his right to the benefit of the exemption allowed him, "except as to wearing ap-

parel, and not exceeding three hundred dollars worth of household and kitchen furniture, and provisions," was held to include corn on the ear in the shuck.

In *Donahue v. Steele*, 1 Ohio Dec. (Reprint) 130, 2 West. L. J. (Ohio) 402, decided in 1845, a nisi prius court in Ohio reached a conclusion at variance with some of these cases, and held that a statute exempting "provisions actually prepared and designed for the use of the family" did not exempt standing corn. "By no reasonable construction of language," said the court, "could grain or corn standing in the field be called 'provisions'—much less provisions actually prepared and designed for the use of the debtor's family."

And in *King v. Moore*, 10 Mich. 538, the court was evenly divided on the question whether a statute exempting provisions covered crops of corn and potatoes recently planted and just visible above the ground.

3. "Necessary" Provisions.—Under a statute exempting a debtor's corn and grain "necessary and sufficient for the sustenance of himself and his family," if the debtor is unmarried, or has no family depending upon him for support, but is a boarder, or in such a situation that he can have no design to use corn or grain as food for himself or his family, these articles do not become necessary for the sustenance of himself and his family, and are not exempt. *Blake v. Baker*, 41 Me. 78.

A statute exempting "all necessary pork, beef, fish, flour, and vegetables, actually provided for family use," covers and protects "such a quantity of the specified articles as is usually provided and laid up for the year; or, rather, such a quantity as will be necessary for the family until the next annual period for laying up such provisions." *Farrell v. Higley*, Hill & D. Supp. (N. Y.) 87.

Provisions "on Hand for Home Consumption."—The allowance of provisions, said the *Texas* Court of Civil Appeals, under a statute exempting "all provisions and forage on hand for home consumption" (Rev. Stat. Tex., 1895, art. 2395), should be "such as a provident man would ordinarily keep on hand." *Ward v. Gibbs*, 10 Tex. Civ. App. 287.

Restriction to Particular Period.—Statutes exempting provisions and food for stock sometimes exempt such an amount only as may be necessary for a specified period of time. But it is not always the case. In *Farrell v. Higley*, Hill & D. Supp. (N. Y.) 87, a statute exempted "all sheep to the number of ten; * * * one cow, two swine, the necessary food for them; all necessary pork, beef, fish, flour, and vegetables, actually provided for family use; and necessary fuel for the use of the family for sixty days." It was held that the restriction to sixty days applied only to fuel.

debtor has more of a particular kind of provisions than the amount exempted, or than is sufficient to support him and his family for the time specified, he cannot claim the excess in order to supply the want of those provisions which he has not.¹

b. FORAGE OR FOOD FOR STOCK. — A statute exempting necessary food for stock² exempts such as may be necessary to keep it until the next period for laying up food for it, but only such as may be necessary during that time.³ It has been held that such a statute applies only to debtors owning or intending to acquire the stock.⁴ Food for stock is not exempt merely because the stock is exempted.⁵

c. PROPERTY IN LIEU OF PROVISIONS AND PROVENDER. — In *Kentucky* the statute exempts "sufficient provisions, including breadstuff and animal food, to sustain the family for one year; if not on hand, other personal property, wages, money, or growing crop, not to exceed forty dollars in value for each member of the family; provender suitable for live stock, if there be any such stock, not to exceed seventy dollars in value; and if such provender be not on hand, such other property as shall not exceed such sum in value." ⁶

1. *Supplying Want of One Kind of Property from Excess of Another Kind.* — *George v. Hunter*, 48 Kan. 651, 30 Am. St. Rep. 325.

2. *Property Necessary to Business of Farmer.* — A farmer has a right to an exemption of hay, oats, corn, clover seed, cornstalks, etc., under a statute exempting the "tools, implements, materials, stock, apparatus, team, vehicle, horses, harness, or other things to enable any person to carry on the profession, trade, occupation, or business in which he is wholly or principally engaged, not exceeding in value two hundred and fifty dollars." *Hutchinson v. Whitmore*, 90 Mich. 255, 30 Am. St. Rep. 431.

3. *Necessary Forage or Food for Stock.* — *Farrrell v. Higley*, Hill & D. Supp. (N. Y.) 87. In this case the statute exempted certain stock and "the necessary food for them," and it was held that the court below properly allowed the inquiry as to how much hay would be necessary to keep the stock through the winter.

Under a statute exempting all "forage on hand for home consumption" it has been held that "it is not necessary that a particular kind of forage be indispensable" in order to bring it within the exemption; that "if it be suitable for feeding stock, and the supply reserved for home consumption be not unreasonably excessive, it is exempt, although some of it may not, in view of other forage on hand, be absolutely indispensable." *Stephens v. Hobbs*, 14 Tex. Civ. App. 148.

When the statute exempts a specified amount of hay or other forage for certain animals, without restriction as to time, the full amount is exempt notwithstanding part of the winter has passed. *Kennedy v. Philbrick*, 38 Me. 135.

Forage for More Animals than Are Exempt. — The right of a debtor to hold corn as exempt under the *Texas* statute exempting "all provisions and forage on hand for home consumption" is not defeated by the fact that he owns more hogs or other animals than are exempt. *Burris v. Booth*, (Tex. Civ. App. 1897) 40 S. W. Rep. 186.

4. *Necessity to Own Stock.* — In *King v. Moore*, 10 Mich. 538, where a statute ex-

empted certain animals and also exempted a sufficient quantity of hay, grain, etc., for properly keeping them for six months, it was held that the exemption did not extend beyond what was sufficient to keep such of the animals as the debtor might have at the time of the levy. See to the same effect *Cowan v. Main*, 24 Wis. 569. And see *Foss v. Stewart*, 14 Me. 312.

The *Vermont* statute exempting certain animals and forage has been construed differently, and it is held that exemption of forage is absolute, and not dependent at all upon the debtor's owning the animals exempted. *Kimball v. Woodruff*, 55 Vt. 229.

Intention to Acquire Stock. — In *Cowan v. Main*, 24 Wis. 569, the court said that a debtor is entitled to hold as exempt the food exempted for stock, though he does not own any of the animals specified in the statute at the time of the levy, if he shows that he has a "present *bona fide* intention and purpose of at once acquiring them, so as to need the food for their support."

5. *Exemption of Stock as Exempting Food.* — In *New York*, for instance, where a statute exempted "one cow and two swine and the necessary food for them," and another statute, "in addition to the articles now exempt," exempted among other things a team, but said nothing about food therefor, it was held that necessary food for an exempt team was not exempt. *Rue v. Alter*, 5 Den. (N. Y.) 119.

6. *Property in Lieu of Provisions and Provender.* — *Gen Stat. Ky.*, 1894, § 1697. See *Com. v. Burnett*, (Ky. 1898) 44 S. W. Rep. 966.

In *Turner-Looker Co. v. Garvey*, (Ky. 1897) 43 S. W. Rep. 202, it was held that where a debtor had sufficient property in addition to the property levied on and claimed by him as exempt under the above statute in lieu of breadstuffs and provender to make up the deficiency in breadstuffs and provender, the claim should not be allowed.

Under the above statute, a claim to property in lieu of provisions must be made before sale on the execution. *Com. v. Burnett*, (Ky. 1898) 44 S. W. Rep. 966.

Under this statute it is necessary, in order to defeat a claim of property as exempt in lieu

d. CROPS GROWN ON HOMESTEAD. — In some jurisdictions, but not in all, crops grown on a homestead are exempt, either by express statutory provision to that effect or because it is considered that the exemption of the homestead extends to them.¹

e. PROHIBITION AGAINST LEVYING ON CROPS. — In *Tennessee* there is a statute prohibiting creditors from levying on crops before the fifteenth of November of the year in which they are grown, unless the owner of the crops has absconded.²

4. Wearing Apparel, Cloth, etc. — *α*. IN GENERAL. — The common-law exemption from seizure of articles on the person of a debtor has been elsewhere shown.³ In most states a broader exemption has been provided by statutes, covering all "wearing apparel" or "necessary wearing apparel," whether or not on the person of the owner.⁴ And there have been statutes exempting wool, yarn, cloth, etc.⁵

Meaning of "Wearing Apparel." — By the weight of authority the term "wearing apparel" in these statutes means clothing, and applies only to garments worn to protect the person from exposure.⁶ It does not include articles intended merely for ornament.⁷

of necessary provisions for the debtor and his family, that the debtor shall have in his possession such property as he can use in order to obtain the necessary provisions. It is not enough to show that he has recovered a judgment for money of an amount sufficient for such purpose. *Brasswell v. Rehkopf*, (Ky. 1897) 42 S. W. Rep. 916.

1. Crops Grown on Homestead. — See the title HOMESTEAD.

2. Prohibition Against Levying on Crops. — Under this statute it was held that creditors could not, as a matter of law, complain of any disposition the owner might choose to make of the crops before the date specified in the statute. *Layman v. Denton*, (Tenn. 1897) 42 S. W. Rep. 153.

3. Wearing Apparel — Common Law. — See *supra*, this title, *Exemptions at Common Law*.

4. Statutory Exemption of Wearing Apparel — Ownership by Householder. — A statute exempting to "any person being a householder" all necessary wearing apparel "for such person and his family" exempts only wearing apparel owned by the householder. It has therefore been held that an adult residing with his stepmother and transacting her business could not claim his wearing apparel as exempt under such a statute. *Bowne v. Witt*, 19 Wend. (N. Y.) 475.

5. Wool, Yarn, Cloth, etc. — A statute exempting "all sheep, to the number of ten, with their fleeces, and the yarn or cloth manufactured from the same," exempts the wool of a debtor, or the yarn or cloth manufactured therefrom, though he does not own the sheep from which the wool was taken. *Hall v. Penney*, 11 Wend. (N. Y.) 44, 25 Am. Dec. 601; *Brackett v. Watkins*, 21 Wend. (N. Y.) 68.

A statute exempting "all the spun yarn and manufactured cloth * * * manufactured by the family necessary for the use of the family," exempts cloth which a debtor has had manufactured outside the family from yarn purchased by him for the purpose, and is not restricted to cloth manufactured in and by the family. *Sims v. Reed*, 12 B. Mon. (Ky.) 51.

6. "Wearing Apparel" Defined. — *Per Sawyer, J.*, in *Towns v. Pratt*, 33 N. H. 345, 66

Am. Dec. 726. See also *Frazier v. Barnum*, 19 N. J. Eq. 316, 97 Am. Dec. 666.

Cloth, etc., in Hands of Tailor. — Cloth and trimmings, not merely made or purchased for clothing, but actually appropriated to that purpose by being put into the hands of a tailor to be made into clothing, are exempt as wearing apparel, though not yet made up. *Richardson v. Buswell*, 10 Met. (Mass.) 506, 43 Am. Dec. 450. And see to the same effect, where the cloth was cut into shape for a coat, *Ordway v. Wilbur*, 16 Me. 263, 33 Am. Dec. 663.

7. Ornaments — Jewelry. — Such articles of jewelry, therefore, as rings, breastpins, necklaces, etc., are not wearing apparel within the meaning of the exemption laws. *Towns v. Pratt*, 33 N. H. 345, 66 Am. Dec. 726; *Frazier v. Barnum*, 19 N. J. Eq. 316, 97 Am. Dec. 666. See *Sawyer v. Sawyer*, 28 Vt. 249.

Watches — Cases Allowing Exemption. — In some of the cases the courts have held that a watch owned by a debtor was exempt as wearing apparel. Thus, in *In re Steele*, 2 Flipp. (U. S.) 324, it was held that a watch of moderate value might be claimed as exempt under the federal bankrupt act as "wearing apparel." "It would not," said Judge Hammond, "be doing any great violence to the meaning of the term 'wearing apparel,' as used in the bankrupt act, to include in it a gold watch of moderate value. The definition of the word 'apparel,' as given by lexicographers, is not confined to clothing; the idea of ornamentation seems to be a rather prominent element in the word, and it is not improper to say that a man 'wears' a watch, or 'wears' a cane."

This decision was followed by the Supreme Court of *Oregon* in *Stewart v. McClung*, 12 Oregon 431, 53 Am. Rep. 374, and it was held, under a statute exempting the "necessary wearing apparel owned by any person to the value of one hundred dollars," that a watch of moderate value could be claimed as exempt if it should be made to appear affirmatively that the watch and other articles selected and retained did not exceed the amount limited by the statute.

And in *Brown v. Edmonds*, 8 S. Dak. 271,

b. "NECESSARY" WEARING APPAREL. — A statute exempting "necessary" wearing apparel exempts such articles as are reasonably required for the convenience and comfort of the debtor and his family, and is not limited to such as are indispensable.¹ But it does not exempt superfluities, or articles intended merely for ornament.²

5. **Arms and Accoutrements.** — Statutes have been enacted from time to time exempting the arms and accoutrements or equipments of militiamen.³

6. **Tools, Implements, Instruments, etc.** — *a.* IN GENERAL. — The chattel exemption laws very generally exempt to a debtor the "tools," or "tools and implements," "tools and instruments," etc., necessary for carrying on his trade or business. The language varies so much in the different statutes that it is not possible to lay down general rules that will apply to all.⁴

the Supreme Court of *South Dakota*, citing both of the cases above referred to, held that a gold watch and chain, owned and habitually worn by a debtor, was absolutely exempt under a statute exempting "all wearing apparel and clothing" without limitation as to value. See also, as tending to support this view, *In re Thiell*, 4 Biss. (U. S.) 241; *Mack v. Parks*, 8 Gray (Mass.) 517, 69 Am. Dec. 267.

In *Beckett v. Wishon*, (Prob. Ct.) 5 Ohio N. P. 155, it was held that a watch and chain of reasonable value were exempt as wearing apparel where they were habitually worn upon the person.

Cases Denying Exemption of Watches. — On the other hand, the *Minnesota* court held that a silver watch and chain worth forty or fifty dollars were not exempt under a statute exempting "all wearing apparel of the debtor and his family," though the watch was worn by the debtor and used to keep the time at his house and place of business. *Rothschild v. Boelter*, 18 Minn. 361. See also, as tending to support this view, *In re Graham*, 2 Biss. (U. S.) 449; *Smith v. Rogers*, 16 Ga. 479; *Gooch v. Gooch*, 33 Me. 535; *Sawyer v. Sawyer*, 28 Vt. 249.

More than One Watch. — Even if one watch could be regarded as part of a debtor's wearing apparel within the meaning of the exemption laws, two watches could not be so regarded. *Smith v. Rogers*, 16 Ga. 479.

Value — Lace Shawl. — When a statute places no limit as to value on the wearing apparel that may be held as exempt, the question of value is immaterial, the only question being whether the property is in its nature wearing apparel and used as such. In *Frazier v. Barnum*, 19 N. J. Eq. 316, 97 Am. Dec. 666, a woman's lace shawl worth three hundred dollars was held exempt under a statute exempting all wearing apparel. The court said: "Whether the shawl is of greater value than she ought to wear, in her condition in life as to property, cannot be inquired into. It was bought for her use before the complainant's judgment or claim. The only inquiry which could be made is whether it is held in good faith as wearing apparel, or purchased for the purpose of putting the price beyond the reach of creditors."

1. "Necessary" Wearing Apparel — Need Not Be Indispensable. — "The word 'necessary,' as here used, is not to be understood in its most rigid sense, implying something indispensable, but as equivalent to convenient and comfortable. * * * It would therefore include such articles of dress or clothing as

might properly be considered among the necessities in contradistinction to the luxuries of life." *Towns v. Pratt*, 33 N. H. 345, 66 Am. Dec. 726.

Extra Clothing, Overcoats, etc. — Such a statute exempts clothing suitable and reasonably necessary for all seasons of the year, and also exempts an extra suit. *Peverly v. Sayles*, 10 N. H. 356.

2. "Necessary" Excludes Luxuries and Ornaments, as jewelry and the like. — *Towns v. Pratt*, 33 N. H. 345, 66 Am. Dec. 726.

Watches. — As was shown in a preceding note, there is a difference of opinion, and a direct conflict in the decisions, as to whether a watch may be regarded as "necessary wearing apparel," or even as wearing apparel at all, within the meaning of the exemption laws. See the second note preceding.

3. **Arms and Accoutrements of Militiamen.** — See *Crocker v. Hunt*, 2 McCord L. (S. Car.) 352; *Wade v. Hussey*, 8 L. C. Rep. 511. See also *supra*, this title, *Exemptions at Common Law — Military Equipments*.

A Horse and Saddle owned by a member of a cavalry company are not exempt under a statute exempting a militiaman's uniform, arms, ammunition, and accoutrements. *Fry v. Canfield*, 4 Vt. 9.

Termination of Right. — In *Owen v. Gray*, 19 Vt. 543, it was held that a statute exempting "such military arms and accoutrements as the debtor is required by law to furnish" was of a temporary character, as applied to individuals, and continued so long only as the debtor was bound by law to furnish arms and accoutrements. It was held, therefore, that such property belonging to one who had been an adjutant of a regiment was not exempt where the debtor had absconded from the state, and thereby ceased to be an officer or under any obligation to furnish such property.

Absence of Statute. — Arms are not exempt unless made so by statute. *Choate v. Redding*, 18 Tex. 579. In this case there is a dictum to the effect that a hunter's or frontiersman's gun might be exempt under a statute as necessary apparatus of trade, etc., or as household furniture.

4. **Tools, Implements, Instruments, etc.** — The Object of all the statutes is the same. It is to save to debtors the means of earning a living for themselves and their families by carrying on their trade or business. "The object of the exemption," said Campbell, J., in a *Michigan* case, "is to encourage men who may have become unfortunate, by preventing them from

Scope of This Section. — In this section it is the purpose to show only what things are exempted by these statutes. Questions as to who may claim the benefit of them are elsewhere considered.¹

6. MACHINERY, MACHINES, AND APPLIANCES. — The term "tools" in the statutes of exemption has been held to mean simple instruments used by hand, and does not embrace such expensive and complicated machines and appliances as are used in large manufacturing establishments.² Nor, by the weight of authority, are such machines and appliances covered by statutes exempting "tools and implements" or "tools and instruments" of a trade or business.³

being deprived of the means of making an honest living." *Harris v. Haynes*, 30 Mich. 140.

According to familiar principles this object is to be considered in determining whether a particular article is embraced in a statute. See *In re Whetmore*, Deady (U. S.) 585; *Files v. Stevens*, 84 Me. 84, 30 Am. St. Rep. 333.

Specification of Articles Exempted. — If a statute specifies the articles which particular persons may claim as exempt, they can claim no others, however necessary such other articles may be to their calling or occupation. *Stanton v. French*, 91 Cal. 274, 25 Am. St. Rep. 174.

1. Who May Claim Exemption. — As to who may claim the exemption of tools, etc., under statutes limiting the exemption to persons engaged in particular occupations, as mechanics, etc., as to whether particular statutes are to be construed as so restricted, as to the rights of persons engaged in several occupations, and as to the effect of a debtor's suspension or abandonment of his trade or occupation, see *supra*, this title, *Persons Entitled to Benefit of Exemption Laws—Persons Engaged in Particular Occupations*.

2. Complicated and Expensive Machinery and Appliances Not "Tools." — "It has been shown, from the best lexicographers," said the court in *Buckingham v. Billings*, 13 Mass. 82, "that by the word 'tool' is to be understood some simple instrument used by the hand; and even if we should not confine the term to so strict a sense, yet we are not at liberty to suppose that the legislature departed so entirely from the appropriate meaning as to extend it to complicated and expensive machinery, which requires many hands to set it in motion. In the broad sense contended for by the plaintiff, all the utensils of a distillery, the looms, spindles, etc., of a cotton or woolen manufactory; the forges and other instruments of a manufactory of iron, would be free from attachment; although it is well known that these articles may cost thousands of dollars. Such a construction cannot be adopted without a violation of the common principles of our laws for the security of debts." See also *Danforth v. Woodward*, 10 Pick. (Mass.) 423, 20 Am. Dec. 531; *Lenoir v. Weeks*, 20 Ga. 596; *Cullers v. James*, 66 Tex. 494.

According to this view it was held, in *Richie v. McCauley*, 4 Pa. St. 471, that a statute exempting the "necessary tools of a tradesman" did not exempt the printing and stamping blocks of a painter of oilcloths, costing from one thousand to one thousand five hundred dollars, and used in a business requiring peculiar and extensive buildings, numerous workmen, and some capital.

3. Not Within the Terms "Tools and Implements," or "Tools and Instruments" — *Connecticut*. — Seeley v. Gwillim, 40 Conn. 106.

Louisiana. — Boston Belting Co. v. Ivens, 28 La. Ann. 695.

Massachusetts. — Smith v. Gibbs, 6 Gray (Mass.) 298.

Texas. — Willis v. Morris, 66 Tex. 628, 59 Am. Rep. 634; *Cullers v. James*, 66 Tex. 494.

Vermont. — Spooner v. Fletcher, 3 Vt. 133, 21 Am. Dec. 579.

Thus in *Smith v. Gibbs*, 6 Gray (Mass.) 298, it was held that the machinery, implements, etc., in a paper mill were not exempt under a statute exempting the "tools and implements, materials, stock, and fixtures of the debtor, necessary for carrying on his trade or business," to the amount of five hundred dollars.

And in *Boston Belting Co. v. Ivens*, 28 La. Ann. 695, it was held that a statute exempting the "tools and implements" of a trade or profession did not exempt the machinery, apparatus, and implements of persons engaged in an extensive business as foundrymen and machinists, and who operated a large factory requiring the attendance and skill of a large number of operatives.

Printing Presses, Cases, Type, etc. — There is a direct conflict in the decisions as to whether the printing presses, cases, and type of a printer are within the statutes exempting tools. In *Buckingham v. Billings*, 13 Mass. 82, they were held not to be exempt under a statute exempting "tools of any debtor necessary for his trade or occupation." The court classed such instruments with complicated and expensive machinery, and said that the word "tools" was only intended to include simple instruments used by hand. This case was adhered to and followed in *Danforth v. Woodward*, 10 Pick. (Mass.) 423, 20 Am. Dec. 531. See to the same effect *Spooner v. Fletcher*, 3 Vt. 133, 21 Am. Dec. 579. And see also the dictum to the same effect in *Oliver v. White*, 18 S. Car. 235.

On the Other Hand, in *Patten v. Smith*, 4 Conn. 450, 10 Am. Dec. 166, it was held that printing presses, cases, and type of a printer, used by him in his business, were tools within the meaning of a statute exempting "tools" of a debtor necessary for upholding life, and that whether they were necessary for upholding life was a question for the jury.

In *Bliss v. Vedder*, 34 Kan. 57, 55 Am. Rep. 237, the printing press, type, and other materials owned and used by the publisher of a weekly country newspaper were held to be within a statute exempting the "tools and implements" of a debtor kept for the purpose of carrying on his trade or business. *Sallee v. Waters*, 17 Ala. 482; *Jenkins v. McNall*, 27

Expensive Tools. — The mere fact that tools claimed as exempt are expensive does not defeat the claim, if they are in fact tools as distinguished from machinery.¹

Simple Machines Operated by Hand. — It has been held that a statute exempting "tools" does not exempt any machine.² But this is not at all clear. At any rate, simple and inexpensive machines operated by hand, as the sewing machine of a tailor or seamstress, or the turning lathe of a mechanic, are covered by statutes exempting "tools and implements," "tools and instruments," or "tools and apparatus."³

That a Machine Takes the Place of a Tool which would be exempt under a statute is no reason for holding the machine exempt.⁴

"Apparatus" in a statute exempting tools and apparatus used in a trade or business is a broader term than "tools" and may embrace machinery and

Kan. 532, 41 Am. Rep. 422, and *Prather v. Bobo*, 15 La. Ann. 524, are to the same effect. And in *Green v. Raymond*, 58 Tex. 80, 44 Am. Rep. 601, such property was held exempt under a statute exempting "all tools and apparatus belonging to any trade or profession." See also *St. Louis Type Foundry v. Taylor*, (Tex. Civ. App. 1896) 35 S. W. Rep. 691; *St. Louis Type Foundry v. International Live Stock Journal Printing, etc., Co.*, 74 Tex. 651, 15 Am. St. Rep. 870.

That Threshing Machines Are Not Exempt under a statute exempting "farming utensils or implements of husbandry," see *infra*, this section, *Farming Tools and Implements*.

1. Expensive Tools. — Seeley *v.* Gwillim, 40 Conn. 106.

2. View that "Tools" Does Not Cover Machines. — In *Vermont* the word "tools" in a statute exempting tools of trade has been construed as applying only to simple instruments ordinarily used in manual labor, and not to an article that is usually denominated a machine. It was therefore held in *Kilburn v. Demming*, 2 Vt. 404, 21 Am. Dec. 543, that a machine used for spinning and manufacturing cloth was not exempt under a statute exempting "tools" necessary for upholding life, though the machine was portable, and was operated by hand, and cost only one hundred dollars.

Following this case it was held, in *Henry v. Sheldon*, 35 Vt. 427, 82 Am. Dec. 644, that a machine for splitting leather, operated either by steam, water, or hand power, and when run by hand power requiring two men to operate it, and which weighed between six and nine hundred pounds, and cost two hundred and fifty dollars, was not exempt as a "tool."

The same construction of the word "tools" was adopted in *Maine*. In *Knox v. Chadbourne*, 28 Me. 160, 48 Am. Dec. 487, it was held that a statute exempting "tools" did not exempt a machine for making pegs, though it could be used by a single person, was operated by hand, and was not of great value. The court said that the statute did not exempt any machines. In this case, however, the court was influenced by the fact that the statute did not contain any restriction as to value, and thought that exclusion of all articles properly called machines was necessary to prevent debtors from claiming expensive machinery.

3. Simple Machines Operated by Hand Held

Exempt. — In *Daniels v. Hayward*, 5 Allen (Mass.) 43, 81 Am. Dec. 731, this distinction between such complicated and expensive machinery as is used in large manufacturing establishments, and machines of simple construction used by a mechanic carrying on a small business, was expressly recognized and applied, and it was held that, under a statute exempting a debtor's tools and implements to the value of one hundred dollars, a bootmaker carrying on a small business, and employing a number of men, could claim as exempt not only his tools in the strict sense, but also machines of simple construction.

Sewing Machines. — In *Cronfeldt v. Arrol*, 50 Minn. 327, 36 Am. St. Rep. 648, the sewing machine of a tailor used by him for carrying on his trade was held exempt under a statute exempting "the tools and instruments" of a debtor, "used and kept for the purpose of carrying on his trade." And in *Rayner v. Whicher*, 6 Allen (Mass.) 292, the sewing machine of a shoemaker was held to be included in the expression "tools, implements, and fixtures." See also *Dowling v. Clark*, 1 Allen (Mass.) 283, 3 Allen (Mass.) 570.

Under such a statute two sewing machines are exempt, if personally used by a tailor for carrying on his trade, and reasonably necessary therefor. And his right in this respect is not affected by another provision exempting generally one sewing machine without reference to the occupation of the debtor. The latter provision in no way qualifies or restricts the former. *Cronfeldt v. Arrol*, 50 Minn. 327, 36 Am. St. Rep. 648. See also *Rayner v. Whicher*, 6 Allen (Mass.) 292.

A Turning Lathe used by a mechanic in shaping wood or metal, and operated by hand, has been held exempt as a tool or implement. *Matter of Robb*, 99 Cal. 202, 37 Am. St. Rep. 48.

Weaver's Loom. — In *McDowell v. Shotwell*, 2 Whart. (Pa.) 26, it was held that a weaver's looms of small value and operated by hand, though not taken into the hand, were exempt as "tools of a tradesman."

Cheese-making Implements. — Articles used by a person by hand in making cheese, as cheese vats, cheese presses, curd knives, etc., are tools and implements, or instruments, within the meaning of the exemption laws. *Fish v. Street*, 27 Kan. 270.

4. Machine Taking Place of Tools. — *Henry v. Sheldon*, 35 Vt. 427, 82 Am. Dec. 644.

appliances that would not fall under the head of tools.¹

Machines or Instruments Operated by Steam or Water Power. — To be exempt as a "tool" the instrument must be operated by hand, and not by steam or water power.² Other terms in the statutes, however, have been construed more broadly.³

c. HORSES, OXEN, VEHICLES, AND HARNESS. — A horse or ox, though used by a debtor to carry on his trade or business, is not exempt as a tool, nor as an implement or instrument of his trade or business.⁴ But by the weight of authority the term "implement" or "instrument" may embrace vehicles and harness.⁵ It has been held in one case, under a somewhat similar provision, that a bicycle was not exempt.⁶

1. Apparatus. — See *Willis v. Norris*, 66 Tex. 628, 59 Am. Rep. 634; *Green v. Raymond*, 58 Tex. 80, 44 Am. Rep. 601.

2. Machines or Instruments Operated by Steam or Water Power. — See *Buckingham v. Billings*, 13 Mass. 86; *Willis v. Morris*, 66 Tex. 628, 59 Am. Rep. 634.

A Mill Saw is not a "tool" within the meaning of the exemption laws. "It is not an instrument worked by hand, or by muscular power, but part of a mill propelled by water." *Batchelder v. Shapleigh*, 10 Me. 135, 25 Am. Dec. 213.

3. Broader Statutes — "Implements, Apparatus," etc. — Thus, in *Michigan*, where the statute exempted "the tools, implements, materials, stock, apparatus, team, vehicle, horses, harness, or other things" to enable a person to carry on his "profession, trade, occupation, or business," not exceeding in value two hundred and fifty dollars, it was held that a person could claim as exempt a steam engine and band wheel to the same, and a shingle machine and gummer, used by him in the manufacture of lumber and shingles. *Wood v. Bresnahan*, 63 Mich. 614.

4. Horses and Oxen. — In *Daily v. May*, 5 Mass. 313, it was said by Chief Justice Parsons that "in no correct sense can oxen or horses be considered as husbandry tools." This was mere dictum, but there have been actual decisions to this effect in other jurisdictions.

Thus, in *Wallace v. Collins*, 5 Ark. 41, 39 Am. Dec. 359, it was expressly held that the horse of a tanner, used by him in his business, was not exempt under a statute exempting implements of trade of a mechanic.

And in *Hanna v. Bry*, 5 La. Ann. 651, 52 Am. Dec. 606, it was held that a doctor's horse could not be fairly comprehended under the denomination of "tools and instruments" necessary for the exercise of his profession. See also *Davidson v. Reynolds*, 16 U. C. C. P. 140.

In *Watson v. Lederer*, 11 Colo. 577, 7 Am. St. Rep. 263, a horse used by a person in his business seems to have been regarded as embraced by the term "tools and implements," but this is not clear, as the language of the statute was "tools, implements, working animals, and stock in trade."

5. Vehicles, etc. — Physician's Buggy and Harness. — In *Richards v. Hubbard*, 59 N. H. 158, 47 Am. Rep. 188, it was held that a physician's buggy wagon and harness might be "tools of

his occupation," within the meaning of a statute of exemption, though whether they were so or not was a question for the jury.

Vehicle of Teamster, Woodcutter, Farmer, etc. — The same court in an earlier case held that a sled used by a debtor in drawing to market wood and timber cut from his land was exempt as a tool of his occupation. *Parshley v. Green*, 58 N. H. 271. See also *Rice v. Wadsworth*, 59 N. H. 100; *Hall v. Nelson*, 59 N. H. 573. And see *infra*, this section, *Farming Tools and Implements*.

Omnibus of Hotel Keeper. — In *White v. Gemeny*, 47 Kan. 741, 27 Am. St. Rep. 320, the omnibus of a hotel keeper, used by him in his business, was held exempt under a statute exempting "the necessary tools and implements of any mechanic, miner, or other person, used and kept for the purpose of carrying on his trade or business."

For Other Cases in which vehicles, harness, etc., have been held to be embraced in the phrase "tools and implements," see *Watson v. Lederer*, 11 Colo. 577, 7 Am. St. Rep. 263, where the wagon and harness of a person engaged in assaying and sampling ores was held exempt; and *Wilhite v. Williams*, 41 Kan. 283, 13 Am. St. Rep. 281, where a statute was held to embrace the buggy and harness of an insurance agent.

There Are Some Decisions Excluding Vehicles from statutes exempting tools. In *Daily v. May*, 5 Mass. 313, under a statute exempting the tools of any debtor, necessary for his trade or occupation, it was held that a husbandman or farmer could not hold implements of husbandry used in tilling his farm, as a cart, or the gears, etc. See also *Gibson v. Gibbs*, 9 Gray (Mass.) 62.

And in *Morse v. Keyes*, 6 How. Pr. (N. Y. Supreme Ct.) 18, it was held, as a matter of law, that a wagon was not exempt under a statute exempting "working tools and a team," although it might be necessary for the debtor to use it in his business. Compare *Dains v. Prosser*, 32 Barb. (N. Y.) 290.

Vehicles Used for Pleasure or Convenience are not exempt as tools of a debtor's occupation. *Richards v. Hubbard*, 59 N. H. 158, 47 Am. Rep. 188; *Parshley v. Green*, 58 N. H. 271.

6. Bicycle. — In *Smith v. Horton*, (Tex. Civ. App. 1898) 46 S. W. Rep. 401, it was held that a bicycle belonging to an architect was not exempt under a statute exempting "all tools, apparatus, and books belonging to any trade or profession."

The Term "Chattel" is broad enough to include a horse used in the debtor's occupation.¹

d. FARMING TOOLS AND IMPLEMENTS. — Statutes sometimes expressly exempt farmers' tools and implements, and statutes exempting the necessary tools or implements of a debtor, without restriction as to occupation, have been held impliedly to exempt the necessary tools of a farmer, as well as those of a mechanic.² It has been held in some states that such statutes exempt only such implements as are used by hand, but the decisions on this point are conflicting.³ In most states the statutes are given a broader construction, and are held to cover expensive and improved implements and machinery.⁴

e. INSTRUMENTS AND BOOKS OF PROFESSIONAL MEN. — In some states

1. "Chattel" Includes a Horse. — It was so held in *Davidson v. Reynolds*, 16 U. C. C. P. 140, under a statute exempting "tools and implements of, or chattels ordinarily used in, the debtor's occupation."

2. Farming Tools and Implements. — *Pierce v. Gray*, 7 Gray (Mass.) 67; *Wilkinson v. Alley*, 45 N. H. 551; *Garrett v. Patchin*, 29 Vt. 248, 70 Am. Dec. 414.

3. "Tools" Cover Farming Implements Used by Hand Only. — The word "tools" in such a statute, said the *Vermont* court, "has long been held to extend to such farming tools as are used by hand, and to include hoes, axes, pitchforks, shovels, spades, scythes, snaths, cradles, dungforks, and other tools of that character. But it is not to include machinery, or implements used by oxen and horses, as carts, plows, harrows, mowers and reapers, etc. We think this is the sound and reasonable construction of the statute." *Garrett v. Patchin*, 29 Vt. 248, 70 Am. Dec. 414. See also *Dailey v. May*, 5 Mass. 313.

4. Statutes More Broadly Construed. — Statutes exempting tools or implements of farmers have been construed very liberally in some states. In *Meyer v. Meyer*, 23 Iowa 359, 92 Am. Dec. 432, it was assumed, though not decided, a decision on the point not being necessary, that a statute exempting the "proper tools or implements of a farmer" would exempt a plow, mower, reaper, binder, or fanning mill, though these are generally operated by horse power.

And in *Wilkinson v. Alley*, 45 N. H. 551, under a statute exempting to debtors, including farmers, the "tools" of their occupation, it was held to be the intention of the legislature to embrace "such implements of husbandry or of manual labor" as are usually employed by farmers. And in this case it was held that the statute exempted a farmer's plough, wheels, axletree, etc., harrow, and drag.

Under the same statute a sled and a wagon have been held to be exempt to a farmer as tools of his occupation. *Parshley v. Green*, 58 N. H. 271; *Rice v. Wadsworth*, 59 N. H. 100; *Hall v. Nelson*, 59 N. H. 573.

In *California* the statute exempted "the farming utensils or implements of husbandry" of a judgment debtor. It was held that this statute exempted all farming implements without regard to their value, and without regard to the amount of land which might be cultivated therewith. *Spence v. Smith*, 121 Cal. 536.

This statute exempts a combined harvester,

regardless of its value, to a farmer engaged extensively in raising and harvesting grain, when he uses it principally in harvesting his own crops, and not in harvesting the crops of others. *Matter of Klemp*, 119 Cal. 41, in which case it was said: "There is no ground for excluding an implement from the operation of the statute because it is an improvement, and supplants a former instrument used with less effectiveness for the same purpose. Present methods of farming, as well as conducting other kinds of business, require the use of improved machinery."

Threshing Machines. — In *Ford v. Johnson*, 34 Barb. (N. Y.) 364, it was held that a statute exempting the "working tools" of a debtor did not exempt a large threshing machine requiring a number of men and horses to operate it.

And in *Meyer v. Meyer*, 23 Iowa 359, 92 Am. Dec. 432, it was held that a statute exempting the "proper tools or implements of a farmer" did not exempt a threshing machine used by a person for threshing the grain of others for hire, even though he also used it to thresh his own grain. But in this case a portion of the court expressly reserved the question whether the statute would exempt a threshing machine of a farmer who owned and needed it for his own use, and did not keep and own it for the purpose of gain.

In *Matter of Baldwin*, 71 Cal. 74, an expensive threshing machine and outfit owned by several farmers, and used partly to do their own threshing, but for the most part to thresh for others for hire, was held not to be embraced in a statute exempting "farming utensils or implements of husbandry."

Tools and Implements for Logging Operations. — In *State v. Creech*, 18 Wash. 186, it was held that a statute exempting farming tools, implements, etc., covered tools and implements used in logging operations, such as a logging capstan and cable and tools, where they were necessary for the clearing and improving of farms.

"Farming Utensils" covers a mower and the like. *Humphrey v. Taylor*, 45 Wis. 251, 30 Am. Rep. 738.

Persons Engaged in Diversified Farming. — In the case of *Matter of Slade*, 122 Cal. 434, it was held that the statute of that state exempting "the farming utensils or implements of husbandry" of a debtor does not limit the exemption of a person engaged in diversified farming to such of his farming utensils or implements as he may use in some one of the separate branches of his farming operations.

there are statutes expressly exempting the books and instruments or implements of professional men, or specifically of lawyers, physicians, etc.¹ The instruments have been held exempt as "tools," or as "tools and implements,"² but it has been held otherwise with respect to a lawyer's or physician's professional library.³

f. MUSICAL INSTRUMENTS, FURNITURE, AND MISCELLANEOUS ARTICLES.

— Many of the courts, in view of the purpose of exemption laws, and under the rule that they are to be liberally construed, have given a broad meaning to the terms "tools," "implements," "instruments," etc., and statutes using one or another of these terms have been held to include such things as musical instruments,⁴ furniture in shops and offices, such as chairs, tables, safes, clocks, etc.,⁵

1. Library and Implements of Professional Men.

— See *Roberts v. Moudy*, 30 Neb. 683, 27 Am. St. Rep. 426.

"Family Library" in the exemption laws has been held to embrace the professional library of a surgeon. *Robinson's Case*, 3 Abb. Pr. (N. Y. C. Pl.) 466.

"Instruments" of a Lawyer will include his ordinary office furniture, such as his desk, table, bookcases, letter press, safe, etc. *Abraham v. Davenport*, 73 Iowa 111, 5 Am. St. Rep. 665.

2. *Instruments of a Surgeon* have been held exempt as his tools. *Robinson's Case*, 3 Abb. Pr. (N. Y. C. Pl.) 466.

A Dentist's Instruments have been held exempt as "mechanical tools." *Maxon v. Perrott*, 17 Mich. 332, 97 Am. Dec. 191. See *Duperron v. Communy*, 6 La. Ann. 789. But see *Whitcomb v. Reid*, 31 Miss. 567, 66 Am. Dec. 579, where a dentist was held not entitled to exemptions under a statute for the benefit of mechanics.

3. *Books of Professional Men.* — In *Lenoir v. Weeks*, 20 Ga. 596, a lawyer claimed his law books as exempt under a statute exempting the "common tools" of a debtor, but it was held that they were not within the statute.

And in *Church's Petition*, 15 R. I. 245, a lawyer's books were held not to be within a statute exempting the "working tools" of a debtor.

In *Lambeth v. Milton*, 2 Rob. (La.) 81, however, it was said that the books of a professional man, in this case a lawyer, were within a statute exempting the "tools and instruments" of a debtor necessary for the exercise of his trade or profession.

4. *Musical Instruments*, such as a cornet or a violin, of a person who earns his living by playing thereon in bands or orchestras, have been held exempt as "implements of a debtor necessary for carrying on his trade or business." *Goddard v. Chaffee*, 2 Allen (Mass.) 395, 79 Am. Dec. 796; *Baker v. Willis*, 123 Mass. 194, 25 Am. Rep. 61.

And the Piano of a music teacher was held exempt in *Amend v. Murphy*, 69 Ill. 337, under a statute using similar terms.

5. *Furniture, etc.* — It has been held that articles of furniture, such as stoves, tables, chairs, etc., are not exempt as "tools" or "implements" of a debtor's "trade." *Seeley v. Gwillim*, 40 Conn. 106. "Stoves, chairs, tables, and the like," said the court in this case, "being common to most kinds of business, cannot in any proper sense be said to be

the tools of any particular trade." The statute in this case used the term "implements."

This view is contrary to the decided weight of authority. There are a number of cases in which articles of furniture used in shops and offices have been held exempt under statutes exempting "tools and implements" of "trade or business." Thus, in *Bequillard v. Bartlett*, 19 Kan. 382, 27 Am. Rep. 120, under such a statute, the lamp, and the showcases with their tables and frame, of a watchmaker and jeweller were held to be exempt.

And in *Woods v. Keyes*, 14 Allen (Mass.) 236, 92 Am. Dec. 765, a milliner's furniture, consisting of a clock, stove, screen, pitcher, and table cover, were held to be within a statute exempting the tools, implements, and fixtures necessary for carrying on the trade or business of a debtor.

A Barber's Chair and Foot Rest have been held exempt under a statute exempting "suitable tools" of a debtor necessary for upholding life. *Allen v. Thompson*, 45 Vt. 472.

And in *Fore v. Cooper*, (Tex. Civ. App. 1896) 34 S. W. Rep. 341, barber chairs, and the table and mirror in front of them, used by a barber in carrying on his trade, were held exempt under a statute (Rev. Stat. Tex., 1895, art. 2397) exempting "all tools, apparatus, and books belonging to any trade or profession."

For Other Cases in which shop, store, or office furniture has been held exempt under statutes exempting "tools and implements" or "tools and instruments," see *Davidson v. Sechrist*, 28 Kan. 324; *Farmers', etc., Bank v. Franklin*, 1 La. Ann. 393; *Harrison v. Mitchell*, 13 La. Ann. 260.

Safes. — In *Matter of McManus*, 87 Cal. 292, 22 Am. St. Rep. 250, a jeweller's safe, necessary and useful in conducting his business, was held to be embraced by a statute exempting "the tools or implements of a mechanic or artisan necessary to carry on his trade."

And in *Davidson v. Sechrist*, 28 Kan. 324, the safe of an abstractor of titles was held to be included in the term "tools and instruments" of trade or business. See also *Farmers', etc., Bank v. Franklin*, 1 La. Ann. 393; *Harrison v. Mitchell*, 13 La. Ann. 260; *Betz v. Maier*, 12 Tex. Civ. App. 219.

See also *Cunningham v. Rodby*, (Wis. 1898) 77 N. W. Rep. 740, where it was held that a merchant could select a safe, showcases, etc., as implements under a statute exempting tools, implements, and stock in trade to a specified amount.

A Clock used by a person in his shop or place

a watch,¹ and a set of abstracts of an abstracter of titles.² Other decisions will be found in the note below.³

g. TOOLS AND IMPLEMENTS USED BY EMPLOYEES. — Some of the courts have held that tools or implements, to be exempt under a statute exempting the tools and implements of a debtor's trade, must be such as are used by the debtor himself.⁴ By the weight of authority, however, they may be exempt though he employs assistants to use them.⁵

h. USE TO EARN LIVING OR CARRY ON TRADE OR BUSINESS. — The statutes often expressly require that the tools and implements which they exempt shall be used by the debtor to earn his living, or to carry on his trade or business, their necessity for this purpose being the reason for exempting them.⁶ And by the weight of authority, when such a condition is not

of business has been held exempt as a tool or implement necessary for carrying on his trade or business. *Woods v. Keyes*, 14 Allen (Mass.) 236, 92 Am. Dec. 765.

1. *Watches.* — In *Bitting v. Vandenberg*, 17 How. Pr. (N. Y. Super. Ct.) 80, it was said by Justice Woodruff. "We can readily imagine cases in which the nature of a man's employment is such that a timepiece is necessary to the prosecution of the business by which he obtains a livelihood, and where he uses his watch in the very business himself. Cases may occur in which his business cannot be done, or, if he be an employee, his duties cannot be discharged, without a watch. In such a case, his watch may properly be included within the term 'working tools.'" The contrary was held in *Rothschild v. Boelter*, 18 Minn. 361, but in *Minnesota* the rule that exemption laws are to be liberally construed was not then recognized.

2. *The Abstracts of an Abstracter of Titles* have been held exempt under a statute exempting a debtor's "tools and instruments * * * used and kept for the purpose of carrying on his trade or business." *Davidson v. Sechrist*, 28 Kan. 324.

3. *The Commercial Books of a Merchant* were held exempt in *Farmers', etc.* *Bank v. Franklin*, 1 La. Ann. 393, under a statute exempting the tools and instruments necessary for the trade or profession by which a debtor gains a living. See also *Harrison v. Mitchell*, 13 La. Ann. 269.

A Net and Boat owned and used by a fisherman have been held exempt under a statute exempting working tools. *Sammis v. Smith*, 1 Thomp. & C. (N. Y.) 444.

And a Photographic Lens which was owned and used by a photographer in his business has been held exempt as an "implement of the debtor's trade." *Davidson v. Hannon*, 67 Conn. 312. *Compare Story v. Walker*, 11 Lea (Tenn.) 515, 47 Am. Rep. 305, where it was held that a statute for the benefit of "mechanics" did not apply to a photographer.

Buildings — of Photographer. — The building in which a photographer carries on his business, even though it may be personal property, is not exempt under a statute exempting "tools" and "instruments." And the same is true of buildings occupied by persons engaged in other occupations. *Holden v. Stranahan*, 48 Iowa 70.

4. *Cases Holding Tools, etc., Used by Employees Not Exempt.* — *Atwood v. De Forest*, 19 Conn. 513. See also *Seeley v. Gwillim*, 40 Conn. 106.

As to the rule at common law, see *Abercrombie v. Alderson*, 9 Ala. 981.

5. *Cases Holding Tools, etc., Used by Employees Exempt.* — Thus, in *Daniels v. Hayward*, 5 Allen (Mass.) 43, 81 Am. Dec. 731, a statute exempting a debtor's tools and implements to the value of one hundred dollars was held to apply to a bootmaker who carried on a small business and employed a number of men therein, working some himself, but generally engaged in superintending his workmen. "While the exemption," said the court, "was not intended to apply to large manufacturing establishments, it has not been supposed to be at variance with the letter or the spirit of the statute to apply it to the case of a mechanic carrying on a small business, although he may have in his employment men who perform the principal part of the labor with the tools, implements, and fixtures." See also *Bliss v. Vedder*, 34 Kan. 57, 55 Am. Rep. 237; *Howard v. Williams*, 2 Pick. (Mass.) 80; *Dowling v. Clark*, 1 Allen (Mass.) 283, 3 Allen (Mass.) 570; *McDowell v. Shotwell*, 2 Whart. (Pa.) 26; *Fore v. Cooper*, (Tex. Civ. App. 1896) 34 S. W. Rep. 341.

6. *Use to Earn Living or Carry On Trade or Business.* — *Prosser v. Hartley*, 35 Minn. 340; *Noel v. Lauerdiere*, 7 Quebec L. Rep. 367; *Wright v. Hollingshead*, 23 Ont. App. 1.

"*Habitual Use to Earn Living.* — In some of the statutes it is required that tools and implements, to be exempt, shall be habitually used by the debtor to earn his living. In the absence of such a requirement it has been held that habitual use is not necessary. See *Perkins v. Wisner*, 9 Iowa 320.

Where there is such a provision, the implements, to be exempt, need not be used exclusively in the business by which the debtor habitually earns his living, for the word "habitually" does not mean exclusively, but customarily. Nor is the right to the exemption defeated by the fact that the debtor derives some revenue from other industries. *Stanton v. French*, 91 Cal. 274, 25 Am. St. Rep. 174.

Where a statute exempted the farming utensils or implements of husbandry of a judgment debtor, it was held that a threshing machine was exempt, although the debtor used the machine to thresh the crops of other persons for hire after threshing his own crops. *Spence v. Smith*, 121 Cal. 536. See also *Matter of Klemp*, 119 Cal. 41, for a similar decision with respect to a combined harvester.

New and Unused Implements. — If an imple-

expressed, it is to be implied.¹

i. "NECESSARY" TOOLS OR IMPLEMENTS. — When the statute exempts a debtor's tools "necessary" for his trade or occupation, or necessary for upholding life, etc., it excludes tools that are not necessary to enable him to work at his trade or occupation.² But by the better opinion it does not require that they shall be absolutely indispensable.³ Even when statutes have not used the term "necessary" it has been implied.⁴

7. **Animals, Vehicles, and Teams** — *a.* IN GENERAL. — In many states there are statutes exempting to debtors generally, or to debtors occupying a particular status or engaged in a particular occupation, certain animals, as horses, oxen, cows, etc., and vehicles or teams. Many questions arising under these statutes are considered elsewhere, as shown in the note below.⁵ In this sub-

ment has been purchased by a debtor for use in carrying on his trade or business, and is intended for such use, it is no answer to his claim of exemption that it is new and has not yet been used. *Fields v. Moul*, 15 Abb. Pr. (N. Y. Supreme Ct.) 6.

1. **Necessity for Use to Earn Living Implied.** — *Files v. Stevens*, 84 Me. 84, 30 Am. St. Rep. 333; *Burgess v. Everett*, 9 Ohio St. 425.

"Tools of His Trade" or "Occupation," in a statute of exemption, implies that the tools of a debtor to be exempt shall be used in his trade or occupation. It was therefore held by the *New Hampshire* court that a person could not hold a daguerreotype apparatus exempt under such a statute, where he had given up his occupation as a photographer, and was using the instrument to teach another the art of using it, with a view to selling it to him. *Norris v. Hoitt*, 18 N. H. 196.

Library of Professional Man. — Under a statute exempting "all tools, apparatus, and books belonging to any trade or profession" (Rev. Stat. Tex. 1895, art. 2397), the library of a lawyer or other professional man is not exempt after he has permanently abandoned his profession. *Cooper v. Pierce*, 74 Tex. 526. See also *Lambeth v. Milton*, 2 Rob. (La.) 81.

Farming Utensils and Implements. — Though a statute exempts "farming utensils and implements of husbandry," without requiring that they shall be such as are needed and used by the farmer in conducting his own farming operations, it is generally to be construed as so limited, and does not exempt implements used by a farmer principally in doing work for others for hire, though he also uses them on his own land. *Matter of Baldwin*, 71 Cal. 74. To the same effect see *Meyer v. Meyer*, 23 Iowa 359, 92 Am. Dec. 432. See also *Nelson v. Fightmaster*, 4 Okla. 38, where a well-boring apparatus and derrick owned by a farmer, but generally used in doing work for others for hire, and only occasionally used on his own farm, was held not to be exempt under a statute exempting "all implements of husbandry used upon the homestead." And see *Reed v. Cooper*, 30 Kan. 574.

2. "Necessary" Tools or Implements. — *Matter of Mitchell*, 102 Cal. 534; *Buckingham v. Billings*, 13 Mass. 82.

3. **Meaning of "Necessary."** — In *Garrett v. Patchin*, 29 Vt. 248, 70 Am. Dec. 414, the court said, in construing a statute exempting such suitable tools "as may be necessary for upholding life": "The term 'necessary' in this connection has been construed to mean

convenient or useful, and that has been deemed convenient or useful which a man procures for his own personal use, unless extravagant."

And in *Healy v. Bateman*, 2 R. I. 454, 60 Am. Dec. 94, where the statute exempted the working tools of a mechanic "necessary for his usual occupation," the court approved an instruction that the phrase quoted "should not be construed to mean only such working tools as should be indispensably necessary to the mechanic, or even such as are in general used by individuals of the same craft, but such as the individual in question has adopted to facilitate and diminish his labor and make it more profitable." See also *In re Bowman*, 83 Cal. 153; *Kenyon v. Baker*, 16 Mich. 373, 97 Am. Dec. 158; *Stewart v. Welton*, 32 Mich. 56.

Some of the courts have held that they must be "necessary" and not merely "convenient." See *Meyer v. Meyer*, 23 Iowa 359, 92 Am. Dec. 432; *Prather v. Bobo*, 15 La. Ann. 524.

The fact that a mechanic who is a machinist is not required to provide a particular tool or implement simply shows that such a tool or implement is not necessary for a mechanic who is a machinist while employed as a journeyman, and does not show that such a machine is not necessary for a mechanic who is a machinist. *Matter of Robb*, 99 Cal. 202, 37 Am. St. Rep. 48.

4. **Necessity Implied** — "Proper" Tools or Implements. — Thus, in *Iowa*, where a statute exempted the "proper tools or implements of a farmer," it was said that the exemption was of "necessary articles, tools, instruments, etc., and not articles and things merely convenient." *Meyer v. Meyer*, 23 Iowa 359, 92 Am. Dec. 432. See also *Matter of Baldwin*, 71 Cal. 74; *Parshley v. Green*, 58 N. H. 271.

5. **Animals, Vehicles, etc., as Tools, Implements, etc.** — In some cases animals, vehicles, and teams have been held exempt under statutes exempting tools and implements or instruments, etc., when used by the debtor in carrying on his trade or business. These cases will be found in another place. See *supra*, this section, *Tools, Implements, Instruments, etc.*

Exemption of Forage or Food for Stock. — See *supra*, this section, *Provisions, Forage, Crops, etc.*; and *infra*, *Property Necessary to Enjoyment of Exempt Property*.

Value of Property. — See *infra*, this section, *Limitations as to Value or Amount of Property*.

Ownership or Possession of Other Property. — As

division it is proposed merely to show what property is covered by the statutes.¹

b. ANIMALS — (1) *Horses, Mules, and Colts.* — The statutes exempting horses, mules, etc., have been liberally construed by the courts, in accordance with their spirit and the intention of the legislature, and the term "horse" has been held to include not only stallions and geldings, but also mares and colts, and in some cases even a mule or jackass.² Some of the statutes exempt a span or pair of horses.³

(2) *Oxen, Steers, and Bulls.* — A statute exempting a "yoke of oxen or steers" may exempt a single ox or steer.⁴ Such a statute also exempts a pair of young and unbroken steers which it is intended to use as oxen.⁵ A bull, if used for work, is within an exemption of oxen or of working cattle.⁶

to the effect of the ownership or possession of other property on the right to claim particular animals or vehicles as exempt, and as to the debtor's right of selection in such cases, see *infra*, this section, *Ownership or Possession of Other Property*.

Persons Entitled. — As to restriction of the statutes, expressly or impliedly, to residents of the state, to householders and heads of a family, and to persons engaged in particular occupations, as farmers, laborers, teamsters, etc., see *supra*, this title, *Persons Entitled to Benefit of Exemption Laws*.

1. *Stock Necessary to Business of Farmer.* — A farmer is entitled to a yearling steer, a heifer, two calves, etc., not exceeding two hundred and fifty dollars in value, under a statute exempting the "tools, implements, materials, stock, apparatus, team, vehicle, horses, harness, or other things to enable any person to carry on the profession, trade, occupation, or business in which he is wholly or principally engaged, not exceeding in value two hundred and fifty dollars." *Hutchinson v. Whitmore*, 90 Mich. 255, 30 Am. St. Rep. 431.

2. *Common Law.* — As to the exemption of a horse at common law while being ridden, see *supra*, this title *Exemptions at Common Law*.

Stallions. — When a statute exempts a "horse" absolutely, without restriction as to its use or the occupation of the debtor, a stallion may be claimed. *Young v. Bell*, 1 Kan. App. 265. And a stallion may be claimed as a work horse, if used for work. *Allman v. Gann*, 29 Ala. 240; *McCue v. Tunstead*, 65 Cal. 506. See *infra*, this subdivision, *Working Animals — Team Work*.

Colts Exempt as "Horses." — *Kennedy v. Bradbury*, 55 Me. 107, 92 Am. Dec. 572. And see *Mallory v. Berry*, 16 Kan. 293. Compare *Murphy v. Harris*, 77 Cal. 194. See *infra*, this subdivision, *Working Animals — Team Work*.

A Jackass which was the only work beast owned by a farmer, and which was used by him in his farming operations, has been held exempt under a statute exempting "a horse, mule, or yoke of oxen," as it was within the spirit and intent of the statute, though not within its strict letter. *Richardson v. Duncan*, 2 Heisk. (Tenn.) 220.

Mules. — And in *Allison v. Brookshire*, 38 Tex. 199, it was held that a debtor owning one horse and one mule could hold the mule as well as the horse under a statute exempting two horses.

Troop Horse. — An early *South Carolina* statute exempted "the troop horse of each trooper, duly entered and registered with the

captain of the troop." In *Southwell v. Harley*, 3 Rich. L. (S. Car.) 180, it was held that a horse not "duly entered and registered" was not exempt, though the owner was enrolled as a trooper, as the words quoted referred to the horse, and not the trooper.

Value of Horse. — See *infra*, this section, *Limitations as to Value or Amount of Property*.

Work Horses. — As to what is a work horse, and whether a stallion or colt can be held under a statute exempting a work horse or working animals, see *infra*, this subdivision, *Working Animals — Team Work*.

Exemption of Horses under the Term "Team." — See *infra*, this subdivision, *Teams*.

Use or Habitual Use to Earn Living. — See *infra*, this subdivision, *Use to Earn Living*.

"Suitable to Debtor's Condition or Occupation in Life." — As to the exemption of a horse under a statute using this expression, see *infra*, this section, *Exemptions Not Confined to Any Particular Property*.

Property Necessary to Enjoyment of Exempt Horse. — As to the exemption of a saddle, harness, etc., because necessary to the enjoyment of an exempt horse, see *infra*, this section, *Property Necessary to Enjoyment of Exempt Property*.

3. *"Span of Horses."* — A mare and her four months old colt do not constitute a "span of horses," so as to render the colt exempt under a statute using such expression, "for the ordinary and familiar signification of the language 'a span of horses' is two animals which may be connected together or united for the purpose of a team." *Ames v. Martin*, 6 Wis. 361, 70 Am. Dec. 468.

"Pair of Horses." — A statute, however, exempting "a pair of horses" has been held not to require that they shall be used as a team, but to exempt any two horses selected by the debtor. *Conway v. Roberts*, 38 Neb. 456.

4. *"Yoke of Oxen"* — *Single Ox Exempt.* — Thus, under a statute exempting a horse, mule, or yoke of oxen, a single ox may be claimed as exempt, if the debtor has no horse, mule, or yoke of oxen. *Wolfenbarger v. Standifer*, 3 Sneed (Tenn.) 659. See also *Bowzey v. Newbegin*, 48 Me. 410. And see *infra*, this subdivision, *Teams*.

5. *Unbroken Steers as Oxen.* — *Mallory v. Berry*, 16 Kan. 293; *Mundell v. Hammond*, 40 Vt. 641. And see *infra*, this subdivision, *Working Animals — Team Work*.

6. *Bulls.* — Thus, in *Nelson v. Fightmaster*, 4 Okla. 38, a yoke of cattle consisting of a bull and a steer was held exempt as a "yoke of work oxen." And in *Bowzey v. Newbegin*,

(3) *Cows*. — The term "cow" or "milch cow" in a statute of exemption will include a heifer, if the debtor intends to keep her for a cow.¹

(4) *Sheep*. — In some states there are statutes exempting a certain number of sheep and their fleeces, etc.²

(5) *Swine, Pork, etc.* — And in some states "hogs," "swine," "pork," etc., are exempted. Cases construing such statutes are referred to in the note below.³

c. *VEHICLES AND HARNESS*. — It has been held that a statute exempting a horse merely does not exempt a vehicle or harness,⁴ but there is a decision holding a saddle and bridle exempt as necessary to the enjoyment of an exempt horse.⁵ In many states there are provisions in the exemption laws expressly exempting particular kinds of vehicles used by a debtor in his business or occupation.⁶

The Term "Wagon," as used in these statutes, has been taken by the courts in different senses. In some states it has been construed broadly, perhaps properly so under the particular statute, as including buggies and other vehicles adapted, intended, and used for the carriage of persons only, while in others it has been given a narrower meaning, as including such vehicles only as are intended and used for the transportation of goods. The purpose of the legislature in giving the exemption is to be considered, and is of great weight.⁷

48 Me. 410, a bull which was used for work in drawing loads was held exempt under a statute exempting "one pair of working cattle."

1. "Cow" as Including Heifer. — In *Vermont* it has been held that a heifer about two years old, whether with calf or not, is within the protection of a statute exempting a debtor's only cow. *Dow v. Smith*, 7 Vt. 465, 29 Am. Dec. 202; *Freeman v. Carpenter*, 10 Vt. 433, 33 Am. Dec. 210.

In *Carruth v. Grassie*, 11 Gray (Mass.) 211, 71 Am. Dec. 707, there was a decision to the same effect, except that it was qualified by the condition that the debtor shall own the heifer "with the expectation and purpose of keeping her for a cow." See to the same effect *Johnson v. Babcock*, 8 Allen (Mass.) 583. And see *Kennedy v. Bradbury*, 55 Me. 107, 92 Am. Dec. 572.

Heifers with calf, which have never been milked, but which are being raised and kept for family use as milch cows, have been held exempt under a statute exempting milch cows. *Nelson v. Fightmaster*, 4 Okla. 38.

Butter. — As to the exemption of butter from an exempt cow, see *infra*, this section, *Produce and Product of Exempt Property*.

2. *Sheep and Their Product*. — Under a statute exempting sheep to a certain number, "with their fleeces, and the yarn or cloth manufactured from the same," cloth from wool of that number of sheep may be claimed by a debtor though he does not own any sheep. *Hall v. Penney*, 11 Wend. (N. Y.) 44, 25 Am. Dec. 601.

3. *Swine, Hogs, Pork, etc.* — A statute exempting from attachment and execution "one hog and one pig and the pork of the same when slaughtered" does not protect from such process a hog in addition to the pork of the slaughtered hog. *Parker v. Tirrell*, 19 N. H. 201.

A Swine Whom Killed was held exempt in *Gibson v. Jenney*, 15 Mass. 205, under a statute exempting one swine. To construe the statute otherwise, said the court, "would be to

convert the intended benefit into an injury; for the swine would be protected until it became fit for food, and then be at the mercy of the creditor."

Pork "on Foot", within the meaning of a statute of exemption, includes hogs of all sizes and conditions, at all seasons of the year, which may, in due season and at the convenience of the debtor, be prepared for and converted into pork. *Byous v. Mount*, 89 Tenn. 361.

"Stock Hogs," within the meaning of such a statute, are such as are capable of reproduction, and do not therefore include barrows and spayed sows. *Byous v. Mount*, 89 Tenn. 361.

Exemption in Alternative. — Where the exemption is in the alternative—as of one thousand two hundred pounds of pork or nine hundred pounds of bacon—the debtor may take both pork and bacon, but the aggregate value of both must not exceed the amount given by the statute. *Byous v. Mount*, 89 Tenn. 361.

4. *Vehicles or Harness — Absence of Express Exemption*. — Thus, in *Somers v. Emerson*, 58 N. H. 48, it was held that a statute exempting beasts of the plough, not exceeding a yoke of oxen or a horse, when required for farming or teaming purposes, or other actual use, did not exempt a wagon or a harness.

5. *Cobbs v. Coleman*, 14 Tex. 594.

6. *Vehicle and Harness as Part of "Team"*. — See *infra*, this subdivision, *Teams*.

Vehicles as Tools and Implements, etc. — See *supra*, this section, *Tools, Implements, Instruments, etc.*

7. "Wagon" — Purpose in Giving Exemption. — *Cone v. Lewis*, 64 Tex. 333, 53 Am. Rep. 707.

Statutes Exempting Vehicles for Carrying Persons as "Wagons". — In *Rodgers v. Ferguson*, 32 Tex. 533, it was said that the term "wagon," in the *Texas* statute of 1866, "should be construed in its popular and most general sense, and should include all four-wheel vehicles, whether covered or placed

The Term "Cart" ordinarily means a two-wheeled vehicle, but under the rule requiring a liberal construction of exemption laws it has been held to include a large wagon with four wheels.¹

d. TEAMS. — In some states the statute exempts the "team" of a debtor, or of a debtor engaged in a particular occupation.²

What Is Included in Term "Team." — This term covers a one-horse team as well as a double team,³ and a team of oxen as well as a team of

upon springs, and for whatever use they may be employed, whether for the transportation of property or persons. The intention of the legislature was to protect all laboring citizens in the pursuit of their occupations, and a correct construction of the law would seem to protect the drayman and cartman in the possession of their vehicles, although they do not come within the strict definition of the word "wagon." And in this case a vehicle sometimes used as a hack for the transportation of passengers, and sometimes as a wagon for the transportation of goods, was held exempt.

In a later case, *Nichols v. Claiborne*, 39 Tex. 363, a pleasure carriage was held exempt as a "wagon" under this statute.

In *Dingman v. Raymond*, 27 Minn. 507, it was held that a single-seated one-horse top buggy designed and adapted for carrying persons only, and used for this purpose by the owner, was not exempt as a "wagon." Gilfillan, C. J., and Cornell, J., based their concurrence in the result on the ground that the buggy was used for pleasure only. In the later case of *Allen v. Coates*, 29 Minn. 46, the decision in *Dingman v. Raymond*, 27 Minn. 507, was virtually overruled, and it was held that a buggy was exempt as a "wagon." And see *Kimball v. Jones*, 41 Minn. 318. See also dissenting opinion of Leonard, J., in *Edgecomb v. His Creditors*, 19 Nev. 149.

Statutes Excluding Vehicles for Carrying Persons Only. — On the other hand, in *Quigley v. Gorham*, 5 Cal. 418, 63 Am. Dec. 139, it was held that the term "wagon" meant "a common vehicle for the transportation of goods, wares, and merchandise of all descriptions," and that a statute using that term did not exempt a hackney coach for the conveyance of passengers.

And in *Gordon v. Shields*, 7 Kan. 320, it was held that a buggy used for carrying persons only was not exempt under a statute exempting "one wagon, cart, or dray, two plows, one drag, and other farming utensils, including harness and tackle for teams, not exceeding in value three hundred dollars."

A Hearse was held exempt as a "wagon" in *Spikes v. Burgess*, 65 Wis. 428, under a statute exempting a wagon without regard to the debtor's occupation.

Dray as a Wagon. — In *Texas*, where a statute exempted one "wagon," and did not limit the right of exemption to persons engaged in any particular occupation, the term was held to include a dray. *Cone v. Lewis*, 64 Tex. 331, 53 Am. Rep. 767.

"Cart or Truck Wagon." — A peddler's wagon designed to be used in trade from place to place, with the body hung upon three elliptic steel springs, with drawer behind and doors at the sides, a railing around the top, and a dasher in front, has been held not within a

statute exempting "one cart or truck wagon." *Smith v. Chase*, 71 Me. 164.

"Express Wagon." — In *Walker v. Carkin*, 88 Me. 302, under a statute exempting an express wagon, the presiding judge instructed the jury that while "an express wagon is commonly known by us all as a four-wheeled vehicle, with a straight body, commonly hung on springs, with a footboard, a movable seat, and a dumping tailboard, a vehicle of light construction," the statute did not limit the exempted vehicle to one strictly of that description; that "the true intent and meaning of the legislature was to exempt to the debtor a vehicle suited and adapted to the transportation of luggage, truck, small parcels of merchandise, light country produce, and other light articles, and one that may be conveniently used for such purpose." It was said in this case that the term did not include carriages designed and mainly used for riding and traveling.

Bicycles. — In *Shadewald v. Phillips*, (Minn. 1898) 75 N. W. Rep. 717, it was held that a bicycle was not a "wagon" within the meaning of the statute exempting wagons.

1. "Cart" Includes Four-wheeled Vehicle. — *Webb v. Brandon*, 4 Heisk. (Tenn.) 285.

In *Favers v. Glass*, 22 Ala. 621, 28 Am. Dec. 272, under a statute exempting "one horse or ox cart," the court held that a debtor could claim as exempt a four-wheeled vehicle, the only one he had, suited to the ordinary purposes of husbandry, drawn by oxen, and employed in the same uses to which carts, in the common acceptance of the term, are appropriated. The term "cart," however, in such a statute, it was said in this case, would not exempt pleasure carriages, nor those larger wagons drawn by horses, or even oxen, and employed solely in the carrying trade; but would cover such carts or wagons only as are suitable to be employed about the domestic establishment in garnering crops, hauling wood, rails, and the like.

2. "Teamsters," etc. — "Habitual Use" of Team. — As to who are "teamsters" or "other laborers" habitually using a team to earn a livelihood, see *supra*, this title, *Persons Entitled to Benefit of Exemption Laws — Persons Engaged in Particular Occupations — Teamsters*.

3. One-horse Team Exempt. — *Wilcox v. Hawley*, 31 N. Y. 648; *Knapp v. O'Neill*, 46 Hun (N. Y.) 317; *Wheeler v. Cropsey*, 5 How. Pr. (N. Y. Supreme Ct.) 288; *Harthouse v. Rikers*, 1 Duer (N. Y.) 606; *Eastman v. Caswell*, 8 How. Pr. (N. Y. Supreme Ct.) 75; *Lockwood v. Younglove*, 27 Barb. (N. Y.) 505.

"If a debtor has but one horse and hires another to work with it, and the two make up the team which he usually works, there can be no doubt, I think, that his own horse, which is his interest in the team, if within the pre-

horses.¹ It includes a vehicle and harness as well as the horse or horses,² and it has been held to apply to a horse not used in connection with a vehicle or harness.³ Under a statute exempting "a team consisting of not more than two horses," two horses, to be exempt, need not be driven together.⁴

e. REQUIREMENT OF ACTUAL USE, OR USE FOR PARTICULAR PURPOSE — (1) *In General.* — The statutes do not always simply exempt particular animals, or vehicles, or a team, without imposing conditions. Sometimes there is an express requirement that they shall be actually used, or used for a specified purpose, as for working or teaming, or in order to earn a living. And sometimes such conditions are impliedly imposed.⁵ This, however, is not

scribed value, is protected." *Lockwood v. Younglove*, 27 Barb. (N. Y.) 505.

Two Horses. — See the dictum in *Dains v. Prosser*, 32 Barb. (N. Y.) 290, where it was said that a team "consists of one horse, or two horses, with their harness and the vehicle to which they are customarily attached for use." And see *Brown v. Davis*, 9 Hun (N. Y.) 43.

1. Ox Team. — See dictum of Bosworth, J., in *Harthouse v. Rikers*, 1 Duer (N. Y.) 607.

2. Teams Includes Vehicles and Harness. — *Harthouse v. Rikers*, 1 Duer (N. Y.) 606; *Dains v. Prosser*, 32 Barb. (N. Y.) 290; *Eastman v. Caswell*, 8 How. Pr. (N. Y. Supreme Ct.) 75; *Brown v. Davis*, 9 Hun (N. Y.) 43; *Wolf v. Farley*, (C. Pl.) 16 N. Y. Supp. 168; *Hutchinson v. Chamberlain*, 11 N. Y. Leg. Obs. 248. And see *Van Buren v. Loper*, 29 Barb. (N. Y.) 383.

In *Morse v. Keyes*, 6 How. Pr. (N. Y. Supreme Ct.) 18, it was conceded that the term "team" included a harness, but it was held that it did not include a vehicle; but this decision, in so far as it excludes the vehicle, was overruled in *Dains v. Prosser*, 32 Barb. (N. Y.) 290, cited above.

3. Horse Without Vehicle or Harness. — *Finnin v. Malloy*, 33 N. Y. Super. Ct. 382. "The word 'team,' as used in our language and in this country," said the court in this case "has a broader and more extensive meaning than that given in our dictionaries, or in any of the cases that I have found which have dwelt upon its interpretation. A horse or other animal trained and used for labor and service, when it constitutes the motive power to accomplish such labor and service is, in my opinion, a team, according to the popular and statutory meaning of the word. It may be trained and worked to carry burdens, without carriage, harness, or other appendage, and, as often is the case, it may be used (without trappings of any kind) to supply motive power to varieties of machinery, and in divers other ways made use of, as a collaborer with its owner. I hold that the horse or animal that thus performs labor, and works for its owner, may be justly and properly designated as a 'working team,' without its being associated or used with any other specified articles of property, and therefore I hold that the laboring horse is of itself a 'working team,' within the popular and statutory definition of these words."

4. Two Horses Driven Singly. — A statute in *Iowa* exempted the horse or team, consisting of not more than two horses, by the use of which any physician habitually earned his

living; and in *Corp v. Griswold*, 27 Iowa 379, it was said that "a physician would be entitled to claim as exempt two horses, if, by their use, he habitually earned his living; and this he could do, whether he drove them together or used them singly. That is to say, if his business was such that he needed to use and did use these horses, in a sulky or single buggy, and by such use habitually earned his living, both would be exempt, as fully and entirely as though he used them together, or as a team, in a double buggy."

5. Use of Property — Implied Conditions. — See *Burgess v. Everett*, 9 Ohio St. 425.

"Required for Actual Use" — Nature of Use. — Under a statute exempting a horse "when required for farming or teaming purposes, or other actual use," "the kind of use is limited. It is not a use of pleasure, or trade, or amusement. A horse is exempted as a 'beast of the plough' — an ancient term in the law signifying the ordinary uses of husbandry, or other actual labor in a lawful and useful industry. The same idea is conveyed by the particular description, when required for farming or teaming purposes, or other actual use, calling distinctly for the rule *ejusdem generis*. That rule imposes the limitations of labor, of such kind as the necessities of the debtor may require. Nor is it enough that the horse may have been actually required for the use of the debtor's family. It is the actual use, by the debtor himself, that brings it within the statute. The exemption law discriminates, in several significant instances, between the wants of the debtor and the wants of his family. When an exemption is not absolute, and is intended for the benefit of the family, the family is named. Beasts of the plough are not exempted for the use of the debtor's family." *Somers v. Emerson*, 58 N. H. 48.

Such a statute, however, does not limit the use to farming or teaming. It extends to any other use required by the reasonable necessities of the debtor. Thus, a horse may be exempt because required by the debtor to convey his children to school and church, *George v. Fellows*, 59 N. H. 206; or because required by a person engaged in traveling about and selling goods by sample, *Towne v. Marshall*, 64 N. H. 460.

Offer for Sale — Keeping for Sale. — The mere fact that one having an exempt animal, vehicle, or team which he uses in his occupation offers it for sale will not deprive him of the right to the exemption, but if he has bought it, and holds it rather for sale or speculation than for the particular use which alone exempts it, and it is not in fact needed

always the case.¹ The intention in procuring the property is generally immaterial.²

(2) *Working Animals — Team Work.* — If the statute, instead of exempting a horse merely, or an ox, etc., exempts a "work horse," or "working animals," the animal, to be exempt, must be used for work.³ And if it exempts a horse "kept and used for team work," it must be kept and used for this purpose.⁴

But Young and Unbroken Animals, as colts and young steers, may be claimed as

or kept for such use, it is not exempt. *O'Donnell v. Segar*, 25 Mich. 367.

1. When a statute exempts a particular animal, vehicle, or team absolutely, and without restriction as to persons engaged in any particular occupation, or as to the use, any person owning such property may claim it as exempt, whatever the purpose for which he uses it. See *Wilhite v. Williams*, 41 Kan. 288, 13 Am. St. Rep. 281; *Young v. Bell*, 1 Kan. App. 265; *Tipton v. Pickens*, 1 Swan (Tenn.) 25.

2. *Intention in Procuring Property.* — Thus, to entitle a physician to a buggy, "by the use of which he habitually earns his living," as properly exempt from execution, it is not necessary that at the time of procuring it he intended so to use it; but it is enough if at the time of seizure he was actually so using it. *Farner v. Turner*, 1 Iowa 53.

3. *Working Horses or Animals.* — See *Robert v. Adams*, 38 Cal. 383, 99 Am. Dec. 413; *Smith v. Dayton*, 94 Iowa 102; *Hogan v. Neumeister*, (Mich. 1898) 76 N. W. Rep. 65.

Horse Not Broken to Gears. — A horse, to be exempt under a statute exempting a "work horse," need not have been broken to gear. "It will not do," said the *Alabama* court in so holding, "to limit the exemption to a horse that has actually performed service in a plow or cart; but we must understand the term 'work horse' to mean one that performs the common drudgery of the homestead, as to haul wood, to draw the plow, to carry the family to church, etc., either under the saddle or in the traces. It is not necessary that he shall have performed this service; if he has performed a part of it, and is intended as such a drudge, it is quite sufficient to bring him within the exemption of the statute." *Noland v. Wickham*, 9 Ala. 169, 44 Am. Dec. 435. See also *Allman v. Gann*, 29 Ala. 240.

A Stallion, when kept for the service of mares only, and not used as a work horse, cannot be claimed by a farmer as exempt under a statute exempting "the farming utensils and implements of husbandry of the judgment debtor; also two oxen, or two horses, or two mules, and their harness, four cows, one cart or wagon, and food for such oxen, horses, cows, or mules, for one month," for the statute is intended to apply to such animals only as are suitable and intended for ordinary work conducted on a farm. *Robert v. Adams*, 38 Cal. 383, 99 Am. Dec. 413. "If a contrary construction of this provision were to prevail," said the court in this case, "a farmer in failing circumstances might invest his whole estate in two valuable stallions or racehorses, worth ten thousand or twenty thousand dollars each, with no intention whatever to use them for farming purposes; and by claiming

them as exempt from execution, might defraud his creditors, under color of law, to a large amount. The benevolent design of the statute might thus be perverted to purposes of the grossest fraud." See to the same effect *Smith v. Dayton*, 94 Iowa 102; *Kreig v. Fellows*, 21 Nev. 307.

In *Kansas*, however, it has been held that a stallion, whatever may be the use to which he is put, may be claimed as exempt under a statute exempting a horse absolutely, without imposing any conditions as to its use, or the debtor's occupation. *Young v. Bell*, 1 Kan. App. 265. The statute under which this case was decided exempted without express restriction to every resident head of a family "two cows, ten hogs, one yoke of oxen, and one horse or mule; or, in lieu of one yoke of oxen and one horse or mule, a span of horses or mules, twenty sheep, and the wool from the same, either in the raw material or manufactured into yarn or cloth."

Partial Use for other purposes does not defeat the right of exemption. See the third paragraph of text following in this subdivision.

Racehorses. — See the note to the fourth paragraph of text following in this subdivision.

Character of Horse Inferred. — In *Matthews v. Redwine*, 25 Miss. 99, where a horse was claimed as exempt as a plow horse, the court instructed the jury that they might, without positive evidence, infer that the horse was a plow horse, and that if he was adapted to this business it was sufficient, without showing that he had been thus used; and it was held that the instructions were correct.

A Bull, if used for work, is within a statute exempting "working cattle." *Bowzey v. Newbegin*, 48 Me. 410; or "work oxen," *Nelson v. Fightmaster*, 4 Okla. 38.

4. *Use for Team Work.* — "The expression," said the *Vermont* court, speaking of such a statute, "was used in the statute in the ordinary sense, and according to the common understanding of its meaning. 'Team work' means work done by a team as a substantial part of a man's business, as in farming, staging, express carrying, drawing of freight, peddling, the transportation of material used or dealt in as a business. This is clearly distinguishable from what is circumstantial to one's business, as a matter of convenience in getting to and from it, or as a means of going from place to place to solicit patronage, or to settle or make collections, or to see persons for business purposes. It is plainly distinguishable from family use and convenience, pleasure, exercise, or recreation. None of these uses of a horse are suggested by the expression 'kept and used for team work.'" *Hickok v. Thayer*, 49 Vt. 372. See also *Webster v. Orne*, 45 Vt. 40.

exempt under such a statute, if they are in good faith kept and intended by the debtor for working animals when broken and capable of work. It is not necessary that they shall be worked or capable of work at the time when they are levied upon.¹

(3) *Use to Earn Living.* — The statutes often require in express terms that the property shall be used, or habitually used, by the debtor for the purpose of earning a living for himself and his family, and in such a case such use, of course, is necessary.² Sometimes this condition has been implied when not

1. Young and Unbroken Animals. — "Such statutes," said the *Minnesota* court, "are to be liberally construed in favor of the right of exemption. Their object is to secure certain articles necessary to the sustenance of the debtor and his family from being taken for debt. The legislature must have had in mind that many men are not in possession of sufficient means to purchase full-grown or well-broken teams. Their only way to acquire them may be to obtain the young animals. If not protected in so doing by the exemption law, those who most need it would derive the least benefit from it. Hence the general tendency of the courts is to hold that where a statute exempts horses, 'oxen,' or 'cows,' young animals of the species and description that by time and subsequent growth would become such in a popular sense are within the meaning and import of these terms as used in the statute." *Berg v. Baldwin*, 31 Minn. 541.

Colts Exempt. — In *Winfrey v. Zimmerman*, 8 Bush (Ky.) 587, a statute exempting from sale under execution two work beasts or two work horses, or one of them and a yoke of oxen, was held to embrace and exempt a mare and her colt, the execution defendant being a housekeeper with a family and owning no other work beast. "By the terms 'work beast' and 'work horse,'" said the court, "the legislature intended and meant an animal of the horse kind which could be rendered fit for service, as well as one of maturer age and in actual use."

So, in *Kennedy v. Bradbury*, 55 Me. 107, 92 Am. Dec. 572, it was held that a colt might be claimed as exempt under a statute exempting "one pair of working cattle, or, instead thereof, one or two horses," not exceeding a certain sum in value, if the debtor did not own more than one pair of oxen or horses. The court said: "The exemption is for the benefit of the debtor. If not able to own a pair of oxen or a horse or horses of the statutory value, it would be a strange doctrine to deny his right to own a colt, which in process of time will soon become a horse."

A colt old enough to be worked, and intended for such use, though not yet broken, would without doubt be exempt as a work horse. See *Mallory v. Berry*, 16 Kan. 293; *Hogan v. Neumeister*, (Mich. 1898) 76 N. W. Rep. 65. Compare *Murphy v. Harris*, 77 Cal. 194.

In *Sullivan v. Davis*, 50 Vt. 648, it was held that a colt less than two years old, too young for team work, was not exempt under a statute exempting a horse "kept and used for team work." And see to the same effect *Connell v. Fisk*, 54 Vt. 381. These cases cannot be reconciled with those above cited, and those cited below in this note, and they must

be regarded as contrary to the weight of authority.

In *Hogan v. Neumeister*, (Mich. 1898) 76 N. W. Rep. 65, where a debtor had two horses which he used in his business, it was held that he could not claim as exempt an unbroken two-year-old colt which had never been used by him, which was not shown to have been intended for use by him in a team, and which he in fact claimed to have sold to his brother shortly before the levy.

Unbroken Steers. — A steer, only twenty months old, which has never been worked or broken to work, may be claimed as exempt under a statute exempting "one yoke of oxen," where the debtor has contracted for the purchase of another and intends to break the two together and work them as oxen. *Mallory v. Berry*, 16 Kan. 293. See to the same effect *Berg v. Baldwin*, 31 Minn. 541; *Nelson v. Fightmaster*, 4 Okla. 38; *Mundell v. Hammond*, 40 Vt. 641. In the case last cited a pair of steer calves less than a year old were held exempt as a "yoke of oxen or steers."

2. Use to Earn Living — "Habitual" Use. — Some statutes only exempt such property when by its use the debtor "habitually" earns his living. See *Brusie v. Griffith*, 34 Cal. 302, 91 Am. Dec. 695; *Calhoun v. Knight*, 10 Cal. 394; *Dove v. Nunan*, 62 Cal. 399; *Murphy v. Harris*, 77 Cal. 194; *Corp v. Griswold*, 27 Iowa 379.

Young Colts. It has been held, cannot be claimed by a farmer as exempt under a statute exempting horses by which a farmer habitually earns his living. *Murphy v. Harris*, 77 Cal. 194. See, however, the note next preceding this.

Keeping for Speculation. — A horse and buggy purchased by a person engaged in the business of an inventor and in selling machines made under his inventions, for speculative purposes only, and not necessary in his business, and held by him for the purposes of sale, are not exempt under a statute exempting, among other things, the team, vehicle, horses, and harness to enable any person to carry on his occupation or business. *Boyle v. Walsh*, 105 Mich. 237.

Use to Support Family. — In a statute exempting one yoke of oxen, or two horses in lieu thereof, "used by the debtor in obtaining the support of his family," the words quoted, being general, and restricted to no particular mode of use, are answered where the team is hired to others for a compensation which goes into the general fund to support the family, as well as where the debtor personally uses the same. But a team kept for pleasure merely is not within either the letter or the spirit of the statute. *Washburn v. Goodheart*, 88 Ill. 229.

expressed.¹ But this is not always the case.²

(4) *Exclusive Use Not Necessary.* — When the statute exempts the property only when used for work, or for teaming, or to earn a living, etc., it is not necessary that it shall be used exclusively for this purpose. Occasional use for other purposes, therefore, will not defeat the right of exemption.³

(5) *Use at Time of Levy Not Necessary.* — Nor is it necessary, under such requirements, that the property shall be used for the specified purpose at the very time when it is levied upon and claimed as exempt.⁴

(6) *Use Out of the State.* — The fact that an animal or team is used outside of the state does not defeat the right to claim it as exempt.⁵

f. NECESSITY. — When, as is often the case, the statute requires that the

1. *Necessity for Use to Earn Living Implied.* — *Burgess v. Everett*, 9 Ohio St. 425.

2. *Actual Use Not Necessary.* — In *Nuzman v. Schooley*, 36 Kan. 177, the statute under consideration exempted to every resident head of a family: "Two cows, ten hogs, one yoke of oxen, and one horse or mule, or, in lieu of one yoke of oxen and one horse or mule, a span of horses or mules; twenty sheep, and the wool from the same, either in the raw material or manufactured into yarn or cloth." It was held that this made the articles therein named exempt absolutely, and could not be confined to such articles as the debtor was in the actual possession of, or such as were actually necessary for the support of himself or his family.

3. *Exclusive Use Not Necessary.* — Thus, a debtor who customarily and principally uses two horses, a wagon, and harness, in his business as a peddler of bread, is entitled to claim them as exempt from execution under a statute exempting such property when the debtor habitually earns his living by its use, though he does not exclusively use them in that business, but occasionally does odd jobs with his team for hire. *Stanton v. French*, 91 Cal. 274, 25 Am. St. Rep. 174.

Exclusive use for teaming is not necessary to exempt a horse under a statute requiring that he be "kept and used for team work." *Webster v. Orne*, 45 Vt. 40.

A Stallion is clearly exempt from levy and sale under execution as a work horse or working animal, if one of the purposes for which he is kept is the use of the family in the performance of the ordinary services of a work horse, although he is sometimes used for the service of mares, or for pleasure driving. *Allman v. Gann*, 29 Ala. 240; *McCue v. Tunstead*, 65 Cal. 506.

And a Bull is exempt as a working animal, where he is used to haul wood, and for other labor, though he is also used for the service of cows. *Bowzey v. Newbegin*, 48 Me. 410.

4. *Use at Time of Levy and Claim.* — Where a statute exempts horses or other animals kept and used as work animals, actual use for such a purpose at the time when the property is levied upon and claimed as exempt, is not necessary. An honest intention to devote the property to such use within a reasonable time is sufficient. *Allman v. Gann*, 29 Ala. 240; *Mallory v. Berry*, 16 Kan. 293.

Thus, under a statute exempting a horse "kept and used for team work," a horse is exempt if kept with a *bona fide* intention of using him for team work within a reasonable time. *Steele v. Lyford*, 59 Vt. 230; *Rowell*

v. Powell, 53 Vt. 302. See also *Hickok v. Thayer*, 49 Vt. 372. Compare *Sullivan v. Davis*, 50 Vt. 648.

Under a statute exempting horses or a team by which a teamster habitually earns his living, a person who has been incapacitated by injuries from pursuing the employment in which he has been engaged upon a railroad, and who has purchased a pair of horses for the purpose of engaging in the business of a teamster or drayman, intending in good faith to engage in such business, may claim such horses as exempt from levy, although he may have not yet actually entered upon such business. *Cleveland v. Andrews*, (Idaho 1896) 46 Pac. Rep. 1025.

As to Unbroken Colts and Steers, see the third paragraph of text preceding this subdivision.

Horse "Required for Actual Use." — Under a statute exempting a horse required by the debtor for actual use it need not be required for actual use at the very time when it is levied upon and claimed as exempt, but, on the other hand, it is not exempt for the reason merely that at some indefinite and uncertain future time it may be required for actual use. It is exempt when, and only when, it is reasonably required for use at the time of the levy or within a reasonable time thereafter. *Jaquith v. Scott*, 63 N. H. 5, 56 Am. Rep. 476.

Racehorses. — Where a farmer has used a horse for work on his farm, and intends to take it back for such use, his right to claim the same as exempt is not defeated by the mere fact that the horse at the time of the levy is in the possession of a horse trainer, either for the purpose of developing its speed as a trotter or of ascertaining its capacity in that direction. This alone does not show that the horse is kept or intended to be used as a racehorse. *Anderson v. Ege*, 44 Minn. 216.

Habitual Use. — One who procures a team, or part of a team intending to complete it for use, in good faith, to earn a livelihood, has it in such "habitual use" as to exempt it from levy, whether he has had the opportunity to use it much or little. *Bevan v. Hayden*, 13 Iowa 122.

Vehicle Awaiting Repairs. — The right of a debtor to claim a wagon as necessary in earning a support for himself and family is not affected by the fact that at the time of levy it has been for some time at a shop awaiting repairs, the debtor in the meantime using a borrowed wagon. *Wolf v. Farley*, (C. Pl.) 16 N. Y. Supp. 168.

5. *Use Out of the State.* — *Whicher v. Long*, 11 Iowa 48.

property shall be necessary to the debtor, it does not mean that it must be indispensable. It is enough if it be reasonably necessary and convenient.¹

8. Stock in Trade, Materials, etc. — *a. IN GENERAL.* — In a number of states there are statutes exempting a debtor's "stock in trade," "stock," "materials," etc.²

To What the Statutes Extend. — Some of the statutes are restricted to the stock in trade or materials kept and used by a mechanic or other person using tools and implements for the purpose of carrying on his trade or business.³ Others are broader, and exempt the stock in trade, etc., of a merchant or shopkeeper,⁴ of a farmer,⁵ etc.

Materials and Manufactured Goods. — "Stock in trade," in these statutes, includes both the raw materials from which it is intended to manufacture goods, and the manufactured goods themselves, whether manufactured for sale to customers generally or upon special orders.⁶

1. Necessity — Property Need Not Be Indispensable. — Thus, in *In re Bowman*, 83 Cal. 153, under a statute exempting to a teamster two horses with their harness, a teamster was allowed to hold as exempt a wagon sheet and a pair of six-horse lines, as the evidence showed that the six-horse lines "were useful and convenient to use with two horses." See *O'Donnell v. Segar*, 25 Mich. 367; *Smith v. Slade*, 57 Barb. (N. Y.) 637. See also *supra*, this section, *Household Goods, Furniture, etc.; Provisions, Forage, Crops, etc.; Wearing Apparel, Cloth, etc.; Tools, Implements, Instruments, etc.*

A Physician's Horse used by him for visiting patients living at a distance has been held "necessary." *Wheeler v. Cropsey*, 5 How. Pr. (N. Y. Supreme Ct.) 288.

2. Unlawful Business. — That stock in trade kept and used for carrying on an unlawful business, as an unlawful liquor traffic, is not exempt, see *Walsch v. Call*, 32 Wis. 159.

3. Statutes Not Exempting Stock in Trade of Merchant or Shopkeeper. — In *Minnesota* a statute exempted "the tools and implements of any mechanic, miner, or other person, used and kept for the purpose of carrying on his trade or business, and, in addition thereto, stock in trade" not exceeding a certain sum in value. The Supreme Court of Minnesota held that this statute applied only to the stock in trade kept and used by persons using tools and implements in their trade or business, and that it did not exempt the stock in trade kept for sale by a merchant or shopkeeper. *Grimes v. Bryne*, 2 Minn. 89; *Prosser v. Hart*, 35 Minn. 340; *Hillyer v. Remore*, 42 Minn. 254.

The Supreme Court of *Kansas* has construed a similar statute in the same way. *Guptil v. McFee*, 9 Kan. 30; *Bequillard v. Bartlett*, 19 Kan. 382, 27 Am. Rep. 120.

And it has been held by the *Massachusetts* court that the stock in trade of a merchant or shopkeeper is not exempt under a statute exempting "the tools and implements, materials, stock, and fixtures" of a debtor necessary for carrying on his trade or business, the statute having been construed as limited to the stock and materials of persons engaged in a trade or business requiring the use of tools and implements. *Wilson v. Elliot*, 7 Gray (Mass.) 69; *Gibson v. Gibbs*, 9 Gray (Mass.) 62; *Reed v. Neale*, 10 Gray (Mass.) 242.

This statute has also been held not to apply to the stock and materials of large manufacturers. *Smith v. Gibbs*, 6 Gray (Mass.) 298.

Goods Bought for Sale by Manufacturer. — Where the statute exempting stock in trade does not apply to goods bought and kept for sale by a merchant, it does not exempt goods bought by a mechanic or manufacturer merely to be sold by him again, in connection with his manufacturing business, and not to be worked up or manufactured by him, for as to these he is a mere merchant, buying and selling. *Hillyer v. Remore*, 42 Minn. 254. See to the same effect, in the case of a jeweller, *Bequillard v. Bartlett*, 19 Kan. 382, 27 Am. Rep. 120.

4. Statutes Applicable to Stock in Trade of Merchants and Shopkeepers. — In *Wisconsin* a statute exempting "the tools and implements, or stock in trade, of any mechanic, miner, or other person, used and kept for the purpose of carrying on his trade or business, not exceeding two hundred dollars in value," has been held to apply to and exempt goods kept for sale by a merchant. *Wicker v. Comstock*, 52 Wis. 315. The dictum of Judge Drummond, construing this statute in *Ex p. Robinson*, 7 Biss. (U. S.) 125, is to the contrary.

A similar statute in *Colorado* has been construed in the same way. *Martin v. Bond*, 14 Colo. 466; *Weil v. Nevitt*, 18 Colo. 10.

Saloon Keepers. — Such a statute applies to the stock in trade, or liquors, of a saloon keeper, if his business is lawful. *Weil v. Nevitt*, 18 Colo. 10; *Walsch v. Call*, 32 Wis. 159.

5. Farmers' Stock and Materials. — Under a statute allowing a debtor, without restriction as to vocation, to claim as exempt stock or materials, etc., to a certain value to enable him to carry on his business, a farmer may claim the exemption out of the property owned by him and necessary to his business, including cattle, hay, oats, seed corn, fodder, etc. *Stilson v. Gibbs*, 46 Mich. 215; *Hutchinson v. Whitmore*, 90 Mich. 255, 30 Am. St. Rep. 431.

6. Materials and Manufactured Goods. — Thus, in *Minnesota*, under statute exempting the stock in trade of mechanics and manufacturers, but construed as not extending to the stock in trade of a mere merchant (see the third note preceding), it was held that articles manufactured by a milliner, in whole or in part, were exempt, and that it made no differ-

b. USE OF PROPERTY IN TRADE OR BUSINESS. — The statutes generally require that the stock, to be exempt, shall be kept and used by the debtor for carrying on his trade or business.¹

9. Wages, Salary, Earnings, etc. — **a. IN GENERAL.** — In a number of states, chiefly to secure the means of support to persons supporting themselves or their families by working for others, the legislatures have enacted statutes exempting the "wages," "salary," or "earnings" of debtors, or of a particular class of debtors. Some of the questions arising under these statutes are elsewhere considered.² The exemption is expressly limited in some jurisdictions

ence that they were placed by her on sale with the non-exempt goods. *Hillyer v. Remore*, 42 Minn. 254.

In an earlier case it was said that the term "stock in trade" has reference to any materials belonging to a mechanic, and which he has provided and holds for the purpose of enabling him to make their use a beneficial or profitable one as a means of support. It includes all the materials got and held for that purpose, in whatever condition or state of preparation for use they may be, so that they are suitable and adapted to the end in view, and to the particular business in which he is engaged. And it was held that unfinished burial cases and caskets, upon which additional labor, expense, and material must be put before they could be deemed finished, or fit for sale and use, were exempt as "stock in trade," when owned and held by a manufacturer for the purpose of being so finished and made fit for use by him. *McAbe v. Thompson*, 27 Minn. 134.

Under a similar statute in *Kansas* it was held that watches and jewelry manufactured by a watchmaker and jeweler, whether manufactured for particular customers upon special orders, or for customers generally and for sale to any person who might wish to purchase, and whether complete or not complete, as well as the raw materials kept by him from which to manufacture watches and jewelry, were exempt. *Bequillard v. Bartlett*, 19 Kan. 382, 27 Am. Rep. 120.

Stock of Merchant Tailor. — Such a statute exempts goods purchased and held by a merchant tailor, not with a view to selling them as merchants usually do, but with a view to making them up into clothing for customers on special orders. *In re Jones*, 2 Dill. (U. S.) 343.

1. Use of Property in Trade or Business Necessary. — It has been held that when the statute imposes this condition, the stock and materials of a debtor, though procured and designed for the purpose of carrying on his trade or business, cease to be exempt when the debtor changes his purpose to use them in his trade or business and determines to sell them. *Rayner v. Whicher*, 6 Allen (Mass.) 202.

In *Rosenthal v. Scott*, 41 Mich. 632, however, the *Michigan* court held that an execution debtor does not lose the benefit of the exemption of goods to enable him to carry on his business by selling them or keeping them idle until they can be used to the best advantage, and that they cannot be levied on unless he goes into some new business in which they will be of no material use to him.

Masquerade Suits Owned by a Tailor, made by

him during times when there was no work in his trade, and kept by him for renting out, have been held exempt under the *Michigan* statute (*How. Annot. Stat. Mich.*, 1882, § 7686) exempting "the tools, implements, materials, stock, apparatus, * * * or other things to enable any person to carry on the profession, trade, occupation, or business in which he is wholly or principally engaged," not exceeding a certain sum in value. *Fischer v. McIntyre*, 66 Mich. 681.

Blacksmiths — Wagon-making Materials. — Under the same statute a blacksmith was held to be entitled to claim as exempt the woodwork of a wagon purchased by him, during dull times in his occupation, and ironed up for sale. *Stewart v. Welton*, 32 Mich. 56.

Carpenter's Stock and Materials. — And in *Hutchinson v. Roe*, 44 Mich. 389, a quantity of shingles and building lumber was held exempt as stock or material to enable a debtor to carry on his trade as a carpenter, where he was about to use it in building a home on his wife's lot.

Abandonment of Business. — The exemption of stock in trade to the value of two hundred and fifty dollars given by the *Michigan* statute (2 *How. Annot. Stat.*, § 7686, subdiv. 8) to enable one to carry on the business in which he is wholly or principally engaged, cannot be claimed where the debtor has abandoned his business. *Betz v. Brenner*, 106 Mich. 87.

2. Exemption of Wages, etc. — Persons Entitled. — In a previous section has been considered the restriction of the statutes to residents of the state, heads of families, householders, laborers, etc., and the meaning of these terms as construed by the courts set forth, and what debtors are entitled to the benefit of them. See *supra*, this title, *Persons Entitled to Benefit of Exemption Laws*. And see particularly, under the section just referred to, the subdivisions *Laborers* and "Clerks" and "Employees."

Extraterritorial Effect of Statutes. — As to the effect of statutes exempting wages outside of the state enacting them, injunction against proceedings in another state in evasion of the exemption, etc., see *supra*, this title, *Operation of Statutes with Respect to Territorial Limits*.

Assignment of Wages or Earnings. — As to the right of a debtor to assign his exempt wages or earnings, and the effect of an assignment, see *infra*, this title, *Sales and Other Transfers, and Incumbrances*.

Analogous Cases, in which the terms "wages," "salary," etc., are construed, arise under statutes preferring debts due by insolvent corporations. See the title *INSOLVENCY AND BANKRUPTCY*.

to wages and salary not yet due,¹ but as a rule this is not the case.

b. FOR WHAT PERIOD. — Some of the statutes exempt salary, wages, or earnings to a certain amount. Others exempt such as are earned during a certain period next preceding the service of a writ of attachment or garnishment. Others exempt a week's or a month's wages, without regard to when they were earned.²

c. "WAGES" AND "SALARY" — (1) *In General.* — The terms "wages" and "salary," as used in the exemption laws, have been regarded as substantially synonymous, but they are not entirely so.³ Thus, by the better opinion the term "wages" does not cover the salary of an officer of a large corporation,⁴ nor that of a public officer.⁵

1. "Wages and Salary Not Yet Due." — It has been held that a statute exempting from seizure "wages and salary not yet due" refers to wages and salary not earned at the time of seizure, and does not exempt such portion of a week's or month's wages or salary as has been actually earned at the time of the service of a writ of attachment, though not exigible by the defendant from the garnishee until the end of the week or month. *Kenwood v. Rodden*, 9 Leg. N. (Quebec) 223.

2. *Restriction to Particular Period.* — A statute declaring that "no person shall be adjudged a trustee by reason of any amount due from him to the principal defendant as wages for his personal labor, for a time not exceeding one month," exempts a month's wages whenever earned, and is not restricted to wages earned during the month immediately preceding the service of process. *Parks v. Knox*, 22 Me. 494.

But a statute exempting wages due "for a time not exceeding one month next preceding the service of the process" exempts only the wages due for labor done during the month immediately preceding the service of process. *Haynes v. Hussey*, 72 Me. 448.

A statute exempting wages not exceeding a certain amount, due for services rendered during thirty days "preceding" the service of process, only exempts wages for services during the thirty days next preceding the service of process. See *Bean v. Germania L. Ins. Co.*, 54 Minn. 366.

Period Prior to "Issue" of Process. — A statute exempting wages for services rendered during thirty days preceding "the issue" of any process of attachment, garnishment, or execution, has been construed as meaning during thirty days preceding the levy of the process. *Bean v. Germania L. Ins. Co.*, 54 Minn. 366.

Period Preceding "Order" in Supplementary Proceedings. — A *New York* statute relating to proceedings supplementary to execution exempting the earnings of a debtor for sixty days "preceding the order" was held to refer to the order for the application of the debtor's property, and not to the original order for his examination, the latter order not being mentioned in the particular section of the statute. *Bush v. White*, 12 Abb. Pr. (N. Y. Super. Ct.) 21.

Earnings Left in Hands of Employer. — When a statute exempts wages or earnings for a certain period prior to levy of execution, attachment, or garnishment, earnings voluntarily left in the employer's hands for such period cannot be claimed as exempt. See *Seligmann v. Heller Bros.' Clothing Co.*, 69 Wis. 410.

And see *infra*, this subdivision, *Current Wages*.

Earnings in Hands of Wife. — Nor are such earnings exempt in the hands of the debtor's wife after the expiration of such period. *Bloodgood v. Meissner*, 84 Wis. 452.

3. "Wages" and "Salary." — "The truth is," said Chief Justice Sharswood, in a *Pennsylvania* case, in speaking of another statute, "and this the lexicographers seem to hold, that if there is any difference in the popular sense between 'salary' and 'wages' it is only in the application of them to more or less honorable services. A farmer pays his farm hands, in common speech, wages — whether by the day, the week, the harvest, or the year. If for any reason he has occasion to employ an overseer, his compensation, no matter how measured, is called a salary. An ironmaster pays his workmen wages, his manager receives a salary. A merchant pays wages to his servant who sweeps the floor, makes the fire, and runs his errands, but he compensates his salesman or clerk by a salary. How can it make any difference in what way the compensation is ascertained?" *Com. v. Butler*, 99 Pa. St. 535. See also *Bell v. Indian Live-Stock Co.*, (Tex. 1889) 11 S. W. Rep. 344.

4. *The Salary of an Officer of a Corporation*, as of the president of a railroad company, would without doubt be exempt under a statute exempting salaries of debtors generally. But it has been held not to be exempt under a statute exempting "the wages of laborers and employees." As was said by the Supreme Court of *Alabama*: "The term 'wages' indicates inconsiderable pay, without excluding 'salary,' which is suggestive of larger compensation for personal services. But its application to laborers and employees certainly conveys the idea of a subordinate occupation which is not very remunerative; one of not much independent responsibility, but rather subject to immediate supervision." *South, etc., R. Co. v. Falkner*, 49 Ala. 115.

In *Bell v. Indian Live-Stock Co.*, (Tex. 1889) 11 S. W. Rep. 344, however, it was held that a person employed by a corporation as manager at a monthly salary of two hundred dollars was entitled to the benefit of a statute exempting "wages."

5. *Salary of Public Officer Not "Wages."* — See *McLellan v. Young*, 54 Ga. 399, 21 Am. Dec. 276.

By the weight of authority, however, on grounds of public policy, and independently of any statutory provision, the salary of a public officer in the hands of the state or municip-

"Compensation Paid to Hired Person for Services" — Independent Contractors. — By the weight of authority, these terms mean the compensation due or paid to a hired person for his services, and cover any earnings of mere servants or employees.¹ But they do not cover the earnings of independent contractors, or persons carrying on an independent business for themselves.²

(2) *Method of Computing Compensation, and Time of Payment.* — Whether compensation for services is wages or salary, and exempt as such, does not depend upon the method agreed upon by the parties for computing it, nor upon the time of payment.³ And it is not necessary that the amount shall

pality is not subject to attachment or garnishment. See *supra*, this title, *Exemptions at Common Law*.

1. "Compensation Paid to Hired Person" for his services. See *Swift Mfg. Co. v. Henderson*, 99 Ga. 136, citing 28 AM. AND ENG. ENCYC. OF LAW (1st ed.) 513, note; *Moore v. Heaney*, 14 Md. 558.

Wages Recovered After Wrongful Discharge. — It has been held that money recovered as wages by an employee who has been wrongfully discharged before the expiration of his term is exempt where wages earned by actual services would be exempt. *Cox v. Bearden*, 84 Ga. 304, 20 Am. St. Rep. 359. In this case, however, the court expressly stated that it did not decide nor consider whether money recovered not as wages, but as damages for breach of contract, in such a case, would stand in lieu of wages, and be exempt.

Labor to Pay for Land — Refusal to Convey. — In *Scott v. Watson*, 36 Pa. St. 342, the owner of land agreed by parol to sell and convey to a laborer a lot of ground, the purchase money to be paid in labor. On a settlement between the parties, the owner of the land owed the laborer for wages a certain sum, which was to be credited on account of the purchase money of the lot. The owner of the land subsequently repudiated the contract, and conveyed the lot to a third person, who obtained possession by ejectment. Under these circumstances it was held that the amount owing to the laborer was wages, and not the purchase price of land, and was exempt.

2. **Persons Carrying On Independent Business — Independent Contractors.** — Thus, a person carrying on an independent business as a blacksmith — and the same would be true of other mechanics — cannot claim the debts due from his customers as exempt under a statute exempting the daily, weekly, or monthly "wages" of a journeyman mechanic or day laborer. While he may be a day laborer, he receives no wages as an employee, and is his own master, and "a person who carries on an independent business for himself does not come under this section." *Tatum v. Zachry*, 86 Ga. 573.

In *Lang v. Simmons*, 64 Wis. 525, it was held that money due upon a contract with the proprietors of a wood factory, for sawing lumber belonging to assignors, was not wages. "They were not," said the court, "persons hired by the assignors to do manual labor for them, nor were they hired persons within the ordinary sense of the words 'hired persons.' They were manufacturers, doing business for themselves and employing other persons * * * to accomplish the work they con-

tracted to do for others. * * * We think it very clear that * * * laborers * * * who can be said to earn wages of an employer must hold such a relation to the employer that he can direct and control them in and about the work which they are doing for him."

And in *Heard v. Crum*, 73 Miss. 157, 55 Am. St. Rep. 520, it was held that a person who has contracted to build a house for a certain sum, and who employed laborers to work under him, could not claim the contract price under a statute exempting wages, though he also did some portion of the work himself. See, as substantially to the same effect, *Riley v. Warden*, 2 Exch. 59; *Henderson v. Nott*, 36 Neb. 154, 38 Am. St. Rep. 720; *Fox v. McClay*, 48 Neb. 820.

Qualified Rule in Pennsylvania. — It is hard to say what the rule on this point is in Pennsylvania. In *Heebner v. Chave*, 5 Pa. St. 115, where a person had made an independent contract to excavate and grade a street at a certain rate per cubic yard, and in doing so used two carts and two or three horses, and employed a number of men sufficient, with himself, to keep the horses and carts employed, it was held that the money due him under the contract was not exempt as the wages of a laborer. This case, however, was expressly restricted by the court in the later case of *Pennsylvania Coal Co. v. Costello*, 33 Pa. St. 241. It was there held that a coal miner who was given a chamber in a mine and paid a certain price per ton for all coal mined by him, and who employed and paid a laborer to assist him, was entitled to hold his earnings exempt as wages. But in the still later case of *Smith v. Brooke*, 49 Pa. St. 147, it was held that the compensation received by a master carpenter for supervising the labor of the hands employed by him in building a house was not exempt from attachment under an act protecting wages.

Professional Services. — That a debt due for professional services of a physician is not a "claim for labor," see *Weymouth v. Sanborn*, 43 N. H. 171, 80 Am. Dec. 144.

In *Sydnor v. Galveston*, (Tex. App. 1890) 15 S. W. Rep. 202, however, a physician's earnings were held exempt as "current wages," where he was employed by a city to attend to smallpox patients for a certain sum per day. See *infra*, this section, *Earnings, Personal Earnings, etc.*

3. **Method of Computing Compensation.** — "The word 'wages' means the compensation paid to a hired person for his services. This compensation to the laborer may be a specified sum for a given time of service, or a fixed sum for a specified work; that is, payment may be

be fixed by the contract.¹

(3) *Commissions*. — That compensation is paid to an employee in the form of commissions does not render it any the less exempt as wages or salary.² But these terms do not cover commissions earned by a factor or broker.³

(4) *Current Wages*. — In *Texas* the statute exempts "current wages" only.⁴ This does not cover past due wages voluntarily left in the hands of the employer.⁵ Under such a statute the amount of compensation need not

made by the job. The word 'wages' does not imply that the compensation is to be determined solely upon the basis of time spent in service. It may be determined by the work done." *Ford v. St. Louis, etc., R. Co.*, 54 Iowa 728, quoted in *Swift Mfg. Co. v. Henderson*, 99 Ga. 136, citing 28 AM. AND ENG. ENCYC. OF LAW (1st ed.) 513, note. And in this latter case it was further held that where the compensation of an ordinary laborer in a factory is so many cents per "hank" for every hank he makes, payable biweekly, this compensation is "wages," and as such exempt from the process of garnishment. And see to the same effect *Adcock v. Smith*, 97 Tenn. 373, citing 28 AM. AND ENG. ENCYC. OF LAW (1st ed.) 513; *Seiders's Appeal*, 46 Pa. St. 57.

Percentage on Cost of House. — In *Moore v. Heaney*, 14 Md. 558, the amount due a person under a contract by which he had agreed "to erect, superintend, and otherwise direct the erection of" a warehouse "for the consideration of five per cent. on the entire amount of cost of said building" was held to be "wages or hire" within the meaning of a statute of exemption. The court adopted a definition of "wages" as "the reward agreed upon by a master to be paid to a servant, or any other person which he hires to do his business for him." And see *Howell v. McDowell*, 47 N. J. L. 359.

Agent Sharing Profits and Losses. — In *Brierre v. Their Creditors*, 43 La. Ann. 423, it was held that the earnings of a person engaged to make sales of goods dealt in by a firm, in a particular state, under a contract by which he was to receive one-half of the profits and bear one-half of the losses on the business done, were not "salary" within the meaning of a statute exempting "the salaries of clerks, secretaries, and other persons of that kind."

1. **Compensation Not Fixed.** — *Dempsey v. McKennell*, 2 Tex. Civ. App. 284.

2. **Commissions Due Employees.** — In *Hamberger v. Marcus*, 157 Pa. St. 133, 37 Am. St. Rep. 719, the question arose as to whether commissions due a person employed to sell goods were exempt, under a statute exempting "the wages of any laborer or the salary of any person in public or private employment," and it was held that they were. See also *Wentroth's Appeal*, 3 W. N. C. (Pa.) 248; *Seiders's Appeal*, 46 Pa. St. 57.

Such a person, however, is not within a statute exempting the wages of a "laboring man," for he is not a laboring man. *Wildner v. Ferrel*, 42 Minn. 112, 18 Am. St. Rep. 495. See *supra*, this title, *Persons Entitled to Benefit of Exemption Laws — Persons Engaged in Particular Occupations*.

3. **Commissions Earned by a Factor or Broker** are not exempt under a statute exempting "the wages of any laborer or the salary of any

person in public or private employment," but an employee selling goods on commission is not a broker within this rule. *Hamberger v. Marcus*, 157 Pa. St. 133, 37 Am. St. Rep. 719, citing AM. AND ENG. ENCYC. OF LAW (1st ed.), vol. 2, p. 572, and vol. 3, p. 317.

4. "Current Wages" are such compensation for personal services as are to be paid periodically, or from time to time, as the services are rendered; as where the services are to be paid for by the hour, day, week, month, or year. The service rendered must be such as that the compensation therefor is measured by the time of the continuance of such service." *Cleburne First Nat. Bank v. Graham*, 3 Tex. App. Civ. Cas., § 462.

"An Attorney's Fee for legal services rendered or to be rendered in a single case, or in the transaction of a single matter, or in the transaction of any amount of legal business in any manner, cannot be correctly termed or held to be 'current wages,' where he has not been hired for his services by the day, week, month, or year, to be paid at the expiration of the time for which he was hired, and not in proportion to the business done." *Cleburne First Nat. Bank v. Graham*, 3 Tex. App. Civ. Cas., § 462.

But in *Sydnor v. Galveston*, (Tex. App. 1890) 15 S. W. Rep. 202, the amount due a physician from a city for attending smallpox patients under a contract by which the city agreed to pay him a certain sum per day was held exempt as current wages.

5. **Wages Left with Employer.** — The reason is that wages so left with the employer after they become due cease to be current. *Bell v. Indian Live-Stock Co.*, (Tex. 1889) 11 S. W. Rep. 344; *Davidson v. F. H. Logeman Chair Co.*, (Tex. Civ. App. 1897) 41 S. W. Rep. 824.

That wages may be deprived of their character as "current wages" by reason of their being thus left in the hands of the employer, they must have been left there voluntarily by the debtor. If the employer refuses to pay them, or if they are not accepted by the debtor when due because the employer tenders only a portion of the amount due, and the employer afterwards, on the advice of counsel, agrees to accept the tender, he may still claim them as exempt, as he does not in such a case voluntarily leave them with the employer or consent that they shall remain there. *Davidson v. F. H. Logeman Chair Co.*, (Tex. Civ. App. 1897) 41 S. W. Rep. 824; *Sydnor v. Galveston*, (Tex. App. 1890) 15 S. W. Rep. 202.

In *Childress v. Franks*, (Tex. Civ. App. 1898) 44 S. W. Rep. 868, the evidence showed that the defendant drew his salary promptly when it was due, and that he sometimes drew it before it was due, and that, though a small amount was due him at the time when the writ of garnishment was served, it was not

be fixed by the contract of hiring.¹

d. EARNINGS, PERSONAL EARNINGS, ETC. — (1) *In General.* — The expressions "earnings," "personal earnings," and "earnings for personal services," used in some of the statutes, are clearly broader than the terms "wages" and "salary."² They include money due for any purely personal services, in the absence of express restriction to a particular kind of service.³ Thus, they include the earnings of professional men⁴ and of artists,⁵ photographers,⁶ agents,⁷ and the like.⁸

left voluntarily with his employer, but was left because he did not know that it was coming to him. It was held that under these circumstances he could claim such sum as exempt.

1. *Compensation Need Not Be Fixed.* — Thus, in *Dempsey v. McKennell*, 2 Tex. Civ. App. 284, where a person employed another to nurse him through a spell of sickness, without any agreement fixing the compensation to be paid, either for the entire service, or by the day, week, or month, but promised merely to pay well for the services, it was held that the compensation due for the services rendered was "current wages" within the meaning of the statute.

2. *"Earnings."* — The *Massachusetts* court in construing the term "earnings" in a statute held that it was a broader term than "wages," and embraced a larger class of credits than would be included in the latter. "It involves," said the court, "the idea of compensation for services rendered, but is not limited to gains from merely personal labor. Money due from time to time from an employer to a third party, for board and lodging of his workmen, is in the nature of compensation for services rendered to such employer. It may involve, to such third party, expenditures for provisions, house room, and other matters besides labor. But to the employer, or to those who receive the board, it is not a sale of the food and rent of the lodgings. The result of the whole is a service rendered, for which the compensation is measured by the time of its continuance. The return due for such service may properly be called 'earnings.' The term applies to the whole reward for the service, and not merely to the profits therefrom." *Jenks v. Dyer*, 102 Mass. 235. See also *Somers v. Keliher*, 115 Mass. 165, where this definition was adhered to, and it was held that it included money to become due for labor and materials furnished under an entire contract for building a house. And see *Jason v. Antone*, 131 Mass. 534.

Proceeds of Homestead and Other Exempt Property. — In *Georgia* it was held that debts due a physician, in the earning of which his skill was the principal factor, and the use of exempted property, such as the living in a house set apart as a homestead and riding an exempted horse in paying his physician's calls, was merely incidental, were not exempt from garnishment on the ground that they were the proceeds of a homestead and exemption set apart to the physician as the head of a family. *Staples v. Keister*, 81 Ga. 772. See the title *Homestead*.

3. *"Personal Earnings"* — *Earnings "for Personal Services."* — These terms are not so broad as the term "earnings." The earnings must be for purely personal services. But they are

broader than the term "wages" or "salary." "My first impression," said Bookstaver, J., referring to a statute exempting earnings for personal services, "was that this exemption applied exclusively to earnings derived from personal services rendered to others in a subordinate or inferior capacity, as the wages of a laborer, the salary of a clerk, etc., and was not intended to cover the earnings of one who carried on an independent business on his own account, where, from the necessity of the case, there must be some hazard of loss as well as opportunity of greater gain, and where some money and credit are required; but I find on further examination that the courts have construed the term 'personal service' to include earnings derived from a business, where the services are the chief factor in it." *McSkiman v. Knowlton*, 20 Civ. Pro. Rep. (N. Y. C. Pl.) 274. See also *Millington v. Laurer*, 89 Iowa 322, 48 Am. St. Rep. 385; *Shelly v. Smith*, 59 Iowa 453; *Brown v. Hebard*, 20 Wis. 326, 91 Am. Dec. 408.

The Salary of the Superintendent of a County Infirmary was held exempt as "personal earnings" under the *Ohio* statute (Rev. Stat., 1897, § 5430, subdiv. 6), where the salary was earned within three months from the time it was sought to reach such earnings, where the superintendent was the head of a family as required by the statute, and where the salary was necessary for the support of himself and his family. *Beckett v. Wishon*, Prob. Ct. 5 Ohio N. P. 155.

4. *Earnings of Professional Men.* — *McCoy v. Cornell*, 40 Iowa 457.

5. *The Earnings of an Artist* for painting a picture are exempt under such a statute, notwithstanding he also furnishes the canvas, paints, and other materials used in producing the picture. *Millington v. Laurer*, 89 Iowa 322, 48 Am. St. Rep. 385.

6. *And a Photographer's Earnings*, where he does his own work, and has little or no assistance, are of the same character and subject to the same rule. *McSkiman v. Knowlton*, 20 Civ. Pro. Rep. (N. Y. C. Pl.) 274.

7. *Agents Selling Goods on Commission.* — *Sanford v. Goodwin*, N. Y. Daily Reg. March 11, 1881, cited in *McSkiman v. Knowlton*, 20 Civ. Pro. Rep. (N. Y. C. Pl.) 274, 14 N. Y. Supp. 284.

8. *The Proprietor of a School*, paying rent and incurring obligations in the business, is entitled to tuition fees which are paid in advance by his patrons, under an exemption of earnings for personal services. *Miller v. Hooper*, 19 Hun (N. Y.) 394.

A Subcontractor, who has agreed to do certain work, as mason work or carpentering, in the construction of a building, for a certain sum, and who has done the work personally, may

(2) *Other Elements than Personal Services.* — By the weight of authority, however, these terms, with the probable exception of the term "earnings," simply, do not include a debtor's income arising from a business involving other elements of gain than his personal services, as the employment of capital.¹

(3) *Employment of Assistants.* — There are decisions in which earnings of a debtor in a business in which he employed assistants have been held exempt as earnings for personal services.² But the soundness of this view is doubtful, and the true rule seems to be to allow only so much as is compensation for his own services.³

e. NECESSITY FOR SUPPORT OF FAMILY. — In some states the statute exempting wages or earnings expressly requires that they shall be necessary for the support of the debtor or his family, and a debtor must show that they are required for this purpose.⁴

hold the sum due for such services as earnings for personal services. And it makes no difference that he also agreed to furnish the necessary materials, and that a certain sum was agreed upon to cover both the work and the cost of the materials, where the contract required the other party to furnish the money with which to buy the materials as fast as they should be needed, and he has so furnished it. *Banks v. Rodenbach*, 54 Iowa 695.

1. Other Elements than Personal Services of Debtor. — *Shelly v. Smith*, 59 Iowa 453; *Robbins v. Rice*, 18 N. H. 507.

Employment of Capital. — In *Brown v. Hebard*, 20 Wis. 326, 91 Am. Dec. 408, the expression "earnings for personal services," was defined to mean "the gains of the debtor derived from his services or labor without the aid of capital."

Income from Boarding House. — In *Shelly v. Smith*, 59 Iowa 453, the distinction was laid down as stated in the text, and it was held that a statute exempting earnings for personal services did not exempt the money due to a boarding-house keeper from her boarders, where she employed servants to do the work about the house, and merely furnished the house, furniture, materials, etc., for carrying on the business, and assisted in and superintended the work.

Hotel Keepers. — The same is all the more true of debts due the proprietor of a public hotel from his boarders and guests. *Youst v. Willis*, 5 Okla. 170.

Saloon Keepers. — The money received by a saloon keeper in his business is not exempt from seizure in supplementary proceedings under Code Civ. Pro. *New York*, § 2463, as earnings from his personal services. *Prince v. Brett*, 21 N. Y. App. Div. 190. And see *Mulford v. Gibbs*, 9 N. Y. App. Div. 490.

Dealers in Merchandise. — The profits realized by a person engaged as a merchant or dealer in merchandise, from buying and selling goods, are not exempt under a statute exempting personal earnings. This view was asserted in *Mulford v. Gibbs*, 9 N. Y. App. Div. 490, and it was held that such a statute did not exempt money due from the customers of a person engaged in retailing ice, and employing in his business a number of carts, horses, and men.

"Earnings" Simply — By Aid of Exempt Team. — Under a statute exempting the "earnings

of all married persons" having a family to provide for, it has been held that a debtor may claim money earned by him personally by the aid of an exempt team. *Kuntz v. Kinney*, 33 Wis. 510.

2. Employment of Assistants. — Thus in *Brown v. Hebard*, 20 Wis. 326, 91 Am. Dec. 408, it was held that a statute exempting earnings for personal services exempted the net income of an inspector of flour, where he passed upon every sample himself, and was paid weekly a certain price for each barrel inspected, and that it made no difference that he employed a deputy, a bookkeeper, and a laborer to assist him. See also *Pennsylvania Coal Co. v. Costello*, 33 Pa. St. 241; *Seiders's Appeal*, 46 Pa. St. 57.

3. Soundness of This View Doubtful — Iowa. — See *Shelly v. Smith*, 59 Iowa 453.

Mississippi. — *Heard v. Crum*, 73 Miss. 157, 55 Am. St. Rep. 520.

New Hampshire. — *Robbins v. Rice*, 18 N. H. 507.

New York. — *Mulford v. Gibbs*, 9 N. Y. App. Div. 490.

Pennsylvania. — *Heebner v. Chave*, 5 Pa. St. 115; *Smith v. Brooke*, 49 Pa. St. 147.

These cases will be found more particularly cited in the notes preceding.

In *Brainard v. Shannon*, 60 Me. 342, it was held that a statute exempting wages for personal labor does not apply to money due a person for the wages or work of other men employed by him, or due to him upon jobs into which other matters besides his personal labor, not capable of being distinguished from it, enter to prove the price he is to receive, even though the amount thus due does not exceed the amount of his wages for his personal labor which is exempted. But it was further held that, under a *bona fide* contract that a person is to receive a certain sum *per diem* for his own wages, and pay for the work of others employed by him at a fixed rate, the wages for his own personal labor, so far as they can be ascertained from the accounts, may be exempted.

4. Necessity of Earnings for Support of Family. — Under such a statute it has been held that a man cannot claim his earnings as exempt where it appears that his wife keeps boarders and supports the family, paying all the bills, and it does not appear that he contributes anything. *Martin v. Sheridan*, 2 Hilt. (N. Y.) 586.

f. CONTINUANCE OF EXEMPTION AFTER PAYMENT. — Though there is a decision by the *Massachusetts* court to the contrary,¹ by the weight of authority a statute exempting the wages or earnings of a debtor protects them not only in the hands of the employer, but also while passing from him to the debtor, and even after they are in the hands of the debtor, so long as they are capable of identification.²

g. FUTURE WAGES OR EARNINGS. — A creditor cannot reach the future wages or earnings of his debtor by garnishment proceedings, so as to defeat his right to claim them as exempt when they become due.³

Under a statute exempting the earnings of a debtor when it is made to appear that they are necessary "for the use of a family supported wholly or partly by his labor," an unmarried debtor who keeps house and has boarders, and who employs a housekeeper, and for her services boards and clothes her and her children, cannot claim his earnings as exempt on the ground that they are necessary for the use of himself and the housekeeper and her children. *Van Vechten v. Hall*, 14 How. Pr. (N. Y. County Ct.) 436.

In *Cushing v. Quigley*, 11 Mont. 577, it appeared that a debtor for a year and a half prior to the levy of an execution had given his earnings to his wife, who kept a boarding house on her own account, and it further appeared that during that period the income and investments from the boarding house and from the husband's earnings, over and above the amount expended in the support of the family, amounted to more than twelve hundred dollars. It was held that a jury was warranted in finding that the earnings of the husband for thirty days prior to the levy, to the amount of one hundred and thirty-one dollars, were not exempt as necessary for the support of his family.

In *New Mexico Nat. Bank v. Brooks*, (N. Mex. 1897) 49 Pac. Rep. 947, the amount garnished was four hundred dollars. The defendant had earned this amount within two months, and his total salary for these two months and for some time previous thereto and afterwards was about five hundred dollars per month. In addition to this his minor son had earned about fifty dollars a month. The whole expenses of his family did not average more than three hundred dollars a month. Under these circumstances it was held that the four hundred dollars was not necessary for the support of himself and his family.

1. *Case Denying Exemption After Payment.* — In *Cook v. Holbrook*, 6 Allen (Mass.) 572, it was held that money in the hands of an attorney at law, which he had collected as wages for the personal services of a debtor, was not exempt as wages.

2. *Cases Recognizing Continuance of Exemption After Payment.* — Other courts, however, have construed the statutes more liberally, and more in accordance with their spirit and purpose. Thus, in *Rutter v. Shumway*, 16 Colo. 95, under a statute exempting absolutely the wages and earnings of any debtor to an amount not exceeding one hundred dollars, etc., it was held that wages of a debtor were exempt after being paid over to him and deposited by him in a bank, and the court said that the exemption would continue to protect

wages so long as they were capable of identification.

This decision was followed by the Supreme Court of *Idaho* in *Elliot v. Hall*, 2 Idaho 1142, 35 Am. St. Rep. 285, under a statute exempting earnings for personal services: and it was held that money due a debtor for wages could not be reached by a creditor in the hands of a person who had collected it at the debtor's request. See also *Cox v. Bearden*, 84 Ga. 304, 20 Am. St. Rep. 359, where it was held that money recovered as wages, and exempt from garnishment in the hands of the employer, is also exempt from seizure by other process while in the hands of the sheriff.

Money Still "Wages" or "Earnings" After Payment. — In *Rutter v. Shumway*, 16 Colo. 95, referred to above, it was argued that the earnings of a laborer cease to be wages, and become capital, after being received by him, and the exemption law has performed its office when it has enabled the laborer to secure his wages from his employer without let or hindrance. The court replied: "The statute cannot be thus reasoned away. Such a construction is narrow and illiberal. It would compel the laborer to leave his earnings in the hands of his employer, or else forego the protection of the statute altogether. It would not only deprive him of the privilege of depositing his earnings with any bank or other depository for safe keeping, but would subject his wages to supplemental proceedings even in his own pocket; for, if earnings once received immediately lose their character as wages, then it is evident that the laborer could never retain his earnings for a single hour without exposing them to the very perils which the statute was designed to avert. Such a construction would practically frustrate the beneficent objects of the statute."

Taking a Nonnegotiable Instrument, as a non-negotiable note or due bill, for wages due is not payment of the wages, and they may still be claimed as exempt. *Lock v. Johnson*, 36 Me. 464.

Analogous Cases will be cited in treating of the exemption of pensions and bounties. See *infra*, this section, *Pensions and Bounties*.

3. *Future Earnings — Anticipation by Creditor.* — When a statute exempts the wages or earnings of a debtor for a certain period, a creditor cannot touch the earnings accruing during that period of time, whether accruing before or after the service of process. He cannot anticipate these wages or earnings. And where a statute exempts wages or earnings to a certain amount, the creditor can reach only whatever may be due the debtor in excess of that amount at the time of service of the writ

h. SUCCESSIVE GARNISHMENTS. — Nor can a debtor's right of exemption be defeated by issuing successive writs of garnishment.¹

Effect of Previous Exemptions. — When the statute exempts earnings to a certain amount, the exemption may be claimed notwithstanding any exemptions previously obtained on other garnishments. It may be claimed to the full amount on every garnishment.²

i. SALARIES OF OFFICERS OF PUBLIC OR PRIVATE CORPORATIONS. — There have been statutes of exemption applying in express terms to the salaries of officers of corporations, public and private.³

j. SEAMEN'S WAGES. — In most maritime countries seamen's wages are exempt from seizure by their creditors to satisfy their debts.⁴ It is so in *England* by express statutory provisions.⁵ In the *United States*, also, they are exempted to some extent by the Act of Congress known as the Merchants' Shipping Act of 1872.⁶ In the absence of statutory provisions to

of garnishment. The garnishment will not reach any wages or earnings that the debtor may earn after the service of the writ, and before the filing of interrogatories and answers.

Illinois. — *Bliss v. Smith*, 78 Ill. 359; *Hoffman v. Fitzwilliam*, 81 Ill. 521.

Iowa. — *Davis v. Humphrey*, 22 Iowa 137; *Thomas v. Gibbons*, 61 Iowa 50.

Kansas. — *Muzzy v. Lantry*, 30 Kan. 49.

Mississippi. — *Chapman v. Berry*, 73 Miss. 437.

Missouri. — *Davis v. Meredith*, 48 Mo. 263; *Mangold v. Dooley*, 89 Mo. 111; *Reinhart v. Empire Soap Co.*, 33 Mo. App. 24.

Payment by Employer After Garnishment. — It follows that so long as a debtor's wages do not exceed the amount exempted, his employer may safely pay them, notwithstanding any garnishee process. *Bliss v. Smith*, 78 Ill. 359; *Hoffman v. Fitzwilliam*, 81 Ill. 521. And see the other cases cited above.

Statutory Provision to the Contrary. — It is otherwise under a statute expressly providing that wages accruing after service of a writ of attachment and before trial shall be bound by the writ. See *Hagerstown First Nat. Bank v. Weckler*, 52 Md. 30. Compare *House v. Baltimore*, etc., R. Co., 48 Md. 130.

Wages Earned but Not Due. — By garnishment of a debtor's wages, where wages not due cannot be garnished, the creditor reaches nothing where less than the amount exempted is due when notice of the garnishment is served, though a greater amount may have been earned but is not due. *Weaver v. Hill*, 97 Tenn. 402.

1. Successive Garnishments. — A creditor cannot by successive writs of garnishment aggregate the weekly or monthly wages of his debtor to an amount in excess of his exemption, and thus seize the excess. *Chandler v. White*, 71 Miss. 161; *Chapman v. Berry*, 73 Miss. 437. See also *Hall v. Hartwell*, 142 Mass. 447.

Where a statute exempts such wages only as are due for the month next preceding the service of garnishment or trustee process by the creditor, a creditor cannot deprive his debtor of the exemption by serving process on the employer when a month's wages are due, and afterwards serving a second writ. *Collins v. Chase*, 71 Me. 434.

2. Effect of Previous Exemption. — *Craft v. Louisville*, etc., R. Co., 93 Ala. 22; *Hall v.*

Hartwell, 142 Mass. 447; *Waite v. Franciola*, 90 Tenn. 191. See *infra*, this section, *Limitations as to Value or Amount of Property*.

3. Salaries of Officers of Corporations. — Thus an early *Georgia* statute (Act 1832) making "all banks, banking companies, and other corporations in this state" liable to garnishment (which was held by the court to apply to both public and private corporations) contained a proviso exempting the corporations therein enumerated from garnishment for the salaries of their officers. This section was repealed by the Act of 1834, which was in turn repealed by the Act of 1850. The latter act provided: "All banks, banking companies, and other corporations in this state, except municipal corporations, shall be liable to be garnished for the salaries of its officers, in all cases where such salary exceeds the sum of five hundred dollars." In *Holt v. Experience*, 26 Ga. 113, it was held that the Act of 1850 exempted the salaries of officers of private corporations, where they did not exceed five hundred dollars, and exempted the salaries of officers of municipal corporations whatever the amount might be.

Salaries of Public Officers Exempt at Common Law. — That the salaries of public officers are exempt from garnishment at common law, independently of any statute, see *supra*, this title, *Exemptions at Common Law*.

4. Exemption of Seamen's Wages. — See opinion of Benedict, D. J., in *McCarty v. Steam-Propeller City of New Bedford*, 4 Fed. Rep. 818.

5. English Statute. — Merchant Shipping Act of 1854, 17 & 18 Vict., c. 104, § 233. This statute enacts that "no wages due or accruing to any seaman or apprentice shall be subject to attachment or arrestment from any court; and every payment of wages to a seaman or apprentice shall be valid in law, notwithstanding any previous sale or assignment of such wages, or of any attachment, incumbrance, or arrestment thereon; and no assignment or sale of such wages, or of salvage made prior to the accruing thereof, shall bind the party making the same."

6. United States Statute. — Rev. Stat. U. S., § 4536. This section provides that "no wages due or accruing to any seaman or apprentice shall be subject to attachment or arrestment from any court; and every payment of wages to a seaman or apprentice shall be valid in

this effect, they would not be exempt.¹

10. Pensions and Bounties — *a. IN GENERAL.* — Pension moneys and bounties granted by the government for enlistment or services in the army, navy, or civil department of the government are not subject to execution, attachment, or garnishment while in the hands of the government.² But after they have been received by the beneficiary they are liable to be taken for his debts to the same extent as other property, unless exempted by some statute.³

By an Act of Congress it is provided that "no sum of money due, or to become due, to any pensioner shall be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, whether the same remains with the pension office, or any officer or agent thereof, or is in course of transmission to the pensioner entitled thereto, but shall inure wholly to the benefit of such pensioner."⁴

law, notwithstanding any previous sale or assignment of wages, or of any attachment, incumbrance, or arrestment thereon." In the Act of 1874 it was provided, among other exceptions, that "none of the provisions" of the Act of 1872 should apply "to sail or steam vessels engaged in the coastwise trade, except the coastwise trade between the Atlantic and Pacific coasts." Act of June 9, 1874, 18 U. S. Stat. at L. 64.

In *Massachusetts* and *Maine* it has been held that coasting vessels, except as specified in the Act of 1874, were taken wholly out of the provisions of the Act of 1872, and that the wages of a seaman on a coasting vessel, otherwise than between the Atlantic and Pacific coasts, are subject to garnishment or trustee process. *Eddy v. O'Hara*, 132 Mass. 56; *White v. Dunn*, 134 Mass. 271; *Ayer v. Brown*, 77 Me. 195.

The question has not often arisen in the federal courts. In those cases in which it has arisen, it has been held that a seaman's wages are exempt under the Act of 1872, whether he is engaged in the coasting trade or not. In *McCarty v. Steam-Propeller City of New Bedford*, 4 Fed. Rep. 818, the wages earned by a seaman in the coastwise trade of the United States were held exempt from garnishment, but the decision was not based on the statute above referred to, but on the ground that independently of any statute seamen's wages, whether earned in the coastwise trade or otherwise, were not subject to garnishment at the instance of a creditor in an action at law. See also *Ross v. Bourne*, 14 Fed. Rep. 858.

In *Telles v. Lynde*, 47 Fed. Rep. 912, and in *Hitchcock v. The St. Louis*, 48 Fed. Rep. 312, it seems to have been considered by Judges Morrow and Barr respectively that the Act of 1872 applied to seamen engaged in the coastwise trade. In the case last cited it was held that a person serving on board a ferryboat on the Mississippi river could claim his wages as exempt under the Act of 1872, as he was a seaman within the meaning of the term as used in that act, because Rev. Stat. U. S., § 4612, declares that the word "ship" should be taken to comprehend "every description of vessel navigating on any sea or channel, lake or river, to which the provisions of this law may be applicable," and that persons engaged in the navigation thereof should be considered as "seamen."

The Act of 1872 applies to merchant seamen only. It does not apply to one who ships for a fishing voyage, to be paid at the rate of a certain sum for each one thousand fish caught by him. *Telles v. Lynde*, 47 Fed. Rep. 912.

Proceedings Supplemental to Execution. — It has been held, in the District Court for the northern district of *California*, that a creditor who has obtained a judgment and issued an execution against a seaman, and who has served the same upon the owners of the vessel, may enforce payment out of the seaman's wages by statutory proceedings supplemental to execution, as these proceedings are not within the provision of the Act of 1872 (Rev. Stat. U. S., § 4536) which provides that seamen's wages shall not be subject to "attachment or arrestment" only. "The libellant's wages," said the court, "were not taken from the respondents under attachment or arrestment, but under execution, and the proceedings supplementary thereto. The law does not exempt seamen's wages from such process." *Telles v. Lynde*, 47 Fed. Rep. 912.

1. Not Exempt in the Absence of a Statute. — *Telles v. Lynde*, 47 Fed. Rep. 912; *Eddy v. O'Hara*, 132 Mass. 56; *White v. Dunn*, 134 Mass. 271; *Ayer v. Brown*, 77 Me. 195.

2. Pension Money and Bounties — In Hands of the Government. — *Manchester v. Burns*, 45 N. H. 482. See the title GARNISHMENT.

3. After Receipt by Beneficiary — In Absence of Statutory Exemption. — *Morse v. Towns*, 45 N. H. 185; *Manchester v. Burns*, 45 N. H. 482.

In *Morse v. Towns*, 45 N. H. 185, a debtor who had enlisted and received a bounty went away to the war, leaving the money with his wife for the support of herself and her children. The wife used a part of it, and gave the rest of it to a third person to be returned from time to time as needed for the support of the family, and for this sum such person gave his note payable to her or her order. This person was held chargeable as trustee in proceedings by a creditor of the husband, on the ground that the bounty, having been thus paid over, was no longer bounty, and as such exempt, but was simply money, and as such not exempt. See also the cases specifically referred to in the following pages.

4. Exemption of Pension Money. — Rev. Stat. U. S., § 4747.

Power of Congress. — There has been no actual decision by the federal courts upon the

State Statutes. — In some of the states, also, statutes have been enacted exempting pension money, and as a rule they are in broader terms than the federal statute quoted above.¹

b. EXTENT OF PROTECTION — (1) *Under the Act of Congress* — (a) **Before Actual Receipt by the Pensioner.** — It seems to be agreed that as the Act of Congress above referred to exempts pension money "in course of transmission to the pensioner," it is exempt until it is actually paid to and received by him, and does not cease to be exempt when he receives the draft.²

(b) **After Receipt by the Pensioner** — Some of the courts go further than this and hold that it is also exempt after it has been actually paid to the pensioner;³ and some even go so far as to exempt property in which pension money has been invested, so long as the property can be identified as its proceeds.⁴

Most of the Courts, however, have held that the Act of Congress protects pension money only while it is in the pension office, or with an officer or agent thereof, or in course of transmission to the pensioner, and that after he has actually received the money the exemption ceases.⁵ And of course, under

question as to the power of Congress to exempt pension money after reaching the hands of the pensioner. But there have been decisions in the state courts to the effect that such power exists. "We have no doubt," said the *Wisconsin* court, "of the power of Congress to attach to the money donated by it the quality of nonliability to seizure for the debt of the donee. Congress has exempted from local taxation the securities of the government, held by its creditors, and no one now questions the power to do so. The power to exempt pension money from seizure for debt rests on the same principle; and if it exists in the one case, it must necessarily exist in the other." *Folschow v. Werner*, 51 Wis. 85. See to the same effect *Eckert v. McKee*, 9 Bush (Ky.) 355; *Crow v. Brown*, 81 Iowa 344, 25 Am. St. Rep. 501; *Fayette County v. Hancock*, 83 Iowa 694. See also *Kellogg v. Waite*, 12 Allen (Mass.) 529.

1. State Statutes. — See *infra*, this subdivision, for illustrations.

2. Act of Congress — Exemption Continues until Actual Receipt of Money — *Iowa*. — *Farmer v. Turner*, 64 Iowa 690; *Webb v. Holt*, 57 Iowa 712.

Kansas. — *Cranz v. White*, 27 Kan. 319, 41 Am. Rep. 498.

Tennessee. — *Payne v. Gibson*, 5 Lea (Tenn.) 173.

Vermont. — *Adams v. Newell*, 8 Vt. 190; *Hayward v. Clark*, 50 Vt. 612.

West Virginia. — *Hisse v. Johnson*, 27 W. Va. 644, 55 Am. Rep. 327.

Illustrations. — Thus in *Payne v. Gibson*, 5 Lea (Tenn.) 173, it was held that since pension money is exempt until it is actually paid to the pensioner, it is exempt though formally paid to a third person, where, by reason of fraud and collusion between such third person and the pension agent, the latter remains liable for the money as still in his hands.

And in *Adams v. Newell*, 8 Vt. 190, it was held that the money of a pensioner in the hands of an attorney or agent appointed to receive it from the disbursing agent of the government, and received on that account, is exempt.

3. Exempt After Receipt by Pensioner — *Iowa*. — *Crow v. Brown*, 81 Iowa 344, 25 Am. St. Rep. 501 [*overruling* decision or dicta in *Webb v. Holt*, 57 Iowa 712; *Triplett v. Graham*, 58 Iowa 135; *Baugh v. Barrett*, 69 Iowa 495; *Farmer v. Turner*, 64 Iowa 690, and *Foster v. Byrne*, 76 Iowa 295]; *Fayette County v. Hancock*, 83 Iowa 694.

Wisconsin. — *Folschow v. Werner*, 51 Wis. 85.

4. Investments Held Exempt. — See *Crow v. Brown*, 81 Iowa 344, 25 Am. St. Rep. 501; *Dean v. Clark*, 81 Iowa 753; *Marquardt v. Mason*, 87 Iowa 136, and other cases referred to *infra*, this section.

5. Pension Money Not Exempt After Reaching Pensioner — *Connecticut*. — See the dictum in *Price v. Savings Soc.*, 64 Conn. 362, 42 Am. St. Rep. 198.

Indiana. — *Faurote v. Carr*, 108 Ind. 124.

Kansas. — *Cranz v. White*, 27 Kan. 319, 41 Am. Rep. 498.

Kentucky. — *Robion v. Walker*, 82 Ky. 60, 56 Am. Rep. 878 [in effect *overruling* *Eckert v. McKee*, 9 Bush (Ky.) 355]; *Sims v. Walsham*, (Ky. 1888) 7 S. W. Rep. 557; *Hudspeth v. Harrison*, 6 Ky. L. Rep. 304; *Herreld v. Skillam*, 6 Ky. L. Rep. 666.

Maine. — *Friend v. Garcelon*, 77 Me. 25, 52 Am. Rep. 739; *Crane v. Linneus*, 77 Me. 59.

Massachusetts. — *Spelman v. Aldrich*, 126 Mass. 113. And see *Kellogg v. Waite*, 12 Allen (Mass.) 529; *Tully v. Tully*, 159 Mass. 91.

New Jersey. — *Jardain v. Fairton Sav. Fund, etc., Assoc.*, 44 N. J. L. 376.

New York. — *Beecher v. Barber*, 6 Dem. (N. Y.) 129. And see *Matter of Winans*, 5 Dem. (N. Y.) 138.

Ohio. — *Fulwiler v. Infield*, 3 Ohio Cir. Dec. 338, 6 Ohio Cir. Ct. Rep. 36.

Pennsylvania. — *Rozelle v. Rhodes*, 116 Pa. S. 129, 2 Am. St. Rep. 591; *Burtch v. Burtch*, 14 Pa. Co. Ct. Rep. 482.

Vermont. — *Martin v. Hurlburt, etc.*, Sav. Bank, 60 Vt. 364, *explaining and overruling* dictum in *Hayward v. Clark*, 50 Vt. 612.

West Virginia. — *McFarland v. Fish*, 34 W. Va. 548.

Change of View in Iowa. — In *Webb v. Holt*, 57 Iowa 712, the Supreme Court of Iowa (Roth-

this construction of the statute, property in which the money is invested is not exempt.¹

(c) **Gift or Transfer of Pension Drafts or Money.** — It has been held that a pensioner can give his pension drafts to his wife or to any other person, for the money is protected so long as it is in the form of a government draft, and his creditors in such a case cannot complain.² On the question whether he can cash the drafts and make a valid gift of the proceeds, the decisions are conflicting.³

rock and Beck, JJ., *dissenting*) held in 1882, with the cases above cited in this note, that pension money was not exempt after reaching the pensioner. The opinion in this case was exceptionally strong, and has without doubt influenced other courts in coming to the same conclusion. It was followed by a number of later cases in Iowa, but in *Crow v. Brown*, 81 Iowa 344, 25 Am. St. Rep. 501, all of these decisions were overruled, and a contrary rule was established. See the cases cited in the second note preceding. The opinion in this case was delivered by Rothrock, C. J., one of the judges who dissented in *Webb v. Holt*. As was said by Chief Justice Rothrock, the personnel of the court had been changed. Judge Beck, who also dissented in *Webb v. Holt*, 57 Iowa 712, was still a member of the court. Robinson, J., dissented. In view of these facts, the decision in *Crow v. Brown*, Sneed (Ky.) 102, is of no greater weight in other states than that in *Webb v. Holt*, 57 Iowa 712, for it is due, not to a change of opinion, but to a change in the personnel of the court.

After Deposit in Bank or with Third Person. — In *Pennsylvania* it has been held that, though a pensioner has deposited his pension draft in a bank, and the proceeds have been placed to his credit as a deposit, subject to his check, the proceeds are not subject to attachment, as the money is not to be regarded as having come into his hands until received from the bank. *Reiff v. Mack*, 160 Pa. St. 265, 40 Am. St. Rep. 720.

Most of the courts, however, hold that the pension money, when the proceeds are in bank subject to check, are to be regarded as received by the pensioner, and that they are no longer exempt.

Kansas. — *Cranz v. White*, 27 Kan. 319, 41 Am. Rep. 408.

Massachusetts. — *Spelman v. Aldrich*, 126 Mass. 113.

New Jersey. — *Jardain v. Fairton Sav. Fund, etc., Assoc.*, 44 N. J. L. 376.

New York. — *Beecher v. Barber*, 6 Dem. (N. Y.) 129. And see *Burgett v. Fancher*, 35 Hun (N. Y.) 647; *Stockwell v. National Bank*, 36 Hun (N. Y.) 583.

Vermont. — *Martin v. Hurlburt, etc.*, Sav. Bank, 60 Vt. 364.

For the same reason the proceeds of a pension draft are held not to be exempt after they have been placed by the pensioner in the hands of a third person for safekeeping. *Rozelle v. Rhodes*, 116 Pa. St. 129, 2 Am. St. Rep. 591. See *Kellogg v. Waite*, 12 Allen (Mass.) 529.

1. Investments Not Exempt. — In *Robion v. Walker*, 82 Ky. 60, 56 Am. Rep. 878, it was held that pension money invested by the pensioner in a homestead was not exempt from the claims of prior creditors. And see *Coak-*

ley v. Underwood, (Ky. 1892) 18 S. W. Rep. 7; *Hudspeth v. Harrison*, 6 Ky. L. Rep. 304; *Johnson v. Elkins*, 90 Ky. 163; *Cavanaugh v. Smith*, 84 Ind. 380; *McFarland v. Fish*, 34 W. Va. 548.

2. Gift of Pension Draft Valid. — *Farmer v. Turner*, 64 Iowa 690; *Holmes v. Tallada*, 125 Pa. St. 133, 11 Am. St. Rep. 880; *Hissem v. Johnson*, 27 W. Va. 644, 55 Am. Rep. 327. And see *Hayward v. Clark*, 50 Vt. 612.

In the *Pennsylvania* case cited above it was held that a pensioner could indorse his pension check and give it to his wife, and allow her to draw the money and purchase land, taking the title in her own name, and that the land could not be reached by his creditors. The other cases cited are substantially to the same effect.

Sims v. Walsham, (Ky. 1888) 7 S. W. Rep. 557, seems to be directly opposed to this view. In that case a pensioner gave his pension draft to another person, and directed him to cash it and give the money to his two sons, to be used by them in purchasing land, which was done. It was held that the pensioner's creditors could reach the land, on the ground that there was a voluntary conveyance from the pensioner to his sons. See also *Coakley v. Underwood*, (Ky. 1892) 18 S. W. Rep. 7; *Johnson v. Elkins*, 90 Ky. 163.

In *Spelman v. Aldrich*, 126 Mass. 113, the court decided that when a husband received a pension check which was indorsed by him and handed to a third person, who, with the consent of the pensioner and his wife, deposited it in a bank to the credit of the wife, the proceeds of the check so deposited were liable to attachment by the husband's creditors. This decision, however, is based upon the statutes of *Massachusetts*, which forbid a married woman from acquiring property by gift from her husband. The proceeds of the check were treated as the money of the husband, and as such liable for his debts.

3. Gift of Proceeds of Pension Draft. — In *Hissem v. Johnson*, 27 W. Va. 644, 55 Am. Rep. 327, it was held that when a pensioner receives pension drafts from the government, and transfers them or their proceeds to another upon his agreement to convey land to the pensioner's wife, and the land is so conveyed, it is not subject to the lien of judgments existing at the time of the receipt of the drafts. *Compare*, however, *McFarland v. Fish*, 34 W. Va. 548. And see to the contrary *Sims v. Walsham*, (Ky. 1888) 7 S. W. Rep. 557; *Coakley v. Underwood*, (Ky. 1892) 18 S. W. Rep. 7, and *Johnson v. Elkins*, 90 Ky. 163, referred to in the note preceding; *Burich v. Burich*, 14 Pa. Co. Ct. Rep. 482. In the case last cited a pensioner drew the money on his draft and purchased land in the name of his wife, and it was held that the land was liable to seizure and sale for the payment of his debts.

(2) *Under State Statutes.* — The state statutes go further than the Act of Congress, and exempt pension money in the hands of the pensioner.¹ And some exempt property in which pension money has been invested.²

The Iowa Statute is very broad, and exempts the money both while in the hands of the pensioner, or of a third person for him, and when invested in other property.³

1. *State Statutes.* — A state statute exempting "pension money" or a "pension" exempts the money after it has reached the pensioner. *Yates County National Bank v. Carpenter*, 119 N. Y. 550, 16 Am. St. Rep. 855; *St. Lawrence State Hospital v. Fowler*, 15 Misc. Rep. (N. Y. Ct. Sess.) 159; *Beecher v. Barber*, 6 Dem. (N. Y.) 129. And see the cases cited in the following notes.

Deposits in Bank. — Under a state statute exempting pension money, such money deposited with a banker, and held subject to the check of the pensioner, is exempt. *Burgett v. Fancher*, 35 Hun (N. Y.) 647; *Stockwell v. National Bank*, 36 Hun (N. Y.) 583.

In *Matter of Kennedy*, 1 Connolly (N. Y.) 181, it was held that the exemption of pension money is lost where it is deposited in bank and an interest-bearing certificate of deposit is taken in return, as it is thereby exchanged for other property. And see to the same effect *Beecher v. Barber*, 6 Dem. (N. Y.) 129. These cases, however, are in effect overruled by *Yates County Nat. Bank v. Carpenter*, 119 N. Y. 550, 16 Am. St. Rep. 855.

Pension Money "in Hands of Pensioner." — A state statute exempting "any pension moneys received from the United States while in the hands of the pensioner" exempts a deposit in savings bank consisting exclusively of the proceeds of a pension check. *Price v. Savings Soc.*, 64 Conn. 362, 42 Am. St. Rep. 198. "While in the bank," said the court in this case, "it [the pension money] was in the hands of an institution conducted for the sole benefit of its depositors, and of which they were the equitable owners; and although the bills or coin that the pensioner originally left there could no longer be identified, and it might be that they and all the cash funds then belonging to the bank had been loaned out or otherwise invested, it is our opinion that his pension money can fairly be said to have been still in his hands, within the meaning of our statute of exemptions."

2. *Investment of Pension Money.* — In *Yates County Nat. Bank v. Carpenter*, 119 N. Y. 550, 16 Am. St. Rep. 855, reversing 49 Hun (N. Y.) 40, 14 Civ. Pro. Rep. (N. Y.) 372, under a provision of the *New York Code* declaring a pension granted by the United States for military service to be exempt from levy and sale by virtue of an execution, or in any legal proceeding, the Court of Appeals of New York held that a dwelling house purchased by a pensioner with collections made by him on his pension certificate was exempt. See also *Countryman v. Countryman*, 23 Civ. Pro. Rep. (N. Y. Supreme Ct.) 161. And see *People v. Williams*, 6 Misc. Rep. (N. Y. Supreme Ct.) 185; *Matter of Murphy*, 9 Misc. Rep. (N. Y. Supreme Ct.) 647, and *Toole v. Oneida County*, 25 Civ. Pro. Rep. (N. Y. Supreme Ct.) 267, 16 Misc. Rep. (N. Y.) 653, in which real property purchased with

pension money was held exempt from assessment and taxation under the *New York* statute exempting from assessment and taxation property which is exempt from levy and sale under an execution.

Inability to Trace Proceeds. — This doctrine does not apply when pension money has been embarked in trade, commerce, or speculation, and become mingled with other funds so as to be incapable of identification or separation. In such a case the pensioner loses the benefit of the exemption. *Yates County Nat. Bank v. Carpenter*, 119 N. Y. 550, 16 Am. St. Rep. 855, explaining *Wygant v. Smith*, 2 Lans. (N. Y.) 185.

Determination of Right. — The court cannot determine whether real estate is exempt because purchased with pension money on *ex parte* affidavits upon a motion to set aside an execution and restrain the sheriff from selling the property under it, but the debtor must be left to his remedy by an action in which the right of exemption may be proved like other questions of fact. *Matter of King*, 24 N. Y. App. Div. 605.

Analogous Cases are cited in treating of the exemption of wages. The better opinion is that wages are exempt under the statutes, even after they have been paid to the debtor so long as they are capable of identification. See *supra*, this section, *Wages, Salary, Earnings, etc.*

3. *Iowa Statute.* — In Iowa the statute (Code 1897, § 4009) provides that "all money received by any person, a resident of the state, as a pension from the United States government, whether the same shall be in the actual possession of such pensioner, or deposited, loaned, or invested by him, shall be exempt from execution, whether such pensioner shall be the head of a family or not." See *Lee v. Teeter*, 106 Iowa 37. Section 4010 exempts a homestead purchased with pension money, or the proceeds and accumulations thereof.

Exchange of Property. — Under this provision it has been held that not only property purchased with pension money, but also property obtained in exchange for such property, is exempt, and that it can make no difference that the property obtained is of greater value than that parted with, if there was an even exchange. *Smith v. Hill*, 83 Iowa 684, 32 Am. St. Rep. 329.

Crops on Land Purchased. — Under the two sections of the statute above referred to, crops grown on land purchased with pension money are not exempt unless the land is a homestead. In such a case only the land is exempt. *Haefer v. Mullison*, 90 Iowa 372, 48 Am. St. Rep. 451.

Payment for Services of Stallion — Exemption of Colts. — In *Diamond v. Palmer*, 79 Iowa 578, it was held that a pensioner who paid pension money for the services of a stallion upon mares which he owned, and which were also bought

11. Life Insurance. — In almost all of the states statutes have been enacted exempting the proceeds of life-insurance policies for the benefit of the widow or children of the deceased. This question is treated at length in another title.¹

12. Exemptions Not Confined to Any Particular Property — *a.* IN GENERAL. — If a statute exempts a particular kind of property or specific articles only, the right of exemption does not extend to any other kind of property or to any other articles.² But the statutes are not always so restricted. In some

with pension money, could hold the colts resulting from such services as exempt to the extent of the money paid for such services. Rothrock, C. J., dissented on the ground that the pension money could not be regarded as having been invested in the colts to any extent.

Amount of Pension Money Paid. — Where a person claims property as exempt on the ground that it was paid for in part by pension money, it is incumbent upon him to show the exact amount of pension money paid. It is not enough to show merely that pension money was invested in the property. *Lee v. Teeter*, 106 Iowa 37.

Rights of Widow. — In *Iowa* the widow of a pensioner is not entitled to pension money, or a certificate of deposit representing the same, left by him, but it goes to his personal representative, for the Iowa statute exempts pension money whether the pensioner is the head of a family or not, and the statute providing for exemptions to the widow allows her all personal property which, in his hands, "as the head of a family," would be exempt from execution. *Perkins v. Hinkley*, 71 Iowa 499.

1. See the title LIFE INSURANCE.

2. Statutes Limiting Exemptions to Particular Property. — See *Carty v. Drew*, 46 Vt. 346; *Stanton v. French*, 91 Cal. 274, 25 Am. St. Rep. 174.

Thus, under a statute (Code Civ. Pro. *Washington*, § 486, subd. 3), allowing a householder to select as exempt a certain number of beds and bedding and "other household goods, utensils, and furniture" not exceeding five hundred dollars in value, it was held that a householder having less than five hundred dollars' worth of household furniture, etc., could not make up the difference by selecting property of a different character, in this case the proceeds of live stock seized and sold by the officer. *Carter v. Davis*, 6 Wash. 327.

Proceeds of Sale of Property on Execution or Attachment. — In *Arkansas* the Constitution exempts personal property "in specific articles to be selected" by the debtor, not exceeding in value a certain amount. Const., art. 9, § 2. And the statute provides particularly the manner in which such exempt property may be claimed, selected, and set apart. Mansf. Dig., § 3006 *et seq.* This statute, it has been held, exempts only specific articles of property. It does not allow a debtor to stand by and see his property sold on execution without claiming his exemption in specific articles, and then claim his exemption out of the proceeds of the sale, except perhaps where he has had no opportunity to select the specific property. "The money arising from the sale of property exempt from execution is therefore never to be paid to the debtor, except under the pressure

of necessity created by an inability or the lack of a reasonable opportunity upon the part of the debtor to claim his exemptions before the sale." *Surratt v. Young*, 55 Ark. 447.

In *Maryland* the Act of 1861 (Laws 1861, c. 7; 2 Pub. Gen. Laws, p. 1272) provides in section 1 that "one hundred dollars' worth of property of each defendant therein shall be exempt from execution issued on any judgment in any civil proceeding whatever, except on judgments for breach of promise to marry or for seduction." Section 2 provides that "each defendant in any such execution may select property, real or personal, to the value of one hundred dollars, to be ascertained by three disinterested appraisers, to be summoned and sworn by the officer at the time of levying the execution; and the appraisement signed by the appraisers shall be returned with the writ." Section 3 provides in substance that if property, real or personal, cannot be divided so as to set apart a portion of it of the value of one hundred dollars, without loss or injury, the whole shall be sold, and the defendant shall receive that amount out of the proceeds. These provisions were construed in *State v. Boulden*, 57 Md. 317, and it was held that primarily they exempted only the property of the debtor, and that he had no right to demand an equivalent in money therefor. "The exemption," said the court, "is of property, and the right to select the property to be exempted is given to each defendant in the execution. Money arising from the sale can be given to him only under the special provisions of the third section."

In *Pennsylvania* the Act of 1849 exempts "property to the value of three hundred dollars" from "levy and sale on execution or by distress for rent," and provides for the appraisement of property and a selection by the debtor. There is express provision that where real property is levied on and is worth more than three hundred dollars, and is indivisible, it shall be sold, and the debtor may be allowed his exemption out of the proceeds, but there is no such provision as to personal property. And it is held that a debtor is not under any circumstances entitled to an exemption of three hundred dollars out of the proceeds of a sale of his personal property on execution, but only to specific property. If his request for an appraisement is denied by the officer, and the property is sold under the execution, his sole remedy is an action for damages. *Hammer v. Freese*, 19 Pa. St. 255. See also *Marks's Appeal*, 34 Pa. St. 36, 75 Am. Dec. 631; *Hatch v. Bartle*, 45 Pa. St. 166, 84 Am. Dec. 484; *Winchester v. Costello*, 2 Pars. Eq. Cas. (Pa.) 279. And see *Miller's Appeal*, 16 Pa. St. 300; *Weaver's Appeal*, 18 Pa. St. 307.

A Statute of British Columbia (Homestead Act,

states, instead of exempting particular property, or in lieu of or in addition to an exemption of particular property, the statute exempts "property" or "personal property" generally, leaving it for the debtor to select.¹

b. WHAT MAY BE CLAIMED — (1) *In General*. — Under a statute exempting "personal property" generally to a certain amount, to be selected by the debtor, he may claim any he may see fit, provided it is personal property and is owned by him, and does not exceed the limitation as to value.² And where such a statute uses the term "property" only, the range of selection is still wider, and extends to real estate.³

(2) *Choses in Action* — (a) *In General*. — Thus, he may claim choses in action,⁴

C. S. B. C. 1888, c. 57, § 10), declared: "The following personal property shall be exempt from forced seizure or sale, that is to say, goods and chattels of a debtor at the option of such debtor to the value of \$500." It was held that this entitled a debtor to an exemption only of goods and chattels seized, and not to an exemption of five hundred dollars out of the proceeds of a sale of goods and chattels, and that an assignor for the benefit of creditors, therefore, though he might claim as exempt goods and chattels in the hands of the assignee to the value specified, could not wait until a sale of the same by the assignee, and then claim his exemption out of the proceeds. *Pilling v. Stewart*, 4 British Columbia 94.

Money Paid to Purchase Exempted Property. — Money paid by a debtor under a contract for the purchase of property which would be exempt in his hands is not exempt. *Edson v. Trask*, 22 Vt. 18.

1. Statutes Not Confined to Particular Property. — Thus, in *Alabama* it is provided that, in addition to certain articles specifically exempted, "the personal property of any resident of this state, to the value of one thousand dollars, to be selected by such resident," shall be exempt. Const., art. 10, § 1. See also Civ. Code 1896, § 2037.

And in *Missouri* it is provided that each head of a family, at his election, in lieu of articles previously specifically exempted, "may select and hold, exempt from execution, any other property, real, personal, or mixed, or debts and wages, not exceeding in value the amount of three hundred dollars." Rev. Stat. 1889, § 4906.

In *Nebraska* the general exemption given by Code Civ. Pro., § 521, of five hundred dollars in personal property to heads of families having neither lands, town lots, nor houses subject to exemption as a homestead, is in addition to the exemption of specifically named property given to debtors by section 530. *Williams v. Golden*, 10 Neb. 432; *Johnson v. Bartek*, (Neb. 1898) 76 N. W. Rep. 878.

2. Any "Personal Property" Exempt — *Alabama* — *Brewer v. Granger*, 45 Ala. 580.

Indiana — *Junker v. Hustes*, 113 Ind. 524; *Coppage v. Gregg*, 1 Ind. App. 112; *Puett v. Beard*, 86 Ind. 172, 44 Am. Rep. 280; *Smith v. Sills*, 126 Ind. 205; *Burdge v. Bolin*, 106 Ind. 175, 55 Am. Rep. 724; *Pate v. Swann*, 7 Blackf. (Ind.) 500.

Missouri. — *State v. Farmer*, 21 Mo. 160; *Mahan v. Scruggs*, 29 Mo. 282; *State v. Finn*, 8 Mo. App. 261.

North Carolina. — *Dean v. King*, 13 Ired. L. (35 N. Car.) 20.

And see the other cases specifically cited in this note and in the notes following.

Under such a statute, said the *Mississippi* court, "the range of selection within the limits prescribed as to value is unlimited. It is for the exemptionist to select for himself, according to his judgment, taste, or fancy, and no court can abridge this right which the law has given to him." *Bernheim v. Andrews*, 65 Miss. 28.

The Words "Personal Property," as used in such laws, have a comprehensive signification, and they embrace everything which is the subject of ownership, not being realty or an interest in realty. *Enzor v. Hurt*, 76 Ala. 595; *Kennedy v. Smith*, 99 Ala. 87.

Rents and Profits of Life Estate. — *Sener v. Scherff*, 10 Pa. Co. Ct. Rep. 529.

Expectant Interest. — In *Pennsylvania*, where the statute does not restrict the debtor as to the kind of property which he may claim as exempt, but allows him to select property not exceeding three hundred dollars in value, it has been held in effect that a vested expectant interest of a debtor in a sum of money payable at his own death, or at the death of another person, may be claimed. *Bennett's Case*, 6 Phila. (Pa.) 472, 25 Leg. Int. (Pa.) 316.

Property in Lieu of Specific Articles. — When a statute exempts specific articles of property, and a subsequent clause or statute declares that any debtor, at his election, in lieu of such property, may select any other property, not exceeding in value a certain sum, a debtor may claim the exemption from his property generally, whether he owns or does not own any of the specific articles mentioned in the first statute or clause. *State v. Farmer*, 21 Mo. 160; *State v. Beamer*, 73 Mo. 37.

And a debtor who owns only a portion of such articles may select such portion as exempt, and, in addition thereto, any other property which, together with such portion, will not exceed the sum specified in the statute. *Mahan v. Scruggs*, 29 Mo. 282.

Whiskey, or other intoxicating liquors, may be selected under a statute exempting personal property generally, *Bernheim v. Andrews*, 65 Miss. 28; provided it is not kept and used unlawfully, as for unlawful liquor traffic, *Walsch v. Call*, 32 Wis. 159.

3. Money Invested in Land. — See *infra*, this subdivision, *Real Property*.

4. That Choses in Action may be claimed as exempt under statutes exempting "personal property," without specifying the kind, is well settled. Strictly speaking, they are not personal property, but in a broad sense they are, and the courts construe the term in the broad

as a note,¹ money due from a bank,² or from an insurance company on an insurance policy,³ or a debt due from any other person,⁴ unless the statute expressly excepts such rights.⁵ And a legatee or distributee may claim his exemption out of his share of the decedent's estate.⁶

sense under the rule that exemption laws are to be liberally construed.

Alabama. — *Enzor v. Hurt*, 76 Ala. 595; *Kennedy v. Smith*, 99 Ala. 83; *Williamson v. Harris*, 57 Ala. 40, 29 Am. Rep. 707.

Arkansas. — *Probst v. Scott*, 31 Ark. 652.

Indiana. — *Smith v. Sills*, 126 Ind. 205; *Coppage v. Gregg*, 1 Ind. App. 112.

Kentucky. — *Miller v. Mahoney*, (Ky. 1895) 29 S. W. Rep. 879.

Missouri. — *State v. Finn*, 8 Mo. App. 262.

North Carolina. — *Frost v. Naylor*, 68 N. Car. 325.

Ohio. — *Chilcote v. Conley*, 36 Ohio St. 545.

A Chose in Action for Damages resulting from negligence in the conduct of a ferry was held exempt as "personal property" in *Broden v. Bradshaw*, 68 Ala. 362.

Decisions Excluding Chose in Action. — In *North Carolina* a statute, after exempting specific articles, declared that in addition thereto there should be exempt the following "property": "one cow and calf, ten bushels of corn, fifty pounds of bacon, farming tools for one to labor, one bed, etc., for every two members of the family," and such other property as the freeholders may deem necessary for the comfort and support of the debtor's family. Such other property not to exceed in value fifty dollars at cash valuation." In *Ballard v. Waller*, 7 Jones L. (52 N. Car.) 84, the court thought that the specification of certain articles, and the fact that other provisions of the statute had reference to such specific property as could be taken on execution, showed that the legislature intended to exempt only articles of property, and held that a chose in action could not be claimed. The rule is different under the present exemption law of North Carolina. *Frost v. Naylor*, 68 N. Car. 325.

In *Canada* it was conceded that a statute exempting "the following personal property * * * from forced seizure and sale by any process at law or in equity; that is to say, the goods and chattels of any debtor * * * to the value of five hundred dollars," would exempt book debts and other choses in action, if the only consideration were a construction of the terms "personal property," and "goods and chattels," but it was held that they were not property that could be seized and sold by any process at law or in equity, and were therefore not within the statute. *Hudson's Bay Co. v. Hazlett*, 4 British Columbia 450. See also *Anglo-Columbian Co. v. Blake*, cited in 4 British Columbia 453.

1. Promissory Notes. — *Darden v. Reese*, 62 Ala. 311; *Smith v. Sills*, 126 Ind. 205; *Burdge v. Bolin*, 106 Ind. 175, 55 Am. Rep. 724; *Pickrell v. Jerauld*, 1 Ind. App. 10; *Coffing v. Dungan*, 6 Ind. App. 386, 388; *Miller v. Mahoney*, (Ky. 1895) 29 S. W. Rep. 879; *Frost v. Naylor*, 68 N. Car. 325.

2. Money Due from Bank. — *Fanning v. Jacksonville First Nat. Bank*, 76 Ill. 53.

3. Money Due on Policy of Insurance. — *Probst*

v. Scott, 31 Ark. 652; *Strouse v. Becker*, 44 Pa. St. 206.

Under the *Arizona* statute, which defines personal property as including money, goods, chattels, things in action, and evidence of debt, it was held that a claim for insurance on a building destroyed by fire was personal property within the meaning of the exemption laws. *Wilson v. Lowry*, (Arizona 1898) 52 Pac. Rep. 777.

As to the exemption of money due on a policy of insurance on exempt property, recognized as exempt because of the exempt character of the property lost, see *infra*, this section, *Proceeds and Product of Exempt Property*.

4. Any Other Debts Due from Others. — *Winter v. Simpson*, 42 Ark. 410; *Coppage v. Gregg*, 1 Ind. App. 112; *Marchildon v. O'Hara*, 52 Mo. App. 523.

Accounts for work and labor, goods sold and delivered, money lent, etc., may be claimed as "personal property." *Coppage v. Gregg*, 1 Ind. App. 112; *Miller v. Mahoney*, (Ky. 1895) 29 S. W. Rep. 879.

Wages. — When one provision or statute exempts personal property to the amount of one thousand dollars, to be selected by the debtor, and another exempts the wages of laborers to the amount of twenty-five dollars per month, a debtor may claim a balance due him as wages or salary, over and above the twenty-five dollars per month, as part of the one thousand dollars of personal property to which he is entitled. *Enzor v. Hurt*, 76 Ala. 595.

A Debt Secured by a Lien on property may be claimed as except under an exemption of "personal property." *Kennedy v. Smith*, 99 Ala. 83.

Fees Due Justice of the Peace or Other Officers. — In *Dane v. Loomis*, 51 Ala. 487, it was held that a justice of the peace could claim fees due him as costs in a civil action tried before him, under a statute exempting "personal property." The rule would necessarily apply to fees due other officers. See *supra*, this title, *Exemptions at Common Law—Compensation of Public Officers and Employees*.

5. Statutes Excepting Money Due. — In *Illinois* the statute (Starr & Curt. Annot. Stat., 1896, c. 52, par. 13) now expressly provides that the selections and exemptions provided for shall not be made to the debtor nor allowed to him or her "from any money, salary, or wages due him or her from any person or persons or corporation whatever." It has been held that this provision applies to any money due a debtor, except the wages exempted by another provision, and therefore that he cannot claim as exempt money due him for board. *Finlen v. Howard*, 126 Ill. 259, affirming 26 Ill. App. 66. It has also been held to apply to money due a debtor from a sale of his exempt property. *Avery Planter Co. v. Cole*, 61 Ill. App. 494. See also *Reade v. Kerr*, 52 Ill. App. 467.

6. Share of Decedent's Estate. — *Swandale v. Swandale*, 25 S. Car. 389.

(b) **Judgments.** — A judgment, though a mere chose in action, is "personal property" within the meaning of the statutes of exemption.¹

(3) **Money.** — Money in the hands either of the debtor or of a third person is exempt as "personal property."²

(4) **Money in Court.** — Under such a statute a debtor may claim his exemption out of money in court.³

(5) **"Suitable" Property.** — The general statutes are sometimes restricted by the requirement that the property claimed as exempt shall be suitable to the debtor's condition.⁴

(6) **Real Property.** — Of course, when the statute in terms exempts personal property only, a debtor cannot claim real property.⁵ In most states, however, there are statutes exempting homesteads,⁶ and in some states the general statute exempts property to a certain value, and allows the debtor to select either real or personal property.⁷

13. Property Necessary to Enjoyment of Exempt Property. — It has been held that property essential to the beneficial enjoyment of property specifically exempted is also exempt.⁸ But this cannot be regarded as a settled rule.⁹

1. Judgments Exempt as "Personal Property" — *Arkansas.* — *Atkinson v. Pittman*, 47 Ark. 464; *Draffin v. Smith*, 63 Ark. 83.

Indiana. — *Puett v. Beard*, 86 Ind. 172, 44 Am. Rep. 280; *Butner v. Bowser*, 104 Ind. 255; *Junker v. Hustes*, 113 Ind. 524; *Carpenter v. Cool*, 115 Ind. 134.

Nebraska. — *Mace v. Heath*, 34 Neb. 54.

North Carolina. — *Curlee v. Thomas*, 74 N. Car. 51. *Contra*, under a former North Carolina statute, *Ballard v. Waller*, 7 Jones L. (52 N. Car.) 84.

As to the rule exempting a judgment for trespass upon, conversion of, or other injury to exempt property, see *infra*, this section, *Proceeds and Product of Exempt Property*.

2. Money. — *Brewer v. Granger*, 45 Ala. 580; *Williamson v. Harris*, 57 Ala. 40, 29 Am. Rep. 707; *Gray v. Putnam*, 51 S. Car. 97; *Fanning v. Jacksonville First Nat. Bank*, 76 Ill. 53; *Burdge v. Bolin*, 106 Ind. 175, 55 Am. Rep. 724; *Chilcote v. Conley*, 36 Ohio St. 545. See the notes preceding as to debts due from others to the debtor.

3. Money in Court. — Thus, under such a statute, an execution debtor may claim his exemption out of money paid into court by his debtor as garnishee under the execution. *Marchildon v. O'Hara*, 52 Mo. App. 523.

So where an assignee in bankruptcy or insolvency refuses to recognize a debtor's claim of exemption, and sells his property, the debtor may assert his claim against the proceeds of the property in the hands of the court for distribution. *In re Jones*, 2 Dill. (U. S.) 343.

Proceeds of Land Sold on Execution. — Under the *Pennsylvania* statute, see *Gery v. Ehrgood*, 31 Pa. St. 329. Under the *Illinois* statute, see *Walsh v. Horine*, 36 Ill. 249. And see the title **HOMESTEAD**.

4. Property "Suitable to Debtor's Condition or Occupation in Life." — Under a statute not limited to any specific property, but exempting a certain amount of property "suitable" to the debtor's condition or occupation in life, to be selected by him, the jury may allow a horse worth less than the amount specified in the statute to a debtor who is a miller receiving only thirty dollars a month wages, but who

has an invalid family requiring exercise in the open air. *Cornelia v. Ellis*, 11 Ill. 584.

5. Money Invested in Land. — The personal-property exemption cannot be claimed out of money that has been invested in land, for the property is no longer personal property. *Dortch v. Benton*, 98 N. Car. 190, 2 Am. St. Rep. 331.

6. Homestead Exemption. — See the title **HOMESTEAD**.

7. Exemption of Real Property Other than Homestead. — For example, in *Indiana* it is declared that "an amount of property not exceeding in value six hundred dollars, owned by any resident householder," shall be exempt, and that "the property may be real or personal, or both, as the debtor may elect and designate at the time he claims the exemption." Rev. Stat. 1896, §§ 703, 704.

And in *Pennsylvania* property generally to the extent of three hundred dollars, to be selected by the debtor, is exempted. Under this statute the debtor may claim his entire exemption out of real estate levied upon, though he may own personal property. *McNair v. Riesher*, 8 Pa. Co. Ct. Rep. 494.

The *Missouri* statute also grants a right of exemption generally to a certain amount, and allows it to be claimed either in real or personal property. Rev. Stat. Mo., 1889, § 4906.

Elsewhere Treated. — Some of the questions relating to the exemption of real property under such statutes as those referred to above have been dealt with in this article, because they do not depend at all upon the fact that real property is claimed. The general treatment of such exemptions, however, will be found in the title **HOMESTEAD**.

8. Property Exempt Because Necessary to Use of Exempt Property. — The only case in which this rule has been squarely laid down is *Cobbs v. Coleman*, 14 Tex. 594, wherein the Supreme Court of Texas held that a statute exempting a horse impliedly exempted everything essential to its beneficial enjoyment, and therefore exempted a saddle and bridle. See also *Dearborn v. Phillips*, 21 Tex. 449.

9. Apparently Contrary Decision. — In *New York*, on the other hand, where a statute exempted a cow and swine and the necessary

14. Proceeds and Product of Exempt Property — *a. PROCEEDS* — (1) *In General*. — In some cases property may be exempt because of its being the proceeds or product of exempt property, but this is not always so.¹

(2) *Sale, Exchange, or Mortgage of Exempt Property* — (a) *Sale or Exchange*. — As a rule, if a debtor voluntarily exchanges property specifically exempted for property that is not exempt, or sells property specifically exempted, and purchases property that is not exempt, the property so acquired is not exempt.²

(b) *Mortgage*. — And for the same reason, if a debtor mortgages property specifically exempted, and it is sold under the mortgage, leaving a surplus, he cannot claim such surplus as exempt.³

(c) *Debt Due for Exempt Property*. — On this principle, if a debtor voluntarily sells property specifically exempted, a debt due him therefor is not exempt.⁴

food for them, and another statute exempted a team but said nothing about food therefor, it was held that necessary food for an exempt team was not exempt. *Rue v. Alter*, 5 Den. (N. Y.) 119.

And it has been held in *New Hampshire* that the exemption of a horse required for farming or teaming purposes, or other actual use, does not include a vehicle and harness. *Somers v. Emerson*, 58 N. H. 48.

1. Proceeds and Product of Exempt Property. — As to the proceeds and product of a homestead, see the title *HOMESTEAD*.

2. Voluntary Sale or Exchange — *Alabama*. — *Pool v. Reid*, 15 Ala. 826.

Iowa. — *Friedlander v. Mahoney*, 31 Iowa 311.

New York. — *Wygant v. Smith*, 2 Lans. (N. Y.) 185. See also *Andrews v. Rowan*, 28 How. Pr. (N. Y. Supreme Ct.) 126. But see as *contra*, *McGivney v. Childs*, 41 Hun (N. Y.) 607. And see cases cited *infra*, this note.

Pennsylvania. — *Knabb v. Drake*, 23 Pa. St. 489, 62 Am. Dec. 352.

Vermont. — *Connell v. Fisk*, 54 Vt. 381.

Wisconsin. — *Roundy v. Converse*, 71 Wis. 524, 5 Am. St. Rep. 240.

Illustration. — In *Connell v. Fisk*, 54 Vt. 381, it was held that a colt which was not exempt under the *Vermont* statute as being kept for team work could not be claimed as exempt because it had been received in exchange for a horse that was so exempt.

Statutes Allowing Exemption from Any Property. — This rule does not apply, of course, where a statute does not restrict the exemption to any particular articles, but allows the debtor to claim and select a certain amount of personal property. In such a case where a debtor has selected property as exempt, he may afterwards make any use of it he chooses, and anything he may get in exchange for it will be exempt to the amount allowed by the statute. *Brewer v. Granger*, 45 Ala. 580.

Statutes Exempting Money. — When a statute does not exempt specific articles, but exempts money to a certain amount, the rule stated in the text does not always apply. And there are cases in which it has been held that property purchased with the exempt money is exempt. Thus, there are a number of cases holding that, where a statute exempts pension money, property purchased with pension money is exempt. *Yates County Nat. Bank v. Carpenter*, 119 N. Y. 550, 16 Am. St. Rep. 855, *distinguishing* *Wygant v. Smith*, 2 Lans.

(N. Y.) 185. See *supra*, this section, *Pensions and Bounties*.

And in *Bridgers v. Howell*, 27 S. Car. 425, it was held that where a debtor uses his money in purchasing a lot of land in his wife's name and for her benefit, his creditors cannot follow and subject to their claims so much of the money as he was entitled to claim as his personal property exemption. See the title *FRAUDULENT SALES AND CONVEYANCES*.

Exchange After Allotment. — In an early *North Carolina* case, under a statute requiring an allotment of exempt property and the recording of a list of the property allotted, it was held that property obtained in exchange for allotted exempt property was not exempt. *Lloyd v. Durham*, 1 Winst. L. (60 N. Car.) 288.

Under the Georgia Laws this rule does not apply; but when exempted personalty has been exchanged, whether legally or not, for property of like kind, the latter stands, as against the husband's creditors, in the place of the former, so long as the exchange is not repudiated by any of the parties in interest. The family are entitled to retain the substituted property, either for enjoyment or for restoration to the true owner. *Morris v. Tennent*, 56 Ga. 577.

In a late *Georgia* case where the head of a family, to whom an exemption of personalty had been set apart, purchased a wagon on credit, and obtained title thereto, and it appeared that in so doing he did not part with any exempted personalty, it was held that the wagon became immediately subject to the lien of an existing judgment against the purchaser, and that this lien was not divested by reason of the fact that he subsequently made a partial payment upon the purchase price of the wagon with money made by hauling therewith. *Anderson v. Cook*, (Ga. 1898) 30 S. E. Rep. 884.

3. Foreclosure of Chattel Mortgage. — In *Roundy v. Converse*, 71 Wis. 524, 5 Am. St. Rep. 240, it was held that a debtor who had executed a chattel mortgage on his stock in trade, without reserving the amount of his exemption, or claiming it while the property was in the hands of the mortgagee, could not claim it out of the proceeds of a sale under the mortgage. "We are aware of no provision of law," said the court, "which extends the exemption of stock in trade to the proceeds of such stock realized upon a sale thereof."

4. Debt Due on Sale of Exempt Property. — *Knabb v. Drake*, 23 Pa. St. 489, 62 Am. Dec.

(3) *Involuntary Conversion* — (a) *In General*. — By the great weight of authority, if exempt property is converted into property not exempt otherwise than by the voluntary act of the debtor, the other property may be claimed as exempt.¹

(b) *Judgment for Taking, Conversion, or Injury*. — Thus, by the weight of authority, where exempt property is wrongfully taken from a debtor by proceedings *in invitum*, as on execution or attachment, or is injured or lost to him through any other wrongful act of another, a judgment recovered by him in an action for the trespass, conversion, or other wrong, or the money collected on such a judgment, is exempt.²

352; *Scott v. Brigham*, 27 Vt. 561. And see *Reade v. Kerr*, 52 Ill. App. 467; *Edson v. Trask*, 22 Vt. 18.

Qualified Rule in Michigan. — In Michigan this rule is not recognized to the full extent, but it is held that if exempt property is sold for the purpose of reinvestment in other exempt property the proceeds, or debts due therefor, are exempt before reinvestment. *Cullen v. Harris*, 111 Mich. 20. See also the title **HOMESTEAD**.

A Statutory Provision that a debtor shall not be allowed an exemption "from any money, salary, or wages due him or her from any person or persons or corporations whatever," prevents a claim of exemption out of money due from the sale of exempt property. *Avery Planter Co. v. Cole*, 61 Ill. App. 494.

1. Involuntary Conversion of Exempt Property. — *Andrews v. Rowan*, 28 How. Pr. (N. Y. Supreme Ct.) 126; *Duff v. Wells*, 7 Heisk. (Tenn.) 17; *Ward v. Goggan*, 4 Tex. Civ. App. 274. And see cases cited in the two notes following.

A Sale of Exempt Property by an Assignee in Bankruptcy or Insolvency, after the debtor has claimed it, cannot defeat his rights. In such a case he may assert his claim against the proceeds of the property in the hands of the court for distribution. *In re Jones*, 2 Dill. (U. S.) 343.

2. Judgment for Trespass upon or Conversion of Exempt Property — *Arkansas*. — *Drafin v. Smith*, 63 Ark. 83.

Iowa. — *Reynolds v. Haines*, 83 Iowa 342, 32 Am. St. Rep. 311.

Kentucky. — *Collett v. Jones*, 7 B. Mon. (Ky.) 586; *Myers v. Forsythe*, 10 Bush (Ky.) 394.

Michigan. — *Cullen v. Harris*, 111 Mich. 20.

Minnesota. — The rule stated in the text is established by statute in this state. *Wylie v. Grundysen*, 51 Minn. 360, 38 Am. St. Rep. 509. The court had previously held that such a judgment was not exempt. *Temple v. Scott*, 3 Minn. 419.

New York. — *Tillotson v. Wolcott*, 48 N. Y. 188 [in effect overruling *Mallory v. Norton*, 21 Barb. (N. Y.) 424, which was to the contrary]; *Andrews v. Rowan*, 28 How. Pr. (N. Y. Supreme Ct.) 126; *Hudson v. Plets*, 11 Paige (N. Y.) 180.

Pennsylvania. — In *Knabb v. Drake*, 23 Pa. St. 489, 62 Am. Dec. 352, the Supreme Court of Pennsylvania said that the recovery of damages in an action for trespass in taking exempt property on execution transferred the right of property, and had the effect of a sale, and that the damages secured by the judgment were therefore subject to attachment.

Later Pennsylvania cases seem, in effect, to overrule this decision. In *Wilson v. McElroy*, 32 Pa. St. 82, it was held that in an action of trespass for disregarding a debtor's claim of exemption, and seizing and selling the property, the debt for which the property was sold could not be deducted in estimating the damages. And in *Steele v. McKerrihan*, 172 Pa. St. 280, it was held that a judgment for damages recovered by a debtor against his creditor for appropriating his exempt wages by going out of the state to evade the exemption laws, in violation of the Pennsylvania statute, represented the wages collected in violation of the statute, and was therefore exempt.

South Dakota. — *Cleveland v. McCanna*, (S. Dak. 1898) 75 N. W. Rep. 908.

Tennessee. — *Crawford v. Carroll*, 93 Tenn. 661, 42 Am. St. Rep. 943; *Duff v. Wells*, 7 Heisk. (Tenn.) 17.

Texas. — *Howard v. Tandy*, 79 Tex. 450; *Burke v. Hance*, 76 Tex. 76, 18 Am. St. Rep. 28.

Vermont. — *Stebbins v. Peeler*, 29 Vt. 289; *Keyes v. Rines*, 37 Vt. 260, 86 Am. Dec. 707.

Wisconsin. — *Below v. Robbins*, 76 Wis. 600, 20 Am. St. Rep. 89.

Homestead. — The same rule has been applied in the case of homesteads. See the title **HOMESTEAD**.

Exempt Stock Killed by Railroad Company. — In accordance with this rule the *Tennessee* court has held in a late case that a judgment recovered by the owner of an exempt horse against a railroad company for negligently killing the horse was exempt. *Crawford v. Carroll*, 93 Tenn. 661, 42 Am. St. Rep. 943. See also *Mudge v. Lanning*, 68 Iowa 641.

Use of Proceeds of Judgment to Replace Exempt Property. — The judgment in such a case, or the proceeds thereof, will not be exempted indefinitely. The debtor must use the proceeds within a reasonable time to replace the exempt property of which he has been deprived. See *Tillotson v. Wolcott*, 48 N. Y. 188.

Judgment in Part for Conversion of Property Not Exempt. — If it appears that a judgment claimed as exempt was not solely for the conversion of exempt property, but that the value of other property also entered into it, and there is no showing upon which to make an apportionment, the rule exempting a judgment for the conversion of exempt property does not apply. *Burke v. Hance*, 76 Tex. 76, 18 Am. St. Rep. 28.

Excessive Judgment — Exemplary Damages. — Perhaps, if a debtor recovers exemplary damages in an action for trespass in taking exempt property, so that the damages secured by the judgment are in excess of the value of the ex-

(c) **Judgment for Evading Exemption Laws.** — The same is true of a judgment under a statute making a creditor liable for evading the exemption by sending his claim out of the state for collection.¹

(d) **Proceeds of Insurance.** — On the same principle it is very generally held that when exempt property is destroyed by fire, the proceeds of a policy of insurance thereon are exempt.²

b. PRODUCT OF EXEMPT PROPERTY. — When specific property is exempted in order that the debtor may have the product for the support of himself and family, the product also is exempt.³

empt property, or if for any other reason he should recover more than the value of the property, the debtor could not claim the excess as exempt. See *Knabb v. Drake*, 23 Pa. St. 489, 62 Am. Dec. 352. And see *Tillotson v. Wolcott*, 48 N. Y. 188.

Costs in Recovering Judgment. — It has been held in *Wisconsin* that the costs incurred in recovering a judgment for trespass upon, conversion of, or other injury to exempt property have the same character as the judgment and are also exempt. Below *v. Robbins*, 76 Wis. 600, 20 Am. St. Rep. 89. Compare, however, the opinion of Lott, C. C., in *Tillotson v. Wolcott*, 48 N. Y. 192.

1. Judgment for Evading Exemption Laws. — In some states there are statutes in effect prohibiting resident creditors from sending out of the state by assignment or otherwise a debt due from a person residing in the state, in order to collect it and deprive the debtor of his exemption under the laws of the state, and allowing a debtor to recover a judgment for the full amount of the debt, interest, and costs, so collected, against the creditor violating the statute. See Act Pa., May 23, 1887.

Under such a statute as this, where a debtor recovers a judgment against a creditor who has sent the claim out of the state and collected it by garnishment of wages exempt in the state, the judgment takes the place of the wages and is exempt. *Steel v. McKerrihan*, 172 Pa. St. 280.

2. Proceeds of Insurance on Exempt Property. — In *Wooster v. Page*, 54 N. H. 125, 20 Am. Rep. 128, the Supreme Court of *New Hampshire* held that money due upon a policy of insurance on exempt household furniture destroyed by fire was not exempt. And *Smith v. Ratcliff*, 66 Miss. 683, 14 Am. St. Rep. 606, is to the same effect. These cases, however, stand virtually alone. By the overwhelming weight of authority the insurance money takes the place of the exempt property and is also exempt.

Alabama. — See *Ellis v. Pratt City*, 111 Ala. 629, 56 Am. St. Rep. 76.

Arizona. — *Wilson v. Lowry*, (Arizona 1898) 52 Pac. Rep. 777.

Arkansas. — See *Probst v. Scott*, 31 Ark. 652.

California. — *Houghton v. Lee*, 50 Cal. 101.

Iowa. — *Reynolds v. Haines*, 83 Iowa 342, 32 Am. St. Rep. 311.

Minnesota. — See *Fletcher v. Staples*, 62 Minn. 471.

New York. — *Cooney v. Cooney*, 65 Barb. (N. Y.) 524; *Bliss v. Raynor*, 91 Hun (N. Y.) 250.

Pennsylvania. — See *Strouse v. Becker*, 44 Pa. St. 206.

Texas. — *Ward v. Goggan*, 4 Tex. Civ. App. 274.

Washington. — *Puget Sound Dressed Beef, etc.*, *Co. v. Jeffs*, 11 Wash. 466, 48 Am. St. Rep. 885. See also *Winsor v. McLachlan*, 12 Wash. 154.

Canada. — *Osler v. Muter*, 19 Ont. App. 94.

It was said by the *Iowa* court in a late case: "The money due on the policy stands in the place of the property destroyed, and this must be true whether the money takes the place of the property by contract, or is acquired in *in-vitum* by proceedings against the owner." *Reynolds v. Haines*, 83 Iowa 342, 32 Am. St. Rep. 311.

Insurance on Homestead. — By the weight of authority, the same rule applies to proceeds of insurance upon buildings upon an exempt homestead. See the title *HOMESTEAD*.

Burden of Proof. — Where money due from an insurance company is claimed as exempt under the rule stated in the text, the burden is on the debtor to show that the property insured was exempt. *Fletcher v. Staples*, 62 Minn. 471. See *Winsor v. McLachlan*, 12 Wash. 154; *Donnelly v. O'Connor*, 22 Minn. 309. And see *infra*, this title, *Enforcement and Protection of the Right—Presumption and Burden of Proof*.

Effect of Lien on Lost Property. — The rule that money due upon a policy of insurance for loss of exempt property by fire is also exempt is not affected by the fact that the creditor had a lien on the property destroyed. *Ward v. Goggan*, 4 Tex. Civ. App. 274.

Use of Money to Replace Exempt Property. — The debtor must use the insurance money within a reasonable time to replace the exempt property lost. *Cooney v. Cooney*, 65 Barb. (N. Y.) 524. And see *Tillotson v. Wolcott*, 48 N. Y. 188; *Puget Sound Dressed Beef, etc.*, *Co. v. Jeffs*, 11 Wash. 466, 48 Am. St. Rep. 885.

3. Product of Exempt Property Exempt. — This proposition is fully supported by the decision and dictum of the *Vermont* court in *Leavitt v. Metcalf*, 2 Vt. 342, 19 Am. Dec. 718. It was held there that a statute exempting a debtor's only cow also exempted butter produced by her. "What," said the court, "are we to understand by 'always excepting one cow'? Is it not that the family may have a support? We cannot presume that they intended the debtor should be at the expense of keeping the cow and for the creditor to have the profits. Hence it must follow that the butter made from said cow must necessarily be within the exceptions."

Product of Exempt Homestead. — See the title *HOMESTEAD*.

15. Title or Right to Support Claim — *a.* IN GENERAL. — It has often been said that a debtor cannot claim an exemption in property, or in the proceeds of a sale of property, which does not belong to him; that title is necessary to support the claim. And no doubt this is generally true.¹

1. Title Necessary to Support Claim — *Florida.*

— *Hinson v. Booth*, 39 Fla. 333.

Illinois. — *Caswell v. Williams*, 12 Ill. 387.

Indiana. — *Holman v. Martin*, 12 Ind. 553.

Maryland. — *Miles v. State*, 73 Md. 398.

Missouri. — *Stotesbury v. Kirtland*, 35 Mo. App. 148; *State v. Springate*, 51 Mo. App. 619.

Pennsylvania. — *Gilleland v. Rhoads*, 34 Pa. St. 187.

Tennessee. — *Byrd v. Curlin*, 1 Humph. (Tenn.) 466.

Vermont. — See *Edson v. Trask*, 22 Vt. 18.

Possession Prima Facie Evidence of Title. — In an action of trespass against an officer for taking exempt property, it is *prima facie* sufficient on the question of title for the plaintiff to show that when the property was taken he was in possession claiming title, for no one but the true owner or one who connects himself with the true owner can impeach his title. *Hovt v. Van Alstyne*, 15 Barb. (N. Y.) 568.

Property "Owned" by the Debtor. — Title would clearly be necessary to support a claim under a statute exempting property "owned" by the debtor. See *Holman v. Martin*, 12 Ind. 553.

Sale of Property. — If a debtor sells property, he cannot afterwards claim it as exempt so long as the sale is recognized as binding upon him. In *Cassell v. Williams*, 12 Ill. 387, an insolvent debtor had transferred certain personal property in fraud of his creditors, and a creditor afterwards had it levied upon and sold as his property. The debtor then sued the officer in trespass to recover the statutory penalty for the seizure and sale, claiming that the property was exempt. It was held that he could not maintain the action, as he had no title to the property. See also *Byrd v. Curlin*, 1 Humph. (Tenn.) 466; *State v. Pruitt*, 65 Mo. App. 154.

In *Mandlove v. Burton*, 1 Ind. 39, it was held that where, between the rendition of judgment and the issuing of execution, the judgment debtor fraudulently conveyed all his property to a third person, and it was afterwards levied on to satisfy the execution, he was not entitled to hold one hundred and twenty-five dollars' worth of said property exempt from the execution, under the *Indiana* statute; and that he could not, on the refusal of the officer to release to him a portion of the property to that amount, maintain trover therefor against the officer and the execution plaintiff.

Estoppel of Creditor to Deny Defendant's Title.

— In a contest of a claim of exemption under the *Alabama* statute the plaintiff will not be allowed to allege or prove that the goods levied on were consigned by him to the defendant for sale and are therefore not the property of the defendant, when it appears that the attachment was sued out by him to recover the price of the goods. *Kolsky v. Loveman*, 97 Ala. 543.

Estoppel of Officer to Deny Title. — If an officer levies upon property as the property of the de-

fendant in the execution, he is not thereby estopped to deny the defendant's title in an action by him for disregarding a claim of exemption and selling the property. His return of the execution is only *prima facie* against him. *Cassell v. Williams*, 12 Ill. 386. And see *Decker v. Armstrong*, 87 Mo. 316; *State v. Springate*, 51 Mo. App. 619; *State v. Pruitt*, 65 Mo. App. 156.

Fraudulent Conveyances. — Whether a fraudulent conveyance by a debtor is to be regarded as divesting his title, so as to prevent him from claiming the property as exempt when the conveyance is attacked by creditors, is a question upon which the courts have not agreed. The question is treated in a subsequent section. See *infra*, this title, *Sales and Other Transfers, and Incumbrances* — *Fraudulent Conveyances*.

Intention or Agreement to Sell or Exchange. — An intention to sell or exchange property, or negotiations therefor, or even a contract to sell or exchange, does not prevent a debtor from claiming the property as exempt, if there is in fact no consummated sale or exchange. *Kriesel v. Eddy*, 37 Neb. 63; *Duvall v. Rollins*, 68 N. Car. 220.

Rescinded Sale. — Nor does a rescinded sale defeat the right of exemption. If, after a sale of exempt property, it is levied upon as the property of the vendor, and the vendee thereupon rescinds the contract of sale, the title reverts in the vendor, and he may claim the property as exempt, or maintain an action against the officer if he sells it. *Duvall v. Rollins*, 68 N. Car. 220.

Effect of Mortgage. — A debtor who has given a mortgage on exempt property, but who retains possession, is not thereby precluded from claiming such property as exempt as against all persons except the mortgagee. *Patten v. Smith*, 4 Con. 450, 10 Am. Dec. 166; *Collett v. Jones*, 2 B. Mon. (Ky.) 19, 36 Am. Dec. 586; *Everson v. Bacon*, 58 Mich. 526. See *infra*, this title, *Sales and Other Transfers, and Incumbrances*.

Property in Possession of the Mortgagee. — Where property is mortgaged and is in the possession of the mortgagee the mortgagee cannot assert that it is exempt from levy, as he is without the title necessary to maintain a claim of exemption. *Eisenberg v. Burchinell*, 10 Colo. App. 457.

Absolute Bill of Sale as Security. — And a person who has given an absolute bill of sale of property merely as security for the payment of a debt may claim the property as exempt as against other creditors, for the bill of sale is in effect a mortgage only. *Emerson v. Bacon*, 58 Mich. 526.

Conditional Sales. — Whether, when property is sold on condition that the title is to remain in the vendor until payment of the price, the vendee, until such payment, has sufficient title or right to support a claim of the property as exempt, and whether the contract prevents a claim of exemption by the vendor, does not

b. POSSESSORY RIGHT. — A statute, however, may allow a debtor to claim property as exempt where his right to the property is merely possessory, and a statute has been so construed where it merely exempted certain articles, without expressly requiring title.¹

16. Property Owned in Common. — It seems to be well settled that a debtor may claim his personal property exemption in property which he owns in common with another. Title in severalty is not necessary.²

Property Not Divisible in Kind. — And by the weight of authority, it makes no difference in the application of this rule that the property is of such a nature as to be incapable of division in kind without the consent of all the owners, as in the case of a horse or team.³

17. Partnership Property. — The title of a partner is very different from that of a mere tenant in common, and this difference has led to a direct conflict of opinion as to whether an exemption can be claimed in partnership property.

a. CASES ALLOWING EXEMPTION — (1) *In General.* — Some of the courts place partnership property on the same footing as property owned in common, to the extent of allowing all the members of the firm, as individuals, or

seem to have been decided. It has been held, however, that if property sold conditionally is destroyed by the wrongful act of a third person, and the vendee sues and recovers and collects damages (for which he would be liable to the vendee in an action for money had and received for his use), and with this money purchases other property, the title to the property so purchased does not vest in the vendor, and the vendee may claim it as exempt. *Smith v. Gufford*, 36 Fla. 481.

Wife's Separate Property — Claim by Husband. — A husband cannot claim any exemption on account of the separate property of his wife. *Stanton v. French*, 83 Cal. 194, 25 Am. St. Rep. 174.

Homestead. — As to the title necessary to support a claim of homestead exemption, see the title *HOMESTEAD*.

1. Possessory Right. — A statute in *Mississippi* declared: "The following property shall be exempt from seizure under execution or attachment," and enumerated different articles, without saying anything as to the title of the debtor. In *Steen v. Hamblet*, 66 Miss. 112, it was held that to entitle a debtor to claim such articles as exempt it was not necessary for him to show that he had title thereto. "Certain things," said the court, "are exempt from seizure under execution. * * * It matters not by what tenure the articles are held by the defendant, they cannot be taken from him. His right may be merely possessory, and the allowance of exemption may inure to the benefit of some one else, who may wrest the property from him, but they are exempt because the statute so provides, and it does not make exemption depend on the title of the defendant."

2. Property Owned in Common — California. — *Servanti v. Lusk*, 43 Cal. 238.

Illinois. — *Heckle v. Grewe*, 125 Ill. 58, 8 Am. St. Rep. 332, 125 Ill. 58, *affirming* 26 Ill. App. 339.

New York. — *Radcliff v. Wood*, 25 Barb. (N. Y.) 52.

South Carolina. — *Moyer v. Drummond*, 32 S. Car. 165, 17 Am. St. Rep. 850.

Tennessee. — *Rutledge v. Rutledge*, 8 Baxt. (Tenn.) 33.

Washington. — *Dennis v. Kass*, 11 Wash. 353, 48 Am. St. Rep. 880.

Wisconsin. — *Newton v. Howe*, 29 Wis. 531, 9 Am. Rep. 616.

In *Radcliff v. Wood*, 25 Barb. (N. Y.) 52, it was held that a debtor who was only part owner of a team could claim his interest as exempt under a statute exempting a team "owned" by a householder.

In *Pennsylvania* joint owners of chattels cannot claim the benefit of the exemption laws as against a levy against them jointly, but where a joint execution is issued against two defendants, and levied upon the property of one of them, he may claim his exemption. *Bonsall v. Comly*, 44 Pa. St. 442; *Hawley v. Hampton*, 160 Pa. St. 18; *Spade v. Bruer*, 72 Pa. St. 57.

3. Property Indivisible in Kind. — *Radcliff v. Wood*, 25 Barb. (N. Y.) 52; *Rutledge v. Rutledge*, 8 Baxt. (Tenn.) 33. And see the other cases cited in the note preceding.

In *Wisconsin* a distinction has been made between divisible and indivisible property. It has been held that a tenant in common of personal property may claim his exemption therein when the property is divisible in its nature, as in the case of grain, so that his share may readily be determined and set apart or appropriated without the consent of the other owners. *Newton v. Howe*, 29 Wis. 531, 9 Am. Rep. 616. But it has been held that a tenant in common has no such right where the property is incapable of division in kind, as in the case of a team, or a stock of jewelry. *Wright v. Pratt*, 31 Wis. 99; *Ex p. Robinson*, 7 Biss. (U. S.) 125 (under Wisconsin statute). Compare, however, *Russell v. Lennon*, 39 Wis. 570, 20 Am. Rep. 60.

Homestead Exemption. — The same question has arisen with respect to the homestead exemption, and it has been held that a homestead cannot be claimed in land owned in common with another. *West v. Ward*, 26 Wis. 579. As to this, however, there is a conflict of opinion. See the title *HOMESTEAD*.

a single member with the consent of the others, to claim their exemptions as against an execution for a partnership debt levied before there has been any division or severance of the property.¹

Effect of Indebtedness to Firm.—Where it is held that a partner is entitled to claim his exemption out of firm property, his right as against attaching or execution creditors is not affected by the fact that he is indebted to the firm for money drawn out by him.²

(2) *Consent of Partners.*—In any case, to entitle a partner to claim exemptions out of partnership property, all the partners must consent. One partner cannot, without the consent of the others, claim an exemption out of partnership assets, leaving partnership debts unpaid, for each partner has a right to have all the property of the firm applied in payment of its debts.³

(3) *An Individual Right.*—The right of partners, where it is recognized, to claim an exemption out of the partnership assets is an individual right, and not a right of the firm as such, and by the weight of authority it must be asserted and enforced by them severally as individuals, and not jointly as partners.⁴

1. Partnership Property — Cases Allowing Exemptions.—*United States.*—*In re Rupp*, 4 Nat. Bank Reg. 95, 21 Fed. Cas. No. 12,141; *In re Young*, 3 Nat. Bank Reg. 440, 30 Fed. Cas. No. 18,148; *In re Richardson*, 11 Nat. Bank Reg. 114, 20 Fed. Cas. No. 11,776.

Georgia.—*Blanchard v. Paschal*, 68 Ga. 32, 45 Am. Rep. 474. And see *Harris v. Visscher*, 57 Ga. 229. Compare *Van Dyke v. Kilgo*, 54 Ga. 551.

Michigan.—*Skinner v. Shannon*, 44 Mich. 86, 38 Am. Rep. 232; *Waite v. Mathews*, 50 Mich. 392; *Chipman v. Kellogg*, 60 Mich. 438; *McCoy v. Brennan*, 61 Mich. 362, 1 Am. St. Rep. 589; *Coville v. Bentley*, 76 Mich. 248, 15 Am. St. Rep. 312.

Montana.—See *Ferguson v. Speith*, 13 Mont. 487, 40 Am. St. Rep. 459.

New York.—*Stewart v. Brown*, 37 N. Y. 350, 93 Am. Dec. 578; *Radcliff v. Wood*, 25 Barb. (N. Y.) 52.

North Carolina.—*Burns v. Harris*, 66 N. Car. 509, 67 N. Car. 140; *Scott v. Kenan*, 94 N. Car. 296; *Evans v. Bryan*, 95 N. Car. 174, 59 Am. Rep. 233; *Davis v. Smith*, 113 N. Car. 94.

Texas.—*St. Louis Type Foundry v. International Live Stock Journal Printing, etc., Co.*, 74 Tex. 651, 15 Am. St. Rep. 870.

Wisconsin.—*Gilman v. Williams*, 7 Wis. 329, 76 Am. Dec. 219 [overruled on other grounds in the case next cited]; *Russell v. Lennon*, 39 Wis. 570, 20 Am. Rep. 60; *O'Gorman v. Fink*, 57 Wis. 649, 46 Am. Rep. 58.

2. Effect of Indebtedness to Firm.—As was said by the *Michigan* court, where a member of a firm sued an officer for levying upon and selling firm property which the plaintiff claimed as exempt, and the defendant objected on the ground that the plaintiff had drawn money from the firm: "The partnership dealings and adjustment between the partners, or between the partners and creditors, cannot be inquired into in this collateral proceeding, nor does the exemption depend upon whether one partner has drawn out more than his share. This question can only be reached by proceedings in equity, upon an accounting and winding up of the concern." *McCoy v. Brennan*, 61 Mich. 362, 1 Am. St. Rep. 589.

3. Consent of Partners Necessary.—*Burns v.*

Harris, 66 N. Car. 509, 67 N. Car. 140; *Stout v. McNeill*, 98 N. Car. 1; *Scott v. Kenan*, 94 N. Car. 296; *Richardson v. Redd*, 118 N. Car. 677; *O'Gorman v. Fink*, 57 Wis. 649, 46 Am. Rep. 58.

In other cases cited in the note preceding this question was not expressly decided, but an examination of them will show that all the partners were in fact consenting.

Surviving Partner.—It follows that a surviving partner cannot claim an exemption out of the partnership assets, as against an execution on a judgment against the firm, without the consent of the administrator of the deceased partner. *Richardson v. Redd*, 118 N. Car. 677. *Southern Commission Co. v. Porter*, 122 N. Car. 692.

Married Women.—Where a married woman, not a free trader, has contributed largely to the capital of a firm, and has been dealt with by the partners as a copartner, they are estopped from setting up that she was incapable of contracting as a partner. In order to assert a right to exemptions in partnership property without her consent. *Richardson v. Redd*, 118 N. Car. 677.

Withdrawal of Consent.—Consent of one partner that the other may claim an exemption out of the partnership property does not constitute a contract between the partners, and it may be withdrawn at any time before allotment. *Stout v. McNeill*, 98 N. Car. 1.

4. The Right Is Individual and Not Joint.—See *McCoy v. Brennan*, 61 Mich. 368, 1 Am. St. Rep. 589; *Rogers v. Raynor*, 102 Mich. 473 [restricting and explaining *Skinner v. Shannon*, 44 Mich. 86, 38 Am. Rep. 232]; *Russell v. Lennon*, 39 Wis. 570, 20 Am. Rep. 60 [overruling *Gilman v. Williams*, 7 Wis. 329, 76 Am. Dec. 219]. See also *Thurlow v. Warren*, 82 Me. 164, 17 Am. St. Rep. 472; *Pond v. Kimball*, 101 Mass. 105; *Bonsall v. Comly*, 44 Pa. St. 442; *Goll v. Hubbell*, 61 Wis. 293; *Madison First Nat. Bank v. Hackett*, 61 Wis. 335; *McNair v. Rewey*, 62 Wis. 167.

Action by One Partner Against Levying Officer.—Since the right of exemption is an individual right of the partners, and not a right of the firm as such, each partner can enforce it individually, and can maintain an individual

b. PREVAILING DOCTRINE DENIES EXEMPTION — (1) In General. — The doctrine above stated, that an exemption may be claimed in partnership property, is opposed to the decided weight of authority. Because of the fact that a partner has not such an absolute title or right in the firm assets that he can take or transfer his share without the consent of his copartners, and of the fact that a surviving partner has a right to all the assets for the purpose of paying the firm debts and winding up the estate, and on other considerations, most of the courts have regarded the exemption laws as inapplicable to partnership property, and have held that neither a single partner with the consent of the others, nor all the partners, can claim an exemption out of the partnership assets during the continuance of the partnership.¹

suit against a levying officer for violating his right. *McCoy v. Brennan*, 61 Mich. 362, 1 Am. St. Rep. 589.

Express Provision. — In *South Dakota*, by express statutory provision, a firm is allowed, as such, to claim partnership property as exempt. Comp. Laws, § 5138, subdiv. 5.

Wife of Partner. — Where there is such a provision, and also a provision allowing the wife of a debtor to claim his exemptions when he fails or refuses to do so, the wife of a partner may assert his right to the partnership exemption, if he fails or refuses to do so. *Noyes v. Belding*, 5 S. Dak. 603.

1. Cases Denying Exemption—Prevailing Doctrine — *United States*. — In *re Handlin*, 3 Dill. (U. S.) 290; *In re Smith*, 2 Hughes (U. S.) 307; *In re Hafer*, 1 Nat. Bankr. Reg. 547, 11 Fed. Cas. No. 5,896; *In re Price*, 6 Nat. Bankr. Reg. 400, 19 Fed. Cas. No. 11,410; *In re Blodgett*, 10 Nat. Bankr. Reg. 145, 3 Fed. Cas. No. 1,555; *In re Tonne*, 13 Nat. Bankr. Reg. 170, 24 Fed. Cas. No. 14,095; *In re Stewart*, 13 Nat. Bankr. Reg. 295, 23 Fed. Cas. No. 13,420; *In re Boothroyd*, 14 Nat. Bankr. Reg. 223, 3 Fed. Cas. No. 1,652; *Short v. McGruder*, 22 Fed. Rep. 46; *In re Croft*, 8 Biss. (U. S.) 188, 17 Nat. Bankr. Reg. 324; *In re Corbett*, 5 Sawy. (U. S.) 206; *In re Hughes*, 8 Biss. (U. S.) 107, 16 Nat. Bankr. Reg. 464; *In re Melvin*, 17 Nat. Bankr. Reg. 543, 16 Fed. Cas. No. 9,406.

Alabama. — *Giovanni v. Montgomery First Nat. Bank*, 55 Ala. 305, 28 Am. Rep. 723 [*overruling Howard v. Jones*, 50 Ala. 67; *Dunklin v. Kimball*, 50 Ala. 251; *Giovanni v. First Nat. Bank*, 51 Ala. 177]; *Terrell v. Hurst*, 76 Ala. 588; *Levy v. Williams*, 79 Ala. 171; *Schlapback v. Long*, 90 Ala. 525; *Aiken v. Steiner*, 98 Ala. 355, 39 Am. St. Rep. 58.

Arkansas. — *Porch v. Arkansas Milling Co.*, 65 Ark. 40; *Richardson v. Adler*, 46 Ark. 43.

California. — *Cowan v. Their Creditors*, 77 Cal. 403, 11 Am. St. Rep. 294. See *Kingsley v. Kingsley*, 39 Cal. 665.

Colorado. — *McCrimmon v. Linton*, 4 Colo. App. 420.

Florida. — *State v. Bowden*, 18 Fla. 17.

Illinois. — *Trowbridge v. Cross*, 117 Ill. 109; *Fingerhuth v. Lachmann*, 37 Ill. App. 489; *Wills v. Downs*, 38 Ill. App. 269.

Indiana. — *Love v. Blair*, 72 Ind. 281; *Smith v. Harris*, 76 Ind. 104; *State v. Emmons*, 99 Ind. 452; *Goudy v. Werbe*, 117 Ind. 154; *Ex p. Hopkins*, 104 Ind. 157; *State v. Day*, 3 Ind. App. 155.

Indian Territory. — *Hart v. Hiatt*, (Indian Ter. 1899) 48 S. W. Rep. 1038.

Kansas. — *Guptil v. McFee*, 9 Kan. 30; *Dodd v. Hills*, 21 Kan. 707; *McFarland v. Bate*, 45 Kan. 1.

Kentucky. — *Green v. Taylor*, 98 Ky. 330.

Louisiana. — *White v. Heffner*, 30 La. Ann. 1280, 31 Am. Rep. 238. And see *Stauffer's Succession*, 21 La. Ann. 520.

Maine. — *Thurlow v. Warren*, 82 Me. 164, 17 Am. St. Rep. 472.

Massachusetts. — *Pond v. Kimball*, 101 Mass. 105.

Minnesota. — *Baker v. Sheehan*, 29 Minn. 235; *Prosser v. Hartley*, 35 Minn. 340.

Mississippi. — *Robertshaw v. Hanway*, 52 Miss. 713.

Missouri. — *State v. Spencer*, 64 Mo. 355, 27 Am. Rep. 244; *Weinrich v. Koelling*, 21 Mo. App. 133; *State v. Pruitt*, 65 Mo. App. 154. And see *Julian v. Wrightsman*, 73 Mo. 569.

Nebraska. — *Till v. Roy*, 3 Neb. 261; *Wise v. Frey*, 7 Neb. 134, 29 Am. Rep. 380.

Nevada. — See *Rhodes v. Williams*, 12 Nev. 20.

New Mexico. — *In re Spitz*, 8 N. Mex. 622.

Ohio. — *Gaylord v. Imhoff*, 26 Ohio St. 317, 20 Am. Rep. 762; *Aultman v. Wilson*, 55 Ohio St. 138.

Pennsylvania. — *Bonsall v. Comlv*, 44 Pa. St. 442; *Clegg v. Houston*, 1 Phila. (Pa.) 352, 9 Leg. Int. (Pa.) 67; *Hubbard v. Everts*, 12 Pa. Co. Ct. Rep. 132.

South Carolina. — See *Ex p. Karish*, 32 S. Car. 437, 17 Am. St. Rep. 865. But compare *Moyer v. Drummond*, 32 S. Car. 165, 17 Am. St. Rep. 850.

Tennessee. — *Spiro v. Paxton*, 3 Lea (Tenn.) 75, 31 Am. Rep. 630; *Gill v. Lattimore*, 9 Lea (Tenn.) 381.

Washington. — *Charleston v. McGraw*, 3 Wash. Ter. 344.

Illustrations. — In *Guptil v. McFee*, 9 Kan. 30, it was held that persons who had formed a partnership as butchers could not, as against a levy for a firm debt, claim as exempt their tools or stock in trade, which belonged, not to them individually, but to the firm. The statute in effect exempted the necessary tools for carrying on his trade or business, and stock in trade to a certain amount, to "every person residing in this state and being the head of a family."

Bankruptcy Laws. — This rule was also applied in a number of cases to the exemptions provided for by the federal bankrupt law. *In re Handlin*, 3 Dill. (U. S.) 293. And see the other cases in the United States courts cited above in this note. See the title *INSOLVENCY AND BANKRUPTCY*.

As Against Individual Debts. — In *Dennis v.*

Homestead Exemption and Widow's and Orphans' Allowance. — The same question arises under the statute providing for a homestead exemption, and under statutes providing for allowances to the widow and children of a deceased debtor, and the same conflict of opinion exists. These statutes are treated in other parts of this work.¹

(2) **Dissolution — Assignment for Creditors.** — The doctrine that partners cannot claim exemptions out of the partnership assets is not affected by the mere fact that the firm has been dissolved, nor by the fact that the partners have made an assignment of the partnership assets for the benefit of creditors.²

(3) **Conversion of Partnership into Individual Property.** — The reason for the rule ceases, however, and with it the rule itself, when partnership property loses its character as such, and is converted into the individual property of the partners, before a partnership creditor has acquired a lien thereon.³

(a) **Sale Between Partners.** — Partnership creditors have no lien, as such, upon the partnership property for the payment of their claims, and if one partner sells his interest in partnership property to the other, in good faith, and before a partnership creditor has levied upon it, the purchaser may claim his exemption.⁴

(b) **Division of Property.** — And if the partnership property is divided by the partners in good faith, before a levy, so as to make it their individual property, each may claim his exemption.⁵

(c) **Sale or Division After Levy.** — It is otherwise where partnership property is

Kass, 11 Wash. 353, 43 Am. St. Rep. 880, the Supreme Court of *Washington* distinguished between a partner's claim of exemption as against partnership creditors and as against his individual creditors, and held that a partner was entitled to an exemption out of partnership property as against an execution on a judgment for an individual debt, where he had obtained possession and control of the property pending a suit to dissolve the partnership, there being no partnership debts, and his relation to the property being substantially that of a tenant in common.

1. **Homestead Exemption and Widow's and Orphans' Allowance.** — See the titles ALLOWANCES, vol. 2, p. 171; HOMESTEAD.

2. **Rule Not Changed by Dissolution of Firm.** — *Wills v. Downs*, 38 Ill. App. 269; *State v. Day*, 3 Ind. App. 155; *Till v. Roy*, 3 Neb. 261.

Assignment for Benefit of Creditors. — *Ex p. Hopkins*, 104 Ind. 157; *Gill v. Lattimore*, 9 Lea (Tenn.) 381.

3. **Conversion of Partnership into Individual Property.** — See the cases cited in the notes immediately following this.

4. **Sale Between Partners.** — When one partner sells out his interest to the other, in good faith, the assets become the individual property of the purchaser, discharged from any lien on account of partnership debts, and he may claim an exemption in them as against partnership creditors.

Alabama. — *Levy v. Williams*, 79 Ala. 171; *Aiken v. Steiner*, 98 Ala. 355, 39 Am. St. Rep. 58, citing 17 AM. AND ENG. ENCYC. OF LAW (1st ed.) 1336.

Indiana. — *Goudy v. Werbe*, 117 Ind. 154.

Kansas. — *Burton v. Baum*, 32 Kan. 641.

Missouri. — *State v. Thomas*, 7 Mo. App. 205.

Ohio. — *Mortley v. Flanagan*, 38 Ohio St. 401; *Louis Voight Sons' Co. v. Larkin*, 6 Ohio Cir. Dec. 124, 12 Ohio Cir. Ct. Rep. 751.

Texas. — See *Watson v. McKinnon*, 73 Tex. 210.

Intent to Claim Exemption. — "A sale fairly and honestly made by one member of a firm, of his interest in the partnership property and effects to the other partner, will not be rendered invalid by the fact that it was expected such partner would thereafter avail himself of the provisions of the statute to hold such property exempt from execution. Such a purpose, where the purchase is *bona fide*, is not the subject of averment or proof." *Mortley v. Flanagan*, 38 Ohio St. 401.

Payment by Purchasing Partner. — To entitle a partner to claim his exemption in partnership property purchased by him from his co-partner, it is not necessary that he shall have paid the price to the seller. Therefore, where one member of a firm withdraws and sells his interest to the other, in consideration of the latter's promise to pay him a certain sum and to pay the debts of the firm, the title to the partnership assets vests in the purchasing partner, and he may claim his exemption therein, though he has made no payments. *Louis Voight Sons' Co. v. Larkin*, 6 Ohio Cir. Dec. 124, 12 Ohio Cir. Ct. Rep. 751.

5. **Division of Property.** — *Aiken v. Steiner*, 98 Ala. 355, 39 Am. St. Rep. 58, citing 17 AM. AND ENG. ENCYC. OF LAW (1st ed.) 1336; *Goudy v. Werbe*, 117 Ind. 154; *Worman v. Giddey*, 30 Mich. 151. See also *Wells v. Ellis*, 68 Cal. 243; *Weinrich v. Koelling*, 21 Mo. App. 133; *Swearingen v. Bassett*, 65 Tex. 267. Compare *as contra*, *In re Sauthoff*, 8 Biss. (U. S.) 35.

In *Gill v. Lattimore*, 9 Lea (Tenn.) 381, it was held that the members of a partnership could not divide the assets of the firm and hold them in severalty as exempt against the claims of partnership creditors; but in this case the partners before the division had made an assignment for the benefit of creditors.

sold to one of the partners, or divided, after the levy of an execution, for the levy creates a lien which they cannot divest.¹

(d) *Insolvency of Firm.* — The mere insolvency of the firm at the time of the conversion of partnership into individual property by a sale or division between the partners does not affect the right to claim an exemption.²

(4) *Individual Property Used by Firm.* — The fact that partners use their individual property in the business of the firm does not make it partnership property, nor prevent them from claiming it as exempt from seizure by partnership creditors.³

18. Limitations as to Value or Amount of Property — *a. IN GENERAL.* — The exemption laws generally limit the value of the property which a debtor may claim as exempt to a certain sum, or limit the number of particular articles which he may claim, and of course his claim cannot exceed the limit.⁴

1. Sale or Division After Levy. — *Richardson v. Adler*, 46 Ark. 43; *Goudy v. Werbe*, 117 Ind. 154; *Gaylord v. Imhoff*, 26 Ohio St. 317, 20 Am. Rep. 762.

Division of partnership property by the partners, or a sale by one to the other, after the levy of an execution for a partnership debt, gives no right to claim any of the property as exempt as against the execution, for the levy gives the execution creditor a lien upon the property "which it is not in the power of the firm, either by sale or by a division between its members, to destroy or in any degree prejudice." *Wise v. Frey*, 7 Neb. 134, 29 Am. Rep. 380.

When partnership property is levied on, and a lien thereby acquired, before dissolution of the firm, and after dissolution and division of the property between the partners the execution is levied on the share allotted to one of the partners, he cannot claim the same as exempt. *State v. Day*, 3 Ind. App. 155.

2. Insolvency of Firm Immaterial. — *Goudy v. Werbe*, 117 Ind. 154; *Mortley v. Flanagan*, 38 Ohio St. 401.

3. Individual Property Used by Firm. — In *Root v. Gay*, 64 Iowa 399, two persons were engaged in the livery business, but the property used in the business belonged to them individually, the only community of interest being in the profits. It was held that the property was not partnership property in such a sense as to prevent the owner from claiming it as exempt from execution. See also *Smith v. Chenault*, 48 Tex. 455.

4. Limitation as to Value. — See *Cook v. Scott*, 6 Ill. 333; *State v. Jungling*, 116 Mo. 162.

Construction of Limitations — *Maine Statute.* — Under a statute exempting to a debtor "one pair of working cattle, or instead thereof, one or two horses not exceeding in value one hundred dollars," and providing that "if he has more than one pair of working cattle, or if the two horses exceed in value one hundred dollars, he may elect which pair of cattle or which of the horses shall be exempted," one horse exceeding one hundred dollars in value is not exempt. *Hughes v. Farrar*, 45 Me. 72.

Under a statute exempting "one or two horses, not exceeding in value one hundred dollars," a debtor cannot claim as exempt a horse worth more than that sum, although it may be the only horse the debtor owns; nor can he protect any portion or interest in it. But if a debtor owns two horses, the aggregate

value of which does not exceed one hundred dollars, he may hold both. If he owns two horses, neither of which is worth one hundred dollars, he may claim either. If one is worth more and the other less than one hundred dollars, he has no election, the latter only being exempt. *Everett v. Herrin*, 46 Me. 357, 74 Am. Dec. 455.

The *Indiana Statute* of 1897 provides that the wages of householders not exceeding twenty-five dollars shall be exempt, and that wages in excess of twenty-five dollars shall not be exempt, while the general law allows six hundred dollars to resident householders only. It is held that these statutes should be construed together, and that the restriction as to the amount of wages exempt to twenty-five dollars applies only to nonresident householders. The provision, it has been held, thus restricting the exemption, does not repeal the general exemption of six hundred dollars to resident householders. *Pomeroy v. Beach*, 149 Ind. 511.

The *Missouri Statute* (Rev. Stat. 1879, § 2343; Rev. Stat. 1889, § 4903), after exempting in different clauses various specific articles, limiting some to a specified value, then declares that all lawyers, physicians, etc., shall have the privilege of selecting "such books as shall be necessary to their profession, in the place of other property herein allowed, at their option." It has been held that this does not exempt a lawyer's library regardless of value, but only so much of it as he may select within the limit of value fixed by the other clauses of the section for the property in lieu of which the books may be selected. *Brown v. Hoffmeister*, 71 Mo. 411.

Kansas Statute. — Under Gen. Stat. Kan., 1889, c. 38, § 3, subdiv. 6, providing that every resident head of a family shall have, among other articles, an exemption of "one wagon, cart, or dray, two plows, one drag, and other farming utensils, including harness and tackle for teams, not exceeding in value three hundred dollars," a debtor is entitled to three hundred dollars worth of "other farming utensils, including harness and tackle for teams," in addition to the articles previously specifically mentioned, for the limitation as to value applies only to the words last quoted. *Donmyer v. Donmyer*, 43 Kan. 444.

Claiming under Two Statutes. — In *Illinois* one statute exempted any personal property not exceeding sixty dollars in value. A subse-

b. VALUATION OF PROPERTY. — In determining the amount of property which may be claimed, the property is to be taken at its fair market value. It is sometimes expressly so declared.¹ Generally the statutes provide for an inventory or schedule and an appraisement to determine the value.²

c. HOLDING PROPERTY BY PAYING EXCESS. — When the statute limits the value of the property that may be claimed as exempt, a debtor cannot select indivisible property exceeding such sum in value, and hold it as exempt on paying the officer the excess.³

d. SUCCESSIVE CLAIMS — DOUBLE EXEMPTION. — When a statute allows a debtor to hold property not exceeding a certain sum in value, he clearly cannot have more than that amount set apart to him at the same time by making several claims.⁴ But he may claim and select his exemption as against each successive execution, provided he does not thereby have set apart to him more than the amount he is entitled to hold.⁵

19. Necessary Property. — Statutes exempting household furniture, wearing apparel, provisions, forage, tools, etc., generally restrict the right to such as

quent statute exempted additional property, and included in terms one horse not exceeding in value one hundred dollars. In *Good v. Fogg*, 61 Ill. 449, 14 Am. Rep. 71, the court held that these statutes were to be construed together according to their spirit, and that a debtor was not limited to selecting a horse not worth more than sixty dollars under the first, or one not worth more than one hundred dollars under the second, but could claim under both a horse not worth more than one hundred and sixty dollars.

1. Valuation of Property. — *Moffett v. Sheehy*, 52 Ill. App. 376.

In the Valuation of Choses in Action, as notes, accounts, etc., the debt or demand is to be taken at its real value, and is not necessarily to be valued at its full amount. *Coppage v. Gregg*, 1 Ind. App. 112.

Debt Secured by Lien. — The fact that a debt is secured by a lien on personal property worth more than the statutory limit as to value does not affect the right to claim the debt as exempt, for the value of the debt is not increased beyond the amount due by the value of the property on which it is secured. *Kennedy v. Smith*, 99 Ala. 87.

Encumbered Property. — If a debtor, under a statute allowing him to select and hold property as exempt, not exceeding a certain sum in value, selects property that is mortgaged or otherwise encumbered, it has been held that he cannot deduct the amount of the incumbrance in determining its value, but the value must be determined regardless of the mortgage. *Moffett v. Sheehy*, 52 Ill. App. 376. It is otherwise by express provision in some states. See *Citizens State Bank v. Harris*, 149 Ind. 268.

License to Sell Intoxicating Liquors Not Property. — A license to sell intoxicating liquors is a mere personal privilege which is neither transferable nor vendible. It confers no vested interest or right of property, and contains no element of a contract and it cannot be considered as property for the purpose of reducing the exemption claim by a debtor to whom it is granted. This is true whether or not the license is intended as a mere police regulation or for the purpose of raising revenue. *Jones v. Motley*, 78 Ala. 370.

2. Inventory or Schedule and Appraisement. — See *infra*, this title, *Enforcement and Protection of the Right — Claiming, Selecting, and Setting Apart of Exemption*.

3. Holding Property Exceeding Specified Value on Paying Officer the Excess. — *Cook v. Scott*, 6 Ill. 333. See also *Waldo v. Gray*, 14 Ill. 184.

4. Double Exemption Not Allowable. — *Weis v. Levy*, 69 Ala. 209, as to which see the next note following.

Pennsylvania. — In *Vogelsong v. Beltzhoover*, 59 Pa. St. 57, a fieri facias and an attachment execution were issued on the same judgment and were running at the same time, and the defendant claimed and received an exemption of three hundred dollars as against the fieri facias. Afterwards funds came into the hands of the garnishee, and the defendant claimed an exemption of three hundred dollars out of them. It was held that he was not entitled thereto under the Act of 1849 exempting "property to the value of three hundred dollars" to be selected by the debtor, as to allow the claim would give the debtor an exemption of six hundred dollars as against the same creditor and the same debt and the same judgment. Compare this case with *Krauter's Appeal*, 150 Pa. St. 47, referred to in the note following.

In *Missouri*, where the statute exempts any property selected by the debtor not exceeding three hundred dollars, it has been held by the appellate court that an execution defendant cannot make several claims of exemption thereunder, where successive levies are made under the same execution on different property; but when a part of his exemptions have been set apart under one levy, the residue may be set apart under the other. *State v. Carroll*, 24 Mo. App. 358.

5. Debtor May Make New Selection. — *Weis v. Levy*, 69 Ala. 209; *Krauter's Appeal*, 150 Pa. St. 47. And see to the same effect *Hanley v. O'Donald*, 30 Pa. St. 261. Compare *Vogelsong v. Beltzhoover*, 59 Pa. St. 57, referred to in the note preceding.

The **Indiana Statute** exempts "an amount of property not exceeding in value six hundred dollars," and provides for an inventory, appraisement, and setting apart of the same. Rev. Stat., 1881, § 703. And it is there held

may be necessary. This feature of the statutes has already been considered in dealing with the particular kinds of property exempted.¹

20. Ownership or Possession of Other Property — a. RIGHT OF SELECTION —

(1) *Exemption of Specific Articles.* — Generally, when the statute exempts specific articles, and a debtor has more of such articles than he is entitled to hold as exempt, he has the right to select which he will hold, and neither the levying officer nor the execution creditor can deprive him of this right by making the selection for him.² When he has an opportunity to make a selection, in cases where a selection is necessary, and fails to do so, a levy may be made on either article.³

that the fact that the exemption has been allowed as against an execution does not prevent the debtor from claiming an exemption in good faith as against an *alias* writ. *Chatten v. Snider*, 126 Ind. 387.

Alabama Statute — Claim and Allotment. — In Alabama, where the statute allows a debtor to hold personal property not exceeding a certain sum in value exempt from execution, and provides for its allotment to him, it is held that he cannot have more than one such exemption at the same time; and therefore, after the full exemption has been once claimed, selected, and allotted, the debtor cannot, so long as he retains the property, and it is undiminished in value, claim any further exemption. *Weis v. Levy*, 69 Ala. 209.

But whenever the property so selected and allotted has been, without his fault, lost to the debtor in whole or in part, either by being taken on judicial process, or by being consumed in the maintenance of himself or his family, or by being applied by him to the payment of debts, or otherwise, or when it has deteriorated in value, the right of exemption secured to him would be impaired if he could not select and retain property notwithstanding the former claim of selection, and he may therefore make a further selection to supply such loss or deterioration. *Weis v. Levy*, 69 Ala. 209. And see Alabama Conference v. Vaughan, 54 Ala. 443.

North Carolina Statute. — In North Carolina, where a statute exempted personal property of the value of five hundred dollars to be selected by the debtor, it was held that a debtor was not restricted to one allotment of exempt property, but might have the allotment renewed from time to time, "so as to keep constantly about him exemptions to the value of five hundred dollars." *Frost v. Naylor*, 68 N. Car. 325. See also *Dean v. King*, 13 Ired. L. (35 N. Car.) 20.

Mississippi Statute. — In *Chandler v. White*, 71 Miss. 161, the statute under the consideration of the court provided that the wages of a laborer having a family, to the amount of one hundred dollars, should be exempt from garnishment or other legal process. It was held that this exemption was not of one hundred dollars yearly or monthly, but could be claimed whenever and as often as wages within the amount exempted should be sought to be subjected by legal process.

Massachusetts and Tennessee decisions are to the same effect as respects wages. *Hall v. Hartwell*, 142 Mass. 447; *Waite v. Franciola*, 90 Tenn. 191.

1. **Such Property as May Be Necessary.** — See *supra*, this section, *Household Goods, Furniture,*

etc.; *Provisions, Forage, Crops, etc.*; *Wearing Apparel, Cloth, etc.*; *Tools, Implements, Instruments, etc.*; *Animals, Vehicles, and Teams.*

2. **Possession of Other Property — Right of Selection in Debtor — Alabama.** — *Ross v. Hannah*, 18 Ala. 125.

California. — *Borland v. O'Neal*, 22 Cal. 504.

Illinois. — *Moffett v. Sheehy*, 52 Ill. App. 376.

Iowa. — *Parker v. Haley*, 60 Iowa 325.

Kansas. — *Rice v. Nolan*, 33 Kan. 28; *Nuzman v. Schooley*, 36 Kan. 177.

Kentucky. — *Robinson v. Myers*, 3 Dana (Ky.) 441; *Stirman v. Smith*, (Ky. 1888) 10 S. W. Rep. 131; *Whittington v. Pence*, (Ky. 1897) 38 S. W. Rep. 843.

Maine. — *Colson v. Wilson*, 58 Me. 416.

Massachusetts. — *Tryon v. Mansir*, 2 Allen (Mass.) 219.

Michigan. — *Bayne v. Patterson*, 40 Mich. 658; *Ganong v. Green*, 71 Mich. 10.

Minnesota. — *Anderson v. Ege*, 44 Minn. 216.

Nebraska. — *Conway v. Roberts*, 38 Neb. 456.

Nevada. — *Elder v. Williams*, 16 Nev. 416.

New Hampshire. — *Greenleaf v. Sanborn*, 44 N. H. 16.

New York. — *Lockwood v. Younglove*, 27 Barb. (N. Y.) 506; *Finnin v. Malloy*, 33 N. Y. Super. Ct. 382.

Tennessee. — *State v. Haggard*, 1 Humph. (Tenn.) 390; *Pyett v. Rhea*, 6 Heisk. (Tenn.) 136; *Clark v. Bond*, 7 Baxt. (Tenn.) 288. *Compare McCoy v. Dail*, 6 Baxt. (Tenn.) 137.

Texas. — *Fuller v. Sparks*, 39 Tex. 136.

Vermont. — *Haskins v. Bennett*, 41 Vt. 698; *Plimpton v. Sprague*, 47 Vt. 467. *Compare Chamberlain v. Whitney*, 65 Vt. 488.

Canada. — *Filion v. Chabot*, 9 Quebec L. R. Super. Ct. 327.

Contra under Former Pennsylvania Statutes. — See *Lindsey v. Fuller*, 10 Watts (Pa.) 144; *Trovillo v. Shingles*, 10 Watts (Pa.) 438; *Hetrick v. Campbell*, 14 Pa. St. 263.

Where the Exemption Is in the Alternative, as, of one thousand two hundred pounds of pork or nine hundred pounds of bacon, the debtor may take both pork and bacon, but the aggregate value of both must not exceed the amount given by the statute. *Byous v. Mount*, 89 Tenn. 361.

3. **Failure to Make Selection.** — *McGee v. Anderson*, 1 B. Mon. (Ky.) 187, 36 Am. Dec. 570. *Colson v. Wilson*, 58 Me. 416; *Chamberlain v. Whitney*, 65 Vt. 488. See *infra*, this title, *Waiver, Forfeiture, and Estoppel.*

When Selection Is Not Necessary. — This rule, of course, does not apply when no selection is necessary. See *infra*, this title, *Waiver, Forfeiture, and Estoppel.*

(2) *Exemption of Property to Be Selected by the Debtor.*—The right of selection is clearly in the debtor under a statute exempting property generally, not exceeding a certain sum in value, to be selected by the debtor.¹

(3) *Effect of Incumbrances.*—When the debtor has a right to select the property which he will hold as exempt, he cannot be compelled to select property that is mortgaged or pledged or otherwise encumbered, instead of unencumbered property.²

b. SURRENDER OF OTHER PROPERTY—(1) *In General*—*Prevailing Rule.*—By the weight of authority, both under statutes exempting specific articles and under statutes exempting property generally not exceeding a certain sum in value, the debtor's right to select and hold particular property as exempt is not in any way affected by the fact that he owns other property which is subject to execution, and which he has not surrendered to the officer.³

In *Wentworth v. Young*, 17 Me. 70, where a statute declared that two swine, one of which should not exceed the weight of one hundred pounds, should be exempt from attachment, execution, and distress, and that where any debtor should own two swine, each exceeding the weight of one hundred pounds, such debtor, by himself or agent, might elect either of the swine to be exempt, it was held that where the debtor had three swine, of which only one exceeded the weight of one hundred pounds, this one was exempt, and that the necessity of an election by the debtor which he would retain existed only where he had two swine, each exceeding the weight of one hundred pounds.

Kentucky.—In *McGee v. Anderson*, 1 B. Mon. (Ky.) 187, 36 Am. Dec. 570, under a statute exempting one work beast or a yoke of oxen, it was held that where a debtor owned two horses and a yoke of oxen, an officer could levy on any one of them before an election by the debtor, and that he would not become liable as a trespasser *ab initio* for failure to surrender the horse or yoke of oxen levied on when afterwards selected and claimed by the debtor, unless the debtor tendered in lieu thereof other property of equal value.

But in *Stirman v. Smith*, (Ky. 1888) 10 S. W. Rep. 131, under a statute exempting two cows and calves, it was held that a levy on the only cow and calf owned by a debtor was illegal, though he also owned heifers which he might have claimed as exempt, and though he did not offer to deliver them or any other property to the officer in lieu of the cow and calf. The reason given by the court for this decision was that the cow and calf, and not the heifers, were primarily exempt, and that the officer was bound to take notice of this without any word from the debtor, whereas in *McGee v. Anderson*, 1 B. Mon. (Ky.) 187, 36 Am. Dec. 570, neither of the horses nor the yoke of oxen was primarily exempt any more than either of the others.

1. Exemption of Property Generally to a Certain Value.—*Bray v. Laird*, 44 Ala. 295; *Kennedy v. Smith*, 99 Ala. 89; *Cook v. Scott*, 6 Ill. 333; *Bingham v. Maxcy*, 15 Ill. 290; *Austin v. Swank*, 9 Ind. 109; *Elliott v. Flanigan*, 37 Pa. St. 425.

2. Debtor Need Not Select Encumbered Property—*California.*—*McCue v. Tunstead*, 65 Cal. 506.

Kansas.—*Rice v. Nolan*, 33 Kan. 28.

Massachusetts.—*Tryon v. Mansir*, 2 Allen (Mass.) 219.

Michigan.—*Bayne v. Patterson*, 40 Mich. 658; *Baldwin v. Talbot*, 43 Mich. 11; *Ganong v. Green*, 71 Mich. 10.

New Hampshire.—*Greenleaf v. Sanborn*, 44 N. H. 16.

Compare *McCoy v. Dail*, 6 Baxt. (Tenn.) 137.

In *Cowan v. Phillips*, 122 N. Car. 70, it was held that, in allowing exemptions to a debtor, property on which there was no lien should be first exhausted.

3. Right of Selection Not Affected by Possession of Other Property—*Articles Specifically Exempted*—*Alabama.*—*Ross v. Hannah*, 18 Ala. 125; *Williamson v. Harris*, 57 Ala. 40, 29 Am. Rep. 707; *Bray v. Laird*, 44 Ala. 296.

Arkansas.—*Atkinson v. Gatcher*, 23 Ark. 101.

Illinois.—*Amend v. Murphy*, 69 Ill. 337.

Indiana.—*Haas v. Shaw*, 91 Ind. 384, 46 Am. Rep. 607.

Michigan.—*Baldwin v. Talbot*, 43 Mich. 11.

Minnesota.—*Anderson v. Ege*, 44 Minn. 216.

Missouri.—*State v. Finn*, 8 Mo. App. 261.

Nevada.—*Elder v. Williams*, 16 Nev. 416.

New York.—*Wheeler v. Cropsey*, 5 How. Pr. (N. Y. Supreme Ct.) 288; *Smith v. Slade*, 57 Barb. (N. Y.) 637; *Wilcox v. Hawley*, 31 N. Y. 648; *Becker v. Becker*, 47 Barb. (N. Y.) 497; *Wolf v. Farley*, (C. Pl.) 16 N. Y. Supp. 168.

Compare, as *contra*, the dictum in *Wallace v. Collins*, 5 Ark. 46, 39 Am. Dec. 359.

Property to Be Selected by Debtor.—An *Indiana* statute exempted three hundred dollars' worth of property to be selected by the debtor. In *Austin v. Swank*, 9 Ind. 109, after a debtor's property had been levied on, and he had made his selection, and the selected property had been set apart to him as exempt, it was levied upon and sold under another execution. In an action for the value of the property it was held that it was no defense to show that he had other property than that levied upon. When the selection has been made, said the court, "the officer must look to such other property as the debtor may possess, and he cannot justify himself in the sale of the selected property on the ground that the debtor had other property."

See also *Megehe v. Draper*, 21 Mo. 510, 64 Am. Dec. 245; *State v. Kurtzborn*, 2 Mo. App. 335; *Duncan v. Frank*, 8 Mo. App. 286; *Bray v. Laird*, 44 Ala. 295; *Shaw's Appeal*, 49 Pa. St. 179.

In Some States this rule is not recognized, but a debtor, if he owns more property than he is entitled to hold as exempt, is required to surrender or point out to the officer all property other than that selected, or specifically exempt, in order that by the sale thereof, or of so much as may be necessary, the money due on the execution may be made.¹

(2) *Effect of Fraud.* — In some states, but not in all, fraudulent concealment or retention of other property than that selected will operate as a forfeiture of the right of exemption,² or the debtor may be held to have selected the property fraudulently concealed or retained.³

c. OTHER PROPERTY NOT OWNED BY THE DEBTOR. — In any case, in order that the possession of other property may affect a debtor's right of exemption, the property must be owned by him,⁴ unless the statute expressly puts property in his possession on the same footing as property which he owns.⁵

Selection by Officer. — When the statute gives the debtor the right to select the property which he will hold as exempt, he cannot be deprived of such right by the officer. If the officer excludes him from the premises and assumes to make the selection for him, he is not bound thereby, and does not lose his right of selection. *Bayne v. Patterson*, 40 Mich. 658.

1. **Contrary Rule in Some States Requiring Surrender of Other Property** — *California.* — *Keybers v. McComber*, 67 Cal. 395.

Illinois. — *Cook v. Scott*, 6 Ill. 342; *People v. Palmer*, 46 Ill. 398, 95 Am. Dec. 418; *Smothers v. Holly*, 47 Ill. 331; *Bonnell v. Bowman*, 53 Ill. 460; *Bingham v. Maxcy*, 15 Ill. 290.

Kentucky. — *McGee v. Anderson*, 1 B. Mon. (Ky.) 187, 36 Am. Dec. 570.

Tennessee. — *Wolfenbarger v. Standifer*, 3 Sneed (Tenn.) 659; *Pyett v. Rhea*, 6 Heisk. (Tenn.) 136.

Texas. — See *Fuller v. Sparks*, 39 Tex. 136; *Pardue v. Recer*, (Tex. Civ. App. 1898) 46 S. W. Rep. 112.

Ownership of No More Property than Is Exempted. — A debtor who has no more property than the law allows him to claim as exempt is not bound to turn out any part of such property to be levied upon, as a condition upon which he may claim the rest. *Vaughan v. Thompson*, 17 Ill. 78.

Property Not Within the Jurisdiction. — In *Robinson v. Myers*, 3 Dana (Ky.) 441, under a statute exempting one work beast, it was held that, while a debtor owning several work beasts might elect which he would hold as exempt, he could not, where he owned one not within the jurisdiction, though subject to his control, and another within the jurisdiction, select the latter, and thus defeat the levy as to both.

In *Anderson v. Ege*, 44 Minn. 216, on the other hand, it was held that the owner of a horse levied upon might avail himself of the right to select that horse as exempt, without bringing his other horses from another county so that the officer might levy upon them.

Exemption to "Family" — Ownership of Other Property by Wife. — In *Alabama* it has been held that a statute exempting furniture, bedding, provisions, cows, working animals, etc., "for the use of every family in this state," without saying anything about the ownership

of the property, does not exempt a horse belonging to a debtor, when his wife has horses or mules, secured to her separate use by deed of settlement, and they are used on the farm occupied by her husband and herself, as the statute is intended only to secure such property for the use of the family, and if the family has such property, the ownership as between the members of the family is immaterial. *Simonds v. Gulley*, 7 Ala. 721.

Excuse for Not Delivering Other Property. — When a debtor files a proper schedule of all his property, and selects part of it as exempt, the sheriff cannot levy on such part and refuse to recognize the selection because of the debtor's failure to deliver other property included in the schedule, but which is held under execution by the sheriff of another county, who refuses to give it up. The inability of the debtor to deliver the other property excuses him. *Keefer v. Guffin*, 38 Ill. App. 622.

2. **Effect of Fraud, Concealment, etc.** — As to the effect of fraud on the part of a debtor in concealing his property, or otherwise acting fraudulently as against creditors, see *infra*, this title, *Waiver, Forfeiture, and Estoppel — Forfeiture*.

3. **Concealment as a Selection.** — *Ross v. Hannah*, 18 Ala. 125. And see *Fuller v. Sparks*, 39 Tex. 136.

4. **Property Not Owned by the Debtor.** — In *Hetrick v. Campbell*, 14 Pa. St. 263, where the statute exempted one yoke of oxen when owned by any person actually engaged in the science of agriculture, it appeared that a person engaged in agriculture had in his possession two yoke of oxen, but that he had sold one of them, and received back the possession of them on the same day for the purpose of breaking them for the purchaser. It was held that the sale, though void as to creditors of the seller, was valid as to the seller, and divested him of the ownership, and that the other yoke, still owned by him, was exempt.

And in *Dow v. Smith*, 7 Vt. 465, 29 Am. Dec. 202, it was held that the fact that a debtor retained in his possession a cow which he had sold to another, so that the sale would be ineffectual as against *bona fide* purchasers from him and attaching creditors, did not prevent him from claiming another cow under a statute exempting his only cow.

5. **Statute Exempting Property "in Possession" of the Debtor.** — In *Lindsey v. Fuller*, 10 Watts

d. OTHER PROPERTY SOLD CONDITIONALLY. — Property which a debtor has sold, and delivered to the purchaser, on condition that it is to become his on paying for it, is not owned by the debtor to such an extent as to prevent him from claiming other property as exempt.¹

e. OTHER PROPERTY MORTGAGED OR PLEDGED. — As to whether a debtor's right to claim particular property as exempt is affected by the ownership of other property which he has mortgaged or pledged, the decisions are conflicting.²

f. OWNERSHIP OF HOMESTEAD. — In many of the states chattel or personal property exemptions are allowed in addition to the homestead exemption. Sometimes, however, they are given in lieu of a homestead, or are given to those only who have no land that is subject to exemption as a homestead, and in such a case they cannot be claimed by one who owns a homestead, or who owns property subject to homestead exemption, as the case may be.³

Lessees of Property. — It has been held that a lessee for a single year of a house, stable, and parcel of land which he does not claim as a homestead is not the owner of a homestead within the meaning of such statute, though the homestead act contains a clause extending its benefits to lessees.⁴ The contrary was held, however, with respect to a lessee for life.⁵

Pa.) 144, the statute before the court (Act of 1828) exempted articles "owned by or in the possession of any debtor," and it was held that where a debtor had two cows in his possession, one owned by him, and the other hired for a term of years, so as to give him a vested interest subject to sale under execution for his debts, the one owned by him might be levied on and sold under execution. See also *Trovillo v. Shingles*, 10 Watts (Pa.) 438.

Title in Doubt. — In *Trovillo v. Shingles*, 10 Watts (Pa.) 438, where a sheriff had levied on a cow claimed as exempt by law from execution, and it appeared that the debtor was then in possession of another, the question of ownership of which he himself had made doubtful, it was held that the sheriff, even if he had heard the testimony in regard to it, and it had pointed to the fairness of the third person's title, was not bound to act at his peril by relinquishing the cow levied on, and that he was not liable to the debtor in trespass for selling it.

1. Property Sold and Delivered Conditionally. — *Wilkinson v. Wait*, 44 Vt. 508, 8 Am. Rep. 391.

2. Other Property Mortgaged. — In *Illinois* it has been held that failure of the debtor to deliver to the officer other property than that which he claims as exempt, in accordance with the rule in that state, is not excused by the fact that the other property was mortgaged, if he did not inform the officer of the facts, so as to give him an opportunity of ascertaining the validity and priority of the mortgage, and enable him to act advisedly. *Smothers v. Holly*, 47 Ill. 331.

Other Property Pledged. — But in *California* it has been held that a farmer's claim of a horse as exempt cannot be defeated by showing that he owns other horses pledged for a debt due from him, and in the possession of the pledgee. *McCue v. Tunstead*, 65 Cal. 506. See *supra*, this section, *Effect of Incumbrances*.

3. Persons Not Owners of a Homestead. — See Code Civ. Pro. *Nebraska*, § 521; Rev. Stat. *Ohio*, § 5441.

Construction of Nebraska Statute. — In a

statute exempting a certain sum in personal property to "all heads of families who have neither lands, town lots, or houses subject to exemption as a homestead," the words "subject to exemption as a homestead" do not refer to houses alone, but apply to lands and town lots as well, and a debtor is entitled to the personal property exemption though he may own unoccupied lands or town lots, in which no homestead right exists. *Widemair v. Woolsey*, 53 Neb. 468. And see *infra*, this note.

Homestead Owned by Wife — Ohio Statute. — Under the provision of the Ohio statute giving the right of exemption out of personal property to "husband and wife living together, * * * and not the owner of a homestead," when real estate occupied as a family homestead is owned either by the husband or the wife neither can claim the personal property exemption. *Dwinell v. Edwards*, 23 Ohio St. 603; *Lippelman v. Boning*, 3 Cinc. Wkly. L. Bul. 296.

Abandonment of Wife's Homestead. — A husband is entitled to the benefit of such a statute notwithstanding the fact that his wife owns a house and lot, if they have moved from it and no longer occupy it as a homestead. *Ryan v. Miller*, 40 Ohio St. 232.

Time of Inquiry as to Ownership of Homestead. — Whether or not a person is the owner of a homestead or of land subject to exemption as a homestead, so as to prevent him from claiming an exemption of personal property levied upon or seized on attachment, is to be determined as of the time of the levy or seizure. If he owns a homestead or such land at that time, he cannot, by afterwards transferring it, render the personal property exempt. *Kilpatrick-Koch Dry Goods Co. v. Callender*, 34 Neb. 727.

4. Lessees of Property — Lease for a Year. — *Colwell v. Carper*, 15 Ohio St. 279.

5. Lessee for Life. — In *Staley v. Woolley*, 8 Ohio Cir. Ct. Rep. 35, 1 Ohio Dec. 679, however, it was held that one who was in possession of land, with a house thereon, and

Encumbered Homestead. — When a statute gives a right of exemption out of personal property to persons who do not own a homestead, the fact that a home is mortgaged does not entitle the owner to claim the benefit of the statute if he occupies the house as a homestead; and it makes no difference that the mortgage is for more than the property is worth or that there has been a default.¹

21. Property of Municipal Corporations and Counties. — In some states it is expressly provided by statute that the property of counties and municipal corporations used for county and municipal purposes shall be exempt from levy and sale on execution or other process.²

X. LIABILITIES AS AGAINST WHICH EXEMPTIONS MAY BE CLAIMED — 1. In General. — The exemption laws do not allow the exemption to be claimed as against all liabilities indifferently. By virtue of express provision in the different statutes themselves, or by virtue of constitutional provisions, the statutes do not apply as against liabilities on contracts entered into before their enactment. And in many states, as will be shown in this section, the statutes expressly except particular liabilities, as debts for the purchase price of the property claimed, for necessities, or for laborers' wages, and liabilities for tort.³ Sometimes these exceptions relate to the homestead only, and do not apply to the personal property exemption.⁴

occupying the premises as a family residence, under a lease conveying an absolute estate for life and containing provisions forfeiting it only for waste, failure to pay taxes, and permitting it to be sold on execution, was the owner of a homestead within the meaning of the statute.

1. Encumbered Homestead. — *State v. Krumpus*, 13 Neb. 321; *Bartram v. McCracken*, 41 Ohio St. 377; *Olding v. Kemker*, 15 Cinc. Wkly. L. Bul. 310; *Lippelman v. Boning*, 3 Cinc. Wkly. L. Bul. 296.

Absolute Conveyance — Equitable Mortgage. — The owner of a life estate in lands occupied by him as a family residence, who has conveyed his interest to a creditor with an agreement for a reconveyance upon the payment of the debt, is the owner of a homestead within the meaning of the statute, as the conveyance is an equitable mortgage only. *Biddinger v. Pratt*, 50 Ohio St. 719.

Allowance on Foreclosure of Homestead. — Under the *Ohio* statute, on a foreclosure sale of a homestead to satisfy debts for which there is a lien thereon, the debtor is entitled to the personal property exemption in lieu of homestead, and it has been held that he is entitled thereto before confirmation of the sale. *Carter v. Ross*, 4 Ohio Cir. Dec. 333, 8 Ohio Cir. Ct. Rep. 130.

Allowance Out of Proceeds of Foreclosure Sale. — See the title **HOMESTEAD**.

2. Property of Municipal Corporations and Counties. — See *Code Ala.*, 1896, § 2040; *Birmingham v. Rumsey*, 63 Ala. 352; *Murphree v. Mobile*, 104 Ala. 532, 108 Ala. 663; *Ellis v. Pratt City*, 111 Ala. 629, 56 Am. St. Rep. 76. See the titles **COUNTIES**, vol. 7, p. 964; **MUNICIPAL CORPORATIONS**.

3. Repeal of Exceptions as to Pre-existing Claims. — A constitutional provision declaring the right of debtors to enjoy the comforts and necessities of life, and exempting a reasonable amount of property generally from forced sale, does not supersede or repeal a statute denying the right of exemption as against a

debt incurred for property obtained under false pretenses, or where the property was obtained on a contract made prior to the adoption of the constitution. *Sundback v. Griffith*, 7 S. Dak. 109.

4. Exceptions Relating to Homestead Only — Arkansas. — In the Arkansas Constitution of 1868, section 1 of article 12, relating to exemptions, provides for the exemption of personal property, and contains no exception in favor of debts contracted for labor, etc. Section 2 declares that the homestead of a married man shall not be encumbered except for taxes, laborers' and mechanics' liens, etc. And section 3 defines the homestead, and declares that it shall be exempt from sale on execution, etc., "but no property shall be exempt from sale for taxes, for the payment of obligations contracted for the purchase of said premises, for the erection of improvements thereon, or for labor performed for the owner thereof." In *Parham v. McMurray*, 32 Ark. 261, it was held that the exception of debts contracted for labor (and the same must be true of the other exceptions) contained in section 3 relates to the homestead only, and does not apply to labor performed on personal property.

Illinois. — *Rev. Stat.*, c. 52, § 1 (Act April 30, 1873), exempts a homestead for the benefit of every householder having a family. Section 2 provides for the continuance of such exemption after the death of the householder. Section 3 declares: "But no property shall, by virtue of this act, be exempt from sale for nonpayment of taxes or assessments, or for a debt or liability incurred for the purchase or improvement thereof." Sections 4 to 12 all relate to the homestead. Section 13 (Act May 24, 1877) provides for an exemption of personal property, without any exception of debts due for purchase money or improvements, or of taxes or assessments. In *Wells v. Lilly*, 86 Ill. 317, it was held that the exceptions in section 3 relate to real estate only, and that there were no such exceptions with respect to the personal property exemption. This was again

2. Constitutionality of Exceptions. — Such provisions cannot be sustained if they are in conflict with the provisions relating to exemptions contained in the state constitution.¹ They are not unconstitutional, however, as being special laws or class legislation, etc.²

3. Exceptions Not Retroactive. — A provision excepting from the operation of the exemption law debts due for particular services or property is not to be construed as retroactive so as to apply to services or property rendered or furnished before its enactment.³

4. Pre-existing Contracts and Liens — *a. RETROACTIVE CONSTRUCTION OF LAWS.* — In a number of states, prior to a decision by the Supreme Court of the United States, hereafter referred to, as to the constitutionality of retroactive exemption laws, statutes of exemption were so construed as to give them a retroactive operation, and exempt property from seizure and sale to satisfy debts contracted prior to their enactment, even when the express terms of the statutes did not require such a construction.⁴ And in some cases the statutes were so construed as to defeat pre-existing liens.⁵

Contrary Construction. — Other courts held that they were not to be construed so as to give them a retroactive effect, unless such an intention on the part of the legislature was clearly expressed.⁶

b. EXPRESS CONSTITUTIONAL OR STATUTORY EXCEPTION — (1) *In General.* — An express prohibition against retroactive exemption laws is to be

decided in *Howard v. Lakin*, 88 Ill. 36, and *Shear v. Reynolds*, 90 Ill. 238.

Georgia. — In *Phelps v. Porter*, 40 Ga. 485, however, it was held that the exception in the Georgia Constitution of 1868 of debts due for purchase money applied as well to personalty as to realty, though a strict construction of the words of the constitution would confine it to realty. "The equity" of the provision, said the court, extended it to the personalty.

1. Constitutionality of Exceptions. — Thus, if the state constitution expressly directs that a reasonable amount of property shall be exempt from seizure or sale for the payment of "any debt or liability," the legislature has no power, in enacting an exemption law, to provide that the right of exemption shall not exist as against certain debts, as against debts for wages due clerks, laborers, and mechanics. *Tuttle v. Strout*, 7 Minn. 465, 82 Am. Dec. 108.

Power of Legislature to Give Lien. — Under such a provision the legislature cannot create an involuntary lien as against the right to claim property as exempt, but it may provide for a lien to be created by the voluntary act of the debtor. Thus in *Minnesota* it has been held that such a provision does not prevent the legislature from giving livery-stable keepers a lien, as against the right to claim an exemption, on animals cared for under a contract with the owner, as it does not prevent the owner of property from voluntarily giving a lien, and thereby waiving his exemption right as to particular property. *Flint v. Luhrs*, 66 Minn. 57.

A decision in *Florida* does not go quite so far, but in that state the constitution expressly exempts property. It is there held that the legislature cannot except claims for rent, and give landlords a lien, superior to the right of exemption, on all the property of the tenant used on the leased premises; but that it may give such a lien on agricultural products grown on the leased premises, as "the land rented [in such a case] is regarded as such a

factor in the production of the crops as to subordinate the title of the tenant thereto to the superior or paramount lien for the use and occupation of the land." *Hodges v. Cooksey*, 33 Fla. 715. See *infra*, this section, *Liens Enforceable Against Exempt Property*.

2. Not Special Laws, Class Legislation, etc. — In *McBride v. Reitz*, 19 Kan. 123, a provision in the *Kansas* exemption law that none of the personal property mentioned in the act should be exempt from attachment or execution for the wages of any clerk, mechanic, laborer, or servant, was held constitutional and valid, as against the objection that it was "unequal and partial legislation, class legislation, and not within the powers conferred on a legislative body," and that it was in contravention of a constitutional provision that "all laws of a general nature shall have a uniform operation throughout the state; and in all cases where a general law can be made applicable, no special law shall be enacted."

3. Exceptions Not Retroactive. — *Moore v. McCown*, 64 Ga. 617.

4. Pre-existing Contracts — *Statutes Construed Retroactively* — *Michigan*. — *Rockwell v. Hubbell*, 2 Dougl. (Mich.) 197, 45 Am. Dec. 246.

Minnesota. — *Grimes v. Byrne*, 2 Minn. 89.

New York. — *Morse v. Gould*, 11 N. Y. 281, 62 Am. Dec. 103, *overruling Quackenbush v. Danks*, 1 Den. (N. Y.) 128, 3 Den. (N. Y.) 594, 1 N. Y. 129.

North Carolina. — *Hill v. Kessler*, 63 N. Car. 437; *McKeithan v. Terry*, 64 N. Car. 25.

Pennsylvania. — *Baldy's Appeal*, 40 Pa. St. 328; *Hill v. Hill*, 42 Pa. St. 108; *Pittman's Appeal*, 48 Pa. St. 315; *Smith's Appeal*, 23 Pa. St. 310. *Compare Neff's Appeal*, 21 Pa. St. 243.

And see the title *HOMESTEAD*.

5. Statutes Construed to Defeat Pre-existing Liens. — See the title *HOMESTEAD*.

6. Statutes Not Construed Retroactively. — *Millay v. White*, 86 Ky. 170; *Taylor's Succession*, 10 La. Ann. 509; *Harris v. Austell*, 2 Baxt.

found in some of the state constitutions.¹ And frequently the exemption laws themselves expressly provide that they shall apply only as against judgments or liabilities on contracts entered into after their enactment, or after a specified date subsequent to their enactment.²

(2) *Retroactive Statutes Impair the Obligation of Contracts.* — The cases referred to under the second and third paragraphs preceding are now of little practical importance, for it has been virtually settled by a decision of the Supreme Court of the United States, overruling dicta to the contrary in earlier cases, that exemption laws which allow an exemption of property as against judgments founded upon contracts entered into before their enactment, and when there was no right of exemption, or which operate to defeat existing liens, are violative of the provision of the Federal Constitution prohibiting the states from passing any law impairing the obligation of contracts.³ Many of

(Tenn.) 148; *Seamans v. Carter*, 15 Wis. 548, 82 Am. Dec. 696; *Dopp v. Albee*, 17 Wis. 590.

1. **Prohibition of Retroactive Laws.** — See *Cunningham v. Gray*, 20 Mo. 170.

2. **Express Exception of Pre-existing Contracts.** — See *Smith v. Brown*, 28 Miss. 810.

Construction of Statutes. — In a statute providing that "so much of any debt which has accrued by reason of the personal services of the debtor as shall not exceed fifty dollars * * * shall be exempted and not liable to be taken by foreign attachment or execution; but this provision shall not apply to any debt due" at a certain date, the "delt" intended by the last clause is the debt due to the debtor from the garnishee, and not the debt owed by him to the attaching creditor. *Burns v. Plame, etc., Mfg. Co.*, 56 Conn. 526.

What Are "Contracts" Within the Meaning of the Exception. — When the statute expressly or impliedly excludes from its operation "contracts," or liability on "contracts," or debts "contracted," entered into, or created prior to its enactment or prior to a specified date, it has reference to contracts entered into between the parties, upon which judicial proceedings may be or have been instituted, and not to legal steps or process that may be allowed to the defendant in the course of suit. *Smith v. Brown*, 28 Miss. 813.

Delivery Bond. — For this reason, when a statute of exemption in terms applies only as to contracts made after a certain date, the exemption cannot be claimed as against an execution issued on a forfeited delivery bond given after such date to procure the release of property from the levy of an execution on a judgment rendered on a contract entered into by the defendant before such date. *Smith v. Brown*, 28 Miss. 810.

Pre-existing Debts — Effect of Repealing Clause. — A statute of exemption providing that it shall apply only to debts subsequently contracted, and repealing prior statutes, does not repeal the prior statutes as to debts previously contracted, but as against those debts exemptions may still be claimed under the pre-existing statutes. Though the repealing clause may be peremptory, if looked at alone, it must be read with and is impliedly qualified by the provision that the statute shall apply only to debts subsequently contracted. "The plain meaning of this is not only that for future transactions there shall be a new law, but that the repealing clause is intended to

affect only such cases. When it declares that it shall not operate on old debts, it excludes its repealing clause from operating upon them." *Mardis v. Clarke*, 19 Pa. St. 386.

3. **Retroactive Statutes Impair the Obligation of Contracts — Federal Decisions.** — In *Bronson v. Kinzie*, 1 How. (U. S.) 311, it was said by Chief Justice Taney that the legislature of a state might as against existing debts exempt tools, implements, and other property from liability to execution. "Regulations of this description," he said, "have always been considered, in every civilized community, as properly belonging to the remedy, to be exercised or not by every sovereignty, according to its own views of policy and humanity. It must reside in every state to enable it to secure its citizens from unjust and harassing litigation, and to protect them in those pursuits which are necessary to the existence and well-being of every community. And although a new remedy may be deemed less convenient than the old one, and may in some degree render the recovery of debts more tardy and difficult, yet it will not follow that the law is unconstitutional."

There is a dictum of Mr. Justice Woodbury to the same effect in *Planters' Bank v. Sharp*, 6 How. (U. S.) 330. See also *In re Owens*, 6 Biss. (U. S.) 434.

In *Gunn v. Barry*, 15 Wall. (U. S.) 610, the dicta in these cases were in effect overruled, and it was held (*reversing* a decision by the Supreme Court of Georgia, *Gunn v. Barry*, 44 Ga. 353) that a homestead exemption law was unconstitutional as impairing the obligation of contracts, if construed retroactively, so as to defeat the lien of a judgment existing before its enactment or adoption. This decision has been construed as not limited to laws defeating or divesting existing liens, but as including laws exempting property from execution to satisfy debts contracted before their enactment. See the cases cited in the note following.

In the later case of *Edwards v. Kearzey*, 96 U. S. 595, the Supreme Court went further than the actual decision in *Gunn v. Barry*, 15 Wall. (U. S.) 610, and held, without regard to any question of defeating liens, that any statute exempting property, or materially increasing the amount of property exempted, as against a debt on a pre-existing contract, is in violation of the constitution.

See also the title IMPAIRMENT OF OBLIGATION OF CONTRACTS.

the state courts had so decided previous to this decision, and since then, of course, all have recognized and followed it.¹

Former Decisions to the Contrary. — Formerly many of the state courts, some of them following the dicta in the earlier opinions of the Supreme Court of the United States, held that retroactive exemption laws were not unconstitutional.² But these decisions are now of no importance, and most of them have been expressly or in effect overruled.³

(3) *Property Acquired After Enactment of Law.* — The rule that retroactive exemption laws are unconstitutional applies as to property acquired after their enactment as well as to that acquired before.⁴

(4) *Amendment or Substitution of Statutes.* — Whether the legislature of a state can constitutionally amend former statutes of exemption, or substitute new statutes, so as to affect debts previously contracted, depends upon the circumstances. Modifications of the law which do not materially affect or impair the remedy of existing creditors are not unconstitutional.⁵

Restriction of Former Exemptions. — Thus a creditor cannot complain if the right of exemption existing when the contract under which his claim arose was entered into is restricted, for in such a case his remedy is not impaired.⁶

Increase of Amount of Exemption. — But the legislature has no power materially to increase the amount of property which a debtor may claim as exempt, so as to affect existing creditors.⁷ The dicta in some of the cases are broad enough to exclude the power to make any increase at all as against existing debts.⁸

1. *State Decisions to the Same Effect* — *Alabama.* — *Wilson v. Brown*, 58 Ala. 62, 29 Am. Rep. 727; *Nelson v. McCrary*, 60 Ala. 301; *Fearn v. Ward*, 65 Ala. 33.

Georgia. — *Jones v. Brandon*, 48 Ga. 593; *Gunn v. Thornton*, 49 Ga. 381; *Shipp v. Smith*, 76 Ga. 1.

Kentucky. — *Kibbey v. Jones*, 7 Bush (Ky.) 243.

Louisiana. — *Taylor's Succession*, 10 La. Ann. 509; *Lavillebeuvre v. Frederic*, 20 La. Ann. 374.

Minnesota. — See *Tillotson v. Millard*, 7 Minn. 513, 82 Am. Dec. 112.

Mississippi. — *Johnson v. Fletcher*, 54 Miss. 628, 28 Am. Rep. 388; *Lessley v. Phipps*, 49 Miss. 790; *Pennington v. Seal*, 49 Miss. 518.

Missouri. — See *Cunningham v. Gray*, 20 Mo. 170; *Tally v. Thompson*, 20 Mo. 277; *Harvey v. Wickham*, 23 Mo. 112; *Hockaday v. Sallee*, 26 Mo. 219.

South Carolina. — *Cochran v. Darcy*, 5 S. Car. 125; *Ex p. Hewett*, 5 S. Car. 409; *De La Howe v. Harper*, 5 S. Car. 470.

South Dakota. — *Sundback v. Griffith*, 7 S. Dak. 109.

Virginia. — *Homestead Cases*, 22 Gratt. (Va.) 266, 12 Am. Rep. 507.

Washington. — *Matter of Heibron*, 14 Wash. 536.

See also the title *HOMESTEAD*.

2. *Former Decisions Upholding Retroactive Statutes* — *Alabama.* — *Sneider v. Heidelberg*, 45 Ala. 126.

Georgia. — *Hardeman v. Downer*, 39 Ga. 425; *Pulliam v. Sewell*, 40 Ga. 73; *Gunn v. Barry*, 44 Ga. 351, *reversed* 15 Wall. (U. S.) 610.

Kansas. — *Cusic v. Douglass*, 3 Kan. 123, 87 Am. Dec. 458.

Massachusetts. — *Bigelow v. Pritchard*, 21 Pick. (Mass.) 174.

Michigan. — *Rockwell v. Hubbell*, 2 Dougl. (Mich.) 197, 45 Am. Dec. 246.

Minnesota. — *Grimes v. Bryne*, 2 Minn. 89.

New York. — *Morse v. Goold*, 11 N. Y. 281, 62 Am. Dec. 103, *overruling* *Quackenbush v. Danks*, 1 Den. (N. Y.) 128, 3 Den. (N. Y.) 594, 1 N. Y. 129.

North Carolina. — *Hill v. Kessler*, 63 N. Car. 437; *McKeithan v. Terry*, 64 N. Car. 25.

Pennsylvania. — *Baldy's Appeal*, 40 Pa. St. 328; *Hill v. Hill*, 42 Pa. St. 198.

South Carolina. — *In re Kennedy*, 2 S. Car. 216.

3. See the cases cited in the second and third notes next preceding.

4. *Property Acquired After Passage of Law.* — *Johnson v. Fletcher*, 54 Miss. 628, 28 Am. Rep. 388.

5. *Changes Not Materially Impairing Remedy of Existing Creditors.* — See *Gunn v. Barry*, 15 Wall. (U. S.) 610; *Edwards v. Kearzey*, 96 U. S. 595; *Stephenson v. Osborne*, 41 Miss. 119, 90 Am. Dec. 358; *Garrett v. Cheshire*, 69 N. Car. 396, 12 Am. Rep. 647; *Hill v. Kessler*, 63 N. Car. 437; *Wilson v. Sparks*, 72 N. Car. 208; *Allen v. Shields*, 72 N. Car. 504; *Nichols v. Claiborne*, 39 Tex. 363.

6. *May Restrict Former Exemptions.* — *Garrett v. Cheshire*, 69 N. Car. 396, 12 Am. Rep. 647.

7. *Increase in Amount of Exemption* — *Material Increase* — *United States.* — *Gunn v. Barry*, 15 Wall. (U. S.) 610; *Edwards v. Kearzey*, 96 U. S. 595.

Alabama. — *Wilson v. Brown*, 58 Ala. 62, 29 Am. Rep. 727.

Georgia. — *Bush v. Lester*, 55 Ga. 579.

Mississippi. — *Johnson v. Fletcher*, 54 Miss. 628, 28 Am. Rep. 388; *Lessley v. Phipps*, 49 Miss. 790; *Pennington v. Seal*, 49 Miss. 518.

See also the title *HOMESTEAD*.

What Is a Material Increase. — An extension of the exemption from one horse to two is a material increase within this rule. *Johnson v. Fletcher*, 54 Miss. 628, 28 Am. Rep. 388.

8. *Doctrine that No Increase Is Permissible.* — In *Homestead Cases*, 22 Gratt. (Va.) 294, 12

c. **TIME OF CONTRACTING LIABILITY.** — Ordinarily there is little difficulty in determining when a particular liability was contracted, for the purpose of applying the exemption laws. The general rule is that a statute does not apply to any liability on a contract entered into before the statute was enacted or before the date specified, when it is in terms applicable only as to debts contracted after a certain time. Decisions on this question are referred to in the note below.¹

Am. Rep. 520, it was said by Judge Christian: "There is, I conceive, no well-defined middle ground between holding that none of the debtor's property can, by a subsequent law, be withdrawn from the reach of the creditor, or else admitting that the whole of his estate may be exempted from sale or execution. In my view, the true doctrine, sustained by the great weight of authority, is that such property as was subject to execution at the time the debt was contracted must continue subject to execution until the debt is paid, so long as it remains in the hands of the debtor."

1. **Time of Contracting Debt.** — See *Pryor v. Smith*, 4 Bush (Ky.) 379.

Burden of Proof. — If a creditor claims the right to seize exempt property on the ground that the debt for which the judgment was recovered accrued before the passing of the exemption law, it rests upon him to show the facts that will take the case out of the exemption. *Wheeler v. Cropsey*, 5 How. Pr. (N. Y. Supreme Ct.) 288.

Renewal Notes. — When the statute provides that it shall apply only as against debts contracted after a certain date, it does not apply as against a note given after such date merely in renewal of a note executed before, for the renewal of a note is not a satisfaction of the debt and the creation of a new debt, unless the parties so intend, but merely a change in the evidence of the debt. *Pryor v. Smith*, 4 Bush (Ky.) 379. See also *Lowry v. Fisher*, 2 Bush (Ky.) 70, 92 Am. Dec. 475; *Ladd v. Dudley*, 45 N. H. 61; *Strachn v. Foss*, 42 N. H. 43.

Note Partly in Renewal. — And when a note is given partly in renewal merely of a note given before the statute of exemption took effect, or before the date specified therein for it to take effect, and partly for a debt contracted after such time, the statute does not apply as against so much of the note as is in renewal of the previous note. *Kibbey v. Jones*, 7 Bush (Ky.) 243; *Reed v. Defebaugh*, 24 Pa. St. 495; *Weaver's Estate*, 25 Pa. St. 434.

Note Given in Satisfaction of Former Note or Debt. — A note may, however, be given in satisfaction of a former note or a debt, and not merely in renewal, if the parties intend such a result, and in such a case the debt evidenced by the new note is to be regarded as contracted when the new note is given, and will be governed by the exemption law then in force, and not by that in force when the original note was given. See *Tucker v. Drake*, 11 Allen (Mass.) 145.

Acceptance of New Note Induced by Fraud. — If a debtor, however, induces his creditor to take a new note in satisfaction of an old note, for the purpose of extinguishing the debt and entitling himself to claim an exemption as against liability on the new note under a statute enacted after the old note was given, and

does not disclose his purpose, but assigns a different reason for the exchange, the new note will not, while in the hands of the original party, be held to extinguish the old one, but will be considered merely as a renewal of it, so as to prevent the debtor from claiming the exemption. *Tucker v. Drake*, 11 Allen (Mass.) 145.

Bona Fide Purchasers of Negotiable Paper have a right to rely upon the date of the paper as evidence of the time when it was delivered as between the original parties; and therefore, when a note is dated prior to the date when a statute of exemption takes effect, the exemption cannot be claimed as against liability to a bona fide purchaser of the note, though it may not have been put in circulation until after such date. *Ladd v. Dudley*, 45 N. H. 61.

Sealed Instruments Given for Pre-existing Consideration. — In *North Carolina* it was held that where a bond is given after the passage of an exemption law, or after the date of its taking effect, the debt is contracted when the bond is given, and the exemption can be claimed as against it, although the consideration of the bond may have existed before such date. *Dean v. King*, 13 Ired. L. (35 N. Car.) 20. This seems to follow necessarily where a sealed instrument is taken for a simple contract debt, if the common-law rule that such a substitution merges and extinguishes the simple contract debt is recognized. See the title MERGER.

In *Pennsylvania* it is held that a merger of securities, or of a liability on a pre-existing oral contract, in a contract under seal, is not always an extinguishment of the antecedent debt; that whether or not the new security is to be a satisfaction of the original debt by substitution depends upon the intention of the parties. *Reed v. Defebaugh*, 24 Pa. St. 495. In this case a sealed note was taken by a creditor after a statute of exemption had become operative for a debt by book account contracted before, and an entry was made in the books to balance the account. The note was afterwards transferred, and judgment obtained upon it, and a levy made on the debtor's personal property. It was held that as no intention to extinguish the original debt by taking the sealed note appeared, the debt was to be considered as having been contracted before the statute became operative, and that no exemption could be claimed under it. See also *Weaver's Estate*, 25 Pa. St. 434.

New Promise to Pay Barred Debt. — It has been held that where a debt barred by the statute of limitations is taken out of the statute by a new promise to pay, or an acknowledgment from which a new promise is implied, the new promise, and not the original promise, is the cause of action. And under this doctrine the debt, for the purpose of

d. APPLICATION OF PAYMENTS. — When part of the debt sought to be enforced against exempted property accrued before, and part after, the enactment of the statute of exemption, and payments have been made generally, the law will apply such payments to the first accruing indebtedness.¹

5. Judgments and Liabilities Not Based upon Contract — *a. IN GENERAL.* — When the statute is general, and contains no express restrictions with respect to the nature of the judgment or claim as against which exemptions may be allowed, the right may be asserted as against a judgment or liability based upon a tort,² and, according to some of the decisions, even on a judgment or liability resulting from a crime,³ as well as where the judgment or liability is founded upon contract.

b. EXPRESS RESTRICTION TO LIABILITIES EX CONTRACTU — (1) *In General.* — Generally, however, the statutes either expressly declare negatively that exemptions shall not be allowed in such cases, or declare affirmatively that they shall be allowed as against executions or other process on judgments or liabilities "founded upon contract," or for "debts contracted."⁴

(2) *Judgment or Liability for Tort.* — In several cases it has been held that exemptions may be claimed as against a judgment for a tort under a statute allowing exemptions as against judgments on "any debt," or on "any debt contracted."⁵ By the overwhelming weight of authority, however, such

applying the statute of exemptions, is to be regarded as contracted when the new promise was made. *Grayson v. Taylor*, 14 Tex. 672; *Coles v. Kelsey*, 2 Tex. 541, 47 Am. Dec. 661. This view of the effect of the new promise or acknowledgment is supported by the decided weight of authority. See the title LIMITATION OF ACTIONS.

New Note After Discharge in Bankruptcy. — When a debtor who has been discharged in bankruptcy afterwards executes a new note for a debt from which he was released by the discharge, the original debt is revived only as of the date of the new note, and the exemption law then in force governs as against a judgment on the note. *Willis v. Cushman*, 115 Ind. 100.

Husband's Liability for Wife's Antenuptial Debts. — Where a husband is still liable for the antenuptial debts of his wife, he is, as against a judgment for such a debt, entitled to claim the exemptions allowed by the law in force at the time of his marriage, and the case is not governed by the law in force when his wife contracted the debt, since his liability dates from his marriage. The wife's right of exemption, on the other hand, if she has any, is governed by the law in force at the time when she contracted the debt. *Williams v. Rivercomb*, 31 Ark. 292.

Liability on Administrator's Bond. — An exemption cannot be claimed as against a judgment on an administrator's bond for a devastavit, if the bond was given before the exemption law went into effect, though the devastavit may have been committed, and the judgment therefor recovered, afterwards. *De La Howe v. Harper*, 5 S. Car. 470.

Judgments Covering Both Prior and Subsequent Claims. — It has been held that when a creditor unites in one judgment claims arising prior with those arising subsequent to the time when a statute of exemption took effect, the defendant is entitled to claim the benefit of the statute against the whole judgment, as the plaintiff "cannot by his voluntary act thus

deprive the party against whom the execution issued of a right secured by law." *Bachman v. Crawford*, 3 Humph. (Tenn.) 213, 39 Am. Dec. 163. But see, *contra*, *Smith's Appeal*, 23 Pa. St. 310.

1. Application of Payments. — *Wheeler v. Cropsey*, 5 How. Pr. (N. Y. Supreme Ct.) 288.

2. Exemption Allowed as Against Tort. — See *Conroy v. Sullivan*, 44 Ill. 451; *Burns v. Maryland Mfg. Co.*, 14 Gray (Mass.) 487; *Dellinger v. Tweed*, 66 N. Car. 206.

3. Allowed as Against Judgment in Criminal Prosecution. — See *Loomis v. Gerson*, 62 Ill. 1. But see *infra*, this section, *Debts Due to the State or the United States*.

4. Express Restriction to Liabilities Based on Contract. — Under a *Pennsylvania* statute exempting property as against "judgments obtained upon contract, and upon distress for rent," it was held that the statute applied as against an execution on attachment under the act abolishing imprisonment for debt, if the original judgment was on a contract. *Waugh v. Burket*, 3 Grant's Cas. (Pa.) 319.

Joinder of Causes of Action. — See *infra*, this section, *Joinder of Claims or Causes of Action*.

As to the Showing or Proof of the nature of the judgment or claim, and as to the necessity for recitals in the judgment or execution, etc., see *infra*, this section, *Showing or Proof as to Date or Nature of Judgment or Claim*.

5. Cases Allowing Exemption as Against Tort. — Thus in *North Carolina*, where the constitution exempted property from sale under execution, or other final process, obtained "on any debt" (not debt contracted), it was held that the exemption could be claimed as against an execution on a judgment for tort. The court thought that the term "debt" was not intended to be limited to liabilities arising out of contract, and that the term would include any judgment. *Pearson, C. J.*, dissented. *Dellinger v. Tweed*, 66 N. Car. 206.

And in *Smith v. Omans*, 17 Wis. 395, a *Wisconsin* statute exempting property from forced sale for any debt or liability contracted

statutes, or at least a statute using the latter expression, as well as statutes allowing exemptions as against judgments "founded upon contract, express or implied," do not apply as against torts, but are limited to cases of contract.¹

Particular Torts. — It has therefore been held under such statutes that no exemption can be claimed as against an execution on a judgment in an action of detinue, trespass, or trover,² or in an action on the case for libel and slander,³ or for malpractice by a physician or surgeon,⁴ or in an action at law or a suit in equity for fraud,⁵ or in ejectment or statutory actions in the nature of ejectment,⁶ or in a statutory action against a tenant holding over, based upon wrongful detention.⁷ Exemptions have also been denied as

after a certain date was held to apply as against a judgment in an action for a tort.

And see *Conroy v. Sullivan*, 44 Ill. 451, and *Loomis v. Gerson*, 62 Ill. 1, which are substantially to the same effect.

1. Decisions Denying Exemption as Against Torts — "**Debts Contracted.**" — *Meredith v. Holmes*, 68 Ala. 190; *Vincent v. State*, 74 Ala. 274; *McLaren v. Anderson*, 81 Ala. 106; *State v. Melogue*, 9 Ind. 196; *Lathrop v. Singer*, 39 Barb. (N. Y.) 396; *Schouton v. Kilmer*, 8 How. Pr. (N. Y. Supreme Ct.) 527. And see the cases cited in the notes immediately following.

Judgments Founded on Contract, Express or Implied, do not include judgments for tort. *Davis v. Henson*, 29 Ga. 345; *State v. Melogue*, 9 Ind. 196; *Gentry v. Purcell*, 84 Ind. 83; *Thompson v. Ross*, 87 Ind. 156; *Kenyon v. Gould*, 61 Pa. St. 292.

2. Judgment in Detinue. — A judgment for damages and costs in an action of detinue is based upon tort. The right of the plaintiff, said the *Alabama* court, to recover the value of the hire or use of the property results from the wrongful and tortious act of the defendant in withholding it, and in no sense from a contract, express or implied, on his part, to pay therefor. There is no exemption of property from the satisfaction of such a judgment, either as to damages or as to the costs. *Stuckey v. McKibbin*, 92 Ala. 622.

Judgment in Trover. — *Wright v. Jones*, 103 Ala. 539; *Gentry v. Purcell*, 84 Ind. 83.

Judgment for Trespass Against Person or Property. — *Meredith v. Holmes*, 68 Ala. 190; *Lathrop v. Singer*, 39 Barb. (N. Y.) 396.

3. Judgment for Libel or Slander. — *Davis v. Henson*, 29 Ga. 345; *State v. Melogue*, 9 Ind. 196; *Kenyon v. Gould*, 61 Pa. St. 292.

4. An Action Against a Physician or Surgeon for Malpractice may be either in tort or contract. If the former, exemptions cannot be claimed as against an execution on the judgment, but if the latter, they can be claimed. See *De Hart v. Haun*, 126 Ind. 378. And see *infra*, this subdivision, *Judgments in Actions Ex Contractu*.

In the case just cited, in an action against a physician for damages for malpractice, the complaint, after alleging that the plaintiff had injured his right shoulder and arm, alleged that "the defendant, being then a practicing physician and surgeon, as such undertook faithfully, skilfully, and diligently to treat and set, and endeavor to cure and heal, said arm and shoulder," and that owing to his lack of skill, his negligence, etc., he injured the plaintiff, etc. It was held that the action was in tort, and not on contract, and that as against

a judgment recovered against the defendant he was not entitled to the benefit of the exemption law.

5. Judgment or Decree for Fraud. — *Massie v. Enyart*, 33 Ark. 688. And see *Robinson v. Wiley*, 15 N. Y. 493.

In *Nowling v. McIntosh*, 89 Ind. 593, a widow, by fraudulently concealing an antenuptial contract by which she had relinquished all interest in her husband's estate, obtained property from his administrator as of right as widow, and for this wrong the administrator sued her and obtained judgment. It was held that the judgment was for a tort, and not for violation of the antenuptial contract, and that she could not claim exemptions from execution issued upon it.

If, however, a man contracts a debt fraudulently, as where he purchases goods on credit and obtains credit by false representations, and his creditor sues, not for the fraud, but on the debt, an exemption may be claimed. See *Robinson v. Wiley*, 15 N. Y. 489. See also *infra*, this subdivision, *Judgments in Actions Ex Contractu*.

6. Ejectment and Similar Statutory Actions. — The action of ejectment sounds in tort, and not in contract, though damages may be recovered therein for rents and profits. "The complaint in ejectment is clearly for a tort, and the damages which can properly be recovered in such an action must be confined to the time of the tortious holding. Such damages arise from tort, not from contract, and against the execution upon a judgment for such damages no exemption can be allowed." *Smith v. Wood*, 83 Ind. 522.

The same is true of statutory actions in the nature of ejectment to recover real property and also a compensation for use and occupation. *Penton v. Diamond*, 92 Ala. 610; *Smith v. Wood*, 83 Ind. 522; *Dorrell v. Hannah*, 80 Ind. 497.

This is not true, however, of actions simply for use and occupation. See the fourth and fifth notes following.

7. Action Against Tenant Holding Over. — In *Thomas v. Walmer*, 18 Ind. App. 112, it was held that an action by a landlord under the *Indiana* statute against a tenant holding over, to recover possession of the premises and damages for the detention, sounds in tort, so as to exclude a claim of exemption as against the judgment for damages, and that this is true even though the original lease, which is merely evidence in the action, is improperly set out in the complaint. "The proceeding," said the court, "is possessory in its nature. The wrongful possession of the defendant is the

against a husband's liability for the torts of his wife,¹ an officer's liability for official misconduct or negligence,² and the liability of an executor or administrator for a devastavit.³

(3) *Judgments in Actions Ex Contractu*. — If judgment is recovered in an action on a contract, either express or implied, exemptions may be claimed as against an execution thereon, though the defendant may also have been guilty of a tort for which an action could have been maintained.⁴ When one who has been injured by the tortious conduct of another waives the tort and recovers judgment in assumpsit, the judgment is based upon contract and cannot be enforced as against exempt property.⁵

gist of the action. The proceeding sounds in tort. In the detention of the premises after such termination of the tenancy, the occupant is a tortfeasor." *Quoting Campbell v. Nixon*, 2 Ind. App. 463.

1. **Husband's Liability for Wife's Tort.** — The liability of a husband at common law for torts of his wife is an incident of the marriage relation or status, and is not based on any idea that there is a breach of the marriage contract. Therefore, where a judgment is rendered against a husband for a tort of his wife, and an execution is issued thereon, he cannot claim an exemption upon the ground that his liability for his wife's tort resulted from his marriage contract with her. *McCabe v. Berge*, 89 Ind. 225.

2. **Liability of Officer for Misconduct or Negligence.** — *Vincent v. State*, 74 Ala. 274; *Kirkpatrick v. White*, 29 Pa. St. 176. As to the liability on official bonds, see *infra*, this section, *Judgments and Liabilities on Bonds*.

3. **The Liability of an Executor or Administrator for a Devastavit** rests upon the ground that the assets are wrongfully withheld or have been wasted, and he can claim no exemption as against a judgment therefor under a statute exempting property as against "debts contracted." *Dangaix v. Lunsford*, 112 Ala. 403.

As to the liability on bonds of executors or administrators, see *infra*, this section, *Judgments and Liabilities on Bonds*.

4. **Judgments in Actions Ex Contractu.** — *Wireman v. Mueller*, (Pa. 1887) 7 Atl. Rep. 592.

Judgment Against Carriers. — When goods are injured or lost by a carrier in the course of transportation, a judgment recovered against it in an action for damages is founded upon contract, and is for a debt, within the meaning of a statute exempting property as against execution or other process for the collection of "debts contracted." *McDaniel v. Johnston*, 110 Ala. 526.

Judgment for Breach of Marriage Promise. — In *Cook v. Newman*, 8 How. Pr. (N. Y. Supreme Ct.) 523, it was held that a good cause of action for breach of promise of marriage was not a debt contracted, within the meaning of a proviso in the exemption law. "Although the action," said the court, "is founded on contract so far as form is concerned, yet it is substantially an action of tort. It is purely a personal wrong, as much so as an action for assault and battery or slander. The damages are not assessed as damages growing out of a loss of property, but rather as a compensation for a personal wrong. They are frequently vindictive as well as compensatory. In fine, in every particular, except in the mere form

of pleading, it follows the analogy of an action of tort."

This decision seems clearly wrong. A promise to marry is a contract, and nothing else, and a breach of such contract is not a tort. An action for the breach is as truly an action on contract as an action for breach of a contract to sell and deliver goods. An action *ex delicto* might be maintained for seduction under promise of marriage, but not for a mere breach of the promise to marry.

5. **Waiver of Tort and Suit in Assumpsit.** — It was so held in *Pennsylvania*, where the judgment was recovered in an action of assumpsit for money embezzled by the defendant while in the plaintiff's employ. *Wireman v. Mueller*, (Pa. 1887) 7 Atl. Rep. 592.

Action for Use and Occupation. — Clearly a judgment in an action of assumpsit at common law for use and occupation is a judgment founded upon implied contract, whether the defendant's possession was lawful or unlawful. *Crane v. Waggoner*, 33 Ind. 83.

And in *Arkansas* it has been held that a statutory action for use and occupation is in the nature of assumpsit at common law on an implied promise, and not an action *ex delicto*, for the purpose of applying the exemption laws, though the defendant may have been a trespasser. *St. Louis, etc., R. Co. v. Hart*, 38 Ark. 112. The court said: "There are remedies in tort also against trespassers, which an owner of land might elect to pursue; but if he adopts this, he adopts it with its characteristics, and waives the tort. It would be reasoning too nicely to confine the meaning of the constitution to contracts actually made, or existing in the intention of the parties. The exemption clause is a highly remedial one, and to be liberally construed."

This principle does not apply to actions sounding in tort for the recovery of land, at common law, or under statutes, as in ejectment, in which damages are also recovered for use and occupation. *Dorrell v. Hannah*, 80 Ind. 497. See the note preceding.

Account Stated. — Where an agent at first refuses to account, but afterwards states an account, and an action is begun by attachment upon the account stated, the cause of action is *ex contractu* and not *ex delicto*, and the defendant may claim the benefit of the exemption laws. *Terrill v. Allgaier*, 21 Pa. Co. Ct. Rep. 346.

Showing as to Waiver of Tort. — In such cases the waiver of the tort must appear from the pleadings and issues. See *infra*, this section, *Showing or Proof as to Date or Nature of Judgment or Claim*.

(4) *Debt for Property Obtained under False Pretenses.* — Some statutes expressly provide that exemptions shall not be allowed as against a debt incurred for property obtained under false pretenses. The fact that the action is in contract in such a case makes no difference.¹

(5) *Judgment for Statutory Penalty.* — A judgment in an action for a statutory penalty is based upon the wrongful conduct of the defendant and upon the statute, and may be enforced as against exempt property, where the statute allows the exemption only as against judgments "on debts contracted," or "founded upon contract, express or implied."²

(6) *Judgments and Liabilities Arising Out of Crime.* — The same, according to the better opinion, is true of a judgment for fine and costs rendered in a criminal prosecution.³ It has been held that an exemption cannot be claimed under such a statute in any case where the liability is based upon criminal conduct, but this is doubtful, and there are decisions to the contrary.⁴

(7) *Judgment in Bastardy Proceedings.* — The liability of the father of a bastard child, who under a statute has been ordered to pay an allowance to the mother, is not based upon contract, even though the proceedings may not be criminal.⁵

(8) *Judgments and Liabilities on Bonds* — (a) *Bonds of Public Officers and Fiduciaries.* — If the statutes are construed literally, it would seem clear that a judgment on the bond of a public officer, or of a fiduciary, as executor or administrator, or a guardian, is a judgment based upon contract, being based upon the bond. As to whether it is to be so regarded, however, the decisions are conflicting.⁶

(b) *Bonds and Recognizances in Legal Proceedings.* — In several cases it has been

1. *Debt for Property Obtained under False Pretenses.* — See *Sundback v. Griffith*, 7 S. Dak. 109; *Taylor v. Rice*, 1 N. Dak. 72.

2. *Judgment for Statutory Penalty.* — Thus, in *Williams v. Bowden*, 69 Ala. 433, under a statute exempting as against judgments for debts contracted, it was held that exemptions could not be claimed as against a judgment rendered in an action to recover the penalty given by statute against a mortgagee for failure to enter satisfaction of the mortgage on the record.

The same is true of a judgment for a statutory penalty for running by a tollgate to avoid paying toll. It is not in any sense founded upon a contract, express or implied. *Keller v. McMahan*, 77 Ind. 62.

3. *Fine and Costs in Criminal Prosecution.* — In *Whiteacre v. Rector*, 29 Gratt. (Va.) 714, 26 Am. Rep. 420, it was held that an exemption could not be claimed as against a fine imposed in a criminal prosecution under a statute granting exemptions from sale under execution or other process "issued on any demand for any debt contracted." But see, as *contra*, *Loomis v. Gerson*, 62 Ill. 1.

4. *Liabilities Arising Out of Crime.* — In *Vincent v. State*, 74 Ala. 275, under a statute allowing exemptions as against "debts contracted," it was held that a public officer could not claim exemptions as against a claim in favor of the state for public moneys embezzled by him, as the claim did not arise out of contract, but out of an act which was both a tort and a crime.

In *Pennsylvania*, however, where an employee had embezzled the money of his employer, and the latter recovered a judgment in an action *ex contractu* therefor on the theory of an implied contract, it was held that exemptions could be claimed as against the judg-

ment. *Wireman v. Mueller*, (Pa. 1887) 7 Atl. Rep. 592.

And the same principle would apply to an action *ex contractu* for a debt contracted under false pretenses amounting to a crime (see *supra*, this section, *Judgments in Actions Ex Contractu*), unless, as in *South Dakota*, such judgments are expressly excepted. See *supra*, this section, *Debt for Property Obtained under False Pretenses*.

5. *Judgment in Bastardy Proceedings.* — The liability is based upon a duty imposed by the state, and is not a debt arising under a contract, and it makes no difference that the allowance is required to be paid directly to the mother instead of to the state or to the clerk of the court. *State v. Parsons*, 115 N. Cal. 730.

In *Ohio* it has been held that a defendant in bastardy proceedings could claim wages garnished as exempt under Rev. Stat., § 543c. *State v. O'Brien*, 7 Ohio Cir. Dec. 386, 14 Ohio Cir. Ct. Rep. 300.

6. *The Liability of a Fiduciary on His Bond* is certainly a liability on contract, and a judgment thereon would seem clearly, even as against him, to be within a statute allowing exemptions as against judgments on contracts, or as against debts contracted. It has been so held in *Indiana* with respect to a judgment on a guardian's or executor's bond, though for money concealed by him and converted to his own use. *Green v. Simon*, 17 Ind. App. 360.

Official Bonds. — In *Schuessler v. Dudley*, 8c Ala. 547, 60 Am. Rep. 124, however, it was held that the liability of a tax collector on his bond was in the nature of a liability *ex delicto*, and was not a liability "for a debt contracted," within the meaning of the exemption laws.

held that the liability of the principal, and even of the sureties, on certain bonds and recognizances given in legal proceedings, as a bond in an action for unlawful detainer, a replevin bond, or a bail bond, or a recognizance in a criminal case, is not to be regarded as arising out of contract, and that exemptions cannot be allowed as against a judgment thereon.¹ It is doubtful, to say the least, whether these decisions are sound, and there are decisions to the contrary with respect to the liability of sureties on such bonds.²

(9) *Judgment or Liability for Costs.* — There is a difference of opinion as to the right of a debtor to claim an exemption as against an execution on a judgment for costs, and the rule varies in the different states.³

Costs as an Incident to the Judgment. — The prevailing view is that the liability for costs included in a judgment, where there is also a recovery on the cause of action sued upon, is an incident to the judgment, and that the right to enforce the liability therefor as against exempt property depends upon whether the rest of the judgment can be so enforced. If the judgment is on a contract liability, for example, no exemption can be claimed as against the costs;⁴ but it is otherwise if the judgment is for a tort.⁵

1. Judgment on Bond in Action for Unlawful Detainer. — According to this doctrine, it has been held that, where the plaintiff in an action for unlawful detainer executes a bond and obtains a writ of possession, and there is afterwards a verdict for the defendant, a judgment for damages and costs against the plaintiff and his sureties on the bond is to be regarded as founded, not upon contract, but upon tort, that is, upon the wrongful dispossession of the defendant by the plaintiff, and that there can be no exemption as against an execution on the judgment under a statute allowing exemptions as against executions on judgments based upon contract. *Gaines v. Toles*, (Indian Terr. 1896) 37 S. W. Rep. 946.

Judgment on Replevin Bond. — And in *Pierce v. Lewis*, 27 W. N. C. (Pa.) 400, it was held that a judgment recovered on a bond given in replevin for goods distrained for rent was not to be regarded as obtained upon contract within the meaning of the exemption law. "The right of action," said the court, "does not depend upon the promise to pay, but upon the failure to perform the duty assumed. Such a cause of action, and the judgment recovered thereon, is not contractual in character, but tortious."

Bail Bonds and Recognizances. — It has been decided in *Pennsylvania* that a judgment on a recognizance given in a criminal prosecution is not "founded on contract" so as to entitle the party liable to claim exemptions as against an execution thereon. *Com. v. Dougherty*, 8 Phila. (Pa.) 366. See also *Edwards v. Withrow*, 22 W. N. C. (Pa.) 576.

2. Contrary Decisions as to Sureties. — The surety on a bond or undertaking given in an action or proceeding is bound only by virtue of his contract. His liability on the bond, and a judgment thereon, is based upon his contract, and not upon anything that may have been done by the principal in the bond. It would seem to follow necessarily, therefore, that the surety, as against an execution on a judgment on the bond, may claim exemptions under a statute exempting property from seizure for debts on contract, though the action or proceeding may be of such a nature as to exclude a claim of exemption by the

principal. This view was taken substantially by the Supreme Court of Indiana in *Maloney v. Newton*, 85 Ind. 565, 44 Am. Rep. 46, and it was held that replevin bail on a judgment in a prosecution for bastardy could claim exemptions as against his liability. "It cannot be said," observed the court, "that one who undertakes as replevin bail for another is guilty of any wrong, no matter what may be the character of the judgment against the principal. If this be true, and we are unable to perceive any ground upon which the proposition can be impeached, it must also be true that the replevin bail cannot be denied the benefit of the statute upon the ground that he has been guilty of a wrong. If then the bail perpetrates no wrong he is not within the letter of the statute excluding from the benefit of its provisions one who commits a tort."

So in *State v. Williford*, 36 Ark. 155, 38 Am. Rep. 34, it was held that the liability of a surety on a bail bond given in a criminal prosecution was a "debt by contract" within the meaning of a statute exempting property from execution or process on debt by contract, and as against a judgment thereon the surety was entitled to exemptions. And see *State v. Pitts*, 51 Mo. 133.

3. Costs of Execution. — When exemptions can be claimed as against an execution, it may be asserted as against the costs of the execution. *Hain v. Rhoads*, 7 Pa. Co. Ct. Rep. 568. And see *McCloskey v. Moulder*, 8 Pa. Co. Ct. Rep. 156.

4. Costs as Incident to Judgment — Action on Contract. — In *Clingman v. Kemp*, 57 Ala. 195, a judgment for costs was held to constitute a "debt" within the meaning of a statute exempting property from sale for payment of debts. In a later case it was said that this decision was intended to apply only to actions *ex contractu*. *Stuckey v. McKibbin*, 92 Ala. 622.

5. Actions for Tort. — In *Stuckey v. McKibbin*, 92 Ala. 622, it was held that exempt property could be seized and sold to satisfy the liability for costs imposed by a judgment for damages and costs rendered in an action *ex delicto*. "Costs," said the court, "partake of the nature of the judgment in favor of the

Liability for Costs as Based upon Implied Contract. — In *Indiana* it has been held that where a judgment is rendered for costs only, not even nominal damages being included, it is not to be regarded as founded upon contract, either express or implied, and can be enforced against exempt property, even though the action may have been on a contract.¹ But in *Pennsylvania* it is held that a judgment for costs, whether there is any other recovery or not, and whether the suit was on a contract or for a tort, or at law or in equity, is for a debt on implied contract within the meaning of the exemption laws.²

6. Debts Due for Purchase Price. — The statutes exempting personal property generally provide in express terms that the exemption shall not be allowed as against an execution for or on a debt or judgment for the purchase money or purchase price.³ Similar provisions are to be found in the homestead

plaintiff. Where that is for a tort, the judgment for costs is for a tort; where that results from and is based on a wrong of the defendant, the judgment for costs results from and is based on the same wrong; and no claim of exemptions can be sustained against either." See also *Penton v. Diamond*, 92 Ala. 610.

The *Indiana* court has decided in the same way, but it based its decision, not on the ground that the costs partake of the nature of the judgment, but on the ground that the judgment is an entirety. *Church v. Hay*, 93 Ind. 323; *Russell v. Cleary*, 105 Ind. 502; *Donaldson v. Banta*, 5 Ind. App. 71. See to the same effect *Massie v. Enyart*, 33 Ark. 688; *Schouton v. Kilmer*, 8 How. Pr. (N. Y. Supreme Ct.) 527; *Lathrop v. Singer*, 39 Barb. (N. Y.) 396.

1. Implied Contract — Doctrine in Indiana. — This question arose in *Donaldson v. Banta*, 5 Ind. App. 71, and it was held (citing 7 AM. AND ENG. ENCYC. OF LAW (1st ed.) 133) that a judgment for costs only against the plaintiff, even in an action on a contract, could be enforced against the defendant's exempted property where the statute allowed exemptions only from execution "for any debt growing out of or founded upon contract, express or implied," as the liability for costs depended not upon contract, but upon statute.

The Supreme Court of *Indiana* decided in the same way in *Ross v. Banta*, 140 Ind. 120. See also *State v. McIntosh*, 100 Ind. 439; *In re Owens*, 6 Biss. (U. S.) 432, construing the *Indiana* statute.

Other States. — See, as in accord with the *Indiana* doctrine, *Massie v. Enyart*, 33 Ark. 688; *Schouton v. Kilmer*, 8 How. Pr. (N. Y. Supreme Ct.) 527; *Lathrop v. Singer*, 39 Barb. (N. Y.) 396. And see the note preceding.

2. Doctrine in Pennsylvania. — According to this view it has been held in *Pennsylvania* that a judgment against an unsuccessful plaintiff in trover is a judgment on contract, as respects the costs, and upon an execution to recover such costs he is entitled to claim the benefit of the exemption law. *Lane v. Baker*, 2 Grant's Cas. (Pa.) 424. In this case Mr. Justice Black said: "A party is not a trespasser because he sues another for trespass. Costs against the plaintiff are not like damages against the defendant. We are of opinion that a judgment for costs is to be considered in the same light as a judgment for debt on contract, so far as the exemption law affects the rights of the parties. The fact that the

costs accrued in an action for a tort makes no difference."

And again in *Bradley v. West Chester St. R. Co.*, 160 Pa. St. 72, 34 W. N. C. (Pa.) 78, where a bill to restrain a trespass was dismissed at the plaintiff's costs, including a master's fee, it was held that the decree as to the master's fee was on an implied contract to pay such fee, and that the plaintiff was entitled to his exemption as against an execution therefor. See also *Pierce's Appeal*, 103 Pa. St. 27; *Taylor's Estate*, 9 Pa. Co. Ct. Rep. 293.

3. Debts Due for Purchase Price. — See *Behymer v. Cook*, 5 Colo. 395.

A debtor is not entitled under the *Pennsylvania* Act of 1849 to the exemption of three hundred dollars out of the proceeds of his real estate as against lien creditors whose judgments are for purchase money. As to them, therefore, there is no exemption law. Hence an approval by the court of the sheriff's return to the fieri facias containing the demand for the appraisement, and the report of the appraisers, is not an adjudication of the defendant's right as against such creditors. *Ulrich's Appeal*, 48 Pa. St. 489.

Constitutionality of Such Provisions. — A provision excepting debts due for the purchase money of property from the operation of the exemption laws is not unconstitutional as class legislation, or as discriminating between different kinds of liabilities as respects the exemption of property from legal process. *Rogers v. Brackett*, 34 Minn. 279.

Construction of Particular Statutes. — Section 1, article 9, of the *Arkansas* constitution of 1874, prescribed the extent of the exemption of personal property to be claimed by an unmarried resident not the head of a family. Section 2 fixed the same right for the married resident or head of a family. At the end of section 1 was a provision "that no property shall be exempt from execution for debts contracted for the purchase money thereof while in the hands of the vendee," but nothing was said as to debts for purchase money in section 2. It was held, however, that the proviso applied also to the second section, and excluded all classes of persons from the exemption of property from execution for debts due for the purchase money. *Friedman v. Sullivan*, 48 Ark. 213.

Application of Exemption to Real Property Only. — See *supra*, at the beginning of this section.

Exception of Particular Articles. — The statutes, in providing that property shall not be

exemption laws of some of the states.¹

Provision Does Not Give Lien. — Such a provision merely allows the seller of property to subject it to the satisfaction of a judgment for the purchase price while it is in the hands of the purchaser. It does not give a lien so as to bind the property in the hands of one to whom the purchaser may sell it,² or affect priorities between creditors.³

Purchase Price of Other Property. — The statutes generally allow a debt for purchase money to be enforced only against the specific property for the purchase of which the debt is due, and do not allow it to be enforced against other exempted property.⁴ Particular statutes, however, may require a different construction.⁵

When Judgment or Debt Is for Purchase Money. — The term "purchase money" in these provisions has been said to mean "the money agreed to be paid by the

exempt from any execution issued upon a judgment rendered for the purchase money for the same, sometimes except particular property, as mechanical tools, implements of husbandry, etc., and allow them to be claimed even as against a debt for the purchase money. See *Maxon v. Perrott*, 17 Mich. 332, 97 Am. Dec. 191. Or else they in terms provide that certain exemptions only shall not be allowed as against a judgment for the purchase-price. See *Vanderhorst v. Bacon*, 38 Mich. 669, 31 Am. Rep. 328.

"Mechanical Tools." — As to what are "mechanical tools," etc., within the meaning of such an exception, see the case just cited. And see *supra*, this title, *Property Exempt under the Statutes—Tools, Implements, Instruments, etc.*

Household Furniture purchased and used by a person for keeping a boarding house is exempt from execution like other household goods, and is not within a statute rendering stock in trade or means of carrying on the debtor's occupation subject to execution on a judgment for the purchase price. *Vanderhorst v. Bacon*, 38 Mich. 669, 31 Am. Rep. 328.

Possession of Other Property. — When the statute provides that no property shall be exempt from seizure and sale to satisfy a claim for the purchase money thereof, a debtor cannot exempt property from such liability by selecting it as exempt, though he may have other property sufficient to satisfy the claim. See *Behymer v. Cook*, 5 Colo. 395.

Prohibition of Sale as Against Debt for Purchase Money. — See *infra*, this title, *Sales and Other Transfers, and Incumbrances—Restrictions on Power to Sell or Encumber.*

1. Homestead Exemption. — See the title **HOMESTEAD**, and the cases cited under that title, many of which are equally applicable to statutes exempting chattels.

2. Exception Does Not Give a Lien on the Property. — *Norris v. Brunswick*, 73 Mo. 256; *Haworth v. Franklin*, 74 Mo. 106; *Straus v. Rothan*, 102 Mo. 261. See the title **SALES**.

3. Priorities Between Creditors. — A statute declaring that exempt personal property shall be subject to execution for the purchase money, and shall in no case be exempt therefrom except in the hands of an innocent purchaser for value and without notice of the existence of such prior claim for the purchase money, does not create any lien, so as to

affect priorities between creditors. *Straus v. Rothan*, 102 Mo. 261.

4. Exception Limited to the Specific Property. — *Loyless v. Collins*, 55 Ga. 370; *Gibbons v. Gaffney*, 154 Pa. St. 48.

5. Conflicting Decisions in New York. — In New York the Revised Statutes in force in 1842 exempted certain property. In that year an act was passed exempting furniture, tools, a team, and other additional property, and containing a proviso that such exemption should not extend "to any execution issued on a demand for the purchase money of such furniture, or tools, or team, or articles now enumerated by law." In construing this proviso the judges have differed in opinion. In *Mathewson v. Weller*, 3 Den. (N. Y.) 52, it was held that no exemption could be claimed against an execution on a judgment rendered for the purchase price of any property exempt from execution by the Revised Statutes or by the Act of 1842, though the particular property claimed as exempt might have been paid for or purchased from another person. See also *Snyder v. Davis*, 47 How. Pr. (N. Y. Supreme Ct.) 147.

In *Cole v. Stevens*, 9 Barb. (N. Y.) 676, however, and again in *Davis v. Peabody*, 10 Barb. (N. Y.) 91, it was held that property exempted by the Revised Statutes could not be taken on an execution issued upon a judgment rendered for the purchase price of property exempted by the Act of 1842, though any property exempted by such act could be taken to satisfy a demand for any other property exempted thereby. See also *Craft v. Curtiss*, 25 How. Pr. (N. Y. Supreme Ct.) 163.

In *Cox v. Stafford*, 14 How. Pr. (N. Y. County Ct.) 519, it was held that any article exempted by the Act of 1842 could be levied upon to satisfy the judgment recovered for the purchase price of that article, or for the purchase price of any other article exempted either by the same act or by the Revised Statutes; but no article exempted by the Revised Statutes could be levied upon to satisfy any judgment whatever, even though it should be a judgment recovered for the purchase price of that article itself. See also *Snyder v. Davis*, 1 Hun (N. Y.) 350.

In *Hickox v. Fay*, 36 Barb. (N. Y.) 9, it was held that the statute did not give a general right to the vendor of any articles of the class of exempt property to take any other of that

purchaser for the property."¹ But this construction is too narrow. The exception has been held to apply to the purchaser's liability on a note or other security given for the purchase price,² though not to the liability of a surety thereon.³ There is a conflict of opinion as to whether a debt due for a loan of money with which to purchase property is for purchase money within the meaning of the statute.⁴ A judgment for conversion of property is not.⁵

Assignment of Claim for Purchase Price. — It has been held that the privilege accorded by such provisions is for the protection of the seller only, and that the exemption may be claimed as against an assignee of a note given for purchase money.⁶ But on this question there is a direct conflict of opinion.⁷

7. Debts Due to Laborers, Mechanics, etc. — By express provision in some states exemptions cannot be claimed as against a liability for wages or salary due to laborers, mechanics, and employees.⁸ In the absence of express

species of property for his debt, but that his right was in the nature of a particular lien on specific property, and did not extend to any other property except the precise property sold. See also *Smith v. Slade*, 57 Barb. (N. Y.) 637.

1. When Debt or Judgment Is for Purchase Money. — *Per Welles, P. J.*, in *Hoyt v. Van Alstyne*, 15 Barb. (N. Y.) 568.

2. Taking Notes and Security for Purchase Price. — A provision that property shall not be exempt from any execution issued for or upon a debt or judgment for the purchase money thereof is not limited to cases in which no instrument or security is taken for the purchase money.

An action by the seller of personal property upon the purchaser's note in full payment and satisfaction of the price of the property is an action for the "purchase money" of the property, within the meaning of the statutes. *Rogers v. Brackett*, 34 Minn. 279.

And a judgment on a note indorsed by a third person as surety, taken for the price of property sold, is a judgment for the purchase money. *Roberts v. McGur*, 82 Mich. 221.

3. Demand Against Surety on Purchase-money Note. — A provision that property shall not be exempt from seizure to satisfy a demand for the "purchase money" does not include a demand on the security given for the purchase money by a third person. Therefore the exempted property of a surety on a note given for the purchase price of exempted property cannot be taken under an execution on a judgment recovered on the note. *Davis v. Peabody*, 10 Barb. (N. Y.) 91. See also *Smith v. Slade*, 57 Barb. (N. Y.) 637.

4. Money Loaned to be used in purchasing certain property, and actually so used by the borrower, has been regarded by some courts as "purchase money" within the meaning of the statute so as to prevent the property so purchased from being claimed as exempt from execution upon a judgment in an action by the lender to recover the money lent. *Houlehan v. Rassler*, 73 Wis. 557.

In this case the statute provided that "no property exempted by the provisions of this section shall be exempt from execution issued upon a judgment in an action brought by any person for the recovery of the whole or any part of the purchase money of the same property."

The question has arisen frequently under

the homestead exemption laws, and some of the courts have decided in accordance with the *Wisconsin* case above cited. Other courts have taken a contrary view. See the title HOMESTEAD.

5. Judgment for Conversion of Property. — Thus, that an execution issued upon a judgment recovered in an action for taking personal property without the consent of the owner, and converting and disposing of the same, is not to be considered as issued on a demand for the purchase money of the property, was held in *Hoyt v. Van Alstyne*, 15 Barb. (N. Y.) 568.

It would perhaps be otherwise, however, if the owner of the property should waive the tort in such a case, as he may do in some jurisdictions, and sue in assumpsit on the theory of an implied contract to pay for the property. See *infra*, this section, *Judgments and Liabilities Not Based upon Contract*.

6. Cases Allowing Exemption as Against Assignee. — *Weil v. Nevitt*, 18 Colo. 10; *Shepard v. Cross*, 33 Mich. 96.

7. Cases to the Contrary. — In *State v. Oran*, 27 Mo. App. 496, a contrary view was taken. It was there held that the right of a vendor of personal property otherwise exempt to subject such property to satisfaction of an execution under a judgment on a note given for the purchase is incident to the note, and passes to the assignee. *Langevin v. Bloom*, 69 Minn. 22, is to the same effect.

Merger in Judgment Recovered by Indorsee and Paid by Indorser. — In *Harley v. Davis*, 16 Minn. 487, however, where the purchaser of personal property gave to the seller his note for the price, and the seller indorsed it to another, who recovered judgment on it against the maker and indorser (the purchaser and seller), it was held that the debt for the purchase money was merged in the judgment, and that an action by the seller, after having paid the judgment, against the purchaser to recover the money so paid, was not an action for the purchase money of the property within the meaning of the exemption laws.

Homestead Exemption. — This question has more frequently arisen under the homestead exemption laws, and the decisions are in direct conflict. See the title HOMESTEAD.

8. Exception of Debts Due to Laborers, etc. — See *Reed v. Umbarger*, 11 Kan. 206; *Snyder v. Brune*, 22 Neb. 189; *Meiers v. Umla*, 6 Kulp (Pa.) 332.

restriction, however, the statutes apply as against such liabilities.¹

A Note Given for Labor does not change the character of the claim, so as to take it out of a statute excepting claims for labor, unless such was the intention of the parties.²

8. Debts Due for Necessaries. — In some states the statute does not allow exemptions to be claimed as against debts due "for necessities" furnished to the debtor or his family, or in a "suit for necessities."³

Action on Judgment for Necessaries. — It has been held in *Rhode Island* that an

Under a statute disallowing exemptions as against a judgment for the wages of any servant or laborer, all of the household goods and stores of a debtor may be seized and carried away under an execution on such a judgment, though he may not only be unable to pay, but his inability may have been caused by sickness or other circumstances over which he had no control. *Hughes v. Melville*, 60 Ill. App. 419.

Exception Limited to Homestead or Real Property Exemption. — See *supra*, at the beginning of this section.

As to the Proof or Showing of the nature of the judgment or claim, and as to the necessity for recitals in the judgment or execution, etc., see *infra*, this section, *Showing or Proof as to Date or Nature of Judgment or Claim*.

Who Are "Laborers" — What Are "Wages." — "The term 'laborer,' " said the *New Hampshire* court, "is ordinarily employed to denote one who subsists by physical toil, in distinction from one who subsists by professional skill. The exception of claims for labor would not, therefore, ordinarily be understood to embrace the services of the clergyman, physician, lawyer, commission merchant, or salaried officer, agent, railroad and other contractors, but would be confined to claims arising out of services where physical toil was the main ingredient, although directed and made more valuable by mechanical skill." *Weymouth v. Sanborn*, 43 N. H. 171, 80 Am. Dec. 144.

Mail Carrier. — A person employed to carry the United States mail has been held a laboring man within the meaning of a constitutional provision excepting from the operation of the exemption laws any demand "for services rendered by a laboring person or a mechanic" (Const. Va., art. II, § 1). *Farinholt v. Luckhard*, 90 Va. 936, 44 Am. St. Rep. 953.

Contractors. — But a person who makes an independent contract to do certain work, and employs laborers to do the manual labor necessary in performance of the contract, is not a laborer, and the money due him under the contract is not within an exception of debts due for clerk's, laborer's, or mechanic's wages. *Henderson v. Nott*, 36 Neb. 154, 38 Am. St. Rep. 720.

An employee who so far retains the control of the work in hand that he is not subject to the direction of his employer while engaged thereat is an independent contractor and not within an exception relating to clerk's, laborer's, and mechanic's wages. *Fox v. McClay*, 48 Neb. 820.

Traveling Salesman and Bookkeeper. — An employee who performs no other services than as traveling salesman and bookkeeper for a mercantile house is not a "laborer or servant"

within the meaning of a proviso in an exemption law that no property shall be exempt when the debt or judgment against which the exemption is claimed is for wages of any laborer or servant. *Epps v. Epps*, 17 Ill. App. 196.

Professional Services. — It has been held that a debt due a physician for professional services is not a "claim for labor" within the meaning of an exception in an exemption statute. *Weymouth v. Sanborn*, 43 N. H. 171, 80 Am. Dec. 144.

Questions Elsewhere Considered. — The questions who are laborers, clerks, mechanics, etc., and what are wages, salary, etc., have been considered at length elsewhere in this article. Many of the decisions there referred to are applicable here. See *supra*, this title, *Persons Entitled to Benefit of Exemption Laws — Persons Engaged in Particular Occupations ; Property Exempt under the Statutes — Wages, Salary, Earnings, etc.*

1. In the Absence of Express Restriction. — Thus, in *Frutchey v. Lutz*, 167 Pa. St. 337, where the statute did not expressly except debts due for wages, it was held that the wages of a street-car conductor could be claimed as exempt under a statute exempting wages, though the claim which it was sought to enforce was for wages due from him.

2. Taking Note for Labor. — *Reed v. Umbarger*, 11 Kan. 206; *Weymouth v. Sanborn*, 43 N. H. 171, 80 Am. Dec. 144.

3. What Are "Necessaries." — The provision of the *Nebraska* Code that property shall not be exempt from execution or attachment "for any debt contracted by any person in the purchase of the actual necessities of life for himself or family" does not apply to debts contracted by the head of a family for groceries and provisions furnished to him as supplies for a boarding house. *Lehnoff v. Fisher*, 32 Neb. 107.

And it has been held that groceries furnished to an unmarried person and used in the family in which he was boarding, being taken in payment for his board, were not "necessaries furnished him or his family" within the meaning of the *Maine* statute. *McAuley v. Tracy*, 61 Me. 523.

A Claim for Medical Attendance and Medicine furnished to the debtor and his family is "a demand for necessities." *Darling v. Andrews*, 9 Allen (Mass.) 106.

Joinder of Claims. — See *infra*, this section, *Joinder of Claims or Causes of Action*.

As to the Showing of Proof of the nature of the judgment or claim, and as to the necessity for recitals in the judgment or execution, etc., see *infra*, this section, *Showing or Proof as to Date or Nature of Judgment or Claim*.

action of debt on a judgment rendered in an action of assumpsit or on account for necessities is an action for necessities, and within such an exception.¹ But in *Maine* there is a decision to the contrary on the ground that the debt due for the necessities is merged in the judgment and extinguished.²

9. Debts Due for Board. — In *Pennsylvania* the statute provides that no exemption of property shall be allowed on a judgment obtained for board for four weeks or less.³ There are conflicting decisions as to whether, under this provision, a judgment for more than four weeks' board cannot be enforced in part as against exempt property.⁴

10. Debts Due for Money or Property Received by Attorney. — In *Nebraska*, and perhaps in other states, it is expressly declared that the exemption law shall not be so construed as to exempt any property from execution or attachment for money due and owing by any attorney at law for money or other property received by him for any person or persons.⁵

11. Debts Due for Rent. — The statutes sometimes expressly exempt property as against liability or distress for rent;⁶ even in the case of a general statute, a claim for rent would seem clearly to stand on the same footing as any other debt arising out of a contract, in the absence of express exception or of a lien, and so it has been held.⁷ In some states, by express provision

1. Action on Judgment for Necessaries. — *Thompson v. Roach*, 15 R. I. 417.

"Strictly speaking," said the court in this case, "the cause of action in the first suit was the promise of the defendant, express or implied, to pay the amount due for necessities, and in the second suit the judgment against the defendant for the amount due for necessities. We cannot see why the cause of action is not as much for necessities furnished in the second suit as in the first. The meaning of the statute is that any person who has furnished another with necessities shall have the right to attach the latter's wages to their full amount. We cannot see any reason why we should not give effect to this meaning when the action is on a judgment as well as when it is on the original promise."

2. In the *Maine* case the statute provided that exemptions should not be claimed in "any suit for necessities." It was held that the action, to come within the exception, must be to recover for the necessities, and that an action of debt upon a judgment previously recovered in an action on account for necessities was not "for necessities," and was not within the exception, as the claim for necessities was merged in the judgment, and the debt for necessities was extinguished. *Brown v. West*, 73 Me. 23.

3. Judgment Obtained for Board. — Under this statute (Act Pa., April 4, 1889), no claim of exemption can be allowed where wages are attached on an attachment execution issued by a justice on a judgment for four weeks' board or less, under the Act of May 8, 1876. *Weisman v. Weisman*, 133 Pa. St. 89. Compare *Thomas v. Glasgow*, 2 Pa. Dist. Rep. 711.

This statute does not give to a creditor the right to attach without giving security. *Serena v. Guilfry*, 20 Pa. Co. Ct. Rep. 549, 7 Pa. Dist. Rep. 141.

The statute disallows the exemption as against such judgments "from and after the passage of this act" only, and does not apply to judgments obtained before the passage of the act. *Brown v. Reiser*, 8 Pa. Co. Ct. Rep. 416.

It is held that the judgment must show affirmatively that it was obtained for board for four weeks or less. See *Weisman v. Weisman*, 133 Pa. St. 89.

4. Judgment for More than Four Weeks' Board. — In *Tredennick v. Jones*, 7 Pa. Co. Ct. Rep. 548, it was held that a judgment rendered for more than four weeks' board was not within the statute, and that it could not be split up and an attachment issued for part of it as against exempt property. In *Karnes v. McGuire*, 18 Pa. Co. Ct. Rep. 306, the decision was to the contrary.

5. Debt for Money Owed by Attorney. — Under the *Nebraska* statute the liability of an attorney at law exempted by section 530 of the Code of Civil Procedure cannot be claimed as against an execution upon a judgment recovered against him for money received professionally for the judgment creditor. *Shreck v. Gilbert*, 52 Neb. 813.

As to the Showing or Proof of the nature of the judgment or claim, and as to the necessity for recitals in the judgment or execution, etc., see *infra*, this section, *Showing or Proof as to Date or Nature of Judgment or Claim*.

6. Express Exemption from Distress for Rent. — See *Harris v. Canada Permanent Loan, etc., Co.*, 17 Can. L. T. 424; *Kenyon v. Gould*, 61 Pa. St. 293; *Rudd v. Ford*, 91 Ky. 183.

Rev. Stat. Ontario, c. 143, § 27, as amended by 55 Vict., c. 31, exempted from seizure by distress for rent the goods and chattels of a debtor exempt from seizure under execution, but contained the proviso, "Provided that in the case of a monthly tenancy such exemption shall only apply to two months' arrears of rent." In *Harris v. Canada Permanent Loan, etc., Co.*, 17 Can. L. T. 424, the court held that it was impossible to say what the legislature meant by this proviso, and granted an injunction restraining distress where a monthly tenant was some eighteen months' rent in arrear at the date of the seizure.

7. In the Absence of Express Provision. — *Mason v. O'Brien*, 42 Miss. 420. And see *St. Louis, etc., R. Co. v. Hart*, 38 Ark. 112; *Crane v. Waggoner*, 33 Ind. 83.

of the statute, exemptions cannot be claimed as against a debt due for rent.¹ This exception generally applies in the case of crops, where an exemption therein is claimed as against liability for rent on the land on which they have been produced.²

12. Debts Due to the State or the United States — Express Exception. — In some states there are express provisions that exemptions shall not be allowed as against claims for taxes and certain other claims in favor of the state.³

In the Absence of Express Provision it has been held or stated in a few cases that the exemption laws do not apply as against debts due to the state, on the principle that the state is not to be bound by a statute unless expressly named therein.⁴ By the weight of authority, however, the statutes are to be regarded as applicable to debts due to the state, because the state is bound by general words of a statute made for the maintenance of religion, the advancement of learning, or the support of the poor, on the ground that the state as well as the individual is within the policy of such laws.⁵

1. Express Exception of Debts Due for Rent. — In *Mississippi*, prior to the amendment of Code 1880, § 1255, by the Act of March 1, 1882 (Acts 1882, p. 113), no exemptions could be claimed as against a demand for rent, by the express provision of that section. *Ransom v. Duff*, 60 Miss. 901.

2. Exception in the Case of Crops. — In *South Carolina*, where the statutes exempted crops, etc., but provided that they should not be claimed as against "an obligation contracted in the production of the crop," it was held that the exemption could not be claimed as against a liability for rent of the farm on which the crop was raised. *Prince v. Nance*, 7 S. Car. 351.

Landlord's Rights as Against Debtor of Tenant. — The rights of a landlord in *Arkansas* against his tenant do not attach as against a debtor of the tenant, against whom the landlord has recovered judgment in a proceeding by garnishment, so as to deprive him of the benefit of the exemption conferred by the constitution. *Swope v. Ross*, 29 Ark. 370.

Landlord's Lien. — See *infra*, this section, *Liens Enforceable Against Exempt Property*.

3. Debts Due to the State — Express Exception of Debts for Taxes. — See *Com. v. Cook*, 8 Bush (Ky.) 220, 8 Am. Rep. 456; *Com. v. Lay*, 12 Bush (Ky.) 283, 23 Am. Rep. 718; *Oliver v. White*, 18 S. Car. 235.

4. Statute Held Not Applicable as Against the State. — See *Vincent v. State*, 74 Ala. 275; *Whiteacre v. Rector*, 29 Gratt. (Va.) 714, 26 Am. Rep. 420; *Com. v. Ford*, 29 Gratt. (Va.) 683.

5. Statutes Held Applicable as Against the State. — *Doe v. Deavors*, 11 Ga. 79. "These laws," said the court in this case, "are founded in a humane regard to the women and children of families. The preamble to the Act of 1822 announces the grounds on which the legislature acted. 'Whereas' (is its language) 'it does not comport with justice or expediency to deprive innocent and helpless women and children of the means of subsistence, be it therefore enacted,' etc. * * * In our judgment the state falls within the operation of a public law passed for the benefit of the poor, and the state is within the policy of our own legislation upon this subject-matter." See also *Fink v. O'Neil*, 106 U. S. 272 [affirming *Salentine v. Fink*, 8 Biss. (U. S.) 503, and in

effect *overruling* *U. S. v. Howell*, 4 Hughes (U. S.) 483, 9 Fed. Rep. 674, 28 Int. Rev. Rec. 49]; *Maloney v. Newton*, 85 Ind. 565, 44 Am. Rep. 46; *State v. Geddis*, 44 Iowa 537, and other cases cited in this note.

Liability for Taxes. — According to this view it has been held that property exempted generally from seizure and sale for the satisfaction of debts cannot be seized and sold to pay taxes due to the state. *Doe v. Deavors*, 11 Ga. 79.

Judgment Against Tax Collector on Bond. — See *Hume v. Gossett*, 43 Ill. 297. The legislature, said the court in this case, did not design to place the state, as to its revenue, in any better position than that in which the citizen was placed in regard to the collection of his debt, as against the exempt property of the debtor.

Doctrine in Kentucky. — In *Com. v. Cook*, 8 Bush (Ky.) 220, 8 Am. Rep. 456, it was held that the exemption law, though general, was not to be construed as exempting the property of a surety on the sheriff's bond from an execution on a judgment on the bond in favor of the state for taxes collected by the sheriff and not accounted for. It should be stated in connection with this decision that under the laws of Kentucky no property of its citizens was exempted as against liability for taxes, and there was a statute expressly subjecting to the payment of "judgments, in the name of the commonwealth, against sheriffs and other public collectors, their sureties or the heirs, devisees, or personal representatives of any of them, * * * the estate, legal and equitable, of all the defendants to said judgments" owned by them at any time from the commencement of suit till satisfied. The dictum in the opinion of the court, however, was sufficiently broad, perhaps, to cover all debts due to the state.

In a later case, *Com. v. Lay*, 12 Bush (Ky.) 283, 23 Am. Rep. 718, the court adhered to the actual decision in *Com. v. Cook*, *supra*, with respect to judgments in favor of the state against public officers and their sureties for public revenue collected and not paid over, but held that exemptions could be claimed as against other liabilities in favor of the state, as, in this case, against a judgment for fines and costs. In connection with this decision it should be stated that there was a statute in Kentucky expressly declaring that

Debts Due to the United States. — And under the Act of Congress adopting generally, for the enforcement of judgments recovered in the federal courts, the remedy by execution as allowed by the laws of the respective states, exemptions may be claimed under the state laws as against execution on a judgment in favor of the United States.¹

In Canada it has been held that statutes of exemption do not bind the crown, unless by their express terms.²

13. Judgment Against Husband for Alimony or Maintenance. — Where an exemption is given expressly or impliedly not merely for the debtor himself, but for the benefit of his family, he will not be allowed to claim it as against a judgment recovered by his wife for maintenance or alimony, since to allow an exemption in such a case would be a perversion of the statute and defeat the intention of the legislature.³

the bail in criminal cases should be owners of visible property to a certain amount "over and above that exempt from execution," thus showing a legislative interpretation of the exemption laws as exempting property of bail from seizure under judgments in favor of the state. See *Brooks v. State*, 54 Ga. 36.

Judgment on Recognizance or Bail Bond. — A judgment on a forfeited recognizance given in a criminal case in favor of the state was held in *Missouri* not to be enforceable against the surety's exempt property, the court being of opinion that debts due to the state, though not expressly mentioned, were as much within the law as debts due to private individuals. *State v. Pitts*, 51 Mo. 133. And see *State v. Williford*, 36 Ark. 155, 38 Am. Rep. 34, for a like decision with respect to a judgment on a bail bond.

Judgment for Fine and Costs. — See *Loomis v. Gerson*, 62 Ill. 1.

Liability in New York for Support of Poor Relatives. — Under the New York statute exempting pensions for military and naval services, and certain other property, "from levy and sale, by virtue of an execution, and from seizure for nonpayment of taxes or in any other legal proceeding," it was held that pension moneys of a father could not be subjected to the maintenance of an insane son who was being cared for at the expense of the state, under a statute requiring relatives of sufficient ability to maintain a poor person, and allowing the proper authorities to apply for an order to compel them to do so. *St. Lawrence State Hospital v. Fowler*, 15 Misc. Rep. (N. Y. Ct. Sess.) 159.

Qualification of Rule Including State. — In *Brooks v. State*, 54 Ga. 36, it was held in effect, conceding that general exemption laws should ordinarily be construed as allowing the exemption as against debts due to the state as well as against those due individuals, that a statute of exemption should not be construed so as to allow an exemption as against debts to the state, if under the circumstances the exemption could not be claimed as against a private debt. In this case, as the exemption laws of *Georgia*, under the decisions of the Supreme Court of the United States, could not allow exemptions as against debts to private individuals contracted prior to the adoption of the law, the court refused to construe the law as allowing an exemption as against a pre-existing liability to the state, even conceding

that the legislature could have given the law such an operation as against the state by use of express terms showing such an intent.

1. Judgments in Favor of the United States. — Section 916 of the Revised Statutes of the United States (Act of Congress June 1, 1872, c. 255) declares as follows: "The party recovering a judgment in any common-law cause in any circuit or district court shall be entitled to similar remedies upon the same, by execution or otherwise, to reach the property of the judgment debtor, as are now provided in like causes by the laws of the state in which such court is held, or by any such laws hereafter enacted which may be adopted by general rules of such circuit or district court; and such courts may, from time to time, by general rules, adopt such state laws as may hereafter be in force in such state in relation to remedies upon judgments, as aforesaid, by execution or otherwise." In *Fink v. O'Neil*, 106 U. S. 272, it was held that this adoption in general terms of the remedy by execution as allowed by state laws embraces the laws granting exemptions of property from execution, and allows a debtor to claim his exemptions as against an execution from a federal court on a judgment in favor of the United States. In this case the execution as against which exemptions were allowed was issued on a judgment recovered on a bond given for the release of property seized under process for violation of the internal revenue laws. This decision affirms *Salentine v. Fink*, 8 Biss. (U. S.) 503, and in effect overrules the decision to the contrary in *U. S. v. Howell*, 4 Hughes (U. S.) 483, 9 Fed. Rep. 674, 28 Int. Rev. Rec. 49.

2. Doctrine in Canada. — *Reg. v. Davidson*, 21 U. C. Q. B. 41.

3. Judgment Against Husband for Alimony or Maintenance. — *Spengler v. Kaufman*, 43 Mo. App. 546, Mo. App. 644.

In *Bates v. Bates*, 74 Ga. 105, it was held that the exemption of wages from garnishment could not be claimed as exempt against a decree for alimony. Under the *Georgia* statutes, as was pointed out by the court in this case, a decree for alimony could be enforced by the imprisonment of the defendant, and he would thereby be totally deprived of all means of supporting himself, so that the whole object of the exemption of debts from garnishment would cease. The court said that a claim for alimony occupied a different position from an ordinary debt, and that wages to the

14. Liens Enforceable Against Exempt Property — *a.* IN GENERAL. — Whether liens created by express agreement, as in the case of a mortgage or pledge, may be enforced as against exempt property, will be shown in a subsequent section. It is the purpose to collect those decisions only which relate to such liens as are created by operation of law.

b. LANDLORD'S LIENS. — In several states the lien given to a landlord for rent may be enforced against crops grown upon the leased premises, notwithstanding a statute allowing a debtor to claim his exemption out of crops,¹ and perhaps in some states the lien may be enforced against other property. The statutes vary in the different states, and no general rules or principles can be laid down. In some states the question is affected by constitutional provisions.²

debtor, which would otherwise be exempt, were liable to process of garnishment founded on such a claim.

1. Landlord's Lien. — In *Georgia* it is held that the crop made upon a rented place, or the money for which it is sold, is subject to the lien of the landlord for rent, and if the same has been set apart as an exemption for the benefit of the family of the tenant, it is, nevertheless, subject to levy and sale for the payment of the rent, the claim for rent being in the nature of purchase money. *Taliaferro v. Pry*, 41 Ga. 622; *Davis v. Meyers*, 41 Ga. 95; *Harrell v. Fagan*, 43 Ga. 339.

Under the North Carolina Statute the lien on crops for rent is superior to the tenant's right of exemption. *Durham v. Speake*, 82 N. Car. 87; *Hamer v. McCall*, 121 N. Car. 196. In this state the lien given to a landlord on crops for rent extends to and includes the costs of such legal proceedings as are necessary to recover his rents; and as all the crops are his until such lien is duly discharged, the tenant has no property therein which he can claim as his constitutional exemption, as against such costs. *Slaughter v. Winfrey*, 85 N. Car. 159.

In Florida the Constitution exempts personal property to the value of one thousand dollars. Acts 1879, c. 3131 (Rev. Stat., § 1761), declared claims for rent to be a lien on all agricultural products raised on the land rented, superior to all other liens, though of older date, and also on all other property of the lessee or his sublessee or assigns, usually kept on the premises, superior to any lien acquired subsequent to bringing the property on the premises, and also on all other property of the tenant dating from the levy of a distress warrant. Under these provisions it is held in that state that the constitutional exemption of personal property cannot be claimed by a tenant as against the lien for rent in favor of the landlord on any of the agricultural products raised on the land rented. The land in such a case is regarded as such a factor in the production of the crops as to subordinate the title of the tenant thereto to the superior lien given by the statute for the use of the premises, and the statute, in giving the lien, is not regarded as unconstitutional. *Hodges v. Cooksey*, 33 Fla. 715; *Schofield v. Liody*, 35 Fla. 1; *Cathcart v. Turner*, 18 Fla. 837; *Blanchard v. Raines*, 20 Fla. 467.

It is held, however, that the legislature could not go further than this and give a lien for rent on other property of the tenant superior to his constitutional right of exemption, and that he may there claim his exemption in property

other than agricultural products raised on the land, though used on the land, as against the lien for rent given by the statute. *Hodges v. Cooksey*, 33 Fla. 715; *Schofield v. Liody*, 35 Fla. 1.

By entering into the lease, the tenant does not impliedly agree that the statutory lien shall attach to his property other than agricultural products, and so waive his constitutional right to claim such property as exempt. *Hodges v. Cooksey*, 33 Fla. 722.

2. In Alabama it was held that under the statute of that state giving to the landlord a lien on the goods for rent (Code 1886, §§ 3069-72), a landlord had a lien for rent of a storehouse upon goods therein, notwithstanding the constitutional provisions giving the right of exemption therein, as the statute must be regarded as an element of the contract between the landlord and the tenant. *Ex p. Barnes*, 84 Ala. 540.

In Texas it is expressly provided that the statute (Rev. Stat. 1895, art. 3251) giving to the landlord a lien on the property of a tenant shall not affect the tenant's right of exemption from forced sale. It is held, however, that this statute does not prevent a judgment against the tenant foreclosing such lien on exempt property if no claim of exemption is made, and in such case the judgment is conclusive against any right of exemption. *York v. Carlisle*, (Tex. Civ. App. 1898) 46 S. W. Rep. 257; *Hammer v. Woods*, 6 Tex. Civ. App. 179.

Rights of Subtenant. — In *Kentucky* the exemption law (Act May 17, 1866, § 1) exempted personal property, money, or growing crops, not exceeding a certain value, from execution, attachment, or distress. Chapter 66, art. 6, § 5, of the General Statutes, relative to landlord and tenant, provided that the personal estate of a subtenant found on the rented premises should be liable to distress by the landlord, and that he should have "a superior lien on the produce of the farm or premises rented, on the fixtures, on the household furniture and other personal property of the tenant or undertenant," etc. But article 2, § 13, of said chapter expressly declared that property exempted from execution should also be exempt from distress or attachment for rent, except for money or property furnished to the tenant by the landlord for the purpose of enabling the tenant to subsist, or to raise his crop, for which the landlord should have a lien on the whole crop of the tenant raised on the leased or rented premises.

Under these provisions it has been held that

c. **OTHER LIENS.** — Various other liens have been held, under particular statutes, to be enforceable as against exempted property, as the lien of a factor on crops for advances to a planter,¹ of a mechanic or materialman on the proceeds of the sale of a building,² of the keeper of a livery or boarding stable on horse or stock cared for,³ and the lien of an innkeeper or boarding-house keeper on the property of a guest or boarder.⁴ The rights of a vendor who has sold property conditionally are shown in another place.⁵

15. Joinder of Claims or Causes of Action. — If the exemption law expressly or impliedly excepts from its operation judgments or debts based upon certain causes, as shown in the paragraphs preceding, and a person joins such a cause of action in his complaint with a cause of action as against which an exemption might be allowed, and recovers a judgment on the two causes jointly, no exemptions at all can be allowed as against the judgment, if the amount recovered for each cause cannot be ascertained or apportioned.⁶ It is other-

a subtenant who enters under a tenant who holds for a term within the statutes is entitled, as against the claim of the landlord upon the original tenant, to the exemption allowed by the Act of 1866. And even if the statute is to be understood as applying only between debtor and creditor, the subtenant, it was held, when the original landlord attempts to seize his property for the rent, occupies the relation of debtor within the spirit of the statute. *Rudd v. Ford*, 91 Ky. 183.

1. Lien of Factor for Advances. — In *Georgia* it was held that where a factor made advances to a planter and took a lien upon the growing crops, under Rev. Code, § 1977, the lien was superior to the wife's title, where the crop was set apart to her as personalty under the homestead laws, after it was made. *Tift v. Newsum*, 44 Ga. 600.

2. Mechanic's or Materialman's Lien — Statutory Liens. — In *Pennsylvania* the Act of April 9, 1849, in effect exempts property from "levy and sale on execution on any judgment upon a contract or distress for rent." The exemption was expressed to be in lieu of the property then so exempt. When the act was passed no right of exemption existed as against mechanics' liens. It was held in *Laucks's Appeal*, 24 Pa. St. 426, that the act applies only as against "judgments against the persons of the parties which may be levied on the goods or lands of the debtor generally, and not judgments *de terris* against specific real estate, which may be executed against such estate, without any contract whatever between the plaintiff and the owner;" and that "from the language of the Act of 1849, as well as from the favor which the law extends to mechanics' liens, * * * it was not the intention of that act to enable debtors to hold possession of buildings, or to take the proceeds of them, without paying the mechanics and materialmen for the materials furnished and work done in erecting them."

Liens at Common Law. — No doubt, a blacksmith who shoes a horse, or a wheelwright who repairs a wagon, and other mechanics performing work on personal property may enforce their lien as against a claim of the property as exempt. See *Flint v. Luhrs*, 66 Minn. 57.

3. Lien of Keeper of Livery or Boarding Stable. — *Munson v. Porter*, 63 Iowa 453. And see,

under an express statutory provision in *Kentucky*, *Fitch v. Steagall*, 14 Bush (Ky.) 230.

In *Flint v. Luhrs*, 66 Minn. 57, it was held that the *Minnesota* statute (Gen. Stat. 1894, § 6248) providing that the keeper of a livery or boarding stable for horses or stock, who at the request of the owner thereof shall keep, support, or care for any such stock, shall have a lien thereon for his reasonable charges therefor, and until they are paid may retain the possession of such stock, and sell the same to pay the lien, applies to any and all stock so kept, whether exempt or unexempt from sale on execution.

4. Lien of Innkeeper or Boarding-house Keeper. — Either the common-law lien or a statutory lien of an innkeeper on the wearing apparel or other property of a guest may be enforced as against a claim of the property as exempt under a general statute. *Swan v. Bournes*, 47 Iowa 501, 29 Am. Rep. 492. See also *Flint v. Luhrs*, 66 Minn. 57; *Thorn v. Whitbeck*, 11 N. Y. Misc. Rep. (Greene County Ct.) 171, citing 11 AM. AND ENG. ENCYC. OF LAW (1st ed.) 30.

The same is true of the lien of a boarding-house keeper given by the *New York* statute. *Thorn v. Whitbeck*, 11 N. Y. Misc. Rep. (Green County Ct.) 171.

5. Conditional Sales. — See *supra*, this title, *Property Exempt under the Statutes — Title or Right to Support Claim*.

6. Effect of Joining Causes of Action — Contract and Tort. — Thus, in *Ries v. McClatchey*, 128 Ind. 125, where the plaintiff in an action united in his complaint a cause of action in tort with one in contract, and recovered a judgment, it was held that the defendant was entitled to treat the judgment as one rendered upon contract, and to claim his exemptions. See also *Holmes v. Farris*, 63 Me. 318.

Debt for Purchase Money. — In *Hickox v. Fay*, 36 Barb. (N. Y.) 9, an execution was issued upon a judgment recovered on a note, a portion only of the consideration of which consisted of a demand for the purchase money of articles exempt from levy and sale under execution, and it was held that it could not legally be levied upon such of the debtor's property as was exempted from levy and sale under execution, and a sale be made of so much of such property as would be necessary to satisfy so much of the judgment as was equal to such

wise, however, if such a separation and apportionment can be made,¹ or if the claim against which there is no right of exemption is clearly in excess of the value of the property claimed as exempt.²

16. Showing or Proof as to Date or Nature of Judgment or Claim. — In the absence of proof to the contrary, it is not necessary that a judgment, or the record thereof, or the execution, shall show the date of the contract on which it is based, or that it shall show the nature of the claim upon which it is founded, as that it is for the purchase price of property, or for a tort, or for necessities, etc., in order that it may be enforced as against exempt property.³ Its nature may be ascertained from the pleadings in the action, or shown by extrinsic evidence, if such proof involves no contradiction or variance of matter of record.⁴ It is otherwise if the statute requires the judgment, or the record thereof, to show its nature, or the nature of the claim on which it is based.⁵

portion of the consideration of the note, as the creditor, by taking a judgment for the price of the exempt property sold to the debtor, together with other debts, must be deemed to have elected to abandon his claim to follow the specific property.

1. Judgment Capable of Separation or Apportionment. — In both of the cases set out in the preceding note it was expressly stated that there could be no separation or apportionment of the judgment as between the causes of action on which it was based. And see the cases cited in the note following.

Keller v. McMahan, 77 Ind. 62, supports this exception. In that case a judgment was recovered for eighteen dollars for penalties due for running a tollgate, and for one dollar for tolls due on account, and the court allowed the judgment to be enforced as to the eighteen dollars as against exempt property, under a statute exempting only as against debts founded upon a contract. See also *Thomas v. Walmer*, 18 Ind. App. 112.

2. Excepted Claim in Excess of Exempt Property. — Thus, in *Pullen v. Monk*, 82 Me. 412, where it appeared by the account annexed to a writ in a trustee suit to reach wages that necessities in excess of the amount attached were furnished to the defendant, it was held that the fact that a few articles which were not necessities were included in the account did not establish an exemption from trustee process as to such articles as were necessities.

3. Judgment Need Not Show Nature of Claim. — Thus, in the absence of express requirements, it is not necessary that the judgment shall recite, or that it shall appear in any way therefore, whether the action was *ex contractu* or *ex delicto*. *McDaniel v. Johnston*, 110 Ala. 526. And see to the same effect *Rogers v. Brackett*, 34 Minn. 279.

The fact that the judgment was recovered for moneys received by an attorney for his client renders applicable a provision disallowing exemptions as against such a judgment, without any finding to that effect in the judgment, where such finding is required by statute. *Shreck v. Gilbert*, 52 Neb. 813.

In *Michigan* the statute does not in terms require that the judgment shall recite that the recovery is for purchase money, and it is there held that the question whether it was or not may be raised and determined whenever it arises. *Lillibridge v. Walsh*, 97 Mich. 459. See to the same effect *State v. Orahood*, 27 Mo. App. 496.

As to the sufficiency of a justice's docket under the *Pennsylvania* statute excepting from the operation of the exemption law debts due for board for four weeks or less, see *Weisman v. Weisman*, 133 Pa. St. 89.

4. Reference to Pleadings. — The complaint and other pleadings in an action may be referred to by the court in order to ascertain whether the judgment is based upon contract or tort, or upon a claim for wages, or for necessities, or purchase money, etc. *McDaniel v. Johnston*, 110 Ala. 526. And see *Shreck v. Gilbert*, 52 Neb. 813.

Showing as to Waiver of Tort. — When it is claimed as against an attempt to enforce a judgment against exempt property as a judgment for tort, that there was a waiver of the tort and that the suit was in contract, the waiver must appear on the pleadings and issues. *Nowling v. McIntosh*, 89 Ind. 595.

Parol Evidence. — If there is nothing on the record of a judgment to show whether it was or was not rendered on a note given for the purchase price of property sold to the defendant, parol evidence is admissible to show that it was. *State v. Orahood*, 27 Mo. App. 496. See also *Rogers v. Brackett*, 34 Minn. 279.

Cannot Contradict or Vary Record. — Matters of record cannot be contradicted or varied by parol evidence with respect to the cause of action on which a judgment is based. *State v. Orahood*, 27 Mo. App. 496.

Evidence is not admissible to show that the suit in which a judgment was rendered was in tort, where the complaint therein is unequivocal as to the character of the cause of action, and shows that it was on contract. In such a case the nature of the cause of action must be determined by the pleadings. *Green v. Simon*, 17 Ind. App. 360. And see *Pickrell v. Jerauld*, 1 Ind. App. 10; *Smith v. Wood*, 83 Ind. 522; *Gentry v. Purcell*, 84 Ind. 83; *Reed v. Umbarger*, 11 Kan. 206.

A sheriff or constable, when sued as a trespasser for seizing and selling the debtor's property in disregard of his claim for the benefit of the exemption law, cannot go behind the judgment of the justice, and prove that the note upon which it was founded embraced a book account part of which was before the time when the exemption law took effect. *Diehl v. Holben*, 39 Pa. St. 213.

5. Express Requirement of Certificate, Recital, or Indorsement by Judge. — In *Missouri* it is provided by Rev. Stat. 1889, § 4910, that no property shall be exempt from seizure and sale

There need be no showing or recital in the execution as to the nature of the claim, unless there is an express requirement to that effect.¹

XI. PROCEEDINGS AND PROCESS IN OR AGAINST WHICH EXEMPTIONS MAY BE CLAIMED — 1. **In General.** — Some of the statutes of exemption are broad in their terms with respect to the proceedings or process in or against which the right of exemption may be asserted. Others in terms apply only to particular proceedings or process.² The tendency of the courts, however, is to construe the statutes as exempting from any process or proceeding by which it is sought to subject the property, if the statute does not by its terms clearly exclude such a construction.³

on execution for services rendered, to a certain amount, by house servants or common laborers. But section 4912 requires that an action for such services, to bring the case within the statute, shall be brought within six months after the last services shall have been rendered; and section 4913 requires the court, justice, or jury trying such action, if it is found for the plaintiff, to find "how much he or she is entitled to recover for services such as are specified in section 4910, for which suit was commenced within the time limited in section 4912, which facts shall be set forth in the judgment rendered and recited in the execution issued thereon." Under these sections, notwithstanding a suit may be for the services of a house servant or a common laborer, and the last service may have been within six months prior to bringing the suit, yet in order to prevent the defendant in such suit from claiming exemptions those facts must appear in the judgment and be recited in the execution. *Buis v. Cooper*, 63 Mo. App. 196. See to the same effect, under the *Illinois* statute, *Hughes v. Melville*, 60 Ill. App. 419.

A judgment and execution without such recital are not void, but are valid as an ordinary judgment and writ. *Buis v. Cooper*, 63 Mo. App. 196.

A recital in a judgment that it is for "work and labor" is not a compliance with a statute requiring it to state that the demand "sued for is for wages due such person as laborer or servant." *Hughes v. Melville*, 60 Ill. App. 419.

Under the *Illinois* statute disallowing exemptions where the judgment is for wages, and the judgment so states, it is sufficient to authorize a levy on exempt property if a judgment of a justice of the peace states that it is for "the wages of a laborer." *Stroup v. Hobbs*, 65 Ill. App. 296.

When the statute, in order that exemptions shall not extend to execution to enforce payment of the purchase money or other particular liability, requires the court to certify that the execution was issued for such liability, the court may make the proper indorsement, notwithstanding there is no such allegation in the complaint, and may do so at a term subsequent to that at which the judgment is rendered. *Green v. Spann*, 25 S. Car. 273.

1. Statement or Recital in Execution Not Necessary. — *Shreck v. Gilbert*, 52 Neb. 813.

Otherwise in Case of Express Requirement. — *Hughes v. Melville*, 60 Ill. App. 419; *Buis v. Cooper*, 63 Mo. App. 196.

Provision Merely Directory. — In *Davis v. Bryan*, 7 Yerg. (Tenn.) 88, it was held that a

provision in a statute that the time when a contract was made should be indorsed by the justice on an execution issued on a judgment thereon, was merely directory, and that want of such indorsement could not be set up by an officer to escape liability for levying upon and selling exempt property.

2. Proceedings and Process In or Against Which Exemptions May Be Claimed. — Some of the statutes in terms exempt from "execution" only. Others exempt from "execution or attachment," or "execution, attachment, or garnishment." Others exempt from "execution or distress for rent." Others exempt from "forced sale" for the payment of debts. See the various local statutes.

3. Tendency of the Courts. — Thus, in *Collier v. Murphy*, 90 Tenn. 300, 25 Am. St. Rep. 698, it was held that a judgment could not be set off in an action brought by the judgment debtor for wages due him which were exempt from execution, attachment, and garnishment. It was said that the language of the statute which created the exemption, strictly construed, would protect the wages only from "execution, attachment, or garnishment," yet the whole spirit of the act was such that it was intended to protect the wages from all manner of legal seizure.

And in *Deering v. Ruffner*, 32 Neb. 845, 29 Am. St. Rep. 473, where a statute of *Nebraska* (Code Civ. Pro., § 531a) exempted the wages of certain persons "from the operation of attachment, execution, and garnishee process" for sixty days, it was held that, in an action for wages protected by it, an indebtedness from the employee to the employer which existed and was due and payable before the wages were earned could not be set off against them.

In *Millington v. Laurer*, 89 Iowa 322, 48 Am. St. Rep. 385, where the statute in terms exempted from "execution" and "attachment" only, and the court held that it could be claimed as against a set-off, it was said by Robinson, C. J.: "The interpretation given to the statute is not in all cases the one which a literal following of its provisions would seem to require, but force and effect are sought to be given to the obvious legislative intent. It is clear that the money due to Merrill could not have been appropriated under an execution or attachment issued against his property. That is conceded, and is according to the letter of the statute. But the primary object of the statute is not merely to protect the earnings of the debtor from seizure by means of the processes technically known as 'attachment' and 'execution,' but to preserve them

2. Execution. — The statutes almost invariably give the right of exemption in terms as against execution.

The Omission in the Execution, in directing the levy to be made on the debtor's property, of the words "except such as is by law exempt from levy and sale," or words of like import, confers no authority upon the officer to take the property exempt. He is bound to know the law and to regard it.¹

3. Attachment. — The statutes very generally allow exemptions to be claimed as against an attachment as well as against an execution, and in a number of cases they have been construed as extending to attachment, either before or after judgment, notwithstanding they in terms exempt only from seizure and sale on execution.² In a few instances the statutes have been construed as not applicable to attachments.³

4. Garnishment Proceedings and Trustee Process. — Property exempted in terms from execution and attachment, or from execution merely, is generally also held exempt from garnishment or trustee process, and when it is sought to reach such property by this process the debtor may intervene and assert his right.⁴

for the benefit of his family against any appropriation for the payment of his debts not authorized by law to which he does not consent." See *infra*, this section, *Claim of Exemption as Against Set-off*.

Sale by Administrator of Insolvent Estate. — In *Kinard v. Moore*, 3 Strobb. L. (S. Car.) 193, it was held that the exemption of certain articles from "levy or sale" in all cases of debt, provided for by the Act of 1823, covered every sale by operation of law which, directly or indirectly, was necessary for the payment of a party's debts, and it was therefore held to include the case of a sale by the administrator of an insolvent estate, for the purpose of paying the debts of the estate.

1. Execution — Omission of Exception of Exempt Property. — *Maxwell v. Reed*, 7 Wis. 582.

2. Exemption from Execution Exempts from Attachment — Arkansas. — *Grubbs v. Ellyson*, 23 Ark. 287.

Kansas — *Seymour v. Cooper*, 26 Kan. 539.

Massachusetts. — *Staniels v. Raymond*, 4 Cush. (Mass.) 314.

Michigan. — *Emerson v. Bacon*, 58 Mich. 526.

New York. — *McCullough v. Carragan*, 24 Hun (N. Y.) 157. See *Handy v. Dobbin*, 12 Johns. (N. Y.) 220.

North Carolina. — *Montgomery County v. Riley*, 75 N. Car. 144.

Ohio. — *Snook v. Snetzer*, 25 Ohio St. 516.

Vermont. — *Kilburn v. Demming*, 2 Vt. 404, 21 Am. Dec. 543; *Parks v. Cushman*, 9 Vt. 320.

"Though the exemption, in terms, is confined to executions, yet as the object of an attachment is to take property to be sold on execution in satisfaction of the judgment which may be recovered, chattels which cannot lawfully be seized and sold on execution cannot lawfully be attached." *Kilburn v. Demming*, 2 Vt. 404, 21 Am. Dec. 543.

Attachment Execution in Pennsylvania is execution process, within the meaning of the statute exempting property from levy and sale on execution, and the exemption may be claimed against a creditor proceeding by such process as effectually as against one who comes with an execution in the ordinary form. *Strouse v. Becker*, 38 Pa. St. 190, 80 Am. Dec.

474, 44 Pa. St. 206; *Bair v. Steinman*, 52 Pa. St. 423; *Ashton v. Glass*, 9 Phila. (Pa.) 510, 29 Leg. Int. (Pa.) 109. *Contra*, *Vezia v. Viench*, 8 Leg. Int. (Pa.) 54, 1 Phila. (Pa.) 176.

On Execution on a Judgment on Attachment, under the Pennsylvania Act of 1842, abolishing imprisonment for debt, exemptions may be claimed under the Act of 1849, exempting from levy and sale on execution. *Waugh v. Burket*, 3 Grant's Cas. (Pa.) 319.

3. Statutes Construed as Not Applicable to Attachment. — In *Iowa* a statute (Laws 1862, c. 113) exempting property of Iowa volunteers in the military service of the United States from levy or sale under and by virtue of any execution issued upon a judgment or decree of court was held not to apply to property levied upon by attachment. *Hannahs v. Felt*, 15 Iowa 141; *Ryan v. Wessels*, 15 Iowa 145.

In *North Carolina*, where a statute exempted property from the operation of a fieri facias, it was held that the exemption did not extend by implication to an original attachment, as it did not follow that, because the legislature deemed it expedient to favor a citizen residing in the state and rendering obedience to the ordinary process of the law, by exempting property from execution, the intention was to extend the like favor to one who should leave the state or persist in disobedience to the commands of the state, as shown by his failing to appear. *Martindale v. Whitehead*, 1 Jones L. (46 N. Car.) 64.

And in *Yelverton v. Burton*, 26 Pa. St. 351, it was held that a statute exempting property "from levy and sale on execution or by distress for rent" did not apply to foreign attachment, as it was not execution process.

Particular Provisions as to Attachment. — The *Pennsylvania* Act of April 15 1845, § 5, which exempts the wages of any laborer, or the salary of any person in public or private employment, from attachment in the hands of the employer, applies to all judgments, whether entered in the Common Pleas or on the docket of a justice of the peace. *Catlin v. Ensign*, 29 Pa. St. 264.

4. Exemption from Garnishment — Arkansas. — *Probst v. Scott*, 31 Ark. 652; *Winter v. Simpson*, 42 Ark. 410.

5. Proceedings Supplementary to Execution. — The statutes of exemption also apply, either by express provision or by implication, as against attachment or garnishment in proceedings supplementary to and in aid of execution.¹

6. Distress for Rent. — Whether property exempt from execution is exempt from distress for rent does not seem to have been decided in any reported case, but it would seem to be so according to the decisions referred to under the three preceding paragraphs.² An exemption could certainly be claimed as against distress for rent under a statute exempting "from forced sale or any process of law."³ Some of the statutes, like that of *Pennsylvania*, expressly exempt from distress for rent.⁴

7. Joint Execution or Attachment. — As to the right to claim exemptions as against an execution or attachment against two or more debtors jointly, the decisions are conflicting. The cases are collected and referred to in a previous section.⁵

8. Alias Writs. — Under a statute exempting property to a certain amount, a debtor may claim his exemption as against an *alias* writ, and it is no answer to his claim to say that he has been allowed an exemption as against the original writ.⁶

Illinois. — *Fanning v. Jacksonville First Nat. Bank*, 76 Ill. 53.

Iowa. — *Brainard v. Simmons*, 67 Iowa 646.

Kansas. — *Seymour v. Cooper*, 26 Kan. 539; *Harding v. Hendrix*, 26 Kan. 583; *Muzzy v. Lantry*, 30 Kan. 49; *Missouri Pac. R. Co. v. Maltby*, 34 Kan. 125; *Zimmerman v. Franke*, 34 Kan. 650; *Bradley v. Byerley*, 3 Kan. App. 357.

Massachusetts. — *Staniels v. Raymond*, 4 Cush. (Mass.) 314.

Michigan. — *Wilson v. Bartholomew*, 45 Mich. 41.

Ohio. — *Chilcote v. Conley*, 36 Ohio St. 545. *Tennessee.* — *Davenport v. Swan*, 9 Humph. (Tenn.) 186.

Vermont. — *Parks v. Cushman*, 9 Vt. 320; *Clark v. Averill*, 31 Vt. 512, 76 Am. Dec. 131.

Garnishment in Justice's Court. — In *Kansas* the exemption of wages may be claimed in garnishment proceedings before a justice of the peace, though section 157 of the justices' act says nothing of exemptions, except an exemption from execution. *Seymour v. Cooper*, 26 Kan. 539.

In *Michigan*, also, property exempted from execution has been held exempt from garnishment before a justice of the peace. *Wilson v. Bartholomew*, 45 Mich. 41.

1. Proceedings Supplementary to Execution. — *Kimball v. Jones*, 41 Minn. 318; Matter of Board of Publication, etc., 22 Misc. Rep. (N. Y. Supreme Ct.) 645; *Bliss v. Raynor*, 91 Hun (N. Y.) 250; *Snook v. Snetzer*, 25 Ohio St. 516; *Wallace v. Lawyer*, 54 Ind. 501, 23 Am. Rep. 661.

2. Distress for Rent. — See *Mason v. O'Brien*, 42 Miss. 420; *Caufield v. M'Alister*, 4 McCord L. (S. Car.) 378; *Parkerson v. Wightman*, 4 Strobb. L. (S. Car.) 363.

3. Any Process of Law. — *Cathcart v. Turner*, 18 Fla. 837; *Hodges v. Cooksey*, 33 Fla. 715.

4. Express Exemption from Distress. — See *Rudd v. Ford*, 91 Ky. 183; *Kenyon v. Gould*, 61 Pa. St. 293.

In *New York* the necessary cooking utensils of a householder were formerly expressly exempted by statute from distress. *Van Sickler v. Jacobs*, 14 Johns. (N. Y.) 434.

In *Pennsylvania* joint owners of chattels levied on under distress for rent due upon a lease signed by them jointly are not entitled to the benefit of the exemption laws. *Bonsall v. Comly*, 44 Pa. St. 442. See *supra*, this title, *Property Exempt under the Statutes—Property Owned in Common; Partnership Property*.

A Stranger or Sublessee or Assignee not in privity with the lessor cannot claim the benefit of the exemption laws of *Pennsylvania* as to goods distrained as the property of the lessee, by whom no claim for the exemption is made, as the exemption law of that state requires the relation of landlord and tenant or debtor and creditor, and neither of these relations exists in such a case. *Rosenberger v. Hallowell*, 35 Pa. St. 369. See also *Guest v. Opdyke*, 31 N. J. L. 552.

But in Kentucky where a landlord distrains the property of a subtenant for rent due by the tenant the subtenant is entitled to the benefit of the statute (Gen. Stat. Ky., c. 66, art. 6, § 5) exempting certain property from distress. *Rudd v. Ford*, 91 Ky. 183.

Express Exemption of Distress for Rent. — In *Mississippi*, section 1255 of the Code of 1880 provided expressly: "No property shall be exempt from execution, when the process is for rent," and it was held that the provision was not limited to cases in which a writ of fieri facias issued on a personal judgment for rent, but applied also in the case of an attachment for rent, as the object of the statute was to abolish all exemption as against demands for rent, without regard to the form of action pursued to recover them. *Ransom v. Duff*, 60 Miss. 901.

The provision has been changed by the Act of March 1, 1882 (Acts 1882, p. 113). See *supra*, this title, *Liabilities as Against Which Exemptions May Be Claimed*.

Waiver of Right of Exemption. — As to a tenant's waiver of his right of exemption, see *infra*, this title, *Waiver, Forfeiture, and Estoppel*.

5. Joint Execution or Attachment. — See *supra*, this title, *Property Exempt under the Statutes—Property Owned in Common; Partnership Property*.

6. Alias Writs. — *Chatten v. Snider*, 126 Ind.

9. Writ of Execution for Recovery of Land and Damages. — In *Alabama* it has been held that personal property exemptions, under the exemption from "execution, or other process for the collection of debts," cannot be claimed as against a writ of execution issued on a judgment for the recovery of land, and for the collection of damages for its wrongful detention.¹

10. Foreclosure Proceedings. — When the statute exempts property to a certain amount from execution, and allows the debtor to select, the exemption may be claimed as against existing judgment creditors out of the surplus proceeds of a mortgage foreclosure sale.² But the debtor cannot claim an exemption as against the mortgage.³

11. In Bankruptcy and Insolvency Proceedings. — The former federal bankruptcy act excepted certain property from the operation of the conveyance to the assignee, including the property exempted by the laws of the state,⁴ and the present bankruptcy act contains provisions as to exemptions.⁵ Exemptions have also been allowed by the various state insolvency laws. These laws, including their provisions as to exemptions, will be treated in another part of this work.⁶

12. Lien of Execution or Attachment. — If the property is absolutely exempt, the levy of an execution or attachment thereon does not create a lien, or

387. See *supra*, this title, *Property Exempt under the Statutes—Limitations as to Value or Amount of Property.*

1. Writ of Execution for Recovery of Land and Damages. — *Penton v. Diamond*, 92 Ala. 610.

2. Foreclosure Proceedings. — *Darby v. Rouse*, 75 Md. 26.

3. Cannot Claim as Against the Mortgage. — *Conway v. Wilson*, 44 N. J. Eq. 457.

As to the Effect of Mortgages on Exempt Property, see *infra*, this title, *Sales and Other Transfers, and Incumbrances.*

Decisions in Pennsylvania. — In Pennsylvania the Act of 1849 (1 Bright. Purd. Dig., 12th ed., 831) exempts property to the amount of three hundred dollars "from levy and sale on execution issued upon any judgment obtained upon contract, and distress for rent."

In *Morgan v. Noud*, 1 Phila. (Pa.) 250, 8 Leg. Int. (Pa.) 158, it was held that by this the legislature meant judgments upon personal contracts, and that the exemption could not be claimed in case of a sale on a *levari facias* upon a mortgage. "The claim of the defendant," it was said, "does not fall within the words of the act. It is not a levy and sale upon judgment obtained upon contract. There is no levy; there is in strictness no judgment obtained upon contract."

In *Hill v. Johnston*, 29 Pa. St. 362, it was held that where the real estate of a debtor is seized and sold under a judgment obtained on a mortgage given for the balance of purchase money of such real estate, and before the sale the debtor notifies the sheriff that he claims the benefit of the Exemption Law of 1849 and desires to have an appraisement made, he is entitled to the balance of the proceeds after the payment of the mortgage debt and costs, it being less than three hundred dollars, in preference to judgments obtained for debts contracted since the exemption law took effect. The sheriff, it was held, under a writ of *levari facias*, has no power or authority to hold the appraisement directed by the Act

of 1849, but the want of an appraisement, in such cases, will not debar the debtor from claiming the benefit of the exemption out of the proceeds of the sale, as against judgments and liens subject to its provisions. The omission of the legislature to point out the form in which the claim for exemption shall be made, where the sale is upon a mortgage, does not annihilate the right conferred by the act.

In *McAuley's Appeal*, 35 Pa. St. 209, it was held that a mortgagor is not entitled to the exemption as against his mortgagee, under an execution issued upon a judgment entered on the bond accompanying the mortgage, and levied on the mortgaged premises.

The same was held in *Gangwere's Appeal*, 36 Pa. St. 466, where it was said that the act is a limitation of the remedy given by the law against a debtor's property, but does not interfere with such as arise out of express contract of the parties, and that a mortgage is, in its nature, a contract waiver of the rights of exemption. Compare *Twaddell v. Rodgers*, 14 Phila. (Pa.) 163, 37 Leg. Int. (Pa.) 299.

4. Bankruptcy and Insolvency Proceedings. — Exempt property did not pass to an assignee in bankruptcy, under this act, but remained the absolute property of the bankrupt, unaffected by the bankruptcy proceedings, and subject to any specific liens created by the voluntary act of the bankrupt or through legal proceedings. *Robinson v. Wilson*, 15 Kan. 595, 22 Am. Rep. 272. And see *Rix v. Capitol Bank*, 2 Dill. (U. S.) 367; *In re Stevens*, 2 Biss. (U. S.) 373; *In re Ellis*, 1 Nat. Bankr. Reg. 555, 8 Fed. Cas. No. 4,400.

5. New Bankruptcy Act of 1898. — The new Bankruptcy Act of 1898, § 6, provides: "This act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the state laws in force at the time of the filing of the petition in the state wherein they have had their domicile for the six months or the greater portion thereof immediately preceding the filing of the petition."

6. See the title *INSOLVENCY AND BANKRUPTCY*.

affect the debtor's right to sell or otherwise deal with it.¹ But if an appraisal or selection is necessary before it can be determined whether the property is exempt, a lien attaches.²

Right of Exemption Acquired After Levy. — It has been held that if a debtor marries or otherwise acquires a status, after a levy on his property, giving him the right to claim such property as exempt from sale, he is entitled to the exemption as against the lien of the execution,³ but there are decisions to the contrary.⁴

13. Claim of Exemption as Against Set-off. — It is well settled that in an action for exempt wages or earnings, or on any other exempt chose in action, which the plaintiff claims as exempt, the defendant cannot defeat a recovery to the full amount by pleading as a set-off a debt due him from the plaintiff, though the exemption law may in terms exempt only from execution and attachment, or from execution merely.⁵ He cannot thus do indirectly what he is prohibited

1 Execution or Attachment Not a Lien — *Alabama*. — *Pool v. Reid*, 15 Ala. 826; *Cook v. Baine*, 37 Ala. 350; *Hadley v. Bryars*, 58 Ala. 139.

Colorado. — *Harrington v. Smith*, 14 Colo. 376, 20 Am. St. Rep. 272.

Connecticut. — *Williams v. Miller*, 16 Conn. 144.

District of Columbia. — *Wallingsford v. Bennett*, 1 Mackey (D. C.) 303.

Indiana. — *Godman v. Smith*, 17 Ind. 152; *Barnard v. Brown*, 112 Ind. 53; *Ray v. Yarnell*, 118 Ind. 112.

Kentucky. — *Perry v. Hensley*, 14 B. Mon. (Ky.) 381, 61 Am. Dec. 164; *Paxton v. Freeman*, 6 J. J. Marsh. (Ky.) 234, 22 Am. Dec. 74.

Michigan. — *Buckley v. Wheeler*, 52 Mich. 1.

Missouri. — *Kulage v. Schueler*, 7 Mo. App. 250.

2. Otherwise Where Property Not Absolutely Exempt. — *Vandibur v. Love*, 10 Ind. 54; *Moss v. Jenkins*, 146 Ind. 589; *Frost v. Shaw*, 3 Ohio St. 270; *Pender v. Lancaster*, 14 S. Car. 25, 37 Am. Rep. 720. And see *Alt v. Lafayette Bank*, 9 Mo. App. 91.

Release from Lien by Setting Off as Exempt. — Where property is claimed by an execution debtor as exempt from sale under executions then in the hands of the sheriff, and is set off to him as exempt, it is relieved from the lien of the executions. *Hall v. Hough*, 24 Ind. 273.

3. Marriage After Levy. — *Watson v. Simpson*, 5 Ala. 233.

In *Robinson v. Hughes*, 117 Ind. 293, 10 Am. St. Rep. 45, a judgment was obtained against an unmarried man, who was not a householder, and his property was levied upon under an execution issued on the judgment, and advertised for sale. After the levy and before the date fixed for the sale, he married and became a *bona fide* householder and claimed the property, which was of less value than allowed by the exemption laws, as exempt. It was held that the exemption should have been allowed, and that its denial entitled the debtor to enjoin the sale.

4. In *Pender v. Lancaster*, 14 S. Car. 25, 37 Am. Rep. 720, it was held that where an execution debtor marries after levy on his personal property, but before its sale, he does not thereby become entitled to its exemption under the homestead provisions of the Constitution of *South Carolina*.

Exemptions for the Benefit of Persons Engaged in Particular Occupations. — It has been held that where a statute exempts property for the benefit of persons engaged in particular occupations or employment, the time to which the inquiry as to the debtor's occupation or employment relates for the purpose of determining his right to an exemption is the time when the property claimed to be exempt was levied upon. In other words, if a debtor's occupation is not such at the time of the levy as to entitle him to claim property as exempt, the lien attaches and cannot be divested by his subsequently engaging in an occupation which brings him within this statute. *Springer v. Lewis*, 22 Pa. St. 191. And see *O'Donnell v. Segar*, 25 Mich. 367.

As to the Rule as Applied to Homestead Exemptions, see the title *HOMESTEAD*.

Dissolution of Partnership. — Many courts recognize the right of partners to claim under the exemption laws property which came to them upon a dissolution of the firm after an execution lien has attached. *Russell v. Lennon*, 39 Wis. 570, 20 Am. Rep. 60; *Blanchard v. Paschal*, 68 Ga. 32, 45 Am. Rep. 474; *Skinner v. Shannon*, 44 Mich. 86, 38 Am. Rep. 232; *Stewart v. Brown*, 37 N. Y. 350, 93 Am. Dec. 578. Others deny this doctrine. *State v. Day*, 3 Ind. App. 155. See *supra*, this title, *Property Exempt under the Statutes* — *Partnership Property*.

5. Cannot Plead Set-off Against Exempt Claim — *Arkansas*. — *Atkinson v. Pittman*, 47 Ark. 464; *Draffin v. Smith*, 63 Ark. 83.

Indiana. — *Smith v. Sills*, 126 Ind. 205; *Pickrell v. Jerauld*, 1 Ind. App. 10; *Coppage v. Gregg*, 1 Ind. App. 113; *Coffing v. Dungan*, 6 Ind. App. 386, 388. And see the cases from this state cited in the second note following.

Iowa. — *Banks v. Rodenbach*, 54 Iowa 695; *Millington v. Laurer*, 89 Iowa 322, 48 Am. St. Rep. 385.

Missouri. — *Wagner v. J. H. North Furniture, etc., Co.*, 63 Mo. App. 206. And see *State v. Finn*, 8 Mo. App. 262.

Nebraska. — *Deering v. Ruffner*, 32 Neb. 845, 29 Am. St. Rep. 473.

North Carolina. — *Curlee v. Thomas*, 74 N. Car. 51.

North Dakota. — *Cleveland v. McCanna*, 7 N. Dak. 455.

Pennsylvania. — See *Wilson v. McElroy*, 32 Pa. St. 82.

from doing directly.¹

Proceeding to Set Off Judgments. — And when a judgment creditor has a right to claim the judgment as exempt as against any "process" from any court, or as against "final process," or even as against execution, the exemption may be claimed in a statutory proceeding to set off judgments.²

Qualification of the Rule. — The rule disallowing a set-off as against an exempt demand does not apply, of course, so as to prevent an employer or other debtor from setting off claims in accordance with the terms of the contract with the employee or other creditor.³

14. In Equity. — A creditor cannot, by going into a court of equity, reach and subject to the satisfaction of his claim property or credits which the debtor would be entitled to claim as exempt in an action or proceeding at law.⁴

15. Process from the Federal Courts. — Congress has adopted generally, for the enforcement of judgments recovered in the federal courts, the same remedies, by execution or otherwise, as are provided in like cases by the laws of the respective states.⁵ This embraces the laws of the respective states grant-

Tennessee. — *Collier v. Murphy*, 90 Tenn. 300, 25 Am. St. Rep. 698. See *Duff v. Wells*, 7 Heisk. (Tenn.) 17.

Texas. — *Howard v. Tandy*, 79 Tex. 450.

Assigned Claims. — In *Dempsey v. McKennell*, 2 Tex. Civ. App. 284, it was held that an employer, in an action for wages exempted "from attachment or execution, or every other species of forced sale for the payment of debts," could not set off a debt due from the employee to a third person and assigned to him.

A Statute Allowing Set-off generally, such as the *Tennessee* statute (Mill. & V. Code, § 3628), declaring that a defendant may set off mutual demands held against the plaintiff at the time of the suit, does not allow such a set-off as against a claim for exempt wages. *Collier v. Murphy*, 90 Tenn. 300, 25 Am. St. Rep. 698.

Effect of Death of Creditor. — In *Indiana* the right of the debtor to demand his exemption as against a set-off cannot be defeated by showing that the creditor is dead and the suit is brought by his personal representative. The right is not defeated by the provision of Rev. Stat. 1881, § 352, that the right of set-off shall not be defeated by the death of either the creditor or the debtor. *Coppage v. Gregg*, 1 Ind. App. 113.

1. An Indirect Evasion of Exemption Law. — *Millington v. Laurer*, 83 Iowa 322, 48 Am. St. Rep. 385.

2. Motion or Application to Set Off Judgments. — The proceeding, said the *Arkansas* court, under a statute providing for the set-off of judgments on motion, is only a substitute for an execution or garnishment, and is clearly a process of court within the meaning of a statute exempting property from seizure on attachment "or other process from any court." *Atkinson v. Pittman*, 47 Ark. 464. And see to the same effect *Draffin v. Smith*, 63 Ark. 83. And in *Curlee v. Thomas*, 74 N. Car. 51, it was held that a motion for set-off of judgments, under a statute, was "final process" within the meaning of the exemption law.

In *Indiana* the decisions are to the same effect with respect to the equitable right to set off judgments. *Puett v. Beard*, 86 Ind. 172, 44 Am. Rep. 280; *Butner v. Bowser*, 104 Ind.

255; *Junker v. Hustes*, 113 Ind. 524; *Carpenter v. Cool*, 115 Ind. 134.

See also *State v. Finn*, 8 Mo. App. 262; *Duff v. Wells*, 7 Heisk. (Tenn.) 17; *Cleveland v. McCanna*, 7 N. Dak. 455.

Decisions to the Contrary. — It was held in *Temple v. Scott*, 3 Minn. 419, by a divided court, that the right of set-off will prevail in such a case as this; but the opinion assumes what is almost universally denied, that the statute of exemption is to be strictly construed, and, starting from this erroneous premise, it is not strange that a wrong conclusion was reached. See *Puett v. Beard*, 86 Ind. 172, 44 Am. Rep. 280.

3. Set-off Authorized by Contract. — Thus, if a creditor employs his debtor under an express agreement that a certain amount of the wages to be paid under the contract shall be applied on the debt, such an amount may be set off in an action for the full wages. *Deering v. Ruffner*, 32 Neb. 845, 29 Am. St. Rep. 473.

The mere fact, however, that a creditor employs his debtor because of the indebtedness, and for the purpose of collecting it by applying the wages in payment, does not give him any right to do so, where there has been no agreement to this effect on the part of the employee. *Millington v. Laurer*, 89 Iowa 322, 48 Am. St. Rep. 385.

Debt Due at Time of Contract. — In *Nebraska*, where the statute (Code Civ. Pro., § 531a) exempted the wages "from the operation of attachment, execution, and garnishee process," it was held that, in an action for wages protected by it, an indebtedness from the employee to the employer which existed and was due and payable before the wages were earned could not be set off against them. *Deering v. Ruffner*, 32 Neb. 845, 29 Am. St. Rep. 473.

4. In Equity. — *Thall's Appeal*, 119 Pa. St. 425.

A Court of Equity will not decree a set-off of a judgment against a debt due from the judgment creditor to the judgment debtor, where at law the debtor would be entitled to claim the debt as exempt. *Thall's Appeal*, 119 Pa. St. 425.

5. Process from Federal Courts — Act of Congress. — Rev. Stat. U. S., § 916.

ing exemptions, and allows exemptions to be claimed as against process from the federal courts whenever they could be claimed as against similar process from the state courts.¹

XII. WAIVER, FORFEITURE, AND ESTOPPEL — 1. Waiver — a. POWER TO WAIVE EXEMPTIONS — (1) Express Provisions. — The exemption laws sometimes expressly allow a waiver of exemptions, and sometimes they contain express prohibitions. In such cases, of course, a waiver in compliance with the requirements of the statute, whether at the time of a levy or by provision in an executory contract, is binding upon the debtor and his family, but a prohibited waiver is ineffectual.²

1. This Adopts Exemption Laws. — *Fink v. O'Neil*, 106 U. S. 272; *Balk v. Harris*, 122 N. Car. 64. See also U. S. *Bank v. Halstead*, 10 Wheat. (U. S.) 53, decided before the passage of the above-mentioned act; *Lawrence v. Wickware*, 4 McLean (U. S.) 56; *Lloyd v. Yost*, 4 Phila. (Pa.) 42, 17 Leg. Int. (Pa.) 117; *Rogers v. McKenzie*, 1 Heisk. (Tenn.) 514 (decided prior to 1872, and holding that United States marshals acting under process from federal courts were not bound by the state exemption laws). See *contra*, *Manufacturers', etc., Bank v. Bayless*, *Brunner's Col. Cas.* 8, 16 Fed. Cas. No. 9,050. And see *Gilman v. Williams*, 7 Wis. 329, 76 Am. Dec. 219.

2. Express Authority to Waive Exemptions. — See *Georgia Constitution* of 1877, and the Code, 1895, § 5914; Code, 1882, § 5212; Acts 1878-79, p. 99; Code, 1882, § 2039a; Code, 1895, § 2863.

These provisions give a debtor the right to waive exemptions as to personal property other than that expressly excepted, by executory agreement in writing not to have the same set apart as exempt, and if he does so he bars any right either he or his wife might otherwise have to have it set apart. *Flanders v. Wells*, 61 Ga. 195; *West v. Wheatley*, 59 Ga. 559; *Hahn v. Allen*, 93 Ga. 612. And see *Taliaferro v. Pry*, 41 Ga. 622.

Exception as to "Provisions." — The exemption of cotton may be waived though produced by labor performed while consuming exempt provisions. The cotton does not take the place of the provisions consumed in its production. *Butler v. Shiver*, 79 Ga. 172.

A Milch Cow is not within the term "provisions" in this statute, and the right to claim the same as exempt may be waived. *Wilson v. McMillan*, 80 Ga. 733.

But the Term "Provisions" covers and prevents a waiver as to corn on the ear in the shuck. *Cochran v. Harvey*, 88 Ga. 352.

Setting Apart by Ordinary. — To entitle the debtor to an exemption of household and kitchen furniture and provisions under these constitutional and statutory provisions, as against a waiver, the property must not only be selected, but it must also be set apart by the ordinary. A mere personal claim to certain property as so selected, with no official action thereon, is not sufficient. *Sasser v. Roberts*, 68 Ga. 252.

General Waiver. — Under the *Georgia Constitution* of 1868, a general waiver of exemptions was ineffectual. *Stafford v. Elliott*, 59 Ga. 837. But such a waiver is valid under the *Constitution* of 1877 and statute of 1878. *Boroughs v. White*, 69 Ga. 841.

These provisions do not permit a debtor to

make a general and indefinite waiver in a note as to all future wages. *Green v. Watson*, 75 Ga. 471, 45 Am. Rep. 479. In this case the waiver in a note was as follows: "And I hereby contract and expressly waive the exemption of my wages or salary from the process of garnishment under the laws of Georgia, or the exemption of my daily, weekly, monthly, or yearly wages or salary from the operation of the garnishment law, in case this note is not paid promptly at maturity." It was held void.

Constitutional and Statutory Provisions in Alabama. — The *Constitution* of Alabama expressly declares that the right of exemptions therein secured may be waived by an instrument in writing, though when the waiver relates to realty the instrument must be signed by both husband and wife and attested by one witness. *Const. Ala.*, 1875, art. 10, § 7. The right to waive is also recognized and provided for in the *Code* of 1876, §§ 2846-2848, in the *Code* of 1886, §§ 2567-2569, and in the *Code* of 1896, §§ 2104-2106.

By the Alabama Act Feb. 21, 1893 (*Laws* 1892-93, No. 398, p. 886), relating to garnishment, it is provided in effect that where a party sues out process of garnishment for a debt due for necessary bread and meat for the debtor and his family, or for house rent, it shall be unlawful for the justice or notary to issue a garnishment on any claim when exemptions have not been waived in writing, and that "such waiver shall only be given for necessary bread and meat for support of the debtor and his family, or for house rent." This constitutional provision allows a waiver by executory contract if the waiver is in writing. See *Adams v. Green*, 100 Ala. 219; *Reed Lumber Co. v. Lewis*, 94 Ala. 626; *Courie v. Goodwin*, 89 Ala. 569; *Terrell v. Hurst*, 76 Ala. 588; *Brown v. Leitch*, 60 Ala. 313, 31 Am. Rep. 42; *Neely v. Henry*, 63 Ala. 261.

Constitutionality of Statute. — In *Adams v. Green*, 100 Ala. 219, it was held that the statute above referred to, in so far as the prohibition as to waiver relates to contracts waiving exemptions made before it took effect, is unconstitutional as impairing the obligation of contracts. It was further held, however, in this case, that the act is not a restraint on the exercise of the constitutional right to waive exemptions, but that it is merely a limitation on the right of garnishment in justices' court to cases in which the defendant has waived his exemptions, and the consideration of the contract was for bread and meat or for house rent, and that the act, therefore, is valid as to contracts made after it took effect.

(2) *In the Absence of Express Provisions.* — As to whether exemptions may be waived in the absence of express constitutional or statutory provisions on the subject, the decisions are to some extent conflicting. The cases in which the question has arisen are very numerous.

(a) *Waiver at Time of Levy or Afterwards.* — In a Few States it has been held that the right of exemption is intended not only for the debtor, but also and equally for the protection of his family, and that he cannot be allowed to waive the right even at the time of a levy.¹

In Most Cases, however, this view is not taken, but it is held that a debtor may waive his right of exemption at the time of a levy on his property or afterwards, whether the property be exempted absolutely or be dependent upon a claim and selection by him, and that he may do so either by expressly consenting to a levy and sale, or pointing out or delivering the property to the officer,² or by failure to assert his right and claim his exemption.³ And

Waiver in Kansas as Against Debts Contracted for Rent. — In Kansas a statute provided that a tenant could waive exemptions in writing as against debts contracted for rents. Gen. Stat. 1897, c. 121, § 5, p. 628. Under this provision it was held that a tenant who waives all right of exemption in a lease could not claim an exemption as against an execution on a judgment for the rent. *Hoisington v. Huff*, 24 Kan. 379. See also *Rice v. Nolan*, 33 Kan. 30.

It is held that the waiver allowed by this provision is limited to the property rights of the debtor under the general exemption laws of the state, and that a lessee cannot waive the benefit of Stat. 1889, par. 4589, exempting the wages of a debtor having a family dependent upon his earnings for support. *Burke v. Finley*, 50 Kan. 424, 34 Am. St. Rep. 132.

Chapter 176 of the Laws of Kansas of 1889, which requires the joint consent of husband and wife to a mortgage of exempt personal property, does not repeal or in any manner affect the statute above referred to, and a tenant may still waive the benefit of the exemption laws for debts contracted for rent, without the consent of his wife. *Kroenert v. Mead*, 59 Kan. 665.

Express Prohibition or Restriction. — Where a statute, as in *South Carolina*, provides that no waiver except by conveyance shall defeat the right of exemption, the mere failure of the debtor to give notice to the officer of a claim of exemption does not impair his right thereto. *Gray v. Putnam*, 51 S. Car. 97.

See also *infra*, this title, *Sales and Other Transfers, and Incumbrances—Restrictions on Power to Sell or Encumber.*

Other Questions arising under the above provisions are considered in a subsequent paragraph. See *infra*, this subdivision, *What Constitutes a Waiver—Executory Contracts.*

1. Cases Denying Right to Waive at Time of Levy. — In *State v. Haggard*, 1 Humph. (Tenn.) 390, it was said that a debtor could waive the benefit of the exemption law. But in a later case the *Tennessee* court, without referring to this dictum, held that the right of exemption is a privilege which a debtor cannot waive even by his consent at the time of a levy. *Denny v. White*, 2 Coldw. (Tenn.) 283, 88 Am. Dec. 596. See also *Mills v. Bennett*, 94 Tenn. 651, 45 Am. St. Rep. 763.

In *Texas*, also, it was held that property reserved by law for the family and exempt from

execution is not subject to be levied on, though with the consent of the head of the family, and therefore, though such property may be pointed out by the defendant in execution, the sheriff cannot properly levy on it. *Ross v. Lister*, 14 Tex. 469. But see *Dodge v. Knight*, (Tex. 1891) 16 S. W. Rep. 626.

2. Cases Allowing Waiver at Time of Levy—Consent — *United States.* — *Spitley v. Frost*, 5 McCrary (U. S.) 43.

Alabama. — *Gresham v. Walker*, 10 Ala. 370.
Arkansas. — *Wallace v. Collins*, 5 Ark. 41, 39 Am. Dec. 359.

Connecticut. — *Patten v. Smith*, 4 Conn. 450, 10 Am. Dec. 166.

Iowa. — *Richards v. Haines*, 30 Iowa 574.
Maine. — *Smith v. Chadwick*, 51 Me. 515; *Fogg v. Littlefield*, 68 Me. 52.

Massachusetts. — *Hewes v. Parkman*, 20 Pick. (Mass.) 90; *Dow v. Cheney*, 103 Mass. 181.

Michigan. — *Charpentier v. Bresnahan*, 62 Mich. 360.

Missouri. — *Robards v. Samuel*, 17 Mo. 555; *Marchildon v. O'Hara*, 52 Mo. App. 523.

New York. — *Kneetle v. Newcomb*, 22 N. Y. 249, 78 Am. Dec. 186; *Turner v. Borthwick*, 20 Hun (N. Y.) 119; *Lockwood v. Younglove*, 27 Barb. (N. Y.) 505.

Pennsylvania. — *Winchester v. Costello*, 2 Pars. Eq. Cas. (Pa.) 279.

Texas. — *Dodge v. Knight*, (Tex. 1891) 16 S. W. Rep. 626.

And see *infra*, this subdivision, *What Constitutes a Waiver.*

3. Implied Consent—Omission to Claim — *United States.* — *Edmondson v. Hyde*, 7 Nat. Bankr. Reg. 1, 2 Sawy. (U. S.) 205; *Spitley v. Frost*, 5 McCrary (U. S.) 43.

California. — *Borland v. O'Neal*, 22 Cal. 504; *Stanton v. French*, 83 Cal. 194, 25 Am. St. Rep. 174.

Illinois. — *Bingham v. Maxcy*, 15 Ill. 291.

Indiana. — *State v. Melogue*, 9 Ind. 196; *Moss v. Jenkins*, 146 Ind. 589.

Iowa. — *Angell v. Johnson*, 51 Iowa 625, 33 Am. Dec. 152.

Maine. — *Smith v. Chadwick*, 51 Me. 515; *McKenzie v. Redman*, 87 Me. 322.

Massachusetts. — *Clapp v. Thomas*, 5 Allen (Mass.) 158.

Ohio. — *Butt v. Green*, 29 Ohio St. 667.

Pennsylvania. — *Strouse v. Decker*, 38 Pa. St. 199, 80 Am. Dec. 474.

a debtor who may waive his exemptions may withdraw a claim of exemptions.¹ This doctrine is generally expressed by saying that the right of exemption is a personal privilege which the debtor may waive.

(b) **Waiver by Executory Contract.** — In Pennsylvania, where there is no express provision on the subject, the court has held that the right of exemption is so far a privilege personal to the debtor that he may waive it by executory agreement in contracting a debt, as by inserting in a note, lease, or other contract a clause waiving the benefit of all exemption laws.²

Reason for This Doctrine. — This doctrine seems to be based upon the idea that creditors, rather than unfortunate debtors, are in need of protection, and is clearly opposed to the policy of the exemption laws as they are generally viewed.³

Exception in Case of Wages. — The court refused to apply the rule to an agreement in a note given by a laborer waiving the proviso in the Act of 1845 which declares that wages shall not be liable to attachment in the hands of an employer, and declared the agreement to be void.⁴

In Other States where the question has arisen the Pennsylvania doctrine has been repudiated. While the courts generally recognize the power of the debtor to waive the right of exemption by his consent or conduct at the time of a levy on his property, they regard it as against public policy to allow a waiver by executory agreement, and hold that such a waiver is ineffectual and does not estop the debtor.⁵

South Carolina. — *Oliver v. White*, 18 S. Car. 235.

And see the other cases cited *infra*, this title, *Enforcement and Protection of the Right*.

1. **Withdrawal of Claims.** — A claim of exemption, where the right of exemption may be waived, may be withdrawn by the debtor at any time before the property is set off to him or paid over to him. *Kyle's Appeal*, 45 Pa. St. 353; *Overseers of Poor's Appeal*, 95 Pa. St. 191.

That the Claimant Is a Pauper, and a charge upon the township or county, does not prevent him from waiving his right of exemptions, or withdrawing a claim of exemption, so as to allow his property to be taken by his creditors. In such a case the overseers of the poor cannot successfully object. *Overseers of Poor's Appeal*, 95 Pa. St. 191.

2. **Pennsylvania Doctrine Allowing Waiver by Executory Agreement.** — In *Bowman v. Smiley*, 31 Pa. St. 225, 72 Am. Dec. 738, it was held on the broadest grounds, and without any statutory authority, that a debtor may waive his statutory privilege of exemption from execution of a portion of his property, given him by the Act of 1849, by an executory agreement in contracting a debt, and that the waiver of exemption in such a case is based on the same consideration as that on which rests the liability to pay, and is irrevocable. And this rule is now well settled in that state. See also *Case v. Dunmore*, 23 Pa. St. 94; *Laucks's Appeal*, 24 Pa. St. 426, 44 Pa. St. 395; *Johnston's Appeal*, 25 Pa. St. 116; *Smiley v. Bowman*, 3 Grant's Cas. (Pa.) 132; *Garrett's Appeal*, 32 Pa. St. 160, 72 Am. Dec. 779; *Shelly's Appeal*, 36 Pa. St. 373; *O'Neil v. Craig*, 56 Pa. St. 161; *Beatty v. Rankin*, 139 Pa. St. 358; *McKinney v. Reader*, 6 Watts (Pa.) 34.

Under this rule allowing a waiver of exemption, a tenant may waive his right of exemption as against distress for rent, though the statute expressly provides for an exemption as against

distress for rent. *McKinney v. Reader*, 6 Watts (Pa.) 34.

As to the Effect of a waiver under this rule, and as to the power to waive in such a way as to prefer creditors, see *infra*, this subdivision, *Effect of Waiver*.

3. **Reason for This Doctrine.** — *Case v. Dunmore*, 23 Pa. St. 93, is a leading case and gives the reasoning upon which this rule has been established.

This Rule Was Afterwards Regretted by the Pennsylvania court in a later case, where Judge Woodward said: "Perhaps it would have been well if the court had set out by denying the capacity of the debtor to waive the statutory exemption in favor of any creditor. It might have been urged in support of such a view that the legislature intended a benefit to the family of the debtor rather than to the debtor himself; and that his caprice or will, tempted as they might be by the creditor, should not defeat the legislative beneficence in favor of those who were dependent upon him." *Shelly's Appeal*, 36 Pa. St. 373. And see *O'Neil v. Craig*, 56 Pa. St. 161.

4. **Exception in the Case of Wages.** — *Firmstone v. Mack*, 49 Pa. St. 387, 88 Am. Dec. 507.

5. **Cases Denying Power to Waive by Executory Agreement** — *District of Columbia*. — *Wallingsford v. Bennett*, 1 Mackey (D. C.) 303.

Florida. — *Carter v. Carter*, 20 Fla. 558, 51 Am. Rep. 618.

Illinois. — *Recht v. Kelly*, 82 Ill. 147, 25 Am. Rep. 301; *Curtiss v. Ellenwood*, 59 Ill. App. 110; *Powell v. Daily*, 61 Ill. App. 552, reversed on another point 163 Ill. 646. And see *Phelps v. Phelps*, 72 Ill. 545, 22 Am. Rep. 149.

Indiana. — *Maloney v. Newton*, 85 Ind. 565, 44 Am. Rep. 46; *Doherty v. Ramsey*, 1 Ind. App. 530.

Iowa. — *Curtis v. O'Brien*, 20 Iowa 376, 89 Am. Dec. 543.

Kansas. — *Burke v. Finley*, 50 Kan. 424, 34 Am. St. Rep. 132.

Reason for This Doctrine. — This doctrine is based upon the ground that it would be contrary to the policy of the exemption laws to allow debtors to agree in advance not to take advantage of them. The reason is well stated in a leading *New York* case, in which it was held broadly that "a person contracting a debt cannot agree with the creditor that in case of nonpayment he shall be entitled to levy his execution upon property exempt from levy by the general laws of the state."¹

Unmarried Debtors. — In *Illinois* it has been held that this rule does not apply to exemptions allowed to an unmarried man, and that a waiver by him by an executory contract is valid and binding.² But the contrary view has been taken in a late *Tennessee* case.³

(c) **Sales, Transfers, and Incumbrances.** — It is well settled, even in those states in which the right to waive exemptions by a clause in an executory contract is denied, that a person, in the absence of express restrictions, may sell, pay out, give away, or exchange his exempt property; and that he may create a lien on specific property by mortgage, pledge, or other agreement, and thereby waive the right to claim such property as exempt as against the mortgagee, pledgee, or other lienee.⁴ Such transactions, by which a present right is vested, are not regarded as within the reasons for denying the power to waive the right of exemption by executory contract.⁵

b. WHO MAY WAIVE — AGENCY — (1) *In General.* — A waiver of

Kentucky. — *Moxley v. Ragan*, 10 Bush (Ky.) 156, 19 Am. Rep. 61.

Louisiana. — *Levicks v. Walker*, 15 La. Ann. 245, 77 Am. Dec. 187.

New York. — *Kneettle v. Newcomb*, 22 N. Y. 249, 78 Am. Dec. 186 (affirming 31 Barb. (N. Y.) 169; *Harper v. Leal*, 10 How. Pr. (N. Y. County Ct.) 276. And see *Crawford v. Lockwood*, 9 How. Pr. (N. Y. Supreme Ct.) 547.

North Carolina. — *Branch v. Tomlinson*, 77 N. Car. 388.

Tennessee. — *Denny v. White*, 2 Coldw. (Tenn.) 283, 88 Am. Dec. 596; *Mills v. Bennett*, 94 Tenn. 651, 45 Am. St. Rep. 763.

West Virginia. — *Moran v. Clark*, 30 W. Va. 358, 8 Am. St. Rep. 66.

Wisconsin. — *Maxwell v. Reed*, 7 Wis. 582.

Agreement under Seal. — Such an agreement is not rendered effectual by the fact that it is under seal. *Branch v. Tomlinson*, 77 N. Car. 388.

Giving Bond in Legal Proceedings. — Nor, according to this doctrine, can a bond or undertaking given in legal proceedings, as an undertaking as replevin bail, operate as a waiver of exemptions as against liability thereon. *Maloney v. Newton*, 85 Ind. 565, 44 Am. Rep. 46. See *supra*, this title, *Liabilities as Against Which Exemptions May Be Claimed.*

Power of Attorney to Confess Judgment. — The doctrine applies to a provision in a warrant or power of attorney to confess judgment on a note waiving exemptions, so as to render such warrant or power ineffectual as against a subsequent claim of exemption. *Maxwell v. Reed*, 7 Wis. 582.

Waiver by Clause in Lease. — It has been held that a clause in a lease waiving the benefit of the exemption laws is within the rule forbidding waiver by executory contract, and that it does not estop the lessee from claiming wages as exempt as against liability under the lease. *Burke v. Finley*, 50 Kan. 424, 34 Am. St. Rep. 132.

And in *Illinois* it has been held that the rule prohibiting a waiver of statutory exemptions by executory agreement rendered void a provision in a lease that if the lessee should fail to pay the rent the lessor might seize his property and sell it, whether exempt or not. *Curtiss v. Ellenwood*, 59 Ill. App. 110; *Powell v. Daily*, 61 Ill. App. 552, reversed on another point in 163 Ill. 646.

But in *Fejavary v. Broesch*, 52 Iowa 88, 35 Am. Rep. 261, a clause in a lease making the rent charge a lien upon the crops and stock upon the leased premises, "whether the same be exempt from execution or not," was upheld as being in the nature of a mortgage on the property, and not a mere executory agreement not to claim the benefit of the exemption laws.

1. **Reason for This Doctrine.** — *Kneettle v. Newcomb*, 22 N. Y. 249, 78 Am. Dec. 186. And see *Carter v. Carter*, 20 Fla. 569, 51 Am. Rep. 618; *Recht v. Kelly*, 82 Ill. 147, 25 Am. Rep. 301.

2. **Unmarried Men.** — *Powell v. Daily*, 163 Ill. 646, reversing on this point 61 Ill. App. 552, and *distinguishing* *Recht v. Kelly*, 82 Ill. 147, 25 Am. Rep. 301.

3. *Mills v. Bennett*, 94 Tenn. 651, 45 Am. St. Rep. 763.

The other cases cited in the second note preceding do not in terms limit the doctrine to married debtors.

4. **By Sales, Transfers, and Incumbrances.** — See *infra*, this title, *Sales and Other Transfers, and Incumbrances.*

5. **Reason Against Waiver Not Applicable.** — As was said by the *Florida* court: "When a man executes a mortgage or bill of sale upon certain specified property, the very nature of the transaction implies the exercise of discretion and the contemplation of inevitable consequences. Such contracts are therefore upheld as well in respect to real as to personal property." *Carter v. Carter*, 20 Fla. 570, 51 Am. Rep. 618. And see *Moxley v. Ragan*, 10 Bush (Ky.) 156, 19 Am. Rep. 61.

exemptions, either at the time of a levy or during proceedings to subject property, or by executory agreement, must be either by the debtor himself or by some person authorized by him.¹

(2) *Garnishees*. — A garnishee, for example, in proceedings to reach wages or any other debt, cannot waive the principal defendant's right to claim the same as exempt, and a payment by him, or a judgment by default against him, without a waiver by the principal defendant, cannot impair such right.²

(3) *Husband and Wife*. — A wife cannot, unless authorized, waive her husband's right of exemption.³ But a waiver by the husband, where the right to waive is recognized, binds the wife, in the absence of express restrictions.⁴

(4) *Partners*. — A partner certainly has no implied authority to bind his copartners as to their individual property by a clause in a firm contract waiving the benefit of the exemption laws.⁵ It has been held otherwise, however, with respect to partnership property, where a right of exemption in such property is recognized.⁶

c. WHAT CONSTITUTES A WAIVER. — Assuming the power to waive exemptions subject to the rules stated in the preceding paragraphs, questions

1. **Who May Waive — Agency.** — *Fanning v. Jacksonville First Nat. Bank*, 76 Ill. 53; *Woodward v. Murray*, 18 Johns. (N. Y.) 400.

2. **Garnishee Cannot Waive for Debtor.** — *Fanning v. Jacksonville First Nat. Bank*, 76 Ill. 53; *Jones v. Tracy*, 75 Pa. St. 417.

3. **Wife Cannot Bind Husband.** — *Woodward v. Murray*, 18 Johns. (N. Y.) 400.

Waiver by Wife as Agent for Husband. — In *Stanton v. French*, 83 Cal. 194, 25 Am. St. Rep. 174, a question arose as to the authority of a wife to waive exemptions so as to bind her husband, and the Supreme Court held that the lower court should have instructed the jury substantially that if a debtor's wife was in the habit of transacting business for him, and was in the habit of receiving and paying out money for him with his consent, then a payment of any balance from the proceeds of sales of exempt property to her in his presence, and without any objection from him, was a payment to him; but the court, on the evidence, said that the receipt by the wife in the particular case of the surplus of the proceeds of the sale after satisfaction of the execution was not a waiver of exemption, for the reason, as it seems, that no agency on her part for her husband appeared.

4. **Husband's Waiver Binds Wife.** — See *Godman v. Smith*, 17 Ind. 152; *Hoover v. Haslage*, 7 Ohio Dec. 98.

It was held under the former constitution and statutes of *Georgia* that the right to homestead and exemption might be waived by the husband and his waiver would bind his wife and minor children. *Taliaferro v. Pry*, 41 Ga. 622. And it is still so under the present constitution and statutes. *Flanders v. Wells*, 61 Ga. 195.

In *Illinois*, where the statute of exemption provides that when the head of a family shall die, desert, or not reside with the same, the family shall be entitled to and receive all the benefits and privileges which are conferred upon the head of a family residing with the same, a husband cannot, after or as part of his desertion of his family, waive his right of exemption. See *Baker v. Baker*, 69 Ill. App. 461.

In *Michigan* the wife was formerly given a

right of action for exempt property taken in execution against her husband (Comp. Laws, § 3294), and it was held that her action could not be defeated by showing that the property was turned out by the husband to be levied on. *King v. Moore*, 10 Mich. 538. Under the present statute, How. Stat. Mich., § 7686, a debtor's waiver of his right of exemption in his stock of goods, given by subdivision 8, is binding on his wife, as subdivision 9, declaring void any bill of sale, mortgage, etc., of property exempted by section 7686, if not signed by the wife, expressly excepts the exemption allowed by subdivision 8. *Charpentier v. Bresnahan*, 62 Mich. 360.

In *Texas* consent of the husband to the levy of a writ of attachment upon exempt community property is a waiver of the right of exemption, if there is no complaint by the wife that it was fraudulently given to deprive her of the privilege. *Dodge v. Knight*, (Tex. 1891) 16 S. W. Rep. 626.

5. **Partner Cannot Bind Copartner as to Individual Property.** — *Terrell v. Hurst*, 76 Ala. 588; *Reed Lumber Co. v. Lewis*, 94 Ala. 626; *Guscott v. Roden*, 112 Ala. 632.

As partnership contracts are several as well as joint, a firm note signed by one of the partners and containing a clause waiving the benefit of the exemption laws constitutes a valid waiver as to him, though for want of authority not binding on his partner. *Terrell v. Hurst*, 76 Ala. 588.

6. **Otherwise as to Partnership Property.** — In *Georgia* it was held that a note executed by a partner in the firm name, containing a waiver of exemptions, bound all of the partners so far as the personal property belonging to the firm was concerned, and that no member of the firm was entitled to an exemption out of the money arising from a sale of such property by a receiver as against a judgment or decree founded on such a note. *Hahn v. Allen*, 93 Ga. 612.

As was shown in another section, the decided weight of authority is to the effect that no exemption at all can be claimed out of partnership property while it is of such a character. See *supra*, this title, *Property Exempt under the Statutes — Partnership Property*.

arise as to whether particular contracts, acts, or omissions are sufficient to constitute a waiver.

(1) *Executory Contracts*. — When a debtor has the power to waive his right of exemption by an executory contract, he can do so, no doubt, in any terms that are sufficient to show such an intention, and he can do so either by inserting a clause to that effect in the note or other contract, or by a separate instrument, unless there are express constitutional or statutory restrictions.¹

Express Requirements. — If a constitutional or statutory provision prescribes a particular form or mode of waiver, the requirements must be complied with, or the waiver will be ineffectual. For example, the waiver may be required to be in writing and subscribed by the debtor.² And the statute may require the fact and extent of waiver to be pleaded³ and to be declared or stated in the judgment and execution.⁴

Waiver as a Contract — Language and Construction. — The waiver of exemptions is a contract, and it is to be construed and given operation and effect as in the case of other contracts.⁵ If a person has signed a contract containing a clause waiving exemptions, he can avoid such clause only by showing fraud or mistake.⁶

1. Sufficiency of Waiver by Executory Contract. — See *Brown v. Leitch*, 60 Ala. 313, 31 Am. Rep. 42; *Laucks's Appeal*, 24 Pa. St. 426.

2. Necessity for Writing. — In *Alabama* a verbal mortgage of personal property is not sufficient as a waiver of the right to claim the property as exempt. *Knox v. Wilson*, 77 Ala. 309.

Indorsement of Note Containing Waiver. — Under the provisions that a waiver of exemptions may be made by a separate instrument, subscribed by the party making the same, or included in any bond, bill of exchange, note, or other written contract executed by him, it has been held that a person who indorses in blank a note containing a waiver of exemptions does not waive his own exemptions, as against his liability on the indorsement. *Jordan v. Long*, 109 Ala. 414.

Authority under Power of Attorney. — Under the *Alabama* statute allowing a waiver of exemptions to be made "by a separate instrument in writing, subscribed by the party making the same," or in a "promissory note or other written contract executed by him," an attorney has no authority to waive exemptions on behalf of his principal in a note signed by him for the principal, under a power of attorney constituting and appointing him attorney "with full power of substitution, attorney and agent for me and in my name, place, and stead, to manage and transact all business appertaining to the business done" under a certain firm name. *Lippman v. Anniston First Nat. Bank*, (Ala. 1898) 24 So. Rep. 581.

Waiver Ineffectual as to Homestead. — The fact that a clause in a note waiving "all rights of exemption to real and personal property" is not good as a waiver as to the homestead, because not contained in a separate instrument, or because the instrument is not signed by both husband and wife, and attested by one witness, as required by statute, does not render it ineffectual as a waiver with respect to personal property. *Wagnon v. Keenan*, 77 Ala. 519. See also *Neely v. Henry*, 63 Ala. 261.

3. Allegation of Waiver in Pleadings. — Under the provisions of the *Alabama* statute advan-

tage of a waiver of exemptions cannot be taken unless properly averred in the complaint, petition, or bill, and an allegation in an action on notes that "in each of said notes defendants waived all homestead exemptions as against this debt" is not an allegation of waiver of exemptions as to personal property. *Reed Lumber Co. v. Lewis*, 94 Ala. 626. See also *Goetter v. Pickett*, 61 Ala. 387; *Fears v. Thompson*, 82 Ala. 294.

4. Declaration of Waiver in Judgment. — It is also necessary, under these provisions, that the judgment on the debt shall declare the fact and extent of the waiver. Such an omission from a judgment on a note will render a waiver of exemptions contained in the note ineffectual either as against an execution on the judgment or in a garnishment suit based on the judgment. *Courie v. Goodwin*, 89 Ala. 569; *Hosea v. Talbert*, 65 Ala. 173.

Such an omission amounts to an abandonment of the waiver and a consent to accept a common judgment against which the right of exemption may be asserted. *Agnew v. Walden*, 95 Ala. 108.

Indorsement on Writ. — *Fears v. Thompson*, 82 Ala. 294.

Presumption from Judgment. — When a judgment by confession recites that there was a waiver of exemptions, it will be presumed, in the absence of a contrary showing in the record, that there was a properly executed instrument in writing expressing such waiver. *Hearn v. State*, 62 Ala. 218.

In *Georgia* the Constitution of 1877 and the Act of 1878 do not contain such requirements as are found in the *Alabama* statutes, and a written waiver of exemption and homestead is good without having the same alleged in the declaration or summons, judgment, or execution, and is, after judgment, provable *aliunde*, whether the lien of the judgment be general or special, and whether the waiver be written on the contract or obligation, or on a separate paper. *Flemister v. Phillips*, 65 Ga. 676.

5. Waiver as a Contract. — *Neely v. Henry*, 63 Ala. 265.

6. Failure to Read Contract. — The general

A Written Instrument Is Not Sufficient as a Waiver of Exemptions, unless an intention to make a waiver is clearly expressed therein. It must be expressed in clear and unequivocal language, and may not rest upon inference or conjecture.¹

Specification of Property. — When a waiver of exemptions is intended to apply only to a part of the property exempted, it must specify the part to which it is intended to apply; but when it is of all exemptions, or of all claim of exemption, no specification of the property is necessary.² Of course, a waiver of exemptions as to certain property only cannot operate as a waiver as to any other property.³

rule is that a party who has full capacity and opportunity to read an instrument which he signs, and to whom there is no misrepresentation of its contents, cannot set up his own want of attention — his failure to read it — as a fact to invalidate it. One, therefore, who can read and write, and who has ample opportunity to read the whole of a note containing a waiver of exemptions, before he signs it, cannot, in the absence of fraud or misrepresentation practiced upon him, or of mistake, set up his own failure to read the note, in order to avoid its stipulations, or in support of a plea putting in issue the fact of the waiver of exemptions. *Goetter v. Pickett*, 61 Ala. 387; *Adams v. Bachert*, 83 Pa. St. 524.

Erroneous Indorsement of Waiver on Judgment. — The fact that a magistrate by mistake indorses upon the judgment on a note and the execution the words "exemption note" cannot deprive the defendant of his right to exemptions, if the note in fact contained no waiver. *O'Neil v. Craig*, 56 Pa. St. 161.

1. Waiver Must Be Clearly Expressed in Instrument. — *Knox v. Wilson*, 77 Ala. 309; *O'Neil v. Craig*, 56 Pa. St. 161.

A Note promising to pay thirty-seven dollars and fifty cents "for value received, or the Homestead Exemption Law," cannot be held a waiver of the exemption. *O'Neil v. Craig*, 56 Pa. St. 161.

2. Specification of Property. — *Neely v. Henry*, 63 Ala. 261.

3. "All Homestead Exemptions." — A clause in a note waiving "all homestead exemptions" has been held not to be a waiver of personal property exemptions. *Reed Lumber Co. v. Lewis*, 94 Ala. 626.

"Homestead Exemption Laws on Both Real and Personal Property." — But a clause in a note waiving "all benefit of the homestead exemption laws on both real and personal property" is a waiver of the personal property exemption. *Terrell v. Hurst*, 76 Ala. 588.

Other Expressions. — And the same is true of a waiver in a note of "all exemptions or relief laws under the statutes and Constitution of Alabama." *Agnew v. Walden*, 95 Ala. 108.

A waiver, by an obligor in a bond, of the benefits of every law made or to be made "to exempt the premises described" in an accompanying mortgage, or "any other premises whatever," from levy and sale under execution, "or any part of the proceeds arising from the sale thereof," from the payment of the moneys secured by the bond, is confined to the obligor's real estate. *Howard Bldg., etc., Assoc. v. Philadelphia, etc., R. Co.*, 102 Pa. St. 220.

Wages. — In *Smith v. Johnson*, 71 Ga. 748, it was held that a statement in a note that the

maker thereby waived and renounced for himself and family any and all homestead and exemption rights to which he or they might in any event be entitled under any provision of the constitution or laws, state or federal, had reference to exemptions of property only, and not to the exemption of wages of a daily laborer. If the latter were intended, it was said, it should have been explicitly stated.

Property Afterwards Acquired. — When a waiver of all exemptions, incorporated in a note as a part of the consideration, is not expressly limited to property then owned by the debtor, it applies equally to property afterwards acquired by him. *Neely v. Henry*, 63 Ala. 261.

Waiver in Lease. — A clause in a lease waiving "the benefit of all laws or usages exempting any property from distress or execution for rent" applies to any property, whether seized upon a landlord's warrant or levied under an execution for rent. *Beatty v. Rankin*, 139 Pa. St. 358.

In *Pennsylvania*, where the statute (Act of 1849) exempts three hundred dollars' worth of property from "levy and sale on execution, or distress for rent," a clause in a lease by which the lessor agrees that "all the personal property on the premises shall be liable to distress, and also all personal property if removed therefrom shall for thirty days after removal be liable to distress and may be distrained and sold for rent in arrear," and waives "all right to the benefit of any laws now made, or hereafter to be made, exempting personal property from levy and sale for arrears in rent," is intended merely to make the rent secure upon the personal property liable to distress, and not to waive the lessor's right of exemption in other respects. The waiver extends only to tangible property on the premises, and does not attach generally to the debt for rent, so as to bar a claim of a chose in action as exempt. *Mitchell v. Coates*, 47 Pa. St. 202.

In *Jenkins v. Stone*, 14 Montg. Co. Rep. (Pa.) 27, it was held that exemptions as to property not upon leased premises seized on execution under a judgment for rent were waived by a provision in the lease that all personal property upon the premises and for thirty days after removal of the same should be liable to distress for rent in arrear, and that the lessee waived the benefit of any and all law exempting property from levy and sale.

In *Kentucky* the right of a debtor who has leased land to claim out of a crop food sufficient for one year, or, in lieu thereof, money or property to the value of forty dollars for each member of the family, is not waived by a stipulation by him in a lease that the landlord

(2) *Consent to Levy or Sale.* — Consent to a Sale of exempt property as well as a levy, in those states in which a debtor is allowed to waive his right of exemption, will clearly operate as a waiver and estoppel, not only so as to bar an action against the officer or creditor for making the levy and sale, but also so as to bar a subsequent claim of the property as exempt.¹

Consent to a Levy will also operate as a waiver so as to bar an action against the officer or creditor on the ground that the levy was wrongful.² And some of the courts have held that it will operate as a waiver of the right of exemption so as to estop the debtor from subsequently claiming such right and stopping a sale.³ Other courts, however, hold that a claim after the levy and before sale should be allowed unless prejudice will result.⁴ If the statute requires the officer to levy in all cases, leaving it for the debtor afterwards to claim his exemptions, consent to a levy merely is not a waiver.⁵

A Question of Intention. — Waiver, it has been said, is a question of intention, to be determined as a fact.⁶ Conduct or consent, therefore, to show a waiver, should be inconsistent with an intention to claim exemptions. This proposition is not laid down in express terms in any reported case, but it is clearly sustained by the decisions.⁷

shall have a lien on the crop for the rent. *Moss v. Carl*, (Ky. 1896) 37 S. W. Rep. 580. Nor is such right of exemption waived by a recital in a note given by a debtor for land that the vendor retains a lien on all crops for the price. *Columbia Finance, etc., Co. v. Morgan*, (Ky. 1898) 45 S. W. Rep. 65.

See further as to waiver in a lease, *supra*, this section, *Power to Waive Exemptions — Express Provisions*; and *infra*, this section, *Effect of Waiver*.

1. Consent to Sale. — *Dow v. Cheney*, 103 Mass. 181; *Rich v. French*, 99 Mich. 27; *Turner v. Borthwick*, 20 Hun (N. Y.) 119; *Butt v. Green*, 29 Ohio St. 667.

2. Consent to Levy — Bars Action Against Officer — Arkansas. — *Wallace v. Collins*, 5 Ark. 41, 39 Am. Dec. 359.

Maine. — *Fogg v. Littlefield*, 68 Me. 52.

Massachusetts. — *Hewes v. Parkman*, 20 Pick. (Mass.) 90.

Michigan. — *Rich v. French*, 99 Mich. 27.

New York. — *Turner v. Borthwick*, 20 Hun (N. Y.) 119.

Consent to an attachment after a seizure of exempt property relates back and renders the attachment valid *ab initio*. *Hewes v. Parkman*, 20 Pick. (Mass.) 90.

3. Bars Subsequent Claim of Exemptions. — There are a number of cases in which it has been held broadly that if a debtor voluntarily points out or delivers his exempt property to an officer to be levied upon, without asserting any right or intention to claim it as exempt, he waives his right of exemption, and will not be allowed to object to or stop a sale under the execution without paying the debt. *Wallace v. Collins*, 5 Ark. 41, 39 Am. Dec. 359; *Richards v. Haines*, 30 Iowa 574; *Angell v. Johnson*, 51 Iowa 625, 33 Am. Dec. 152; *Charpentier v. Bresnahan*, 62 Mich. 360. And see *Dorsey v. Hills*, 4 La. Ann. 106.

4. Cases Requiring Prejudice. — *Jordan v. Autrey*, 10 Ala. 276. See also *Gresham v. Walker*, 10 Ala. 370; *Wallis v. Truesdell*, 6 Pick. (Mass.) 455; *McAfee v. Thompson*, 27 Minn. 134; *Rogers v. Collier*, 2 Bailey L. (S. Cal.) 581, 23 Am. Dec. 153.

5. Where the Statute Requires a Levy, consent

to a levy or voluntary delivery of property to an officer to be levied upon does not operate as a waiver of all right of exemption, so as to prevent a claim of exemption at any time before a sale. *Eltzroth v. Webster*, 15 Ind. 21, 77 Am. Dec. 78. "As the levy has to be made," said the court in this case, "we are not able to perceive any good reason why the fact that the property was given up should be considered a waiver of the right to claim it as exempt from sale."

6. Waiver a Question of Intention. — See *Ehrlich v. Etna L. Ins. Co.*, 88 Mo. 249; *Marchildon v. O'Hara*, 52 Mo. App. 523.

Conduct may show consent. *Fogg v. Littlefield*, 68 Me. 52.

7. Conduct Consistent with Claim of Exemption. — Thus it has been held that the mere fact that an execution debtor has procured the garnishment of a person who owes him money will not constitute a waiver so as to prevent him from claiming his exemptions out of the debt, when the debt exceeds the amount of his exemptions, for such action on his part is entirely consistent with an intention to appropriate the excess only to the payment of the execution. *Marchildon v. O'Hara*, 52 Mo. App. 523.

In *Harrington v. Smith*, 14 Colo. 376, 20 Am. St. Rep. 272, a debtor who was absent in another state when informed of a levy on his exempt property, the property being such that it was the duty of the officer not to levy upon it, wrote a letter to the officer, stating that it was impossible for him to come home, and requesting postponement of the cause until a day specified, when he could come home and fix up everything satisfactorily. He did not return at the day indicated, and the officer did not sell the property until a subsequent date. It was held that there was no waiver.

Receiving Proceeds of Sale. — So, when property levied upon is claimed as exempt, and the officer refuses to recognize the claim and sells the property, the debtor does not waive his right by receiving the surplus of the proceeds of the sale after satisfaction of the execution. See *Stanton v. French*, 83 Cal. 194, 25 Am. St. Rep. 174.

An Agreement to Turn Over Property to a creditor to be applied in payment of a debt, which is not complied with, is not a waiver, so as to prevent a claim of exemption as against a subsequent levy.¹

Execution of a Delivery Bond to procure the release of exempt property from a seizure under execution or attachment is not *per se* a waiver of the right to claim the property as exempt.²

(3) *Omission to Claim Exemption.* — As was stated in a preceding paragraph, a debtor may waive his exemptions by omission to claim them as well as by expressly consenting to a levy and sale. It may be laid down as a general proposition that the failure to assert or claim a right of exemption at all, or a failure to assert or claim it at the time and in the manner, if any, expressly or impliedly required by the statute which confers the right, is a waiver of the right.³

d. REVOCATION OF WAIVER. — It would seem clear that consent that exempt property may be levied upon and sold, if not supported by a consideration, may be revoked at any time before it is acted upon, and so it has

Yielding to Force, and Receipting for Property.

— The fact that a debtor's wife gave a receipt for property levied upon by an officer, to save its being taken away while an effort could be made to pay the judgment, and that, on failing in this, possession was yielded to the officer, only shows a yielding to a force which she could not resist, and is not a surrender or waiver of the right of exemption. *Vanderhorst v. Bacon*, 38 Mich. 669, 31 Am. Rep. 330.

That a debtor does not waive his exemption by receipting for property levied upon, so as to retain possession, see *Heath v. Keyes*, 35 Wis. 668.

Retaining Possession and Purchase at Sale.

— When an officer levies an execution on personal property and leaves such property in the debtor's possession, neither the fact of the debtor's retaining possession nor the fact of his purchasing the property, either directly or through others, at the execution sale, will amount to a waiver of his right to claim the property as exempt. *Parham v. McMurray*, 32 Ark. 261.

Sale of Real Estate in Pennsylvania. — The Pennsylvania Act of 1849 exempts three hundred dollars' worth of property (1 Bright. Purd. Dig. 831, § 29), provides (§ 30) for an appraisement, and declares in effect (§§ 31, 32) that where the property levied upon consists of real estate of greater value than three hundred dollars and the appraisers shall determine that it cannot be divided so as to give the debtor a portion of the value of three hundred dollars, the plaintiff may have a writ of venditioni exponas to sell the same, and that in such event the defendant shall be allowed his exemption out of the proceeds. Under these provisions it has been held that the defendant, by waiving an inquisition to condemn his real estate, and agreeing to a sale thereof on a fieri facias, does not waive his right to demand an exemption of three hundred dollars out of the proceeds of the sale. *Shaw's Appeal*, 49 Pa. St. 177.

The Burden of showing a waiver is on the officer or creditor asserting it. *State v. Haggard*, 1 Humph. (Tenn.) 390. See *infra*, this title, *Enforcement and Protection of the Right — Presumption and Burden of Proof.*

1. Agreement to Turn Over Property. — *Washburn v. Goodheart*, 88 Ill. 229; *Haswell v. Parsons*, 15 Cal. 267, 76 Am. Dec. 480.

2. Executing Delivery Bond Not a Waiver — *Alabama.* — *Jordan v. Autrey*, 10 Ala. 276; *Daniels v. Hamilton*, 52 Ala. 108.

Arkansas. — *Atkinson v. Gatcher*, 23 Ark. 101; *Jacks v. Bigham*, 36 Ark. 481.

California. — See *Servanti v. Lusk*, 43 Cal. 238.

Indiana. — *Eltzroth v. Webster*, 15 Ind. 21, 77 Am. Dec. 78.

Iowa. — *Angell v. Johnson*, 51 Iowa 625.

Kentucky. — *Perry v. Hensley*, 14 B. Mon. (Ky.) 381, 61 Am. Dec. 164.

Missouri. — *Robards v. Samuel*, 17 Mo. 555.

Nebraska. — *Desmond v. State*, 15 Neb. 438.

Validity of Bond. — The bond given under such circumstances, being executed under duress, and being without consideration, is void. *Servanti v. Lusk*, 43 Cal. 238; *Perry v. Hensley*, 14 B. Mon. (Ky.) 381, 61 Am. Dec. 164; *Robards v. Samuel*, 17 Mo. 555. See the title DURESS, vol. 10, p. 320.

3. Waiver by Omission to Claim Exemption — *Alabama.* — *Mitchell v. Corbin*, 91 Ala. 600.

Arkansas. — *Scanlan v. Guiling*, 63 Ark. 540.

Colorado. — *Behymer v. Cook*, 5 Colo. 395.

Illinois. — *Cook v. Scott*, 6 Ill. 333.

Indiana. — *State v. Melogue*, 9 Ind. 197.

Kentucky. — *McGee v. Anderson*, 1 B. Mon. (Ky.) 187, 36 Am. Dec. 570.

Massachusetts. — *Clapp v. Thomas*, 5 Allen (Mass.) 158.

Pennsylvania. — *Strouse v. Becker*, 38 Pa. St. 190, 80 Am. Dec. 474, 44 Pa. St. 206.

South Dakota. — *Longley v. Daly*, 1 S. Dak. 257.

Many other cases on this point from these and other states will be found cited in a subsequent section. See *infra*, this title, *Enforcement and Protection of the Right — Claiming, Selecting, and Setting Apart of Exemption.*

Allowance to Widow. — The rule that failure to claim an exemption, where a claim is necessary, is a waiver of the right, applies under statutes allowing exemptions to widows out of the decedents' estates. *Cook v. Jennings*, 40 S. Car. 204. See the title ALLOWANCES, vol. 2, p. 163.

been held.¹ There are decisions, however, in conflict with this view, or seemingly so.²

The Death of a Debtor after executing and delivering a judgment note containing a waiver of exemptions does not revoke the waiver.³

e. EFFECT OF WAIVER — (1) *In General*. — If a debtor is authorized expressly or impliedly to waive his exemptions, a waiver certainly places the property in the same situation as nonexempt property as against the particular creditor in whose favor the exemption has been waived.⁴

Release of Waiver, or Compromise. — A creditor in whose favor the debtor has waived exemptions may release him from the effect of the waiver, or compromise the claim of exemption.⁵

(2) *Preference of Creditors — Order of Distribution*. — A waiver of exemptions may also operate, contrary to the intention of the parties, in favor of other creditors than the one for whom it was intended. It is the established doctrine in *Pennsylvania*, where an exemption of three hundred dollars is allowed out of personal property or the proceeds of real estate levied on and sold, that a debtor cannot waive his right of exemption in favor of one lien creditor so as to give him a preference over a creditor having a prior lien.⁶

1. Revocation of Consent. — *Bliss v. Raynor*, 91 Hun (N. Y.) 250; *Hutchinson v. Campbell*, 25 Pa. St. 273. And see *Haswell v. Parsons*, 15 Cal. 266, 76 Am. Dec. 480. For the specific decision in this case, see *supra*, this section, *What Constitutes a Waiver*.

2. See *Butt v. Green*, 29 Ohio St. 667; *Winchester v. Costello*, 2 Pars. Eq. Cas. (Pa.) 279.

3. Death of Debtor Does Not Revoke Waiver. — *Barrett v. Barrett*, 9 Pa. Co. Ct. Rep. 454.

4. Effect of Waiver in General. — See *Wallace v. Collins*, 5 Ark. 41, 39 Am. Dec. 359; *Hoisington v. Huff*, 24 Kan. 379; *Bowman v. Smiley*, 31 Pa. St. 225, 72 Am. Dec. 738; *Kyle's Appeal*, 45 Pa. St. 353.

Appraisement. — The waiver of the privilege of exemption is a waiver of the right to an appraisalment under the *Pennsylvania* statute. *Bowman v. Smiley*, 31 Pa. St. 225, 72 Am. Dec. 738.

Effect in Other States. — When a note is executed in one state where both of the parties reside, and contains a waiver merely "of all rights of exemption and homestead," without expressly referring in any way to the exemptions allowed by the laws of other states, it is presumed that it refers only to the exemptions allowed by the law of the state in which it is executed, and does not apply in an action on the note in another state. *Seay v. Palmer*, 93 Ala. 381, 30 Am. St. Rep. 57. Compare dictum in *Holland v. Bergan*, 89 Ala. 622.

Effect on Life Insurance for Benefit of Wife. — Section 2356 of the Code of *Alabama* (Code 1896, § 2535) provides that a wife may insure the life of the husband for the benefit of herself, or for the benefit of herself and child or children of the marriage, and that the husband or father may insure his life for the benefit of the wife and child or minor children, and such insurance shall be exempt from liability for his debts or engagements, if the annual premiums do not exceed five hundred dollars. In *Craft v. Stoutz*, 95 Ala. 245, it was held that a waiver of exemptions in a promissory note does not affect the promisor's right to insure his life for the benefit of his wife, paying annual premiums not in excess of five hundred dollars, and that the creditor, after reducing

his debt to judgment, cannot reach and subject in equity property which the surviving wife has bought or improved with the proceeds of the policy. Such a note, said the court, "is a mere debt or engagement. It in no sense creates a lien on property or money. The effect of the statute which permits the husband to insure his life for the benefit of his wife is to enable the husband to expend so much money in the manner prescribed, for the benefit of his wife, which, without the statute, would not be exempt from liability for the debts of the husband."

Waiver of Landlord's Lien by Taking Note. — A landlord, by taking in payment of rent notes containing a waiver of exemption of personal property, does not thereby abandon the landlord's lien. *Stephens v. Adams*, 93 Ala. 117.

5. Release of Waiver, or Compromise. — In *Beegle v. Wentz*, 55 Pa. St. 369, a debtor who had given a note in which he waived the three hundred dollars exemption under the *Pennsylvania* Act of 1849, claimed the exemption when the land was levied on, and the creditor made a new arrangement by parol with him, agreeing that if he would abandon his claim he might retain part of the land. It was held that this arrangement was binding on the plaintiff.

6. Preference of Creditors — Order of Distribution. — In the distribution to liens of the proceeds of a sheriff's sale, a waiver as to any lien will inure to the benefit of all prior liens, on the principle that a debtor cannot alter the precedence settled by law. *Hallman v. Hallman*, 124 Pa. St. 347; *Bowyer's Appeal*, 21 Pa. St. 210; *Garrett's Appeal*, 32 Pa. St. 160, 72 Am. Dec. 780; *Shelly's Appeal*, 36 Pa. St. 373; *Laucks's Appeal*, 44 Pa. St. 395 [*distinguishing and restricting* *McAfoose's Appeal*, 32 Pa. St. 276]; *Kyle's Appeal*, 45 Pa. St. 353; *Thomas's Appeal*, 69 Pa. St. 120; *Jimison's Appeal*, 13 W. N. C. (Pa.) 25.

Application of Rule. — In *Garrett's Appeal*, 32 Pa. St. 160, 72 Am. Dec. 779, A had issued a fieri facias and levied on the defendant's personal property, and B and C had afterwards issued executions and levied on the same goods. The defendant claimed the benefit of

(3) *Rights of Subsequent Lien Creditors.* — It is also settled that a waiver of exemptions as to any lien will inure to the benefit of creditors having subsequent liens, so far as to entitle them to compel the creditor in whose favor exemptions have been waived to resort first to the exempted fund, on the principle of equity of creditors having one and two funds respectively under their control.¹ But when the waiver is in favor of a claim which is less than the amount of the exemption, it does not operate as a complete abandonment of the exemption, and does not prevent a claim of the balance of the exemption as against creditors having subsequent liens.²

(4) *Judgment for Purchase Money — Prior Liens.* — When a debtor waives his right of exemption, a provision of the exemption law that no exemption shall be allowed as against a judgment for the purchase money ceases to have any operation, and such a judgment creditor's rights are inferior to those of a prior creditor.³

2. Forfeiture — a. FRAUD. — In a Few States, notably in *Pennsylvania*, it is held that by fraud a debtor may forfeit his right to the benefit of the exemption laws. In accordance with this doctrine it has been held that a debtor forfeits his right to exemptions by fraudulently conveying other property than that claimed, with intent to hinder and delay his creditors,⁴ or by fraudulently

the exemption law under the writ of A, and three hundred dollars worth of property was set apart to him; D then issued a fieri facias on a judgment in which the defendant had waived the benefit of the exemption law, and levied on the same goods; and on the following day the defendant waived the benefit of the exemption law in favor of B and C. It was held that A's execution was entitled to the proceeds of the sheriff's sale.

In *Shelly's Appeal*, 36 Pa. St. 373, there was a first lien with a waiver, several subsequent liens without waiver, and a last lien with a waiver. The first and last liens, on which there were waivers, amounted to more than the three hundred dollars exemption. The court did not refer to this fact specially, but held, following *Bowyer's Appeal*, 21 Pa. St. 210, that the waiver on the last judgment inured to the benefit of all the prior judgments without waiver.

Waiver in Lease. — A waiver of exemptions in a lease does not inure to the benefit of an execution creditor as to whose claim there is no waiver, on notice by the landlord to the officer levying the execution that a year's rent is due from the execution debtor. *Temple v. Gough*, 9 Pa. Co. Ct. Rep. 85.

1. Equity of Subsequent Lien Creditors — Resort to Exempted Fund. — *Hallman v. Hallman*, 124 Pa. St. 347; *Johnston's Appeal*, 25 Pa. St. 116; *Shelly's Appeal*, 36 Pa. St. 373; *Pittman's Appeal*, 48 Pa. St. 315.

2. Waiver in Favor of Claim Less than Amount of Exemption. — See *Bowyer's Appeal*, 21 Pa. St. 210.

In *Johnston's Appeal*, 25 Pa. St. 116, the court below following, as it thought, *Bowyer's Appeal*, treated a waiver in favor of any creditor as a complete abandonment of the debtor's claim, and made distribution of the fund in the ordinary way as if no exemption had been made. The Supreme Court, however, reversed the judgment and distributed the fund (which was less than three hundred dollars) first, to a debt contracted before the Act of 1849, second, to the judgment of the appellants

as to which there was a waiver, and the balance to the defendant, in disregard of all other liens. See also *Thomas's Appeal*, 69 Pa. St. 120; *Hallman v. Hallman*, 124 Pa. St. 347. Compare *Shelly's Appeal*, 36 Pa. St. 373.

Landlord's Claim for Rent. — In *Steininger v. Butler*, 5 Pa. Dist. Rep. 43, it was held that a waiver by a debtor of the benefit of his three hundred dollars exemption in favor of an execution creditor whose judgment was for four hundred and thirty-three dollars inured to the benefit of a landlord's claim for rent, whether regarded as a prior or subsequent lien.

3. Judgment for Purchase Money — Prior Liens. — *Kyle's Appeal*, 45 Pa. St. 353.

4. Forfeiture by Fraud — Fraudulent Conveyance. — *Strouse v. Becker*, 38 Pa. St. 190, 80 Am. Dec. 474, 44 Pa. St. 206; *Imhoff's Appeal*, 119 Pa. St. 350; *Huey's Appeal*, 29 Pa. St. 219; *Dieffenderfer v. Fisher*, 3 Grant's Cas. (Pa.) 30; *Carl v. Smith*, 8 Phila. (Pa.) 569. See also *Riddell v. Shirley*, 5 Cal. 488. But compare *Randall v. Buffington*, 10 Cal. 491.

"If a defendant," said the *Illinois* court, "has aliened, or concealed, or otherwise disposed of all his property except such as he desires to select, for the purpose of defrauding, delaying, or hindering his creditor in the collection of his debts, he will not be entitled to the benefit of this law for the protection of the property thus retained by him." *Cook v. Scott*, 6 Ill. 333.

In *Weis v. Levy*, 69 Ala. 209, there is a dictum to the effect that if a debtor were to dispose fraudulently of the property he has claimed and retained as exempt, with the view and for the purpose of obtaining an additional exemption, his claim to such additional exemption should be disallowed. But see the *Alabama* cases hereafter cited in this subdivision.

Conveyances or Transfers Not Fraudulent. — It has been held that a debtor does not forfeit his right of exemption in *Pennsylvania* by collecting debts due him and using the proceeds in paying debts due by him and in defraying the

concealing his property, or denying his ownership, or omitting it from his schedule, with such intent.¹

Intent of Debtor. — It makes no difference that the debtor intended to pay the debt and that his denial of ownership of the property levied on was merely for the purpose of gaining time.²

Reason for This Doctrine. — This doctrine is based upon the view that the benefits of the law are intended for the honest poor, and that rogues and cheats are not the object of its bounty.³

Independent Fraud. — It is not independent fraud, however, but such as affects the execution of the creditor, that defeats the debtor's claim, under this doctrine.⁴

expenses of living, as this is not a concealment of property nor a fraud upon creditors. *New York, etc., Cut Sole Co. v. Zuber*, 20 Pa. Co. Ct. Rep. 21.

It has also been held that a debtor does not forfeit his right of exemption by conveying his interest in land to his wife, where the conveyance is for the purpose of securing her for part of the purchase money advanced by her from her own separate estate. *Martin v. Kohr*, 19 Pa. Co. Ct. Rep. 513.

1. Fraudulent Concealment of Property. — Thus, in *Imhoff's Appeal*, 119 Pa. St. 350, it was held that a debtor who by falsehood and deception succeeds in concealing and withdrawing his personal property from the grasp of an execution forfeits his right to claim the benefit of the exemption law out of the proceeds of the sale of his real estate. See to the same effect *Emerson v. Smith*, 51 Pa. St. 90, 88 Am. Dec. 567; *Smith v. Emerson*, 43 Pa. St. 456. And see the dictum in *Fuller v. Sparks*, 39 Tex. 136.

Disclaimer or Denial of Ownership. — *Miles v. State*, 73 Md. 398; *Strouse v. Becker*, 38 Pa. St. 190, 80 Am. Dec. 474, 44 Pa. St. 206; *Gilleland v. Rhoads*, 34 Pa. St. 187; *Dieffenderfer v. Fisher*, 3 Grant's Cas. (Pa.) 30; *Frank v. Kurtz*, 4 Pa. Super. Ct. Rep. 233; *Engle v. Harrington*, 4 Luz. Leg. Obs. (Pa.) 40.

If an Assignor for the Benefit of Creditors fraudulently denies the ownership of property belonging to him and thereby hinders the assignee in the discharge of his duties, he will forfeit his right under this doctrine to receive out of the assigned estate so much property as is exempt from levy and sale on execution, reserved by him in the deed of assignment. *Kreider's Estate*, 135 Pa. St. 578.

Fraudulent Reduction to Amount Exempted. — In *Brackett v. Watkins*, 21 Wend. (N. Y.) 68, it was held that a debtor forfeits his right to claim property as exempt if he purposely reduces his visible property to such an amount as to claim the benefit of an exemption with the intent to defraud his creditors. This case, however, seems to have been in effect overruled by *Wilcox v. Hawley*, 31 N. Y. 648, referred to in the note following.

There is a dictum in *Grimes v. Bryne*, 2 Minn. 104, in accord with the decision in *Brackett v. Watkins*, 21 Wend. (N. Y.) 68. See also *Pratt v. Burr*, 5 Biss. (U. S.) 36.

Liability of Officer — Mitigation of Damages or Absolute Bar. — In several *Pennsylvania* cases it was held that, in an action against an officer for refusing to allow a claim of exemption, fraud upon the part of the debtor in conceal-

ing his property or denying ownership, etc., could be shown only in mitigation of damages. *Freeman v. Smith*, 30 Pa. St. 264; *Smith v. Emerson*, 43 Pa. St. 456. This view, however, has since been abandoned, and it is held that such fraud is an absolute bar to the action. *Emerson v. Smith*, 51 Pa. St. 90, 88 Am. Dec. 568.

2. Intent of Debtor in Denying Ownership. — *Strouse v. Becker*, 38 Pa. St. 190, 80 Am. Dec. 474.

3. Reason for This Doctrine. — "The benefits of the exemption acts are intended for unfortunate but honest debtors, not for the protection of dishonest persons." *Imhoff's Appeal*, 119 Pa. St. 350. See also the observations of Mr. Justice Woodward in *Strouse v. Becker*, 38 Pa. St. 190, 80 Am. Dec. 474.

4. Independent Fraud No Bar. — *Emerson v. Smith*, 51 Pa. St. 90, 88 Am. Dec. 567; *Smith v. Emerson*, 43 Pa. St. 456.

Concealment of Property Is Prejudicial. — "But if a debtor can hide his property, or keep it under cover, so as to conceal its knowledge from the officer, and thereby assist himself to retain that which he finds it convenient or necessary to keep openly, his fraud bears directly upon the latter; for it is because the former is unknown or out of the way the latter is suffered to remain with him." *Emerson v. Smith*, 51 Pa. St. 90, 88 Am. Dec. 567.

Falsehood Not Prejudicial No Bar. — "If the falsehood [in denying ownership of property] was merely casual, and was not used at a time and in a manner to delay, hinder, or embarrass the officer, indefensible as it was, too much account would be made of it by grounding upon it a denial of the statutory exemption. It is only a lie with circumstances that works a forfeiture. If the officer is in no degree hindered or delayed by it, no legal consequences attach to it." *Strouse v. Becker*, 38 Pa. St. 190, 80 Am. Dec. 474.

Sale or Conversion of Property Not Prejudicial. — A debtor does not forfeit his right to claim exemption from his land when levied upon, under the *Pennsylvania* Act of 1849, by reason of the fact that he converted a large amount of securities into money and left home, where he left a sufficient amount of personal property behind him to satisfy the execution, as this is not such fraud as to hinder and delay the creditor. *McNair v. Riesher*, 8 Pa. Co. Ct. Rep. 494.

False Statement as to Possession of Other Property. — A debtor's right to claim an exemption in property levied upon or its proceeds is not defeated by the fact that he falsely declared

Prevailing Doctrine Against Forfeiture. — In most of the states the doctrine of forfeiture of the right of exemption by fraud, above stated, is repudiated, and it is held that the courts have no right to impose any conditions upon the right of exemption other than such as are imposed by the legislature, and that a debtor, therefore, as a general rule, does not forfeit such right merely by reason of fraudulent conduct as against creditors, unless it is so provided by statute.¹

Applications of This Doctrine. — In accordance with this doctrine, it has been held that a debtor does not forfeit his right of exemption by fraudulent conveyance of other property than that claimed as exempt or of the property claimed;² or by fraudulent conveyance and denial of ownership;³ or by false testimony as to the ownership of property in a claim suit;⁴ or by fraudulent concealment

that he had money or other property before or about the time the fieri facias was issued, where it does not appear that the levying creditor or any other creditor made any attempt to levy on the property, or to proceed as provided by law, to compel him to account for any money he might have which he refused to apply to his debts, there being no evidence of concealment or transfer of property to avoid levies upon it. *Shaw's Appeal*, 49 Pa. St. 179.

In *Haskins v. Bennett*, 41 Vt. 698, where a debtor told his creditor, upon being requested to pay the debt, that he had several thousand dollars' worth of property, and had two yoke of oxen and other property that could be attached, and that he would pay soon, and the creditor shortly after sued and attached one yoke of oxen, leaving the oxen, as he supposed, that would be most serviceable to the debtor, it was held that such declarations of the debtor would not estop him from claiming the yoke attached as exempt.

Fraud in Contracting Debt. — A debtor is not prevented from claiming his exemptions as against a debt by reason of the fact that the debt was fraudulently contracted, as the rule in *Pennsylvania* denying exemptions to dishonest debtors has reference only to dishonesty in conveying or concealing property in order to defraud or hinder and delay creditors. *New York, etc., Cut Sole Co. v. Zuber*, 20 Pa. Co. Ct. Rep. 21.

1. Prevailing Doctrine — No Forfeiture by Fraud — *United States*. — *Matter of Henkel*, 2 Sawy. (U. S.) 305.

Alabama. — *Pinkus v. Bamberger*, 99 Ala. 266.

Arkansas. — *Sannoner v. King*, 49 Ark. 299, 4 Am. St. Rep. 49.

Indiana. — *Over v. Shannon*, 91 Ind. 99; *Douch v. Rahner*, 61 Ind. 64; *Boesker v. Pickett*, 81 Ind. 554.

Michigan. — See *Baldwin v. Talbot*, 43 Mich. 11.

Mississippi. — *Moseley v. Anderson*, 40 Miss. 49.

Missouri. — *Megehe v. Draper*, 21 Mo. 510, 64 Am. Dec. 245.

Nebraska. — *State v. Carson*, 27 Neb. 501, 20 Am. St. Rep. 681.

North Carolina. — *Cowan v. Phillips*, 122 N. Car. 70.

Wisconsin. — *Comstock v. Bechtel*, 63 Wis. 656.

2. Fraudulent Conveyance of Nonexempt Property. — In *Moseley v. Anderson*, 40 Miss. 49, it appeared that a debtor, for the purpose of delaying and defrauding his creditors, sold all

of his property except such as was exempt, and it was held that he did not thereby forfeit his right to claim the exempt property. See also *Wilcox v. Hawley*, 31 N. Y. 648, wherein it was held that a debtor's right to claim a horse levied upon as exempt was not forfeited or defeated by the fact that shortly before the levy he had disposed of other personal property which he owned, and transferred the proceeds to his wife. And see *Duvall v. Rollins*, 71 N. Car. 218, where it was held that the personal property exemption is confirmed by the constitution, and is inviolable; and that it cannot be reached by execution nor forfeited by any attempt to make a fraudulent conveyance.

"The exemption law," said the *Arkansas* court, "is generous and humane. It applies to the just and the unjust alike. To strain the quality of its mercy, and exclude one from its operation because he has attempted to defraud his creditors, would be to engraft an exception upon the law that is not written in it or found in its spirit." *Sannoner v. King*, 49 Ark. 299, 4 Am. St. Rep. 49. See to the same effect *Calloway v. Carpenter*, 10 Ala. 500; *Doherty v. Ramsey*, 1 Ind. App. 530; *Bean v. Hubbard*, 4 Cush. (Mass.) 85; *Baldwin v. Talbot*, 43 Mich. 11. And see *Spencer v. Scott*, 46 La. Ann. 1209.

3. Fraudulent Conveyance and Denial of Ownership. — In *State v. Carson*, 27 Neb. 501, 20 Am. St. Rep. 681, on the same principle, it was held that the fact that a debtor had transferred property to his wife, and had testified in an unsuccessful action by her to regain it from a levying officer that it was hers absolutely, did not deprive him of the right afterwards to claim it as exempt. See to the same effect *Boylston v. Rankin*, 114 Ala. 408; *Byrd v. Curlin*, 1 Humph. (Tenn.) 466. See also, as tending to support this view, *Wallis v. Truesdell*, 6 Pick. (Mass.) 455; *McAbe v. Thompson*, 27 Minn. 134; *Farrell v. Higley, Hill & D. Supp.* (N. Y.) 87.

4. False Testimony in Claim Suit. — In *Boylston v. Rankin*, 114 Ala. 408, it was held that where, after the levy of an execution upon property as belonging to the defendant in the execution, there was instituted by a third person a statutory trial of the right to the property, the fact that the defendant in the execution testified in the claim suit that the property was not his, but belonged to the claimant, did not estop him, upon judgment being rendered in the claim suit declaring the property liable to the satisfaction of the execution, from asserting his claim of exemption in

of property other than that exempted;¹ or by a conversion of nonexempt property into exempt property;² or by collusion with other creditors than the one against whom the exemption is claimed.³

Right of Selection. — When, under the particular statute, the debtor has the right to elect whether he will retain property levied upon or other property, and after the levy and before a sale he puts articles not levied upon out of the officer's way, this will amount to an election to retain them, and will determine the right.⁴

b. IN THE ABSENCE OF FRAUD. — Perhaps in all jurisdictions it will be held that, in the absence of fraud, a debtor does not forfeit or lose his right of exemption for any reason, unless he fails to comply with some statutory requirement upon which his right to exemptions is made to depend.⁵

the property at any time prior to the sale thereunder.

1. Fraudulent Concealment of Property other than that specifically exempt, so as to keep it out of the reach of an execution, has been held to be no bar to a claim of exempt property. "If the defendant in the execution," said the court, "who claims the property to be exempt has concealed and hid, or placed beyond the immediate reach of the officers of justice, his property, and this fact be known to the plaintiffs in the execution, let them ferret out the hidden property, and take steps to reach it, and subject it to the process of the law." *Megehe v. Draper*, 21 Mo. 510, 64 Am. Dec. 245. See to the same effect *Elder v. Williams*, 16 Nev. 416. And see *Douch v. Rahner*, 61 Ind. 64; *Over v. Shannon*, 91 Ind. 99.

2. Conversion of Nonexempt into Exempt Property. — In *O'Donnell v. Segar*, 25 Mich. 367, it was held that the fact that a debtor has disposed of all the property he had which was subject to execution, for the very purpose of investing the proceeds in, or converting them into, that kind of property which was exempt under the statute, will not deprive him of the exemption, so long as his occupation is such as the statute requires, and the particular property is needed in that occupation; and that such conduct does not constitute legal fraud.

And in *Comstock v. Bechtel*, 63 Wis. 656, it was held that an insolvent debtor who sells property which is subject to levy on execution, and with the proceeds immediately purchases exempt property, will be presumed to have done so with intent to hinder, delay, or defraud his creditors; but that the property so purchased does not for that reason cease to be exempt, the only remedy of the creditors being by attacking the sale of the nonexempt property. See also *Cipperly v. Rhodes*, 53 Ill. 346; *Tucker v. Drake*, 11 Allen (Mass.) 145.

3. Collusion with Other Creditors. — In *Pinkus v. Bamberger*, 99 Ala. 266, it was held that when the inventory filed by a debtor, claiming an exemption of personal property, is contested by attaching creditors, his fraudulent conduct in collusion with another person, who first sued out an attachment, is not relevant to the issue involved, except so far as it shows that he had other moneys or effects not included in his inventory.

4. Right of Selection — Concealing Property. — *Bray v. Laird*, 44 Ala. 295; *Ross v. Hannah*, 28 Ala. 125; *Hooover v. Haslage*, 7 Ohio Dec. 98.

But when a debtor owns several articles, and is entitled to claim only one of such articles as exempt, and he claims one, that one is not subject to execution merely by reason of the fact that when it was levied upon the debtor claimed that it was the only one he owned, and that the title to the others was in a third person, and that whether he had any interest in them could not be ascertained until a settlement between him and such third person, though it turns out afterwards that he does own all the articles. *Plimpton v. Sprague*, 47 Vt. 467. See also *supra*, this title, *Property Exempt under the Statutes — Ownership or Possession of Other Property*.

5. In Garnishment of exempt wages, or of any other exempt chose in action, a judgment by default against the garnishee, or payment by him, where no notice or opportunity to protect his rights has been given to the principal, does not defeat his right of exemption. See *Fanning v. Jacksonville First Nat. Bank*, 76 Ill. 53; *Jones v. Tracy*, 75 Pa. St. 417.

Unlawful Sale by Assignee in Bankruptcy or Insolvency. — Where a bankrupt or insolvent debtor claims property as exempt before a sale thereof by the assignee in bankruptcy or insolvency, the assignee's refusal to recognize the claim, and his sale of the property, cannot defeat the debtor's rights, for they are not dependent upon the discretion of the assignee, and he may assert his claim against the proceeds of the sale while in the hands of the court for distribution. *In re Jones*, 2 Dill. (U. S.) 343.

Mingling Exempt with Nonexempt Goods. — In *North Dakota* it has been held that a merchant who purchases goods of the same class and quality from different parties, and in the ordinary course of business so mingles the goods upon his shelves that it becomes impossible to designate the goods purchased from any one party, does not thereby render the entire stock liable to seizure at the suit of one of such parties to recover the purchase price of goods sold to such merchant, notwithstanding Comp. Laws, § 5137, provides that no exemption shall be allowed against an execution issued for the purchase money of property that has been seized under the execution; and when, in such a case, the owner brings the action of claim and delivery against the officer holding such property, on the ground that it was exempt from such seizure, the burden is upon the officer to show what specific property seised by him was liable to seizure for the pur-

c. SALES, TRANSFERS, AND INCUMBRANCES. — As has been shown in a previous section, an effectual sale of property bars any claim of it as exempt,¹ but an intention or attempt to sell property, or a contract to sell not carried out, or a *bona fide* sale which is afterwards rescinded, will not operate as a forfeiture of the right to claim the property as exempt.² Nor will a *bona fide* mortgage or pledge forfeit the right of exemption as against others than the mortgagee or pledgee.³

Fraudulent Conveyances. — As to whether a debtor may claim exemptions out of property conveyed or mortgaged by him with intent to hinder, delay, or defraud his creditors, the doctrine varies in the different states. The subject is considered at length in a subsequent section.⁴

d. FILING SCHEDULE OF PROPERTY. — When the statute requires a debtor claiming an exemption as against a levy to make out and file a schedule of all his property, failure to file a schedule will operate as a forfeiture of his right to an exemption.⁵

e. OMISSION OF PROPERTY FROM SCHEDULE. — Though the statute may require the debtor to include all his property in the schedule, and may provide that property not included shall not be exempt, the omission of property from the schedule without fraudulent intent will not defeat a claim of property included in the schedule,⁶ but it will defeat a claim of property omitted, even though omitted by mistake.⁷

A Fraudulent Omission of property from the schedule will not defeat a debtor's right to property included in the schedule in those states in which it is held that a debtor does not forfeit his exemptions by fraud.⁸

f. ABSENCE FROM STATE. — Temporary absence of a debtor from the state at the time when an execution is levied upon his property does not operate as a forfeiture of his right of exemption,⁹ unless there is some statutory provision

chase price thereof under the process in his hands. *Wagner v. Olson*, 3 N. Dak. 69.

But in *Georgia*, where a party levied a distress warrant on property consisting of a lot of drugs, which had been exempted by the ordinary under the law of personalty exemption, and it appeared that the drugs exempted had been mixed with other drugs bought by the parties, it was held that the privilege of exemption extended only to the articles exempted by the ordinary, and that they must be claimed and identified to release them from levy. *Smith v. Turnley*, 44 Ga. 243.

1. Effect of Sale. — See *supra*, this title, *Property Exempt under the Statutes — Title or Right to Support Claim*.

2. Intention or Attempt to Sell — Rescinded Contract of Sale. — *Duvall v. Rollins*, 68 N. Car. 220. And see *Bevan v. Hayden*, 13 Iowa 122; *Haswell v. Parsons*, 15 Cal. 267, 76 Am. Dec. 480. See *infra*, this title, *Sales and Other Transfers, and Incumbrances — Sale or Exchange*.

A Contract to Sell and convey property, if not executed, does not affect the debtor's title, or amount to a waiver or forfeiture of his right to claim the property as exempt. See *supra*, this title, *Property Exempt under the Statutes*; and *infra*, *Sales or Other Transfers, and Incumbrances*.

3. Mortgage or Pledge. — *In re Jones*, 2 Dill. (U. S.) 343. See *infra*, this title, *Sales and Other Transfers, and Incumbrances — Mortgage, Pledge, and Other Liens*.

4. Fraudulent Conveyances. — See *infra*, this title, *Sales and Other Transfers, and Incumbrances — Fraudulent Conveyances*.

5. Failure to File Schedule of Property. — *Blair v. Parker*, 4 Ill. App. 409. See *infra*, this title, *Enforcement and Protection of the Right — Claiming, Selecting, and Setting Apart of Exemption*.

6. Omission of Property from Schedule. — *Berry v. Hanks*, 28 Ill. App. 51; *Douch v. Rahner*, 61 Ind. 64; *Over v. Shannon*, 91 Ind. 99.

7. Defeats Claim to Property Omitted. — *Blair v. Parker*, 4 Ill. App. 409; *Berry v. Hanks*, 28 Ill. App. 51. See *Spencer v. Scott*, 46 La. Ann. 1209.

But omission from a prior schedule will not defeat the right of exemption in those jurisdictions in which it is held that fraud does not operate as a forfeiture. *Sannoner v. King*, 49 Ark. 299, 4 Am. St. Rep. 49.

Further on this Question, see *infra*, this title, *Enforcement and Protection of the Right — Claiming, Selecting, and Setting Apart of Exemptions — Schedule or Inventory*.

8. Fraudulent Omission Not a Forfeiture. — Thus, in *Douch v. Rahner*, 61 Ind. 64, it was held that the facts that a debtor had fraudulently omitted property from his schedule and had perjured himself in swearing to the schedule did not operate as a forfeiture of his right to claim as exempt property included in the schedule. See *Over v. Shannon*, 91 Ind. 99. See also *Boesker v. Pickett*, 81 Ind. 554.

9. Absence from State Does Not Forfeit. — *Freehling v. Bresnahan*, 61 Mich. 540, 1 Am. St. Rep. 617; *Wilson v. McElroy*, 32 Pa. St. 82.

Nonresidence. — Where, however, a debtor leaves the state without an intention to return, and so loses his residence therein, he ceases to be entitled to the benefit of laws giving a

to that effect.¹

3. Estoppel — *a. IN PAIS.* — If a person may expressly waive his right of exemption, he may clearly be estopped by his conduct from claiming such right as against a *bona fide* purchaser at an execution sale, or from asserting it as against an officer who has levied upon and has sold his property.² The general principles governing the doctrine of equitable estoppel apply as fully to a claim of exemptions as to the assertion of any other right of property.³

Necessity for Prejudice. — The doctrine of equitable estoppel is based upon equitable grounds, and it is well settled that the declarations or conduct of a person, to estop him from asserting a right as against another, must have misled the other and induced him so to change his position that it would be inequitable to allow the claim to be asserted.⁴ This rule must necessarily apply where it is claimed that a debtor is estopped from claiming exemptions.⁵

right of exemption to residents only. See *supra*, this title, *Persons Entitled to Benefit of Exemption Laws — Residence and Citizenship.*

1. Express Statutory Provision. — In *Washington*, by express statutory provision, a debtor who has left the state with intent to defraud his creditors forfeits his right of exemptions. *Carter v. Davis*, 6 Wash. 327.

2. Estoppel by Allowing Sale Without Asserting Right of Exemption. — If a debtor stands by and allows his property to be sold on execution without asserting his right of exemption, he will be estopped from afterwards asserting the right as against the purchaser. See *Twinam v. Swart*, 4 Lans. (N. Y.) 263; *Smith v. Hill*, 22 Barb. (N. Y.) 656. Compare *Myers v. Forsythe*, 10 Bush (Ky) 394, where the court, after holding that a debtor's right of action for the recovery of property exempted from execution, or its value, passed to his widow for the benefit of the heirs or infant children residing with her, held that the fact that she was present at the sale of the property on execution and made no objection did not estop her from asserting her right.

3. Estoppel in Pais. — See *John V. Farwell Co. v. Patterson*, 76 Ill. App. 601.

In *Maine* it has been held that an insolvent debtor who had pointed out to his assignee in insolvency two wagons as part of his estate, but refused, on request of the assignee, to select which one he would retain, claiming to be entitled to both, was estopped from maintaining replevin against the assignee for one of the wagons taken by him in the belief that it was part of the assigned estate. *McKenzie v. Redman*, 87 Me. 322.

Dow v. Cheney, 103 Mass. 181, was a case of equitable estoppel, though the court spoke of it as a case of waiver. In that case personal property which was exempt from liability to attachment was attached on mesne process in an action against the owner. He then agreed in writing with the plaintiff that it might be sold at auction on a certain day, but by reason of a second attachment the sale was postponed for several months, and until the owner having meanwhile taken the benefit of the bankrupt act, it was prevented altogether by the claiming and taking of the property by the assignee in bankruptcy from the officer, in whose custody it had remained without any notice from the owner that he claimed it as exempt from attachment. It was held that the owner could not claim that the property

was exempt, and could not maintain an action against the officer for a conversion of the property.

Disclaimer of Title. — A person who disclaims ownership and advises an attachment of chattels as the property of another, and consents to the levy, is estopped from afterwards setting up a claim of title and exemption as against such proceedings. *Sebright v. Moore*, 33 Mich. 92. And see *Gilleland v. Rhoads*, 34 Pa. St. 187. See also *supra*, this section, *Forfeiture — Fraud.*

4. Necessity for Prejudice to Work Estoppel. — See the title *ESTOPPEL*, vol. II, p. 385.

5. Application to Claim of Exemptions. — *Ellsworth v. Savre*, 67 Iowa 449; *Bramble v. State*, 41 Md. 435.

Disclaimer of Title. — On this principle it has been held that a disclaimer by a debtor of any ownership of the property levied upon on an execution against him will not estop him from afterwards asserting and proving his title thereto as owner, and claiming the property as exempt, when the disclaimer has not influenced the conduct of the officer or been acted on by him or the plaintiff in the execution. *McAbe v. Thompson*, 27 Minn. 134. And see, to the same effect, *Boylston v. Rankin*, 114 Ala. 413; *Sannoner v. King*, 49 Ark. 299, 4 Am. St. Rep. 49; *Farrell v. Higley*, Hill & D. Supp. (N. Y.) 87. See also *Jordan v. Autrey*, 10 Ala. 276; *Wallis v. Truesdell*, 6 Pick. (Mass.) 455. Compare, as *contra*, *Miles v. State*, 73 Md. 398; *Gilleland v. Rhoads*, 34 Pa. St. 187.

Forfeiture by Fraud. — As is shown in another place, a few courts, in *Pennsylvania* particularly, hold that a debtor's fraudulent denial of ownership of property levied upon operates as a forfeiture of the right of exemption on account of the fraud, but the decided weight of authority is against this view. See *supra*, this section, *Forfeiture — Fraud.*

Receipting For and Retaining Property Levied On. — The fact that a debtor and another person have given to the sheriff a receipt for articles levied on, and thus retained possession of them, does not estop the debtor or his co-receptor from setting up the exemption of the property as a defense, in an action by the sheriff on the receipt, where the property levied was claimed as exempt at the time of the levy, and no facts are shown which would make it a fraud still to insist upon such claim. *Heath v. Keyes*, 35 Wis. 668.

There is a distinction between estoppel *in pais* and waiver.¹

Matter of Contract — Waiver of Exemptions. — An estoppel *in pais* relates to matters of fact, and not to matters of contract, and an agreement to waive exemptions, beyond the power of the debtor, cannot operate by way of estoppel.²

b. By JUDGMENT — RES ADJUDICATA. — An adjudication by a court having jurisdiction of the parties and the subject-matter, against the right of exemption, will clearly estop the parties to the proceeding.³ But the right of exemption must have been in issue and adjudicated, and the debtor must have been a party to the action or proceeding.⁴

XIII. SALES AND OTHER TRANSFERS, AND INCUMBRANCES — 1. In General. — Ordinarily it is not within the purpose or intent of the exemption laws to interfere in any way with the power of a debtor to dispose of his property as he may see fit. With respect to the *jus disponendi* exempt property is, as a

An Assignment for the Benefit of Creditors by a debtor, without exception or reservation of exempt property, does not estop the debtor from claiming his exemptions as against levying creditors, where no action has been taken or had under the assignment, and the property is not claimed as against the debtor under the assignment, but upon a seizure made a considerable time before the assignment was filed, as the action of the debtor in making the assignment cannot have misled or influenced the action of the creditors, and there can be no estoppel unless his action operated to their prejudice. *Rice v. Nolan*, 33 Kan. 28.

1. Waiver and Estoppel Distinguished. — "The plea in this case," said the *Maryland* court, where an action was brought against a sheriff for seizing and disposing of exempt property, "only sets forth that the plaintiff had notice of what the sheriff intended to do, and did not make any demand upon him until long after the money in question was distributed and applied. There is no pretense that the conduct of the plaintiff in any way influenced the action of the sheriff. The facts stated in the plea might be some evidence of a waiver, but they are certainly wholly insufficient to constitute an estoppel *in pais*." *Bramble v. State*, 41 Md. 435.

2. Invalid Agreement to Waive Exemptions No Estoppel. — *Crawford v. Lockwood*, 9 How. Pr. (N. Y. Supreme Ct.) 547.

In a few states, as has been shown in a previous subdivision, a waiver of exemptions by executory contract is binding, but in most states it is otherwise. See *supra*, this section, *Waiver*.

3. Judgment as an Estoppel — Res Adjudicata. — See the title RES ADJUDICATA.

For example, if under the particular statute a claim of exemption is required to be asserted and the right determined in attachment proceedings, an attachment defendant who fails to assert his right of exemption out of the attached property in the attachment proceedings cannot claim the property as exempt from seizure and sale under an order of sale or an execution issued on the judgment rendered against him in such proceedings. The right of exemption, so far as the attached property is concerned, is *res adjudicata*. *State v. Manly*, 15 Ind. 8; *Perkins v. Bragg*, 29 Ind. 507.

The same rule has been applied to a claim of wages as exempt after a final order in gar-

nishment proceedings. *State v. Bermudez*, 39 La. Ann. 622.

4. When Right Is Not Adjudicated Nor in Issue. — Thus, in the case of attachment proceedings, the judgment therein does not bar the right to claim the property as exempt from sale, where the right of exemption is not required to be passed upon and adjudicated as an issue in the proceedings. *McMichael v. Grady*, 34 Fla. 219; *Rice v. Nolan*, 33 Kan. 28; *Close v. Sinclair*, 38 Ohio St. 530.

In *Nebraska* the judgment of a court sustaining an attachment does not settle the status of the attached property and determine whether or not it was exempt from seizure on attachment. *Johnson v. Bartek*, (Neb. 1898) 76 N. W. Rep. 878; *Hamilton v. Fleming*, 26 Neb. 240; *State v. Carson*, 27 Neb. 501, 20 Am. St. Rep. 681. These cases overruled on this point *State v. Sanford*, 12 Neb. 425; *State v. Krumpus*, 13 Neb. 321. See also *State v. Wilson*, 31 Neb. 462; *Smith v. Johnson*, 43 Neb. 755. The reason for the rule was stated by Harrison, J., in *Quigley v. McEvony*, 41 Neb. 73, to be that the question as to whether attached property is or is not exempt is not an issue involved in an attachment proceeding.

And as to a claim of exemption after an order in garnishment proceedings, see *Union Pac. R. Co. v. Smersh*, 22 Neb. 751, 3 Am. St. Rep. 290. This question is more fully considered in another section. See *infra*, this title, *Enforcement and Protection of the Right — Time of Asserting Claim — In Case of Attachment or Garnishment*.

In *Arkansas* the right to exemptions is not determined by a judgment against a person whose property has been levied on under an execution, after he has filed a schedule of his exemptions as required by statute, asked for the issuance of a supersedeas, appealed from a decision refusing the supersedeas on the ground that he had failed to give the statutory notice, and afterwards dismissed his appeal, but in such case he may file a new schedule and again ask for a supersedeas. *Taylor v. Tomlinson*, 65 Ark. 232.

Judgment on Trial of Right to Property. — In *Boylston v. Rankin*, 114 Ala. 408, where, after the levy of an execution upon property as belonging to the defendant, there was instituted by a third party a statutory trial of the right to the property levied upon, and judgment was rendered in favor of the plaintiff in the

general rule, on substantially the same footing as nonexempt property. It has already been shown that such laws confer a personal privilege which the debtor may assert or waive at his option, and also that the power to dispose of or encumber exempt property is not affected by the rule of public policy established in most jurisdictions, prohibiting a waiver of the right of exemption by executory agreement.¹

2. Sale, Exchange, Assignment, or Gift — *a. SALE OR EXCHANGE.* — It is well settled, therefore, that a debtor, in the absence of express restrictions,² has the absolute power to sell or exchange his exempt personal property as he may see fit.³ A contrary rule would make the exemption laws operate to the detriment rather than to the benefit of the debtor.⁴

Sale by Wife of Absconding Debtor. — If a statute provides, as in *Iowa*, that when a debtor absconds and leaves his family, such property as is exempt to him shall be exempt in the hands of his wife and children or either of them, the wife of a debtor who has absconded and abandoned his family, leaving in her hands exempt property, may sell it, and his creditors cannot complain.⁵

b. SALE AFTER ISSUE OR LEVY OF EXECUTION OR ATTACHMENT. — If the property is specifically and absolutely exempt, or if it has been selected and set apart, where this is necessary, it may be sold after the issue or levy of an execution or attachment, as no lien is created thereby.⁶ It is otherwise

execution, it was held that the judgment in such claim suit was not conclusive upon the defendant in execution as to his right to claim exemptions, and was no bar to the assertion of such right, as the defendant in the execution was not a party to the claim suit.

1. Sales, Transfers, and Incumbrances. — See *supra*, this title, *Waiver, Forfeiture, and Estoppel—Waiver.*

2. See *infra*, this section, *Restrictions on Power to Sell or Encumber.*

3. May Sell or Exchange—Alabama. — *Callo-way v. Carpenter*, 10 Ala. 500; *Pool v. Reid*, 15 Ala. 826; *Cook v. Baine*, 37 Ala. 350.

Florida. — *Carter v. Carter*, 20 Fla. 558, 51 Am. Rep. 618; *Hinson v. Booth*, 39 Fla. 333.

Illinois. — *Vaughan v. Thompson*, 17 Ill. 78; *Cole v. Green*, 21 Ill. 105; *Recht v. Kelly*, 82 Ill. 147, 25 Am. Rep. 301; *Washburn v. Goodheart*, 88 Ill. 229.

Indiana. — *Godman v. Smith*, 17 Ind. 154; *Gregory v. Latchem*, 53 Ind. 449; *Love v. Blair*, 72 Ind. 281; *Ray v. Yarnell*, 118 Ind. 112; *Barnard v. Brown*, 112 Ind. 53; *King v. Easton*, 135 Ind. 353; *Moss v. Jenkins*, 146 Ind. 589.

Iowa. — *Bevan v. Hayden*, 13 Iowa 122.

Kansas. — *Arthur v. Wallace*, 8 Kan. 267.

Kentucky. — *Paxton v. Freeman*, 6 J. J. Marsh. (Ky.) 234, 22 Am. Dec. 74; *Moxley v. Ragan*, 10 Bush (Ky.) 156, 19 Am. Rep. 61.

Massachusetts. — *Bean v. Hubbard*, 4 Cush. (Mass.) 85; *Mannan v. Merritt*, 11 Allen (Mass.) 582.

Michigan. — *Anderson v. Odell*, 51 Mich. 492; *Buckley v. Wheeler*, 52 Mich. 1; *Emerson v. Bacon*, 58 Mich. 526; *Charpentier v. Bresnahan*, 62 Mich. 360; *Singer Mfg. Co. v. Cullaton*, 90 Mich. 639.

Missouri. — *Kulage v. Schueler*, 7 Mo. App. 250; *Stotesbury v. Kirtland*, 35 Mo. App. 148.

Nebraska. — *Gillespie v. Brown*, 16 Neb. 460.

North Carolina. — *Duvall v. Rollins*, 71 N. Car. 218.

Ohio. — *Tracy v. Cover*, 28 Ohio St. 61.

Tennessee. — *Denny v. White*, 2 Coldw. (Tenn.) 283, 88 Am. Dec. 596; *Cronan v. Honor*, 10 Heisk. (Tenn.) 533; *Cox v. Ballentine*, 1 Baxt. (Tenn.) 363; *Edwards v. Thompson*, 85 Tenn. 720, 4 Am. St. Rep. 807.

Vermont. — *Jewett v. Guyer*, 38 Vt. 209.

Virginia. — *White v. Owen*, 30 Gratt. (Va.) 43.

West Virginia. — *Moran v. Clark*, 30 W. Va. 358, 8 Am. St. Rep. 66.

Wisconsin. — *Carhart v. Harshaw*, 45 Wis. 340, 30 Am. Rep. 752; *Comstock v. Bechtel*, 63 Wis. 656.

4. "It Would Very Much Impair the Value of the Exemption Provision," said the *Indiana* court, "to hold that it was operative only while the specific articles of property remained in the possession of the debtor. It would destroy their merchantable value to him, while their usefulness to his family might depend almost entirely upon that quality; and we are not able to perceive that serious inconvenience would result from continuing the exemption in the hands of a purchaser." *Godman v. Smith*, 17 Ind. 152.

Change of Debtor's Status After Sale. — The owner of property exempt from execution confers a clear and valid title to it by sale or gift, although by a subsequent change in his occupation or circumstances he acquires such a status that he would be unable himself to hold it as exempt if he had retained the title. *Carhart v. Harshaw*, 45 Wis. 340, 30 Am. Rep. 752. And see to the same effect *Ketchum v. Allen*, 46 Conn. 414.

5. Sale by Wife of Absconding Debtor. — *Waugh v. Bridgeford*, 69 Iowa 334.

6. Execution or Attachment Before Sale—Alabama. — *Pool v. Reid*, 15 Ala. 826.

Indiana. — *Godman v. Smith*, 17 Ind. 152; *Barnard v. Brown*, 112 Ind. 53.

Kentucky. — *Paxton v. Freeman*, 6 J. J. Marsh. (Ky.) 234, 22 Am. Dec. 74.

Michigan. — *Buckley v. Wheeler*, 52 Mich. 1.

Missouri. — *Stotesbury v. Kirtland*, 35 Mo. App. 148; *Hombs v. Corbin*, 20 Mo. App. 498, 34 Mo. App. 393.

where a selection is necessary and no selection has been made,¹ except, perhaps, where all the debtor's property does not exceed the amount which he is entitled to claim.²

c. ASSIGNMENT OF EARNINGS OR OTHER CHOSSES IN ACTION. — A debtor may assign exempt wages or earnings, or other exempt choses in action, and his right to have them exempt from seizure for the payment of his debts will pass to his assignee.³

d. GIFT OR BEQUEST. — A debtor may not only sell, exchange, or assign his exempt property for a valuable consideration, but he may give it away, if he sees fit, not only to his wife or children, but also to strangers, for he has the absolute *jus disponendi* in the absence of express restrictions.⁴ And he may dispose of such property by will.⁵ The rights of creditors in such cases are elsewhere considered.⁶

e. EFFECT OF SALE, EXCHANGE, OR ASSIGNMENT. — Since a debtor has the right to sell, exchange, or assign his exempt property, it follows that a *bona fide* sale, exchange, or assignment for value conveys a good title to the

Tennessee. — *Edwards v. Thompson*, 85 Tenn. 720, 4 Am. St. Rep. 807.

An attachment levied while a sale of exempt property is being made and before it is perfected does not affect the right of the owner under the exemption laws, and the sale gives a good title to the purchaser. *Bevan v. Hayden*, 13 Iowa 122.

After Setting Off. — After property has been set off by the sheriff under the exemption law as exempt from sale on execution, it may be sold by the debtor free from the lien of the execution and judgment. *Moss v. Jenkins*, 146 Ind. 589.

1. Sale Before Necessary Selection. — In *Stotesbury v. Kirtland*, 35 Mo. App. 148, it was held that where property is not specifically exempted, but may be made exempt by the debtor's selection of it in lieu of other property under the *Missouri* statute, the debtor can make no disposition of it against the lien of an execution until after it has been actually so selected; that he cannot assign his right of selection, and that any attempted transfer will be void as against the execution, unless made after exemption has attached by a proper selection.

In *Illinois*, where the statute requires a schedule and selection, it is held that after an execution has become a lien upon property, a purchaser from the debtor cannot hold it if there has been no schedule and selection. *Chapin v. Hoel*, 11 Ill. App. 309.

2. Entire Property Not in Excess of Exemption. — In *Vandibur v. Love*, 10 Ind. 54, the statute before the court exempted from liability to sale on execution an amount of property not exceeding in value three hundred dollars, to be selected by the debtor after an appraisal, etc. It was held that where a debtor had sold property after the levy of an execution, and after informing the constable who had levied the execution that he intended to claim his exemptions, owned altogether less than three hundred dollars' worth of property, he might assert his claim and perfect his right of exemption after the sale for the benefit of his vendee.

3. Assignment of Wages or Earnings. — *Bibb v. Janney*, 45 Ala. 329; *Millington v. Laurer*, 89 Iowa 322, 48 Am. St. Rep. 385. "The ex-

emption," said the court in this case, "was for the benefit of the debtor's family, and to hold, when exempt property is transferred, it becomes subject, in the hands of the assignee, to the payment of the assignor's debts would in many cases destroy the value of the exemption by preventing the family of the debtor from deriving any benefit from it." See also *Nash v. Stevens*, 96 Iowa 616; *Union Pac. R. Co. v. Smersh*, 22 Neb. 751, 3 Am. St. Rep. 290.

Drawing Bill on Employer as a Waiver of Exemptions. — In *Bibb v. Janney*, 45 Ala. 329, a laborer had drawn an order or bill of exchange on his employer, to be paid out of his wages; and the question was whether this was a waiver of his right to claim this sum due him for wages as exempt under the statute. The claim of exemption was disallowed.

Assignment to Nonresident. — The assignment of exempt earnings may be to a nonresident of the state. *Millington v. Laurer*, 89 Iowa 322, 48 Am. St. Rep. 385.

May Assign Other Choses in Action. — *Anderson v. Odell*, 51 Mich. 492; *Williams v. Watkins*, 92 Va. 680.

Bounties. — A claim against a town for bounty money may be assigned, in the absence of express restrictions, notwithstanding it is exempted from liability for the beneficiary's debts, and when the money is paid to the assignee it becomes his. See *Yates v. Hurst*, 41 Vt. 556.

4. May Make Gift of Exempt Property — *Kansas.* — *Arthur v. Wallace*, 8 Kan. 270.

Michigan. — *Fischer v. McIntyre*, 66 Mich. 681.

Minnesota. — *Furman v. Tenny*, 28 Minn. 77.

Mississippi. — *Smith v. Allen*, 39 Miss. 469.

Nebraska. — *Gillespie v. Brown*, 16 Neb. 460.

New York. — *Youmans v. Boomhower*, 3 Thomp. & C. (N. Y.) 21; *Whiting v. Barrett*, 7 Lans. (N. Y.) 106.

Pennsylvania. — *Hildebrand v. Bowman*, 100 Pa. St. 580.

Wisconsin. — *Carhart v. Harshaw*, 45 Wis. 340, 30 Am. Rep. 752.

5. Bequest. — *Hinson v. Booth*, 39 Fla. 333.

6. Rights of Creditors. — See *infra*, this section, *Fraudulent Conveyances*.

purchaser or assignee as against his creditors.¹

Subsequent Claim by Debtor. — Of course, after the title has thus passed, the debtor cannot claim the property or the proceeds of a sale thereof on execution as exempt, for he has no title.²

Fraudulent Conveyances. — The effect of fraudulent conveyances is considered in another place.³

f. **ASSIGNED CHOSE IN ACTION — EQUITIES.** — When a chose in action is assigned the assignee takes it subject to equities, as the right of set-off or counterclaim, etc., and he cannot set up the assignor's right of exemption, which is a personal right, to defeat this rule.⁴

g. **INTENTION OR ATTEMPT TO SELL OR EXCHANGE — RESCINDED CONTRACT.** — A *bona fide* intention or attempt to sell or exchange exempt property, or a contract of sale or exchange which is afterwards rescinded, does not defeat or in any way prejudice the debtor's right to claim the property as exempt.⁵

h. **EXEMPTION OF PROCEEDS.** — If the statute exempts particular property only, the proceeds of a sale or exchange of exempt property, unless also within the statute, are not exempt; but it is otherwise if the proceeds are of such a character as to be themselves within the statute, as where an exempt horse is exchanged for another horse, or where property is sold for money and the statute allows money to be claimed as exempt.⁶

3. Mortgage, Pledge, and Other Liens — a. POWER TO MORTGAGE OR PLEDGE. — A debtor may not only sell and convey his exempt property absolutely, as shown in the preceding paragraphs, but he also has the power, in the absence of express restrictions, to mortgage or pledge it, and when he does so he thereby waives his right of exemption as to the particular property against the mortgagee or pledgee.⁷ Mortgages and pledges are not within the

1. Purchaser Acquires Title as Against Creditors. — Pool v. Reid, 15 Ala. 826; Bevan v. Hayden, 13 Iowa 122; Paxton v. Freeman, 6 J. J. Marsh. (Ky.) 234, 22 Am. Dec. 74. And see other cases cited in notes preceding.

2. Vendor Cannot Afterwards Claim Property as Exempt. — Miles v. State, 73 Md. 398; State v. Springate, 51 Mo. App. 619. See *supra*, this title, *Property Exempt under the Statutes — Title or Right to Support Claim*.

3. Fraudulent Conveyances. — See *infra*, this section, *Fraudulent Conveyances*.

4. Set-off and Counterclaim as Against Assigned Note. — As far as personal property is concerned, the right of exemption is personal to the debtor, and it loses its quality of exemption as soon as it is effectually transferred. Therefore a note held as part of the personal property exemption of a judgment debtor loses its quality of exemption when assigned, and the assignee holds it subject to the counterclaim of judgments against the assignor owned by the maker of the note. Lane v. Richardson, 104 N. Car. 642.

5. Intention or Attempt to Sell or Exchange No Bar. — In Shaw v. Davis, 55 Barb. (N. Y.) 389, it was held that the fact that a man was taking his vegetables to market, to exchange them for articles of prime necessity in his family, or even to obtain the means to pay his taxes, did not deprive him of his right to insist that the vegetables were "actually provided for family use," and therefore exempted from seizure and sale on execution. And see Haswell v. Parsons, 15 Cal. 267, 76 Am. Dec. 480.

Rescinded Contract. — Boesker v. Pickett, 81 Ind. 554; Bevan v. Hayden, 13 Iowa 122; Du-

vall v. Rollins, 68 N. Car. 220. See *supra*, this title, *Property Exempt under the Statute — Title or Right to Support Claim*.

6. Proceeds of a Sale or Exchange of exempt property are not for that reason alone also exempt. Pool v. Reid, 15 Ala. 826. See *supra*, this title, *Property Exempt under the Statutes — Proceeds and Product of Exempt Property*.

7. Debtor May Mortgage Exempt Property — United States. — In re Jones, 2 Dill. (U. S.) 343.

Connecticut. — Patten v. Smith, 4 Conn. 450, 10 Am. Dec. 166.

Florida. — Patterson v. Taylor, 15 Fla. 336; Carter v. Carter, 20 Fla. 558, 51 Am. Rep. 618.

Georgia. — Stafford v. Elliott, 59 Ga. 837.
Illinois. — Vaughan v. Thompson, 17 Ill. 78; Cole v. Green, 21 Ill. 105; Recht v. Kelly, 82 Ill. 147, 25 Am. Rep. 301; Washburn v. Goodheart, 88 Ill. 229.

Indiana. — Slaughter v. Detiney, 15 Ind. 49; Love v. Blair, 72 Ind. 281; Hall v. Hough, 24 Ind. 273; Recker v. Kilgore, 62 Ind. 10.

Iowa. — Fejavy v. Broesch, 52 Iowa 88, 35 Am. Rep. 261; Curtis v. O'Brien, 20 Iowa 376, 89 Am. Dec. 543; Evans v. St. Paul Harvester Works, 63 Iowa 204.

Kentucky. — Collett v. Jones, 2 B. Mon. (Ky.) 19, 36 Am. Dec. 586; Moxley v. Ragan, 10 Bush (Ky.) 156, 19 Am. Rep. 61.

Michigan. — Emerson v. Bacon, 58 Mich. 526; Charpentier v. Bresnahan, 62 Mich. 360.
New Jersey. — Conway v. Wilson, 44 N. J. Eq. 457.

New York. — Monroe v. Button, 20 Misc. Rep. (N. Y. Supreme Ct.) 494.

rule prohibiting a waiver of the right of exemption by executory agreement.¹
 A Bill of Sale Given as Security, being a mortgage in equity, is subject to the same rule.²

An Express Waiver of exemptions is not necessary in case of a mortgage or pledge of exempt property. A mortgage or pledge implies a waiver as to the particular property.³

Exemption from Forced Sale. — The fact that a statute exempts property from "forced sale under any process of law" does not give the mortgagor or pledgor of exempt property the right to claim it as exempt as against proceedings to enforce the mortgage or pledge.⁴

b. OTHER LIENS. — A debtor may also create other liens which will be superior to his right of exemption, as by inserting a clause in a lease giving a lien for rent,⁵ or by delivering materials to another to have labor bestowed thereon, so as to give him a lien on the product.⁶

c. EQUITABLE LIENS. — And he may create an equitable lien, as by giving a note charging property with the payment of the debt.⁷

d. EFFECT OF MORTGAGE OR PLEDGE — (1) *In General.* — A mortgage or pledge of exempt property is a waiver of the right of exemption as to such

Ohio. — Frost v. Shaw, 3 Ohio St. 270; Butt v. Green, 29 Ohio St. 667.

Oklahoma. — Irwin v. Walling, 4 Okla. 128.

Pennsylvania. — See McAuley's Appeal, 35 Pa. St. 209; Gangwere's Appeal, 36 Pa. St. 466; Hawley v. Hampton, 160 Pa. St. 18.

Tennessee. — Cox v. Ballentine, 1 Baxt. (Tenn.) 363; Cronan v. Honor, 10 Heisk. (Tenn.) 533; Denny v. White, 2 Coldw. (Tenn.) 283, 88 Am. Dec. 596.

Virginia. — White v. Owen, 30 Gratt. (Va.) 43.

West Virginia. — Moran v. Clark, 30 W. Va. 358, 8 Am. St. Rep. 66.

May Pledge Exempt Property — *Illinois.* — Washburn v. Goodheart, 88 Ill. 229.

Kansas. — Jones v. Scott, 10 Kan. 33; Rice v. Nolan, 33 Kan. 28.

Ohio. — Frost v. Shaw, 3 Ohio St. 270.

Pennsylvania. — Hawley v. Hampton, 160 Pa. St. 18.

Virginia. — Williams v. Watkins, 92 Va. 680.

Where personal property otherwise exempt from execution has been pledged as collateral security for the payment of a debt, and judgment has been rendered on the debt, an execution may be issued, and the property seized and sold thereon, as in other cases, and it cannot be claimed as exempt as against such an execution. Jones v. Scott, 10 Kan. 33.

Pension Moneys. — In the absence of express restrictions, a pensioner may pledge exempt pension moneys to the same extent as he may pledge any other exempt property, and he may mortgage property that has been purchased with pension moneys and that is exempt for that reason. Such a mortgage is not void as contrary to public policy. Monroe v. Button, 20 Misc. Rep. (N. Y. Supreme Ct.) 494.

Consent of Wife. — See *infra*, this section, *Restrictions on Power to Sell or Encumber.*

1. Not Within Prohibition of Waiver by Executory Agreement. — See *supra*, this title, *Waiver, Forfeiture, and Estoppel* — *Waiver.*

2. Bill of Sale Given as Security. — Emerson v. Bacon, 58 Mich. 526.

3. Express Waiver Not Necessary. — Hawley v. Hampton, 160 Pa. St. 18.

4. Exemption from "Forced Sale." — Patterson v. Taylor, 15 Fla. 336. See also Peterson v. Hornblower, 33 Cal. 266.

The Texas Statute expressly declares that the exemption of personal property from forced sale for debt shall not apply to debts "secured by a lien on such property." Under this statute a mortgage of property so exempt is valid, and the exemption cannot be claimed as against a sale to satisfy the mortgage. Rose v. Martin, (Tex. Civ. App. 1895) 33 S. W. Rep. 284.

5. Liens for Rent. — A lessee, by express agreement in the lease, may make the rent charge a lien upon the crops, stock, and other property upon the leased premises, "whether the same be exempt from execution or not," and thereby waive his right, as against the lessor, to claim property covered by such agreement as exempt from seizure to satisfy his debt for the rent. Such a clause in a lease is in the nature of a mortgage, and does not come within the rule forbidding an executory contract waiving the benefit of the exemption laws. Fejavy v. Broesch, 52 Iowa 88, 35 Am. Rep. 261. Compare Burke v. Finley, 50 Kan. 424, 34 Am. St. Rep. 132, where a clause in a lease waiving generally the benefit of the exemption laws was held invalid as a waiver of the lessee's right to claim his wages exempt as against his liability under the lease.

In Moss v. Carl, (Ky. 1896) 37 S. W. Rep. 580, it was held that a clause in a lease reciting merely that the landlord should have a lien on the crop for the rent did not show an intention to waive the benefit of the exemption law, and that the tenant could claim his exemptions out of the crop or its proceeds as against a claim for rent.

6. Artisan's Lien for Labor. — Thus, in Rogers v. Raynor, 102 Mich. 473, it was held that a person who delivered paper to another to be transformed into books by the other's labor impliedly waived his right of exemption as to such property to the extent of giving the other a lien thereon for his labor.

7. Equitable Lien. — Mynatt v. Magill, 3 Lea (Tenn.) 72.

property in favor of the mortgagee or pledgee.¹ But it does not operate as a general waiver. It does not prevent the mortgagor or pledgor from asserting his right of exemption as against other creditors levying an execution or attachment on the property.²

(2) *Claim Out of Proceeds of Sale under Mortgage.* — Whether a debtor who has mortgaged exempt personal property may claim an exemption out of the surplus proceeds of a sale under the mortgage depends upon whether the statute exempts the specific property only, or exempts property generally to a certain amount to be selected by the debtor.³

1. Mortgage or Pledge a Waiver in Favor of Mortgagee or Pledgee. — See *supra*, this subdivision, *Power to Mortgage or Pledge*.

2. Not a Waiver as Against Other Creditors — *United States.* — *In re Jones*, 2 Dill. (U. S.) 343.

Alabama. — *Collier v. Wood*, 85 Ala. 91.

Connecticut. — *Patten v. Smith*, 4 Conn. 450, 10 Am. Dec. 166.

Iowa. — *Evans v. St. Paul Harvester Works*, 63 Iowa 204; *Brainerd v. Simmons*, 67 Iowa 646.

Kentucky. — *Collett v. Jones*, 2 B. Mon. (Ky.) 19, 36 Am. Dec. 586.

Montana. — *Cheney v. Caldwell*, 20 Mont. 77.

Oklahoma. — *Irwin v. Walling*, 4 Okla. 128.

Virginia. — *Williams v. Watkins*, 92 Va. 680.

The Statutes Providing for a Levy on Mortgaged Property do not affect the rule that a mortgage of exempt property operates as a waiver of the right of exemption only in favor of the mortgagee, but subject to execution or attachment the interest of a mortgagor in such property only as would have been subject to execution if he had not mortgaged it. *Collett v. Jones*, 2 B. Mon. (Ky.) 19, 36 Am. Dec. 586; *Cheney v. Caldwell*, 20 Mont. 77.

In *Irwin v. Walling*, 4 Okla. 128, it was contended that a statute declaring that "personal property mortgaged may be taken under attachment or execution issued at the suit of a creditor of a mortgagor" modified the laws relating to exemptions and rendered mortgaged exempt property liable to execution at the suit of other creditors than the mortgagee; but the contention was overruled. The statute, said the court, "was not enacted with the view to affecting exemptions, but to enable creditors to reach property which, in the absence of the statute, it was doubtful if creditors could subject to attachment or execution."

Claim in Equity of Redemption. — A debtor is entitled to his personal-property exemption in an equity of redemption in personal property subject to mortgage. *Gaster v. Hardie*, 75 N. Car. 460.

Right of Mortgagor to Maintain Trespass. — Where a mortgagor of exempt personal property remains in possession, he may maintain an action of trespass against an officer for levying upon and selling such property. "Mortgagors of land, in possession, are regarded as the true and real owners of the estate, and their equity is liable to sale on execution. *Fitch v. Pinckard*, 5 Ill. 83. The mortgagor of personalty in possession must have at least a like and equal interest where the mortgage is duly recorded, and the absolute property where it is not, so far as creditors and subsequent purchasers are concerned,

when liable to execution. The mortgagor's interest would be of little value to him under such circumstances if he could not maintain the usual actions for its protection." *Vaughan v. Thompson*, 17 Ill. 78.

Release by Mortgagee. — A mortgagee may, as against an execution creditor of the mortgagor, release from his mortgage property selected by the mortgagor as exempt. *Ganong v. Green*, 71 Mich. 1.

Mortgage Declared a General Assignment for Benefit of Creditors. — Since a mortgage does not operate as a waiver of the right of exemption as against any other creditor than the mortgagee, it has been held that where a mortgage on exempt property is declared a general assignment for the benefit of creditors under the insolvency laws, those creditors only as against whom exemptions have been waived can claim the right to share in the proceeds of a sale of the property. *Collier v. Wood*, 85 Ala. 91.

Property in Possession of Mortgagee. — That an exemption cannot be claimed in mortgaged property where the property is in the possession of the mortgagee, see *Eisenberg v. Burchinell*, 10 Colo. App. 457.

3. Claim Out of Surplus Proceeds of Foreclosure Sale. — When the statute allows a debtor to claim as exempt property not exceeding a certain sum in value as against levy and sale on execution, a debtor whose property has been sold on foreclosure of a mortgage may claim the same out of the surplus proceeds of the sale, as against judgment creditors. *Darby v. Rouse*, 75 Md. 26.

In Pennsylvania, under the Act of 1849, allowing an exemption of three hundred dollars out of the proceeds of a sale of real estate, where the real estate of a debtor is seized and sold under a judgment obtained on a mortgage, and before the sale the debtor notifies the sheriff that he claims the benefit of the exemption law, and desires to have an appraisement made, the debtor is entitled to the balance of the proceeds after the payment of the mortgage debt and costs, it being less than three hundred dollars, in preference to judgments obtained for debts contracted after the act took effect. The sheriff, under a writ of *levari facias*, has no power or authority to hold the appraisement directed by the Act of 1849; but the want of an appraisement, in such cases, will not debar the debtor from claiming the benefit of the exemption out of the proceeds of the sale, as against judgments and liens subject to its provisions. *Hill v. Johnston*, 29 Pa. St. 302.

As to the rule in *Pennsylvania*, see *supra*, this title, *Proceedings and Process In or Against*

(3) *Marshaling Assets*. — Some courts, but not all, hold that where a mortgage covers both exempt and nonexempt property, the mortgagor has a right, both as against the mortgagee and as against a creditor having a lien upon the nonexempt property alone, to demand that the mortgagee shall first exhaust the nonexempt property before resorting to the exempt.¹

Rule Founded on Equity — Failure to Assert Right. — This rule, however, where it is recognized, is founded on mere equity, and will not be enforced where it would be inequitable to do so. And the right is one which the mortgagor must seasonably assert for himself.²

4. Restrictions on Power to Sell or Encumber — *a. IN GENERAL.* — Restrictions upon the power to sell or encumber exempt property are frequently imposed by the homestead and exemption laws,³ but as a general rule debtors are left free to deal with exempt personal property as they may see fit, to the same extent and in the same manner as if it were not exempt. Sometimes, however, the statutes exempting personal property also contain express restrictions.⁴ The validity of such restrictions does not seem to have been passed upon.⁵

Which Exemptions May Be Claimed — Foreclosure Proceedings.

Statutes Exempting Specific Property. — Where the statute exempts specific property only, and does not allow the debtor to claim his exemptions out of property generally, including money, a mortgagor of property so specifically exempted cannot claim his exemption out of the proceeds of a sale on foreclosure of the mortgage. See *Roundy v. Converse*, 71 Wis. 525, 5 Am. St. Rep. 240.

1. Application of Doctrine as to Marshaling Assets. — This doctrine was recognized by the *Minnesota* court in *Miller v. McCarty*, 47 Minn. 321, 28 Am. St. Rep. 375. And see to the same effect *Searle v. Chapman*, 121 Mass. 19; *Jones v. Dow*, 18 Wis. 241; *White v. Polleys*, 20 Wis. 503, 91 Am. Dec. 432; *Chapman v. Lester*, 12 Kan. 592; *Plain v. Roth*, 107 Ill. 588; *Webster v. Bronston*, 5 Bush (Ky.) 521 (divided court); *State Sav. Bank v. Harbin*, 18 S. Car. 425; *Hallman v. Hallman*, 124 Pa. St. 347. But compare *Armitage v. Toll*, 64 Mich. 412; *McLaughlin v. Hart*, 46 Cal. 638; *Wilson v. Patton*, 87 N. Car. 318; *McArthur v. Martin*, 23 Minn. 74; *Horton v. Kelly*, 40 Minn. 193. And see the title HOMESTEAD.

2. Rule an Equitable One—Right Must Be Asserted. — *Miller v. McCarty*, 47 Minn. 321, 28 Am. St. Rep. 375.

3. Express Restriction on Power to Sell or Encumber. — See the title HOMESTEAD.

4. In Alabama a debtor was formerly prohibited from selling his exempt property, and it was provided that if it should be sold "and taken possession of by the purchaser" it should be liable for the debts of the seller. *Simpson v. Simpson*, 30 Ala. 225. But the prohibitory statute was repealed by the Act of February 14, 1854, and by such repeal all restrictions on the power of a debtor to sell or otherwise dispose of exempt personal property were removed. *Cook v. Baine*, 37 Ala. 350.

In New York under Code Civ. Pro., § 1404, a debtor, in order to waive or release an exemption of real property, is required to subscribe, acknowledge, and record a formal notice that he canceled exemptions, and any other release or waiver is declared to be void. It is

also declared that a mortgage on such property, except for the purchase money thereof, shall be ineffectual until the exemption shall be so canceled. In 1894 (Sess. Laws 1894, c. 202) this section was amended so as to allow husband and wife jointly to convey or mortgage property so exempt.

In *Countryman v. Countryman*, 23 Civ. Pro. Rep. (N. Y. Supreme Ct.) 161, it was held that section 1404, prior to its amendment, applied to real estate exempt because purchased with pension money exempted by section 1393 (see *supra*, this title, *Property Exempt under the Statutes — Pensions and Bounties*), and that the making of a contract, therefore, for the erection of a building on real estate purchased with pension moneys, under an agreement by which the price was to be paid partly in cash and partly by giving a mortgage on the property, and the giving of the mortgage, did not cancel the exemption of such real estate.

In *Monroe v. Button*, 20 Misc. Rep. (N. Y. Supreme Ct.) 494, however, a contrary view was taken. It was held that as the said section 1404 by its express terms related only to exemptions of real property as prescribed and allowed by the statute, and in no manner mentioned pension moneys or the proceeds thereof, it did not apply either to pension moneys or to land purchased therewith and exempt merely for that reason, and that the right to claim such land as exempt was waived by the execution of a mortgage by the pensioner.

As to the effect of these provisions, see also the title HOMESTEAD.

5. Power of the Legislature. — There is a dictum to the effect that the legislature has no power to prohibit a debtor from selling or otherwise disposing of his exempt personal property. In *Cox v. Ballentine*, 1 Baxt. (Tenn.) 362, the court charged the jury that if the "plaintiff was the head of a family and owned only two head of horses or mules [the number exempted by statute], he could not sell, barter, exchange, or mortgage the horses or mules except for the benefit of his family." This was held error. "If the plaintiff below," said the court, "was the absolute owner of the property, he had the right to sell or otherwise dispose of it as he might see fit. The legisla-

b. CONSENT OF WIFE OR ORDER OF COURT. — The power of a debtor to sell or otherwise transfer exempt personal property, or to encumber it, is not in any way dependent upon the consent of his wife, nor upon an order of the court, in the absence of express provision in the constitution or statute, and a sale, transfer, or incumbrance by him will bar any right the wife might otherwise have.¹ In some jurisdictions, however, the constitution or statute expressly requires the wife's consent or an order of the court.²

ture could not prohibit him as owner from selling it or otherwise disposing of it."

There seems to be no case, however, in which this question has been squarely raised and decided. And in a number of cases restrictions on the power of a debtor to dispose of or encumber exempt property have been assumed to be valid. See the cases cited in the note preceding and in the notes following.

1. **Consent of Wife Not Required.** — *Flanders v. Wells*, 61 Ga. 195; *Godman v. Smith*, 17 Ind. 152.

2. **Express Requirement of Wife's Consent or Order of the Court** — In Georgia, under the peculiar statutes of that state, it was held in *Simpson v. Roberts*, 35 Ga. 180, that an indigent debtor had no power to encumber his property so as to divert that portion exempt by law for the support of his wife and minor children, and that a husband could not by an incumbrance of any kind defeat his wife's claim.

It is now provided by the constitution of that state that the property thereby exempted shall not, after being set apart as exempt, be alienated or encumbered, but that the property may be sold by the debtor and his wife, if any, jointly, with the sanction of the judge of the Superior Court, the proceeds to be reinvested upon the same uses. Code Ga. 1895, § 5914; Code 1882, § 5212. See *Clifton v. Northen*, (Ga. 1898) 31 S. E. Rep. 782; *Hart v. Evans*, 80 Ga. 330.

Before the property has been set apart the owner has full power to dispose of it. For this reason, in *Stowers v. Mathews*, 98 Ga. 371, it was held that, while, where an exemption of personalty was void as to certain creditors for want of notice to them, it was the right of the head of the family to make another application for exemption, to give notice thereof to these creditors, and to have the same personalty exempted as to them, yet where, before the allowance of the second application, the applicant had sold and parted with the title to and possession of a portion of the property, although he had included the same in the second application, the exemption thereafter allowed was, as to the property thus sold, ineffective and void as to such creditors.

In Florida, the Constitution exempts to the head of a family a homestead to the extent of one hundred and sixty acres of land, or the half of one acre within the limits of any incorporated city or town, together with one thousand dollars' worth of personal property, and then declares that "the real estate shall not be alienable without the joint consent of husband and wife, when that relation exists;" but nothing is said as to the alienation of personal property. In that state, therefore, a debtor has, as an incident of his ownership, the unrestricted right to dispose of his exempt

personal property by will or otherwise, without the consent of his wife. *Hinson v. Booth*, 39 Fla. 333.

In Indiana the statute exempts generally property not exceeding a certain sum in value (formerly three hundred dollars, now six hundred dollars), to be selected by him and set apart, and allows the selection of either real or personal property. Rev. Stat. Ind. 1896, §§ 703, 704. And it is provided (section 716) that "no mortgage or sale of any real estate exempted under the provisions of this act shall be valid if executed by a married man, unless the mortgage or deed be signed and acknowledged by the wife in due form of law." In *Sullivan v. Winslow*, 22 Ind. 153, it was held that the statute did not operate as an absolute exemption of three hundred dollars' worth of property in favor of the debtor, but required a selection and setting apart, and that consent and joinder of the wife in a conveyance or mortgage of land by a debtor made before any selection and setting apart of the land as exempt was not necessary, though all the property of the debtor, including the land, did not exceed three hundred dollars in value at the time of the conveyance or mortgage. Compare *Slanker v. Beardsley*, 9 Ohio St. 590, cited *infra* in this note.

In Kansas joint consent of husband and wife is required by statute to render valid a mortgage on exempt property, and a mortgage on such property not executed by both husband and wife is void. Gen. Stat. Kan., 1897, c. 118, § 9.

In Michigan the statute (How. Stat., 1882, § 7686) exempting in different subdivisions particular property, and in subdivision 8 "the tools, implements, materials, stock, apparatus, team, vehicle, horses, harness, or other things, to enable any person to carry on the profession, trade, occupation, or business in which he is wholly or principally engaged, not exceeding in value two hundred and fifty dollars," expressly provides (subdivision 9) that "any chattel mortgage, bill of sale, or other lien created on any part of property above described, except such as is mentioned in the eighth subdivision of this section, shall be void, unless such mortgage, bill of sale, or lien be signed by the wife of the party making such mortgage or lien (if he have any)." Under this statute the exemption provided for by subdivision 8 is put outside of any interference by the wife, and the husband may sell, mortgage, or otherwise dispose of it in any way he may see fit, and without her consent. *Charpentier v. Bresnahan*, 62 Mich. 360. As to the other property, however, the consent and signature of the wife are expressly required.

Property exempted by other sections of the statutes, as a sewing machine exempted by section 7717, is not covered by subdivision 9

c. **ABANDONMENT OF FAMILY.** — If a statute secures to a deserted wife or family the right of exemption conferred upon the head of a family, it restricts the power of a husband to dispose of or encumber his exempt property after or as part of his act of deserting his family.¹

d. **PROHIBITIONS AS AGAINST DEBT FOR PURCHASE MONEY.** — In some states the statute, after declaring that property shall not be exempt from execution issued on a judgment for the purchase money, imposes restrictions on the power of the debtor to alienate property as against such a debt after steps have been taken to subject it.²

5. Voluntary Assignment for the Benefit of Creditors — *a.* **IN GENERAL.** — An insolvent debtor may assign exempt as well as nonexempt property for the benefit of his creditors. When he assigns all of his property, without reservation, he waives his exemptions, in the absence of express provision to the contrary, and cannot afterwards claim them, either in specific property or out of the proceeds of a sale by the assignee.³

of section 7686, and may be sold or mortgaged by the husband without the joinder or consent of his wife. *Singer Mfg. Co. v. Cullaton*, 90 Mich. 639.

In *Harvey v. Ford*, 83 Mich. 506, it was held that said section 7686 does not apply to chattel mortgages executed by one partner in the name of the partnership, although his copartners may not be aware of their execution.

In *Ohio* by the Act of April 17, 1857, "securing to married women such personal property as may be exempt from execution," etc., it was declared that no married man should "sell, dispose of, or in any manner part with" any personal property "which now is or may hereafter be exempt from sale upon execution," without having first obtained the consent of his wife thereto. And it was further declared that if any married man should violate such prohibition, his wife, in her own name, might commence and prosecute a civil action for the recovery of such property or its value in money. This statute, it was held, prohibited a sale by the husband, without his wife's consent, of any property which would be exempt if an execution should be levied thereon, and he, in good faith, should assert his right of exemption. And it was held that where property sold by a husband was not in itself specifically exempt, but might become so upon a selection to be made by him, he was nevertheless prohibited from such sale, if his entire property, sold and unsold, was insufficient to satisfy the exemption secured by the act. *Slanker v. Beardsley*, 9 Ohio St. 590; *Colwell v. Carper*, 15 Ohio St. 279. Compare *Sullivan v. Winslow*, 22 Ind. 153, cited *supra* in this note.

In *Colwell v. Carper*, 15 Ohio St. 280, it was held that where a husband executed a chattel mortgage on his exempt property, without his wife's consent, and the mortgagee, after condition broken, caused the property to be seized in execution under a judgment recovered for the debt, which the mortgage was given to secure, this was such a disposing of and parting with the property by the husband as entitled the wife to sue to recover the property or its value. This statute is no longer in force.

Mortgage by Debtor Owning Other Property of the Same Kind. — Under *How. Stat. Mich.*, 1882, § 7686, exempting specific articles, including "two cows," and declaring that any

chattel mortgage, bill of sale, or other lien created on any part of the property therein described, with certain exceptions, shall be void unless signed by the wife of the party making it, it has been held that a mortgage of two cows by a debtor who owns five is valid without his wife's signature, for the husband has the right to select those which he will hold as exempt, and giving the mortgage operates as a selection out of those not mortgaged. *Harley v. Procmier*, (Mich. 1897) 72 N. W. Rep. 1099.

1. Abandonment of Family by Husband. — In *Illinois* the exemption law provides that "when the head of a family shall die, desert, or not reside with the same, the family shall be entitled to and receive all the benefits and privileges which are * * * conferred upon the head of a family residing with the same." And it is held that by the act of desertion a husband transfers to his family the right to the exemption out of his property which the statute confers upon him while residing with the same, and that he cannot, after or as a part of such desertion, encumber his property in favor of one knowing the facts, to the detriment of his family. *Baker v. Baker*, 69 Ill. App. 461.

2. Prohibition of Sale as Against Debt Due for Purchase Money. — *How. Stat. Michigan*, § 7716. This statute does not affect the right of the vendee of personal property to alienate it until the notice required by the statute has been filed. *Lillibridge v. Walsh*, 97 Mich. 460. And see *Roberts v. McGur*, 82 Mich. 221.

The effect of the *Missouri* statute (*Rev. Stat.* 1870, § 2353; *Rev. Stat.* 1889, § 4314) is not to prohibit a vendee absolutely from selling exempt property so as to defeat a claim for the purchase money. It does not give a lien to the vendor. It merely precludes a purchaser from the debtor from setting up the absolute right of the debtor to dispose of such property as against the vendor's execution for the purchase money, unless he bought in good faith without notice that the purchase money was unpaid. *Straus v. Rothan*, 102 Mo. 261; *Barton v. Sitlington*, 128 Mo. 164.

3. An Assignment for the Benefit of Creditors, without reservation or exception of exempt property, is a waiver of exemptions. *Carroll v. Else*, 75 Md. 301. And see *Graves v. Hinkle*, 120 Ind. 160; *Moses v. Thomas*, 26

b. RESERVATION OF EXEMPTIONS. — In most states, however, an insolvent debtor, in assigning his property for the benefit of his creditors, may except or reserve property that is exempt from execution. Such a reservation is no evidence of fraud, and will not render the assignment invalid. And, subject to the exceptions shown in the following paragraphs, the reservation itself is valid, and entitles the assignor to his exemptions.¹

N. J. L. 124; Van Waggoner v. Moses, 26 N. J. L. 570. Compare Lowenstein v. Finney, 54 Ark. 124; Shirley v. Teal, 67 Ala. 449; Pilling v. Stewart, 4 British Columbia 94.

Under Bates's Annot. Stat. *Ohio*, § 6348, and under the statute (section 5441) providing for an exemption in lieu of a homestead of five hundred dollars' worth of personal property, in addition to the amount of chattel property otherwise exempted, a probate court exercising jurisdiction over property embraced in an assignment for the benefit of creditors has power to order such allowance of five hundred dollars out of personal property to the assignor in lieu of a homestead. *Mercer v. Cunningham, 53 Ohio St. 353.* And see *Kuhn v. Nieberg, 40 Ohio St. 631.*

Under Rev. Stat. *Indiana, 1881*, § 2670, it has been held that it was the intention of the legislature "to place the failing debtor who voluntarily surrenders all his property for the benefit of all his creditors, under such law, on precisely the same footing and to give him precisely the same right, no greater and no less as to the exemption of a reasonable amount of his property from seizure or sale for the payment of his debts, as the execution debtor had under the existing law of this state." *Ex p. Hopkins, 104 Ind. 157.*

In *Pennsylvania* when an assignor for the benefit of creditors has not reserved his exemptions in the assignment, property may and should be set apart to him under the Act of 1864. But when he has reserved his exemptions in the assignment, they should be set apart to him under the Exemption Act of 1849. *Delliker's Estate, 3 Del. Co. Rep. (Pa.) 357.* Under this act the exemption is confined to household furniture and things of domestic use, and does not extend to other property, as implements of husbandry, machinery, wagons, horses, and cows. *Strohm's Estate, 1 Pa. Co. Ct. Rep. 573.*

Assignment Not Acted Upon — Effect as to Prior Levy. — Where exempt property of a debtor is levied upon by attachment, and a few days before the sale thereof the defendant makes an assignment for the benefit of creditors, with no reservation of the exempt property so levied on, but no other or further proceedings are taken under such assignment, and where the plaintiffs do not claim the property thereunder, and are not influenced or prejudiced thereby, the defendant is not estopped as against such plaintiffs from thereafter claiming the attached property as exempt from sale under such attachment process. *Rice v. Nolan, 33 Kan. 28.*

Right of Assignee to Assert Assignor's Right of Exemption from Execution. — It has been held that, as the claim that property levied on and sold upon execution is exempt from execution is a claim personal to the defendant in the execution, and he only can avail himself of the

privilege, an assignee for the benefit of creditors, though the assignment contains no reservation or exception of exempt property, cannot claim property as assignee as against an execution levied before the assignment, on the ground that it was exempt from execution. *Smith v. Hill, 22 Barb. (N. Y.) 656.*

Waiver of Exemptions by Assignee. — An assignee for the benefit of creditors, although claiming under a general assignment which does not except exempt property, cannot claim property as exempt from an execution, against the assignor, after having stood by at the time of the sale thereof, on the execution, and made no claim to the property as assignee. *Smith v. Hill, 22 Barb. (N. Y.) 656.*

Reformation of Assignment. — When an assignor for the benefit of creditors omits by mistake to reserve his exemptions, he may maintain a bill in equity to reform or correct the assignment so as to secure his right to exemptions. See *Chandler v. Jenks, 50 Mich. 151.*

1. Assignor May Reserve Exemptions — *United States.* — *Wooldridge v. Irving, 23 Fed. Rep. 676.*

Alabama. — *Southern Suspender Co. v. Van Borries, 91 Ala. 507; Myers v. Conway, 90 Ala. 199, overruled on another point in Frank v. Myers, 97 Ala. 437.*

Arkansas. — *Baker v. Baer, 59 Ark. 503; King v. Hargadine-McKittrick Dry Goods Co., 60 Ark. 1; Clark Shoe Co. v. Edwards, 57 Ark. 331; Lazarus v. Camden Nat. Bank, 64 Ark. 322.*

Florida. — *Parker v. Cleveland, 37 Fla. 39.*
Iowa. — *Perry v. Vezina, 63 Iowa 25; Bradley v. Bischel, 81 Iowa 80.*

Kentucky. — *Bank of Commerce v. Payne, 86 Ky. 447; Moore v. Stege, 93 Ky. 27.*

Maine. — See *Canal Bank v. Cox, 6 Me. 395.*

Maryland. — *Muhr v. Pinover, 67 Md. 480.*

Michigan. — *Hollister v. Loud, 2 Mich. 309; Rosenthal v. Scott, 41 Mich. 632.*

Mississippi. — *Richardson v. Marqueeze, 59 Miss. 80, 42 Am. Rep. 353.*

Missouri. — *Rainwater v. Stevens, 15 Mo. App. 544.*

Nebraska. — *Liningier v. Raymond, 9 Neb. 40.*

New York. — See *Dolson v. Kerr, 5 Hun (N. Y.) 643.*

North Carolina. — *Brannon v. Hardie, 88 N. Car. 243; Eigenbrun v. Smith, 98 N. Car. 207; Bobbitt v. Rodwell, 105 N. Car. 236; Barber v. Buffaloe, 111 N. Car. 206; Davis v. Smith, 113 N. Car. 94; Morehead Banking Co. v. Whitaker, 110 N. Car. 345; Blair v. Brown, 116 N. Car. 631.*

North Dakota. — *Red River Valley Bank v. Freeman, 1 N. Dak. 196.*

Ohio. — *Close v. Sinclair, 38 Ohio St. 530.*

Pennsylvania. — *Mulford v. Shirk, 26 Pa. St. 473; Knight v. Waterman, 36 Pa. St. 259;*

General Reservations. — By the overwhelming weight of authority, a general reservation or exception of exempt property from an assignment for the benefit

Heckman v. Messinger, 49 Pa. St. 465; Peterman's Appeal, 76 Pa. St. 116; Hildebrand v. Bowman, 100 Pa. St. 580.

South Carolina. — Haynes v. Hoffman, 46 S. Car. 157.

South Dakota. — Dawley v. Sherwin, 5 S. Dak. 597.

Tennessee. — Farquharson v. McDonald, 2 Heisk. (Tenn.) 404; McCord v. Moore, 5 Heisk. (Tenn.) 734.

Texas. — Baldwin v. Peet, 22 Tex. 708, 75 Am. Dec. 806.

Wisconsin. — Bates v. Simmons, 62 Wis. 69; German Bank v. Peterson, 69 Wis. 561; Cribben v. Ellis, 69 Wis. 337; Severson v. Porter, 73 Wis. 70.

And see the cases cited in the notes following.

Express Provisions. — In some states the statute relating to assignments for the benefit of creditors expressly gives or recognizes the right of the debtor to reserve exempt property. See Bangs v. Fadden, 5 N. Dak. 92.

Sufficiency of Reservation. — Where an assignment for the benefit of creditors limits the transfer to property "which might be reached or recovered by any of the creditors" of the assignee, it sufficiently excludes such property as would be exempt by law. Chandler v. Jenks, 50 Mich. 151.

A deed of assignment made for the benefit of creditors, in which the grantor reserves an amount within the statute as exempt to an insolvent debtor who is the head of a family, is not void upon its face for the sole reason that it neither recites that the grantor is insolvent, nor the head of a family, but such facts may be shown in a proper case by a party in position to question the legality of the transaction. Dawley v. Sherwin, 5 S. Dak. 594.

Retention of Property by Assignor — Effect on Assignment. — In Mahorner v. Forchheimer, 73 Miss. 302, the court held that the retention by an assignor for the benefit of creditors of the proceeds of sales made on the day of the assignment made the assignment void, where there was nothing to show that the sum so retained was selected by the assignor as exempt property, though the assignment expressly reserved exemptions, and though the amount retained may not have exceeded what he would have been entitled to select as exempt. *Compare*, however, Clark Shoe Co. v. Edwards, 57 Ark. 331.

Partnership Assignment — Invalid Reservation. — In an assignment by a partnership of all the partnership property, an exception of "what is by law exempt" does not render the assignment void in a state where it is held that partners are not entitled to exemptions out of partnership property. The exception is nugatory and may be treated as surplusage. Dodd v. Hills, 21 Kan. 707. See also Guptil v. McFee, 9 Kan. 30; McFarland v. Bate, 45 Kan. 1; Madison First Nat. Bank v. Hackett, 61 Wis. 335; Goll v. Hubbell, 61 Wis. 300; McNair v. Rewey, 62 Wis. 167.

In Dubuque First Nat. Bank v. Baker, 68 Wis. 442, an assignment by partners purported

to convey to the assignee all the partnership property "not exempt to them by the laws of the state," and a schedule contained a claim by each partner of certain property as being exempt. All of the property, however, was delivered to the assignee and remained in his possession, and the assignors never in fact claimed any property as exempt. It was held, under these circumstances, that the exemption clause did not invalidate the assignment.

If an assignment by a firm excepts exempt property without designating it, the presumption is that an exemption out of the individual property of each partner was intended, and the assignment is valid. Wooldridge v. Irving, 23 Fed. Rep. 676.

Effect of Assignment as to Prior Levy. — Where property has been levied on by attachment, and, pending the suit, the debtor assigns all his property for the benefit of creditors, excepting only such as he may lawfully hold exempt from execution, the right of the debtor to select the attached property as exempt from sale is not thereby waived. Close v. Sinclair, 38 Ohio St. 530.

Creditors Holding Liens. — Exemptions cannot be claimed by an assignor for the benefit of creditors to the injury of a creditor holding a lien for the purchase money of the property claimed. See Wiley's Appeal, 90 Pa. St. 173; Bausman's Appeal, 90 Pa. St. 178.

Claims Waiving Exemptions. — Nor can exemptions be claimed by the assignor as against a judgment or claim waiving exemptions. Bausman's Appeal, 90 Pa. St. 178; Shaeffer's Appeal, 101 Pa. St. 45.

Out of What Property. — The claim of exemption must be restricted, said the *Pennsylvania* court, speaking of the Exemption Act of 1849, to some property which the assignor owned, or in which he had an interest, at the time of the assignment, or at the furthest to the proceeds of a sale of such property. It cannot extend to money made by the assignee's care, management, and use of the assigned property, as money received by the assignee as rent for the use of a farm covered by the assignment, due, not on a term existing at the time of the assignment, but on a letting afterwards. "The whole intent and spirit of the act is to leave him [the assignor] something which he already has, and of which he might otherwise be deprived at that point of time. Whatever was unreservedly assigned passed to the assignees in trust for the benefit of all the creditors of the assignor, according to their legal and equitable rights. The income or product of the property, while in their hands, is held by them in like manner." Bausman's Appeal, 90 Pa. St. 178.

Time of Claim under Reservation. — In *Pennsylvania* the reservation in an assignment for the benefit of creditors of the assignor's right to the exemption must be exercised at the time of the appraisement, and if it is not then claimed it will not inure to the benefit of a subsequent execution creditor upon a judgment with a waiver of exemption. Long v. Wilson, 15 Pa. Co. Ct. Rep. 68.

of creditors, without specifying or describing it, does not render the assignment void for uncertainty, or fraudulent as against creditors.¹ Nor is the reservation or exception invalid.²

Reservation Out of Proceeds. — There is a conflict in the decisions as to whether an assignor for the benefit of creditors may assign all his property and reserve his exemption in money out of the proceeds of the sales by the assignee, when the statute exempts property only.³ There can be no objection to such a

1. General Reservation or Exception — Assignment Valid — *Alabama*. — Frank v. Myers, 97 Ala. 437 [overruling Block v. Maas, 65 Ala. 211; Myers v. Conway, 90 Ala. 109]; Southern Suspender Co. v. Van Borries, 91 Ala. 507.

Arkansas. — Lazarus v. Camden Nat. Bank, 64 Ark. 322.

Florida. — Parker v. Cleveland, 37 Fla. 39.

Indiana. — Garnor v. Frederick, 18 Ind. 507.

Iowa. — Perry v. Vezina, 63 Iowa 25; Bradley v. Bischel, 81 Iowa 80.

Kentucky. — Knefler v. Shreve, 78 Ky. 297; Moore v. Stege, 93 Ky. 27.

Maryland. — Muhr v. Pinover, 67 Md. 480.

Michigan. — Hollister v. Loud, 2 Mich. 309; Smith v. Mitchell, 12 Mich. 180; Brooks v. Nichols, 17 Mich. 38.

Mississippi. — Richardson v. Marqueze, 59 Miss. 80, 42 Am. Rep. 353.

Missouri. — Hartzler v. Tootle, 85 Mo. 23; Rainwater v. Stevens, 15 Mo. App. 544.

Montana. — McCulloch v. Price, 14 Mont. 320, 43 Am. St. Rep. 637.

North Carolina. — Eigenbrun v. Smith, 98 N. Car. 207; Bobbitt v. Rodwell, 105 N. Car. 236; Barber v. Buffaloe, 111 N. Car. 206; Morehead Banking Co. v. Whitaker, 110 N. Car. 345.

North Dakota. — Red River Valley Bank v. Freeman, 1 N. Dak. 196; Bangs v. Fadden, 5 N. Dak. 92.

Ohio. — Kelly v. Duffy, 31 Ohio St. 437.

Pennsylvania. — Heckman v. Messinger, 49 Pa. St. 465; Peterman's Appeal, 76 Pa. St. 116.

Wisconsin. — Bates v. Simmons, 62 Wis. 69; German Bank v. Peterson, 69 Wis. 561.

Doctrine in Tennessee. — In Sugg v. Tillman, 2 Swan (Tenn.) 208, it was held that an assignment in trust by a debtor for the benefit of a portion of his creditors, of all his property, of every description, consisting of real and personal estate, and including corn, fodder, bacon, etc., farming utensils, and household and kitchen furniture, with a reservation by the debtor in the deed to this effect: "Reserving to myself, however, out of the aforesaid stock, farming utensils, provender, provisions, household and kitchen furniture, * * * so much as I am, by law, allowed to retain free from execution," was fraudulent and void in law, whether so intended or not, under the rule invalidating an assignment for the benefit of creditors, reserving a benefit or advantage to the debtor, and because of the generality of the reservation.

In the later case of Farquharson v. McDonald, 2 Heisk. (Tenn.) 404, the case of Sugg v. Tillman, 2 Swan (Tenn.) 208, was distinguished on the ground that the assignment in that case conveyed all the debtor's property, and then reserved exemptions, and it was held that where an assignment does not convey all the debtor's property, but excepts such articles

as are exempt, the exception does not affect the validity of the assignment further than to prevent the passing of the title to the property of like character with that reserved until the separation of the goods reserved from those conveyed. See also McCord v. Moore, 5 Heisk. (Tenn.) 734.

See Overton v. Holinshade, 5 Heisk. (Tenn.) 683, where it was held that it is a badge of fraud to give so general a description of the property sought to be conveyed by mortgage or deed of trust that it is difficult, if not impossible, to distinguish it from other property; that there must be such a description, either general or special, as would enable any one to take the deed, and from its face to designate the property described.

2. Validity of Reservation or Exception. — In Frank v. Myers, 97 Ala. 437, one Mullane executed a deed of assignment for the benefit of creditors, purporting to convey all of his property, and containing the clause: "But the party of the first part, making this assignment, reserves to himself any and all exemptions to which he is entitled under the laws of the state of Alabama." It was held that this exception was not void for uncertainty or repugnancy to the grant, and could not for any reason be avoided by creditors unless waived by the assignor by want of timely exercise of the right it reserved to select and retain such property as was exempt. See also, in support of this view, Moore v. Stege, 93 Ky. 27; Smith v. Mitchell, 12 Mich. 180; Rosenthal v. Scott, 41 Mich. 632; Red River Valley Bank v. Freeman, 1 N. Dak. 196; Peterman's Appeal, 76 Pa. St. 116; Severson v. Porter, 73 Wis. 70.

Particular Provisions. — If a statute relating to assignments for the benefit of creditors provides, as in *North Dakota*, for a general assignment of all the debtor's property, and recognizes the right of the assignor to reserve his exemptions, and provides for the setting forth of the property claimed as exempt in an inventory to be subsequently filed, a general reservation of exemptions in the assignment is valid. Bangs v. Fadden, 5 N. Dak. 92.

Absolute Exemption of Specific Articles. — It has been held, even in *Alabama*, that, where the law exempts only particular articles of property, without restrictions as to value, etc., and without requiring any selection or appraisal, a general reservation of such property "as is by law exempt from execution" is valid. Southern Suspender Co. v. Van Borries, 91 Ala. 507.

3. Reservation Out of Proceeds. — See Pilling v. Stewart, 4 British Columbia 94.

In *Arkansas* it has been held that a deed of assignment conveying all the property of the assignor, and reserving to the assignor from the proceeds of the property a sum equal to the amount of property which he is entitled to

reservation where the statute expressly allows a debtor to claim his exemptions in money.¹

c. CONVEYANCES TO PREFER CREDITORS. — A conveyance of all his property by an insolvent debtor to a particular creditor, for the purpose of giving him a preference, will not operate as a general assignment of exempt property under a statute declaring that an insolvent debtor's conveyance of all his property for the purpose of preferring a creditor shall operate as a general assignment and inure to the benefit of all his creditors.²

d. CLAIM AND SELECTION. — Perhaps when an assignor for the benefit of creditors reserves or excepts his exempt property, such property as is absolutely exempt does not pass to the assignee at all, and no claim or selection is necessary as against the assignee.³ But if the exemption law is such that a claim and selection are necessary,⁴ the claim and selection must be made, and they must be made within a reasonable time after the assignment, or the right of exemption will be waived.⁵

hold as exempt, is void, because it casts upon creditors the expense of holding and selling the property and the loss by reason of depreciation in value. *King v. Ruble*, 54 Ark. 418.

In *South Carolina*, on the other hand, where an assignment for the benefit of creditors directed the assignee to sell the property and reserved the right to claim in money out of the proceeds of the sales a sum equal to the amount of his personal property exemption, it was held that the assignment and the reservation were valid. *Adler v. Cloud*, 42 S. Car. 272.

And in *Indiana* it has been held that an assignor for the benefit of creditors who waives or foregoes the right to select specific articles of property under his claim of exemption, in pursuance of an agreement with the assignee that in lieu of such property he shall have the proceeds thereof to that amount in money when the property is sold, is entitled to the proceeds of such property, in the hands of the assignee, to the amount of the exemption. *Faulkner v. Jones*, 13 Ind. App. 381.

In *North Carolina*, also, it has been held that a reservation in a deed of trust for the benefit of creditors of the homestead and personal property exemption provided by the constitution, or five hundred dollars in money in lieu of such personal property exemption out of the proceeds of the property conveyed, is not fraudulent. *Morehead Banking Co. v. Whitaker*, 110 N. Car. 345; *Blair v. Brown*, 116 N. Car. 631.

1. Statutes Allowing Exemptions in Money. — In *Ohio*, by express statutory provision, a debtor may claim his exemption in money, and the exemption may be allowed by the court out of the proceeds of a sale of property assigned for the benefit of creditors. See *Kuhn v. Nieberg*, 40 Ohio St. 631; *Mercer v. Cunningham*, 53 Ohio St. 353.

It has been there held that where an insolvent debtor assigns his property, consisting of a stock of goods covered by chattel mortgages, for the benefit of creditors, reserving his right to exemptions, and the goods are sold and the mortgages paid, he is entitled to his exemptions out of the surplus. *In re Bremer*, 4 Ohio Dec. 80, 3 Ohio N. P. 12. And see *In re Knepfle*, 6 Ohio Dec. 417, 4 Ohio N. P. 213.

In *Pennsylvania*, also, exemptions may be

allowed in money out of the proceeds of property covered by an assignment for the benefit of creditors. See the *Pennsylvania* cases cited in the notes preceding.

2. Conveyances to Prefer Creditors. — *Shirley v. Teal*, 67 Ala. 449. And see *Calloway v. Calloway*, (Ky. 1897) 39 S. W. Rep. 241. See also *Haynes v. Hoffman*, 46 S. Car. 157.

3. When Claim and Selection Are Not Necessary. — See *Bank of Commerce v. Payne*, 86 Ky. 447. See *supra*, this title, *Waiver, Forfeiture, and Estoppel* — *What Constitutes a Waiver*.

4. When Claim and Selection Are Required. — See *supra*, this title, *Waiver, Forfeiture, and Estoppel* — *What Constitutes a Waiver* — *Omission to Claim Exemption*.

5. Pilling v. Stewart, 4 British Columbia 94.

"Where an assignment is made of property subject to exemption, and from which the exempt part has not been selected, the exempt interest comes of necessity within the body of the trust, until steps are taken for its separation." *Chipman v. Kellogg*, 60 Mich. 438, citing *Sheldon v. Rounds*, 40 Mich. 425.

Waiver by Delay. — In *Bong v. Parmentier*, 87 Wis. 129, partners assigned for the benefit of creditors all their property, including a stock of goods, "except such as are exempt from levy and sale under execution." The whole of their stock of goods was included in the inventory and delivered to the assignee, and no selection or claim of any specific property as exempt was made until more than ten weeks after the assignment was completed. It was held that this was an unreasonable delay and a waiver of any right to exemptions out of such stock. And see to the same effect *Lamont v. Wooton*, 88 Wis. 107.

Where the grantor in an assignment for the benefit of creditors reserves his exemptions in general terms, he may select the property within a reasonable time; and the selection is made in time if it does not delay the assignee in the discharge of his duties. *Lazarus v. Camden Nat. Bank*, 64 Ark. 322.

In *In re Bremer*, 4 Ohio Dec. 80, 3 Ohio N. P. 12, an insolvent debtor assigned for the benefit of his creditors a stock of goods covered by chattel mortgages, reserving his right of exemptions. The stock was sold and a surplus remained. It was held that a demand by the debtor for the allowance of his exemptions, made within a reasonable time after the

Refusal, in such a case, to make a selection, upon request by the assignee, will clearly operate as a waiver and estoppel.¹

Statutory Requirements. — If the statutes point out a particular mode and time in and at which exemptions shall be claimed by an assignor for the benefit of creditors, the requirements in this respect must be observed. By failure to comply with them the assignor waives his exemptions,² unless he can show a good excuse for his noncompliance.³

e. **EFFECT OF FRAUD.** — The doctrine recognized in some states, that a debtor forfeits his right of exemption if he is guilty of fraud as against his creditors, applies to debtors who have made an assignment for the benefit of creditors, reserving exempt property.⁴

f. **ASSIGNMENT IN BANKRUPTCY OR INSOLVENCY.** — Under some of the state insolvency laws, property that is specifically exempted from execution

sale, was sufficient to entitle him to his exemption out of the surplus.

Under the Pennsylvania Act of 1849, referred to elsewhere in this article (see *supra*, this title, *Waiver, Forfeiture, and Estoppel—Waiver—Omission to Claim Exemption*), a claimant is not entitled to the proceeds of the sale of land unless he has first claimed a part of the land and it has been decided by the appraisers that such part cannot be set off without prejudice to the whole. Therefore, where a deed of assignment for the benefit of creditors conveying real estate only reserves "so much [property] as may be exempt from execution," and the assignor neglects to apply for an appraisal of any specific part thereof, or to take any further steps to secure his exemption, his administrator cannot, after his death, maintain a claim to three hundred dollars from the proceeds of the assignee's sale of the real estate. *Shaeffer's Appeal*, 101 Pa. St. 45. See also *Afferbach's Estate*, 7 Pa. Co. Ct. Rep. 157; *Kreider's Estate*, 135 Pa. St. 578; *Hawbicker's Estate*, 6 Pa. Co. Ct. Rep. 570; *Long v. Wilson*, 15 Pa. Co. Ct. Rep. 68.

The proper time for the assignor, under such a deed, to make his election of specific property is when the appraisers appointed by the court are appraising the property in the hands of the assignee. *Shaeffer's Appeal*, 101 Pa. St. 45.

In *Larkin's Estate*, 132 Pa. St. 554, it was held that where an assignor for the benefit of creditors reserves in the deed of assignment "such property as is now by law exempt from levy and sale on execution," such reservation is sufficient notice of the claim for exemption, both to the assignee and to all claimants upon the assigned estate; and that in such case, where the assignor's personalty, appraised at less than the amount of his exemptions, is retained by him, it is the duty of the assignee, upon the sale of the realty, consisting of a single tract, to pay the balance of the exemption claim out of the proceeds, and no specific appraisalment of the land is necessary.

1. Refusal to Select—Estoppel. — See *McKenzie v. Redman*, 87 Me. 322.

2. In *Indiana* the assignor must assert his right to hold property as exempt at the time and in the manner prescribed. The property must be claimed and selected by him and set apart by the appraisers, and if he fails to assert his rights at the time of the appraisalment, without sufficient excuse, he waives

them. *Graves v. Hinkle*, 120 Ind. 157. And see *Wagner v. Barden*, 13 Ind. App. 571.

In *Ohio*, under *Bates's* Annot. Stat., § 6348, the Probate Court having jurisdiction over property embraced in an assignment for the benefit of creditors is the proper court to which to apply for the allowance of the five hundred dollars exemption, and if an assignor omits to invoke its power he cannot resort to the Court of Common Pleas by an action upon the bond of the assignee to recover the value of such property, even though he made demand therefor upon the assignee and the appraisers. *Mercer v. Cunningham*, 53 Ohio St. 353.

3. Exceptions—Excuse for Omission to Claim. — It has been held by the *Indiana* Appellate Court that this rule does not apply where the assignor waives or foregoes the right of the selection of specific articles of property out of a retail stock of merchandise in pursuance of an agreement with the assignee that in lieu of such property he shall have the proceeds thereof to that amount in money when the stock is sold. *Faulkner v. Jones*, 13 Ind. App. 381.

And it has also been held that where an assignor for the benefit of his creditors has pointed out to the assignee the property he desires to be set aside to him as his exemption, and has received a promise from the assignee that it shall be so set aside, he is not prevented from claiming his right to the exemption if he is sick and unable to attend at the time when and place where the property is appraised; and that, after the property is sold by the assignee, he may maintain a petition against the latter to have the amount of his exemption allowed in cash out of the assets of the estate. *Doherty v. Ramsey*, 1 Ind. App. 530.

4. Effect of Fraud. — *Kreider's Estate*, 135 Pa. St. 578. And see *supra*, this title, *Waiver, Forfeiture, and Estoppel—Forfeiture—Fraud*.

Liability of Assignee for Allowing Exemption. — In such a case where property has been claimed, appraised, set apart, and delivered to the assignor by the assignee, in good faith and without notice of any fraud, the assignee will no doubt be protected, even though in fact the assignor has been guilty of fraud; but if the appraisers award to the assignor his exemption out of the proceeds of property sold, and the assignee afterwards pays the money of his own motion and without an order of the court, he will be surcharged with it on proof

and attachment does not pass to the assignee under the statutory assignment, and no claim by the insolvent is necessary to entitle him to hold such property as against the assignee.¹ Under others, exempt property passes to the assignee unless claimed or reserved.²

If a Selection Is Necessary to render property exempt, and an insolvent debtor refuses to make a selection when requested by the assignee, he waives his rights and is estopped from afterwards claiming as exempt property taken by the assignee.³

Federal Bankruptcy Laws. — The federal Bankruptcy Act of 1867 and the amendments thereof expressly excepted from the operation of the assignment household and kitchen furniture and certain other property not exceeding five hundred dollars in value, wearing apparel, and property exempted by the laws of the state.⁴ The present Bankruptcy Act merely provides that it shall not affect the allowance to bankrupts of the exemptions which are prescribed by the state laws, and in providing that the title to the bankrupt's property shall vest in the trustee excepts property which is exempt.⁵ The right to exemptions under the state insolvency laws and under the federal bankruptcy acts is considered at length in another part of this work.⁶

6. Fraudulent Conveyances. — The decisions are conflicting on the question whether a conveyance or mortgage of exempt property can be fraudulent as to creditors, so as to entitle them to treat it as void or sue to set it aside and subject the property to the satisfaction of their claims.⁷

Property Absolutely Exempt. — If the property is exempt absolutely and unconditionally at the time of the conveyance or mortgage, the overwhelming weight of authority is in favor of the doctrine that the conveyance or mortgage cannot be fraudulent as to creditors, nor defeated by them, on the ground either that it is voluntary, that there has been no change of possession, or that there was an actual fraudulent intent.⁸

that the assignor's right to receive it had been forfeited by fraud. *Kreider's Estate*, 135 Pa. St. 578.

1. Statutory Assignment by Insolvent. — Thus in *California* the Insolvency Act of 1880, §§ 17, 21, provided that the assignment should operate to vest in the assignee "all the estate of the insolvent debtor not exempt by law from execution," and that the assignee should have power to take possession of all the estate of such debtor "except property exempt by law from execution." Under this statute exempt property did not pass to the assignee. *Mogk v. Peterson*, 75 Cal. 496. The present statute (Act March 26, 1895) provides for the setting apart of exemptions by the court.

2. In Connecticut the Insolvent Act of 1853 provided that every assignment in insolvency under that act should "embrace all the property of the assignor, except such as is exempt from execution, * * * and excepting also, in the case of sole assignors, the sum of one hundred dollars in cash." Under this provision it was held that an insolvent could retain the exemptions and privileges allowed by the act, or not, as he might elect, and that a general assignment of all his property, without reservation, was a waiver of such exemptions and privileges. *Raymond's Appeal*, 28 Conn. 47.

3. Refusal to Select — Estoppel. — *McKenzie v. Redman*, 87 Me. 322.

4. Federal Bankruptcy Act of 1867. — Rev. Stat. U. S., 1878, § 5045.

5. Act of 1898. — Act of Congress July 1, 1898, §§ 6, 70.

6. Elsewhere Treated. — See the title INSOLVENCY AND BANKRUPTCY.

7. Effect of Fraudulent Conveyances. — See the title FRAUDULENT SALES AND CONVEYANCES. As to the effect of a fraudulent conveyance of non-exempt property on the right to claim exemptions, see *supra*, this title, *Waiver, Forfeiture, and Estoppel — Forfeiture*.

8. Property Absolutely and Specifically Exempt — *Alabama*. — *Lehman v. Bryan*, 67 Ala. 558; *Wright v. Smith*, 66 Ala. 514; *Alley v. Daniel*, 75 Ala. 403.

Arkansas. — *Sannoner v. King*, 49 Ark. 299, 4 Am. St. Rep. 49.

Connecticut. — *Patten v. Smith*, 4 Conn. 450, 10 Am. Dec. 166; *Ketchum v. Allen*, 46 Conn. 414.

Georgia. — See *Morris v. Tennent*, 56 Ga. 577.

Illinois. — *Vaughan v. Thompson*, 17 Ill. 78.

Indiana. — *Faurote v. Carr*, 108 Ind. 123;

Taylor v. Duesterberg, 109 Ind. 165; *Blair v. Smith*, 114 Ind. 114, 5 Am. St. Rep. 593.

Iowa. — *Delashmut v. Trau*, 44 Iowa 613.

Kansas. — *Arthur v. Wallace*, 8 Kan. 267.

Kentucky. — *Anthony v. Wade*, 1 Bush (Ky.) 110; *Morton v. Ragan*, 5 Bush (Ky.) 334; *Minor v. Sharp*, (Ky. 1895) 33 S. W. Rep. 411.

Massachusetts. — *Mannan v. Merritt*, 11 Allen (Mass.) 582; *Bean v. Hubbard*, 4 Cush (Mass.) 85.

Michigan. — *Rosenthal v. Scott*, 41 Mich. 632; *Anderson v. Odell*, 51 Mich. 492; *Buckley v. Wheeler*, 52 Mich. 1; *Emerson v. Bacon*, 58 Mich. 526; *Freehling v. Bresnahan*, 61 Mich.

The Reason for This Doctrine is that since creditors have no right to subject the property, they cannot be injured by the conveyance or mortgage.¹

Property Conditionally Exempt. — If the exemption is not absolute, but is dependent upon the existence of certain conditions, and by reason of a fraudulent

540, 1 Am. St. Rep. 617; *Fischer v. McIntyre*, 66 Mich. 681; *Bresnahan v. Nugent*, 92 Mich. 76. *Minnesota*. — *Furman v. Tenny*, 28 Minn. 77. *Mississippi*. — *Smith v. Allen*, 39 Miss. 469. *Missouri*. — *Kulage v. Schueler*, 7 Mo. App. 250; *Stotesbury v. Kirtland*, 35 Mo. App. 148. *Nebraska*. — *Derby v. Weyrich*, 8 Neb. 174, 30 Am. Rep. 827; *Gillespie v. Brown*, 16 Neb. 460; *Bloedorn v. Jewell*, 34 Neb. 649.

New York. — *Youmans v. Boomhower*, 3 Thomp. & C. (N. Y.) 21; *Whiting v. Barrett*, 7 Lans. (N. Y.) 106; *McGivney v. Childs*, 41 Hun (N. Y.) 607.

North Carolina. — *Montgomery County v. Riley*, 75 N. Car. 144; *Duvall v. Rollins*, 71 N. Car. 218; *Gaster v. Hardie*, 75 N. Car. 460.

Ohio. — *Tracy v. Cover*, 28 Ohio St. 61. *South Carolina*. — *Bridgers v. Howell*, 27 S. Car. 425.

South Dakota. — *Canton First Nat. Bank v. North*, 2 S. Dak. 480.

Texas. — *Eaves v. Williams*, 10 Tex. Civ. App. 423.

Vermont. — *Foster v. McGregor*, 11 Vt. 595, 34 Am. Dec. 713; *Jewett v. Guyer*, 38 Vt. 209; *Prout v. Vaughan*, 52 Vt. 451.

Wisconsin. — *Bond v. Seymour*, 1 Chand. (Wis.) 40; *Pike v. Miles*, 23 Wis. 164, 99 Am. Dec. 148; *Carhart v. Harshaw*, 45 Wis. 340, 30 Am. Rep. 754; *Allen v. Ferry*, 56 Wis. 178; *Comstock v. Bechtel*, 63 Wis. 656.

Wages and Earnings. — If money is exempt as wages or earnings, no disposition of it by its owner can operate as a fraud upon his creditors. *Elliot v. Hall*, 2 Idaho 1142, 51 Am. St. Rep. 285; *Nash v. Stevens*, 96 Iowa 616; *Union Pac. R. Co. v. Smersh*, 22 Neb. 751, 3 Am. St. Rep. 290. But where the law exempts the earnings of a debtor for a certain period only, he cannot, by placing his earnings in the hands of his wife from time to time as he receives them, hold as exempt from the claims of creditors earnings for a greater period. Creditors may reach in the hands of the wife all money so received by her except such as was earned by the debtor within the statutory period. *Bloodgood v. Meissner*, 84 Wis. 452.

Property Subject to Execution for Purchase Price. — When the statute subjects exempt property to execution issued on a judgment for the purchase money thereof, and prohibits a sale by the vendee after an attempt has been commenced to subject the property, and notice has been filed, the effect is to take the property out of the class of exempt property entirely, so far as the remedy of the vendor to collect the purchase money is concerned. A transfer of the property, as against the vendor, is subject to the same incidents as a transfer of nonexempt property. As it is within the power of the vendor to subject the property in the hands of the debtor to the payment of this debt for the purchase money, it follows logically that if the debtor, for the purpose of defeating this right, fraudulently transfers the property to another to avoid the suit of his particular creditor, it is as much a fraud

against him as would be a similar transfer of property generally subject to sale on execution a fraud upon general creditors, and the vendor may follow it into the hands of the fraudulent transferee and subject it to the satisfaction of his judgment. *Lillibridge v. Walsh*, 97 Mich. 461.

1. Reason for Rule — No Injury to Creditors. — "Creditors," said the *Michigan* court, "have no right to complain of dealings with property which the law does not allow them to apply on their claims. So long as the statutory amount of exemption is not exceeded, there can be no appreciable reason why the property cannot be converted or exchanged. There is difficulty in understanding how a creditor can first become entitled to reach his debtor's property the moment it ceases to be his property." *Anderson v. Odell*, 51 Mich. 492.

Since the policy of the law, said the *Ohio* court, in substance, gives creditors no right to subject exempt property, against the debtor's will, to the satisfaction of their judgment against him, it is not easy to see how his sale of it, whether real or pretended, could operate as a fraud upon their rights. The fraud can have existed in intention only, and that intention must have originated from ignorance of his rights. *Tracy v. Cover*, 28 Ohio St. 61.

How can a gift of exempt property, said the *Kansas* court, be held to have been made "with intent to hinder, delay, or defraud, when the gift neither had nor could possibly have any such effect? It is not merely the thought which passes in the mind, but the thought coupled with the possibility of the act done accomplishing the evil intended, which renders the act void." *Arthur v. Wallace*, 8 Kan. 267.

See also the observations of the court in *Blair v. Smith*, 114 Ind. 114, 5 Am. St. Rep. 593.

Retention of Possession by Seller or Mortgagor. — "It has long been the law in this state," said the *Vermont* court, "and has been most undeviatingly adhered to, that upon the sale of personal property there must be a delivery, and a substantial and visible change in the possession, or the sale is fraudulent and void against creditors. * * * But the case now under consideration is one where the property sold was not liable to attachment or execution, at the suit of any of the creditors of B. [the seller], and there is no reason why a change in the possession should be indispensable to a valid sale as against creditors, any more than as between the parties. Creditors could have no claim upon this cow as a means of satisfying their debts, and it is idle to talk about acquiring a false credit from the possession of property which is exempt from attachment and execution. No principle of policy requires a change in the possession of such property. It must be as valid against creditors as against the parties themselves without such change." *Foster v. McGregor*, 11 Vt. 595, 34 Am. Dec. 713.

Effect of Waiver of Exemption. — The rule that

conveyance the conditions do not exist, the conveyance is necessarily upon the same footing as any other fraudulent conveyance, and may be successfully attacked by creditors.¹

Property Exempt After Selection Only — Selection Before Conveyance. — When the right of exemption depends upon a claim and selection to be made by the debtor, property is absolutely exempt after it has been selected and set apart, and, by the weight of authority, a conveyance after that time of the property selected and set apart cannot be regarded as in fraud of creditors.²

Conveyance Before Selection. — When a selection is necessary, some of the courts hold that a debtor who has made a conveyance without consideration, or otherwise in fraud of his creditors, without having selected the property as exempt, cannot make such selection and claim the property for the first time when the conveyance is attacked as fraudulent by his creditors.³ Other courts allow such a claim, and they allow it when the debtor has more property than he is entitled to hold as exempt,⁴ as well as where he has less.⁵

a gift of exempt property cannot operate as a fraud upon creditors, so as to entitle them to follow it and subject it to the satisfaction of their claims, applies only because the property, being exempt, is not subject to their claims. Therefore, where a debtor has waived his exemptions as to a debt, and the waiver appears of the judgment, the judgment debtor cannot, by a gift of the property to his wife, prevent the judgment creditor from reaching and subjecting it to the satisfaction of the judgment. *Tillis v. Dean*, (Ala. 1898) 23 So. Rep. 804.

1. Property Exempt Conditionally. — Thus, if a statute exempts goods only upon condition that they shall be used, or intended for use, in carrying on a particular trade or business, and the owner of such goods, instead of using or keeping them for such purpose, conveys them voluntarily or with intent to hinder and delay his creditors, they may attack the conveyance as fraudulent, and reach the goods, and the debtor cannot escape the effect of the conveyance by claiming the goods as exempt. *Stevenson v. White*, 5 Allen (Mass.) 148; *Rayner v. Whicher*, 6 Allen (Mass.) 292.

2. Conveyance After Selection and Setting Apart. — See *Phenix Ins. Co. v. Fielder*, 133 Ind. 557; *Smith v. Allen*, 39 Miss. 469; *Stotesbury v. Kirtland*, 35 Mo. App. 148. And see the cases cited in the second note preceding.

3. Conveyance Before Selection — Cases Disallowing Claim of Exemption. — *Barton v. Brown*, 68 Cal. 11; *Phenix Ins. Co. v. Fielder*, 133 Ind. 557.

In *Missouri*, under a statute requiring a claim by the debtor in order to give property the legal status of exempt property, a debtor who has conveyed property in fraud of his creditors without having claimed it as exempt cannot, when it is levied upon as his on the ground that the conveyance is void, claim that it is exempt, though he might have claimed it as exempt at the date of the conveyance. *Alt v. Lafayette Bank*, 9 Mo. App. 91. In this case the exemption was claimed out of a stock of groceries which the debtor had conveyed in fraud of creditors, and which were levied on by his creditor, and it was disallowed. See to the same effect *Stotesbury v. Kirtland*, 35 Mo. App. 148; *State v. Koch*, 40 Mo. App. 635; *Stewart v. Stewart*, 65 Mo. App. 663.

New York. — In *Field v. Ingreham*, 15 Misc. Rep. (N. Y. County Ct.) 529, it was held that

an unrecorded chattel mortgage on property which remained in the possession of the mortgagor was void as against an existing contract creditor of the mortgagor, though the property was such as might be claimed by the mortgagor as exempt, under Code Civ. Pro., § 1391, providing for the exemption to a householder, or one having a family, of certain kinds of property, to a value not exceeding two hundred and fifty dollars, as such exemption did not attach to any particular property until claimed and selected.

In *Pennsylvania*, where the statute of 1849 allows a debtor to claim an exemption out of the proceeds of his real estate sold on execution, but requires a claim and appraisal before the sale, it is held that a conveyance of land that is fraudulent as to creditors is binding upon the grantor, though void as against creditors, and that when the land is levied upon and sold by a creditor the grantor cannot claim his exemption out of the proceeds. *Huey's Appeal*, 29 Pa. St. 219.

The same rule applies in that state to a fraudulent conveyance of personal property. The courts of that state say that the title to property fraudulently conveyed may be in the debtor in so far as his creditors are concerned, but not so as to entitle him to claim the property as exempt. See *Larkin v. McAnnally*, 5 Phila. (Pa.) 17, 19 Leg. Int. (Pa.) 60; *Huey's Appeal*, 29 Pa. St. 219.

The Pennsylvania cases have also based the doctrine in that state on the broad ground, not recognized in most states, as has already been shown, that the benefit of the exemption laws is intended for the "honest poor" only, and that a debtor forfeits his right of exemption if he is guilty of fraud. *Carl v. Smith*, 8 Phila. (Pa.) 569; *Huey's Appeal*, 29 Pa. St. 219. See *supra*, this title, *Waiver, Forfeiture, and Estoppel — Forfeiture*.

4. Cases Allowing Exemptions. — The courts holding this doctrine consider that the conveyance, if treated as void by creditors, is also void for the purpose of allowing the debtor to assert his claim of exemption. *Tracy v. Cover*, 28 Ohio St. 61. See also *Zelnicker v. Brigham*, 74 Ala. 598; *Rosenthal v. Scott*, 41 Mich. 632; *Gaster v. Hardie*, 75 N. Car. 460.

5. Ownership of Less Property than Is Exempted. — *Erb v. Cole*, 31 Ark. 554; *Sannoner*

XIV. ENFORCEMENT AND PROTECTION OF THE RIGHT — 1. Scope of Section. —

Having shown when the right of exemption exists, and the persons entitled to claim the benefit of the particular statutes, it remains to show the mode in which a debtor may enforce his right when it is sought to subject his property to the satisfaction of his debts, the duty of officers with respect to exemptions in making levies, sales, etc., and the actions by which a debtor may protect his right or obtain redress for an infringement of it. This is the scope of the present section.

2. Claiming, Selecting, and Setting Apart of Exemption — a. NECESSITY FOR CLAIM AND SELECTION — (1) In General. — The statutes often either expressly or impliedly require that the debtor shall claim or select his exemption in order that he may be entitled thereto, and sometimes they require that the claim and selection shall be made at a particular time and in a particular manner. As was stated in a preceding section, it is a general rule that a failure to assert or claim an exemption at the time and in the manner, if any, prescribed by the statute which confers the right is a waiver of the right.¹

(2) *Statutes Requiring Claim and Selection. —* If a statute expressly requires a claim and selection by the debtor, or if it does not exempt specific articles absolutely and unconditionally, but exempts property generally, or property of a particular kind, not exceeding a certain sum in value, or if it exempts a certain number of articles or animals of a particular kind, leaving it for the debtor to select, the debtor must assert his claim and make his selection, or he will be held to have waived his right,² unless he has no more property than

v. King, 49 Ark. 299, 4 Am. St. Rep. 49; *Vaughan v. Thompson* 17 Ill. 78; *Berry v. Hanks*, 28 Ill. App. 51; *Burdge v. Bolin*, 106 Ind. 175, 55 Am. Rep. 724; *Tracy v. Cover*, 28 Ohio St. 61.

1. Waiver by Omission to Claim Exemption. — See *supra*, this title, *Waiver, Forfeiture, and Estoppel — Waiver*. And see the cases cited specifically in this section, in most of which this proposition is laid down or recognized.

In *South Carolina* it is expressly provided by statute that no waiver except by conveyance shall defeat the right of exemption. Under such a statute as this a debtor does not waive his right to claim exemptions by failure to give notice of the claim to the officer. *Gray v. Putnam*, 51 S. Car. 97.

2. Claim and Selection Necessary — Canada. — *Pilling v. Stewart*, 4 British Columbia 94.

Alabama. — *Ross v. Hannah*, 18 Ala. 125; *Gresham v. Walker*, 10 Ala. 370; *Bell v. Davis*, 42 Ala. 460; *Alley v. Daniel* 75 Ala. 403; *Mitchell v. Corbin*, 91 Ala. 600; *Patillo v. Taylor*, 83 Ala. 230.

Arkansas. — *Scanlan v. Guiling*, 63 Ark. 540; *Settles v. Bond*, 49 Ark. 114; *Surratt v. Young*, 55 Ark. 447.

California. — *Borland v. O'Neal*, 22 Cal. 504; *Gavitt v. Doub*, 23 Cal. 78, *Stanton v. French*, 83 Cal. 194, 25 Am. St. Rep. 174.

Colorado. — *Behymer v. Cook*, 5 Colo. 395; *Harrington v. Smith*, 14 Colo. 376, 20 Am. St. Rep. 272; *Schwartz v. Birnbaum*, 21 Colo. 21; *Madera v. Holdrege*, 4 Colo. App. 126; *Autrey v. Wright*, 4 Colo. App. 179; *Eisenberg v. Burchinell*, 10 Colo. App. 457.

Illinois. — *Cook v. Scott*, 6 Ill. 333; *Figueira v. Pyatt*, 88 Ill. 402; *Lindley v. Miller*, 67 Ill. 244, *Amend v. Smith*, 87 Ill. 198.

Indiana. — *State v. Melogue*, 9 Ind. 197; *Graham v. Crockett*, 18 Ind. 119; *Sullivan v. Winslow*, 22 Ind. 153, *Terrell v. State*, 66 Ind.

570; *Over v. Shannon*, 75 Ind. 352; *Boesker v. Pickett*, 81 Ind. 554.

Iowa. — *Angell v. Johnson*, 51 Iowa 625, 33 Am. Dec. 152.

Kentucky. — *McGee v. Anderson*, 1 B. Mon. (Ky.) 187, 36 Am. Dec. 570.

Maine. — *Smith v. Chadwick*, 51 Me. 515. And see *Colson v. Wilson*, 58 Me. 416.

Maryland. — *State v. Boulden*, 57 Md. 314; *Miles v. State*, 73 Md. 398.

Massachusetts. — *Clapp v. Thomas*, 5 Allen (Mass.) 158; *Savage v. Davis*, 134 Mass. 401. And see *Nash v. Farrington*, 4 Allen (Mass.) 157.

Michigan. — *Gass v. Van Wagner*, 63 Mich. 610.

Minnesota. — *Lynd v. Pickett*, 7 Minn. 184, 82 Am. Dec. 79; *Tullis v. Orthwein*, 5 Minn. 377.

Missouri. — *Finley v. Barker*, 110 Mo. 408; *Davis v. Williamson*, 68 Mo. App. 307; *Stewart v. Stewart*, 65 Mo. App. 663.

New York. — *Seaman v. Luce*, 23 Barb. (N. Y.) 240; *Twinam v. Swart*, 4 Lans. (N. Y.) 263.

North Carolina. — *Henson v. Edwards*, 10 Ired. L. (32 N. Car.) 43. And see *State v. Morgan*, 3 Ired. L. (25 N. Car.) 186, 38 Am. Dec. 714.

Ohio. — *Frost v. Shaw*, 3 Ohio St. 270; *Butt v. Green*, 29 Ohio St. 667; *Slanker v. Beardsley*, 9 Ohio St. 590.

Pennsylvania. — *Strouse v. Becker*, 38 Pa. St. 190, 80 Am. Dec. 474, 44 Pa. St. 206; *Keller v. Bricker*, 64 Pa. St. 379; *Winchester v. Costello*, 2 Pars. Eq. Cas. (Pa.) 279; *Gilleland v. Rhoads*, 34 Pa. St. 187; *Line's Appeal*, 2 Grant's Cas. (Pa.) 197; *Dodson's Appeal*, 25 Pa. St. 232, *Bair v. Steinman*, 52 Pa. St. 423.

South Carolina. — *Oliver v. White*, 18 S. Car. 235; *Pender v. Lancaster*, 14 S. Car. 25, 37 Am. Rep. 720.

is exempt,¹ or unless he has a good excuse for not asserting his claim.²

(3) *Statutes Absolutely Exempting Specific Property.* — By the weight of authority, however, when the statute exempts specific articles absolutely, without expressly or impliedly requiring any selection by the debtor, the debtor does not waive or lose his right to claim the articles as exempt by failure to assert the claim at the time of a levy, even though he has notice of it.³ He may claim the property at any time before it is sold, and even after

South Dakota. — *Pirie v. Harkness*, 3 S. Dak. 178; *Longley v. Daly*, 1 S. Dak. 257.

Canada. — *Pilling v. Stewart*, 4 British Columbia 94.

Other cases as to the necessity for a claim and selection will be found specifically cited in subsequent notes to this section.

Particular Statutes. — In *Indiana* under Burns's Rev. Stat., 1894, § 715, it is held that the right of exemption granted to the debtor is a personal privilege which he may waive or claim at his election, and that a failure to claim the exemption before sale is a waiver of such right. *Moss v. Jenkins*, 146 Ind. 589.

In *New York* the Code of Civil Procedure, § 1390, provides that certain specified articles of personal property, when owned by a householder, shall be exempt. Section 1391 provides that in addition to such exemptions, "necessary household furniture, working tools and team, professional instruments, furniture, and library, not exceeding in value two hundred and fifty dollars," shall be exempt. Section 2909 requires an officer to execute a warrant of attachment by levying on the goods of the defendant "not exempt from levy and sale by virtue of an execution." Under these provisions it has been held that, in order to maintain an action to recover as exempt under section 1391 property seized under attachment, or to maintain an action for its conversion, the debtor, if he has more property than is exempt, must notify the officer of his claim of exemption. *Wilcox v. Howe*, 59 Hun (N. Y.) 268, 20 Civ. Pro. Rep. (N. Y.) 214. See also *Russell v. Dean*, 30 Hun (N. Y.) 242; *Twinam v. Swart*, 4 Lans. (N. Y.) 263; *Seaman v. Luce*, 23 Barb. (N. Y.) 240.

Under the *Wisconsin* statute exempting two hundred dollars' worth of "stock in trade," the exemption must be claimed and the articles selected by the debtor, where his stock is in excess of this amount, or it is waived. "This," said the Wisconsin court, "is not a specific exemption, which, it has been held by this court, need not be claimed by the debtor, but which the officer takes at his risk, as in *Gilman v. Williams*, 7 Wis. 329, 76 Am. Dec. 219, and many other cases [see *infra*, this subdivision, *Statutes Absolutely Exempting Specific Property*]; nor is it a case where all of the property does not exceed the exemption, and which is therefore specific [see *infra*, this subdivision, *Entire Property Within Amount Exempted*]. It is an exemption of goods as stock in trade, of the value of two hundred dollars, part and parcel of a stock of goods of the value of several thousand dollars, which must necessarily be selected and set apart, and rendered specific and certain, by some one, and the question is, by whom? * * * The true principle, sustained by reason, and, as we think, by the better and more numerous au-

thorities, is that whenever the exemption is not specific and certain, and a selection is necessary, that selection devolves upon the debtor." *Zielke v. Morgan*, 50 Wis. 560.

In *Georgia*, where a party levied a distress warrant on property consisting of a lot of drugs, which had been exempted by the ordinary under the law of personal property exemption, and it appeared that the drugs exempted had been mixed with other drugs bought by the parties, it was held that the privilege of exemption extended only to the articles exempted by the ordinary, and they must be identified to release them from levy, and that the exempted drugs, being mixed with other drugs, were liable to levy and sale, except as to such parts or articles as might be specifically claimed and identified. *Smith v. Turnley*, 44 Ga. 243.

1. Entire Property Within Amount of Exemption. — See *infra*, this subdivision, *Entire Property Within Amount Exempted*.

2. Excuse for Failure to Claim. — See *infra*, this subdivision, *Excuse for Omission to Claim or for Delay*.

3. Absolute Exemption of Specific Articles — *Kentucky.* — *Stirman v. Smith*, (Ky. 1888) 10 S. W. Rep. 131.

Michigan. — *Vanderhorst v. Bacon*, 38 Mich. 669, 31 Am. Rep. 328; *Elliott v. Whitmore*, 5 Mich. 532.

Minnesota. — *Lynd v. Pickett*, 7 Minn. 184, 82 Am. Dec. 79; *Murphy v. Sherman*, 25 Minn. 196.

Wisconsin. — *Gilman v. Williams*, 7 Wis. 329, 76 Am. Dec. 219.

And see the cases cited in the two following notes.

In *Iowa* the court at one time took a different view. In that state the statute (Code, § 3072) exempted specific articles absolutely, and yet it was held that a debtor who had notice of an intended levy, and allowed it to be made without claiming the property as exempt, waived his rights. *Angell v. Johnson*, 51 Iowa 625, 33 Am. Dec. 152. See also *Moffitt v. Adams*, 60 Iowa 44; *Richards v. Haines*, 30 Iowa 574. This section of the code has since been amended (Laws 1882, c. 49), and it is now declared in effect that any person entitled to any of the exemptions mentioned in that section does not waive his rights thereto by failing to object to a levy thereon, unless he fails or refuses to make designation or selection of property which he claims as exempt when required to do so by the officer. *Ellsworth v. Savre*, 67 Iowa 449.

Section 3055 of the Code of Iowa of 1873, requiring an officer to levy an execution on any personal property in the possession of, or that he has reason to believe belongs to, the defendant, unless he has received notice in writing from some other person that the property

the sale has commenced.¹ Whether he may claim it after a sale is not clear.² But under such a statute his failure to assert his rights, even until after a sale, does not bar an action against the officer or the execution creditor, for the law makes the selection for him, and they act at their peril in levying and selling.³

(4) *Entire Property Within Amount Exempted.* — The same is true, by the weight of authority, where the statute exempts a certain number of animals or articles of a particular kind, or property of a particular kind, not exceeding a certain value or amount, and the debtor has only so much as is thus exempted. No claim is necessary in such a case, either to save his exemption or to entitle him to sue the officer for levying on the property and selling it.⁴ In *Indiana* there is a decision in conflict with this view.⁵

belongs to him, applies only to persons other than the execution defendant, and does not require him to notify the sheriff that property levied upon belongs to him, and that he claims it as exempt, before he can maintain an action to recover the property as being exempt. *McCoy v. Cornell*, 40 Iowa 457; *Parsons v. Thomas*, 62 Iowa 319.

1. **May Claim After Commencement of Sale.** — *State v. Emmerson*, 74 Mo. 607.

2. **Omission to Claim Before Sale — Recovery of Property.** — That the exemption may be claimed and the specific property or its proceeds recovered, even after a sale, except as against an innocent purchaser, would seem clear, and a *Minnesota* decision supports such view. *Howard v. Rugland*, 35 Minn. 388.

3. **Action Against Officer — Property Absolutely Exempt.** — A claim or demand is not necessary at all to support an action against an officer for levying upon and selling property that is absolutely exempt.

Colorado. — *Harrington v. Smith*, 14 Colo. 376, 20 Am. St. Rep. 272.

Massachusetts. — *Woods v. Keyes*, 14 Allen (Mass.) 236, 92 Am. Dec. 765; *Copp v. Williams*, 135 Mass. 401.

Minnesota. — *Lynd v. Pickett*, 7 Minn. 184, 82 Am. Dec. 79; *Howard v. Rugland*, 35 Minn. 388; *Murphy v. Sherman*, 25 Minn. 196.

Mississippi. — *Perry v. Lewis*, 49 Miss. 443.

New York. — *Russell v. Dean*, 30 Hun (N. Y.) 242; *Frost v. Mott*, 34 N. Y. 253; *Cantrell v. Conner*, 51 How. Pr. (N. Y. C. Pl.) 45.

Ohio. — *Frost v. Shaw*, 3 Ohio St. 270.

Tennessee. — *State v. Haggard*, 1 Humph. (Tenn.) 390.

Wisconsin. — *Gilman v. Williams*, 7 Wis. 329, 76 Am. Dec. 219.

In *Maryland*, under the Act of 1861, c. 7, it was held that where a sheriff seized a farm on execution and sold it, and received the purchase money, and was sued by the defendant to recover the amount of exemption fixed by that act, it was no defense to say that the defendant failed to make any claim for his exemption until a long time after the money had been distributed and applied by the sheriff to some other purpose or claimant; that when money came into his hands as sheriff, it was his duty to distribute and apply it to the parties entitled, and length of time in making a demand for it would not excuse him, unless such a period of time had elapsed as would enable him to plead the statute of limitations. *Bramble v. State*, 41 Md. 335.

Confusion of Articles. — The fact that articles of household furniture which are absolutely

exempt from attachment are intermingled in the house of the owner with other similar articles not so exempt has been held not to constitute such a confusion of goods as will justify an officer, upon failure of the owner to claim any of the articles as exempt, in attaching all of them. *Copp v. Williams*, 135 Mass. 401.

4. **Entire Property Within Amount Exempted.** — See *Stirman v. Smith*, (Ky. 1888) 10 S. W. Rep. 131; *Lynd v. Pickett*, 7 Minn. 184, 82 Am. Dec. 79; *Howard v. Rugland*, 35 Minn. 388; *Murphy v. Sherman*, 25 Minn. 196; *State v. Haggard*, 1 Humph. (Tenn.) 390. See also *Alley v. Daniel*, 75 Ala. 403.

Illustrations — Animals of a Certain Value. — In *Colorado* the statute exempted "from levy and sale upon any execution or writ of attachment * * * working animals to the value of two hundred dollars, one cow and calf" and "tools and implements or stock in trade * * * not exceeding two hundred dollars in value," and imposed a penalty upon any officer or other person who should take or seize any articles exempted, etc. There was no language in the statute making it incumbent upon the debtor to select or point out property claimed as exempt. In *Harrington v. Smith*, 14 Colo. 376, 20 Am. St. Rep. 272, it was held in substance that where a debtor had only two working horses, not worth more than two hundred dollars, a cow and a calf, and certain implements not worth two hundred dollars, an officer had no right to levy on them and sell them; that the debtor was not bound as against a levy to assert a claim of exemption, and that he did not waive his right of exemption by failing so to do, so as to prevent him from maintaining an action against the officer for seizing and selling the property.

Property Generally of a Certain Value. — In *Cole v. Green*, 21 Ill. 104, where a statute exempted property to the value of sixty dollars, "to be selected by the debtor," it was held that where a judgment debtor had no more than that amount of property he need not prove a formal or express selection of that property in order to protect it from levy and sale on execution, but that in such a case it was "placed beyond the reach of the law, unless by the voluntary affirmative act of the owner."

5. **Decision to the Contrary.** — In *Indiana*, where the statute exempts six hundred dollars' worth of property to be selected by the debtor, it is held that the fact that the value of the property of a judgment debtor is less than six hundred dollars does not relieve such property

(5) *Successive Executions or Attachments.* — When a claim of exemption is necessary under the rules stated in the preceding paragraphs, the claim must be made as against each successive execution or attaching creditor. A claim as against one levy is not effectual as against subsequent levies.¹ It has been said, however, that where several writs are in the sheriff's hands at the same time, one demand is sufficient as against them all.²

(6) *Garnishment — Money Due under Continuing Contract.* — In garnishment, when the garnishee in his answer admits an indebtedness for services rendered by the defendant under a continuing contract, and a claim of exemption is made by the defendant, and, on appeal, an oral examination being required, he admits a further indebtedness, which has accrued under the contract since his first answer was filed, this indebtedness is not included in the claim of exemptions already filed, and is liable to the plaintiff's demand unless a new claim is interposed.³

(7) *In Bankruptcy or Insolvency Proceedings.* — The right to exemptions in the case of bankruptcy or insolvency proceedings is regulated by the bankruptcy and insolvency laws, and is elsewhere treated.⁴ It is no doubt safe to say that where, under these laws, a claim or selection is necessary to render property exempt, a failure or refusal to assert a claim or make a selection will operate as a waiver and estoppel.⁵

(8) *As Against Assignment for Benefit of Creditors.* — The effect of a voluntary assignment for the benefit of creditors on the right to claim exemptions has been considered in a previous section. It will be there seen that the assignor, even when the assignment reserves the right of exemption, may waive such right by omission to claim it.⁶

(9) *In Actions or Proceedings to Foreclose Liens.* — It was shown at some length in a previous section that a mortgage or pledge of exempt property, or the creation of other liens, waives the right of exemption only as against the mortgagee, pledgee, or other lienor.⁷ The right to exemptions, however, out of the surplus, on foreclosure of the mortgage, pledge, or other lien, may be waived and lost by neglect or delay in claiming it.⁸

b. TIME OF ASSERTING CLAIM — (1) Express Requirements. — Sometimes the statute expressly provides that exemptions shall be claimed within a certain time after a levy, and such provisions must be complied with, or the

from the lien of an execution in the hands of an officer. *Moss v. Jenkins*, 146 Ind. 589.

1. *Claim as Against Each Execution or Attachment.* — In *Dodson's Appeal*, 25 Pa. St. 232, a debtor's land was levied upon, and he claimed the exemption, and an appraisement was made, but no sale was effected under that execution. Afterwards another creditor levied upon a part of the same land and sold it, without the debtor's having given notice and made the claim upon the latter execution. It was held that he had waived his right and was not entitled to claim three hundred dollars out of the proceeds of the sale, under the *Pennsylvania Act of 1849*.

In *Strouse v. Becker*, 38 Pa. St. 190, 80 Am. Dec. 474, affirmed 44 Pa. St. 206, an execution was levied on exempt household goods, and the debtor claimed his exemption. The goods were covered by insurance, and before appraisement they were destroyed by fire. Another creditor then attached the money due from the insurance company. It was held that the debtor was bound to make a claim of exemption as against the attachment, notwithstanding his previous claim as against the execution, and that he waived his right to the

exemption by failure to do so. See also *Line's Appeal*, 2 Grant's Cas. (Pa.) 197; *Bechtel's Appeal*, 2 Grant's Cas. (Pa.) 375; *McCreary's Appeal*, 74 Pa. St. 194.

This rule has also been recognized and applied in other states. *Weller v. Moore*, 50 Ark. 253; *Finley v. Sly*, 44 Ind. 266.

2. *Several Writs at Same Time.* — *Bechtel's Appeal*, 2 Grant's Cas. (Pa.) 375.

3. *Garnishment—Money Due under Continuing Contract.* — *Craft v. Louisville, etc., R. Co.*, 93 Ala. 22.

4. *Insolvency and Bankruptcy Proceedings.* — See the title *INSOLVENCY AND BANKRUPTCY*.

5. *McKenzie v. Redman*, 87 Me. 322.

6. *Assignment for the Benefit of Creditors.* — See *supra*, this title, *Sales and Other Transfers, and Incumbrances—Voluntary Assignment for the Benefit of Creditors*.

7. *Waiver in Actions or Proceedings to Foreclose Liens.* — *Darby v. Rouse*, 75 Md. 26; *Hill v. Johnston*, 29 Pa. St. 362.

8. *Gibbons v. Gaffney*, 154 Pa. St. 48; *Roundy v. Converse*, 71 Wis. 524, 5 Am. St. Rep. 240. See *supra*, this title, *Sales and Other Transfers, and Incumbrances—Mortgage, Pledge, and Other Liens*.

right of exemption will be lost,¹ unless there is good excuse for the delay.²

(2) *In the Absence of Express Requirements* — (a) **Claim After Sale.** — When a claim and selection are necessary, and the statute does not prescribe the time for making them, they must certainly be made before a sale of the property under the execution. Delay beyond that time, without sufficient excuse, is a waiver of any right of exemption either in the property sold or in its proceeds, and is a bar to any action against the officer for selling.³ As has been shown, however, when property is absolutely exempted, or, by the weight of authority, when the debtor has no more property than he is entitled to hold as exempt, no claim is necessary at all, even before sale, to entitle him to maintain his action against the officer for damages.⁴

(b) **Claim Before Sale.** — It is impossible to lay down any general rule as to the time at which exemptions should be claimed before a sale of the property, when a claim and selection are necessary, for the question depends to a great extent upon the language of the particular statute.

aa. **CLAIM AT TIME OF LEVY.** — Some of the courts hold that, to entitle the debtor to an exemption, the claim must be interposed before or at the time of the levy, if the debtor has notice, and that he waives his right if he fails to claim at that time.⁵ No doubt all the courts will hold that, when a claim and

1. Express Provisions as to Time of Claim. — It was so held in *Illinois*, where the claim was required to be made within ten days after the levy of an execution. *Griffin v. Maxwell*, 23 Ill. App. 405; *Alden v. Yeoman*, 29 Ill. App. 53. See also *Lindley v. Miller*, 67 Ill. 244.

And in *South Dakota* the claim must be made within five days after notice of the levy. Comp. Laws, § 5135, as amended by Laws 1893, c. 19; *Furrow v. Zollars*, 8 S. Dak. 522.

The time for making the claim is not extended by the fact that an action of replevin by a third person to recover the property, to which the debtor is not a party, is pending. *Furrow v. Zollars*, 8 S. Dak. 522.

2. Excuse for Delay. — See *infra*, this section, *Excuse for Omission to Claim or for Delay*.

3. A Claim After Sale is too late when a claim and selection are necessary.

United States. — *Spitley v. Frost*, 5 McCrary (U. S.) 43.

Indiana. — *Moss v. Jenkins*, 146 Ind. 589.

New York. — *Russell v. Dean*, 30 Hun (N. Y.) 242; *Twinam v. Swart*, 4 Lans. (N. Y.) 263.

North Carolina. — *Henson v. Edwards*, 10 Ired. L. (32 N. Car.) 43.

Pennsylvania. — *Winchester v. Costello*, 2 Pars. Eq. Cas. (Pa.) 279.

South Dakota. — *Longley v. Daly*, 1 S. Dak. 257.

And see the other cases cited *supra*, this subdivision, *Statutes Requiring Claim and Selection*.

Sale under Attachment—Insolvency Laws. — In *Calloway v. Calloway*, (Ky. 1897) 39 S. W. Rep. 241, after an insolvent debtor's property had been sold under attachments, and the court had declared that prior preferential conveyances by the debtor were an assignment of all his property for the benefit of all his creditors, except such property as he was entitled to hold as exempt from execution, it was held that an application for such exemption subsequently made by the debtor before the commissioners, to whom the cause was referred, was in time to entitle him to the exemptions.

4. See *supra*, this subdivision, *Statutes Absolu-*

tely Exempting Specific Property; Entire Property Within Amount Exempted.

5. Claim at Time of Levy. — In *Iowa*, before the amendment of 1882, it was held in *Angell v. Johnson*, 51 Iowa 625, 33 Am. Dec. 152, that a debtor who saw his exempt property levied on and made no objection, but, being advised of his right, permitted it to be taken, waived his right and was estopped from asserting it afterwards. *Richards v. Haines*, 30 Iowa 574; *Moffitt v. Adams*, 60 Iowa 44. The statute of 1882 (Laws 1882, c. 49), amending section 3072 of the code, changed this rule by expressly declaring that a debtor's failure to claim the exemptions allowed by that section, or to object to a levy, should not operate as a waiver, unless he should be required by the officer to designate or select his exempt property. *Ellsworth v. Savre*, 67 Iowa 449.

In *Illinois* the former statute (Act March 4, 1843), after exempting specific articles, exempted sixty dollars' worth of property "to be selected by the debtor." Under this statute it was held to be the duty of an officer having an execution in his hands, before proceeding to seize any of the personal property of the defendant in the execution by a levy thereon, to notify him of his having the execution in his hands, if practicable, and that it was then the right of the defendant to select such property as he might wish to retain, surrendering to the officer all his other property, not thus selected or specifically exempt, for the satisfaction of such execution. And if the defendant, after such notice from the officer, neglected or refused to make a selection it was held that the officer might proceed to levy upon any of his property not specifically exempt, and sell the same, regardless of any subsequent claim of the defendant to such property as exempt. It was held, however, that if the officer should seize the defendant's property on execution, without giving notice to the defendant or allowing him an opportunity to select, the defendant might make his selection after the levy, of the very property levied on, precisely as he might have done be-

selection are necessary, the claim must be made before or at the time of the levy, to render the officer liable in damages for levying.¹

bb. CLAIM AT TIME OF LEVY OR WITHIN A REASONABLE TIME. — Other courts, in so far as the right to hold the property as exempt is concerned, allow the claim to be asserted either before or at the time of the levy, or within a reasonable time thereafter, but hold that an unreasonable delay is a waiver.² What is a reasonable time, of course, will depend upon the circumstances of the particular case.³

fore the levy. *Cook v. Scott*, 6 Ill. 333; *McCluskey v. McNeely*, 8 Ill. 578; *Bingham v. Maxcy*, 15 Ill. 290; *People v. Palmer*, 46 Ill. 398, 95 Am. Dec. 418; *Wright v. Deyoe*, 86 Ill. 490; *Amend v. Smith*, 87 Ill. 198.

The present statute exempts three hundred dollars' worth of other property, instead of sixty dollars' worth, but uses the same language, "to be selected by the debtor." Act May 24, 1877; *Starr & Curt. Annot. Stat.*, 1896, p. 1887.

1. Time of Claim to Render Officer Liable. — *Clapp v. Thomas*, 5 Allen (Mass.) 158; *Seaman v. Luce*, 23 Barb. (N. Y.) 240; *Oliver v. White*, 18 S. Car. 235; *Longley v. Daly*, 1 S. Dak. 257.

2. Claim at Time of Levy or Within Reasonable Time Afterwards — *California*. — *Borland v. O'Neal*, 22 Cal. 504; *Gavitt v. Doub*, 23 Cal. 79; *Stanton v. French*, 83 Cal. 194, 25 Am. St. Rep. 174.

Massachusetts. — *Savage v. Davis*, 134 Mass. 401.

Minnesota. — *Lynd v. Picket*, 7 Minn. 184, 82 Am. Dec. 79.

New York. — *Seaman v. Luce*, 23 Barb. (N. Y.) 240; *Twinam v. Swart*, 4 Lans. (N. Y.) 263.

Ohio. — *Frost v. Shaw*, 3 Ohio St. 270.

3. What Constitutes Reasonable Time. — There may be cases where a notice of the claim and selection given at any time before the sale will be sufficient, as where it appears that no injury has been caused by the delay. *Borland v. O'Neal*, 22 Cal. 507; *McAbe v. Thompson*, 27 Minn. 134.

Possession of Other Property. — In determining whether notice of claim of exemption of property levied upon was given by the debtor within a reasonable time, the fact that the plaintiff had at the time of the levy other property of a similar character out of which the debt might have been made is proper matter of proof. *Borland v. O'Neal*, 22 Cal. 504. In this case two of several horses owned by an execution debtor were levied upon, and no notice of claim of exemption was given to the officer until the day of sale, which was four months after the levy. It was held that the right of election had been lost by the unreasonable delay in exercising it, and that the officer was justified in selling the property.

Pennsylvania Statute. — The exemption law of Pennsylvania is somewhat peculiar, and there are a number of decisions with respect to the time at which a claim of exemption must be asserted. The statute allows an exemption of property to the value of three hundred dollars, and provides for the appointment of appraisers by the officer, if requested by the debtor, to appraise the property which he may elect to retain. *Bright. Purd. Dig.*, pp. 831,

832, §§ 29, 30. It is provided (§§ 31, 32), that if the property levied upon consists of real estate of greater value than three hundred dollars, and the defendant elects to retain real estate amounting in value to the whole sum of three hundred dollars, or any less sum, the appraisers shall determine whether the real estate can be divided. If it can be divided they are required to set off to the defendant by metes and bounds so much as he is entitled to hold as exempt. If it cannot be divided, and the appraisers so certify, the plaintiff, upon the return of the writ, is entitled to a writ of venditioni exponas to sell the whole of the real estate levied upon, and after it is sold the defendant is entitled to receive the amount of his exemption out of the proceeds.

Levy on Personal Property in Pennsylvania. — Under these provisions, when personal property is levied upon, the defendant should claim his exemptions before the plaintiff has incurred costs. If he unnecessarily fails to assert his claim until costs have been incurred, which would otherwise have been avoided, he waives his right of exemption. As a general rule, unless there is excuse for the delay, a claim of exemption not made until a day has been set for the sale, and advertisements posted, and *a fortiori*, a claim not made until the day of sale, is too late. *Williamson v. Krumbhaar*, 132 Pa. St. 455; *Diehl v. Holben*, 39 Pa. St. 213; *Yost v. Hefner*, 69 Pa. St. 68; *Stewart's Appeal*, (Pa. 1887) 10 Atl. Rep. 833; *Hammer v. Freese*, 19 Pa. St. 255; *Rogers v. Waterman*, 25 Pa. St. 182; *Kensel v. Kern*, 4 Phila. (Pa.) 86, 17 Leg. Int. (Pa.) 213. And see *Keller v. Bricker*, 64 Pa. St. 379; *Lancaster Trust Co. v. Gonchenauer*, 6 Pa. Super. Ct. Rep. 209; *Moore v. McMorrow*, 5 Pa. Super. Ct. Rep. 559.

In *Dieffenderfer v. Fisher*, 3 Grant's Cas. (Pa.) 30, it was held that a demand of appraisal and exemption should be made at the time of the levy, though it may be made afterwards if not at so late a time as to postpone the sale; that when a debtor is at hand at the time of the levy, or in circumstances reasonably convenient for the purpose, he is bound to demand an appraisal before the plaintiff is put to the cost of any further proceeding; and that a debtor who sees his property levied on and advertised without claiming the exemption waives it, and the sheriff or constable may disregard a demand coming so late as half an hour before the sale.

The fact that the claim is not made until a number of days after the issue of the execution does not bar the debtor's rights, if it is made before a day has been set for a sale under the execution, or advertisements have been posted, or other expenses have been incurred. *Williamson v. Krumbhaar*, 132 Pa.

cc. CLAIM AT ANY TIME BEFORE SALE. — Other courts allow a claim of exemption to be asserted at any time before a sale under the levy, and it makes no difference, so long as the claim is interposed before the sale, that it might have been interposed at an earlier day.¹ In *Ohio* it has been held that a claim can-

St. 455; *Hammer v. Freese*, 19 Pa. St. 255; *Cornman's Appeal*, 90 Pa. St. 254; *Com. v. Boyd*, 56 Pa. St. 402. And see *Evans v. Evans*, 13 Montg. Co. Rep. (Pa.) 164.

Excuse for Omission to Claim. — Special circumstances, such as the absence of the debtor, or ignorance of the levy, may excuse a failure to assert the claim before advertisements are put up. *Diehl v. Holben*, 39 Pa. St. 213. See *infra*, this subdivision, *Excuse for Omission to Claim or for Delay*.

Exemption from Proceeds of Sale. — Under the *Pennsylvania* statute the debtor is not under any circumstances entitled to an exemption of three hundred dollars out of the proceeds of a sale of his personal property under an execution. See *supra*, this title, *Property Exempt under the Statute — Proceeds and Product of Exempt Property*.

Levy upon Real Estate in Pennsylvania. — When real estate is levied upon, the defendant should claim his exemption and demand the appraisement without delay. If he knows of the levy and makes no claim until after a sale of the property, he cannot claim the exemption of three hundred dollars out of the proceeds of the sale. *Miller's Appeal*, 16 Pa. St. 300; *Weaver's Appeal*, 18 Pa. St. 307; *Dodson's Appeal*, 25 Pa. St. 232; *Line's Appeal*, 2 Grant's Cas. (Pa.) 197.

Ordinarily the election to retain real estate levied upon, and request for an appraisement, should be made before inquisition, and in cases where no inquisition is necessary, as in proceedings under the mechanics' lien acts, the request for an appraisement should be made before advertisement of the sale. *Bowyer's Appeal*, 21 Pa. St. 210; *Miller's Appeal*, 16 Pa. St. 300; *Com. v. Boyd*, 56 Pa. St. 402; *McCloskey v. Moulder*, 8 Pa. Co. Ct. Rep. 156.

"In every case where the demand of the debtor is made so tardily that a compliance with it would prevent the collection of the debt for a term beyond that at which the money might have been realized if the demand had been prompt, it may and ought to be disregarded entirely." *Bowyer's Appeal*, 21 Pa. St. 210.

The claim, it has been held in a late case, should not be denied because made six days after the first advertisement of execution sale, and ten days only before the sale, if the sale is not delayed by the appraisement of the exemption, and no additional costs are incurred. *Snyder v. Schmick*, 166 Pa. St. 429. See also *Hart v. Hart*, 167 Pa. St. 13.

In *Seibert's Appeal*, 73 Pa. St. 359, it appeared that, at the time of a levy, the defendant claimed of the sheriff his exemption, but no appraisement, etc., was made by the sheriff, who shortly afterwards went out of office. At the request of the defendant made the day before the sale on the venditioni exponas, the next sheriff, on the day of sale, had the defendant's real estate appraised. It was held that the defendant was entitled to his exemption from the proceeds of the real estate.

"The demand for appraisement is in time if it does not delay the plaintiff; and that has been generally defined to be any time before advertisement." *Com. v. Boyd*, 56 Pa. St. 402. In this case an inquisition was waived under a *fieri facias* and the court below ruled that the defendants' claim ought to be made at the time of the waiver, or at any time during the same day, but not after. This was held to be error.

Attachment Execution. — As to the time of claiming the exemption in the case of attachment execution, see *infra*, this subdivision, *In Case of Attachment or Garnishment*.

Claim by Partners. — In *Wisconsin*, when partnership property is levied upon, the partners are held to be entitled to sever their interests and claim exemptions, and they are entitled to a reasonable time within which to do so. An unreasonable delay is a waiver. *Bong v. Parmentier*, 87 Wis. 129; *Lamont v. Wootton*, 88 Wis. 107.

In *Ladwig v. Williams*, 87 Wis. 615, goods belonging to a firm were seized on attachments, and the attachments were traversed by the firm. Not more than seventeen days after the seizure, and before there was any title to the property, the partnership was dissolved, and a partner claimed his exemptions. It was held that there was no waiver of exemptions, and that the delay in claiming the exemptions was not unreasonable.

As to the right of partners to claim exemptions see *supra*, this title, *Property Exempt under the Statutes — Partnership Property*.

1. Claim at Any Time Before Sale — Alabama. — *Ross v. Hannah*, 18 Ala. 125; *Jordan v. Autrey*, 10 Ala. 276; *Bray v. Laird*, 44 Ala. 295; *Daniels v. Hamilton*, 52 Ala. 108; *Boylston v. Rankin*, 114 Ala. 408.

Arizona. — *Wilson v. Lowry*, (Arizona 1898) 52 Pac. Rep. 777.

Indiana. — *Pate v. Swann*, 7 Blackf. (Ind.) 500; *Eltzroth v. Webster*, 15 Ind. 21, 77 Am. Dec. 78; *State v. Read*, 94 Ind. 103; *Robinson v. Hughes*, 117 Ind. 293, 10 Am. St. Rep. 45.

Kansas. — *Rice v. Nolan*, 33 Kan. 28; *Gardner v. King*, 37 Kan. 671; *Frey v. Butler*, 52 Kan. 722; *Dennis v. Benfer*, 54 Kan. 527.

Missouri. — *State v. Emmerson*, 74 Mo. 607. *Nebraska.* — *Chesney v. Francisco*, 12 Neb. 626; *Desmond v. State*, 15 Neb. 438.

North Carolina. — *Shepherd v. Murrill*, 90 N. Car. 208.

Ohio. — *Butt v. Green*, 29 Ohio St. 667; *Close v. Sinclair*, 38 Ohio St. 530.

Tennessee. — *Pyett v. Rhea*, 6 Heisk. (Tenn.) 136.

In *Alabama*, under the Code 1886, §§ 2520, 2521 (Code 1896, §§ 2046, 2047), a claim of exemptions is required to be filed after a levy of process upon the property claimed, and it is held that a claim of exemptions is in time if filed at any time before the sale under the levy. *Boylston v. Rankin*, 114 Ala. 408.

In *Florida* the property is exempted from "forced sale," and it is held that where per-

not be interposed before sale, if the defendant has waived his rights by his express consent or by his conduct before the sale,¹ but there are several cases which hold that a waiver may be withdrawn.²

(3) *In Case of Attachment or Garnishment.* — If a statute expressly or impliedly requires the right of exemption to be passed upon and adjudicated in attachment or garnishment proceedings, the defendant cannot for the first time after final judgment in such proceedings claim the attached property or debt as exempt from process issued on the judgment. The question of exemption is *res adjudicata*.³ But this rule does not apply when the statute merely exempts property from execution and attachment, or from forced sale, and does not require the right of exemption to be claimed or adjudicated in attachment proceedings.⁴

sonal property that is so exempted is simply levied upon by attachment or other process of law, the mere silence or failure of the party entitled to such exemption to assert or claim it until there is an actual attempt at forced sale under the process cannot constitute a waiver of the right or work an estoppel to its assertion when the inhibited forced sale is actually attempted. *McMichael v. Grady*, 34 Fla. 219.

In *Kansas*, where it is held that a debtor may claim his exemption at any time before the day of sale under an execution, it was held that the fact that a debtor who was entitled to claim two horses claimed only one of them at the time of levy, and informed the officer that he would not claim another "at the present time," did not constitute a waiver or preclude him from claiming another at any time prior to the sale. *Frey v. Butler*, 52 Kan. 722.

Under a *Maryland* statute exempting property not exceeding a certain sum in value, to be selected by the debtor, and providing for an appraisal, it was held that the debtor, after a levy on his property, was bound to claim his exemption before commencement of the sale under the execution. *State v. Boulton*, 57 Md. 317.

1. **Waiver by Conduct Before Sale.** — In *Butt v. Green*, 29 Ohio St. 667, after an officer had levied upon a horse belonging to the execution debtor, and he had demanded "the exemptions allowed by law," they then mutually agreed upon a proper time and place for the debtor to select and the officer to cause to be appraised the property of the debtor exempt from levy and sale, but the debtor purposely failed to be present and make selections at the time and place agreed upon. It was held that the debtor by such failure waived his right to select and hold as exempt the horse so levied on, and that he could not afterwards assert his right even before the sale. "When once waived," said the court, "it could not afterward, but before the sale, be revived and asserted."

2. See *supra*, this title, *Waiver, Forfeiture, and Estoppel — Revocation of Waiver*.

3. **In Attachment.** — *State v. Manly*, 15 Ind. 8.

In such a case, "whether the property attached is subject to execution is *res adjudicata*, after judgment in attachment. The judgment against the property is a judgment *in rem*, and is as conclusive as a judgment against the person." *Perkins v. Bragg*, 29 Ind. 507. See also *Haas v. Shaw*, 91 Ind. 384, 46 Am. Rep. 607.

4. **Adjudication or Claim in Attachment Not Required** — *Florida.* — *McMichael v. Grady*, 34 Fla. 219.

Kansas. — See also *Rice v. Nolan*, 33 Kan. 28, where it was held that the exemption of such portion of a debtor's stock in trade as he may select, up to a certain limit of value, given by the *Kansas* statute, is absolute and does not depend upon any claim or selection to be made by him, and that the mere failure of the debtor to claim his right of exemption until the morning preceding a sale made by an officer upon an order of attachment does not operate as a waiver of such right.

Ohio. — And see *Close v. Sinclair*, 38 Ohio St. 530, where it was held that the right given by section 3 of the Homestead Act, as amended by the Act of February 27, 1873 (70 Ohio L. 51), to hold exempt from levy and sale property as therein mentioned, to be selected by the debtor "at any time before sale," applies as well to property levied on by attachment as by execution; and that an order for the sale of the attached property, made in the proceeding in attachment, does not prevent the debtor from exercising his right of selection after the making of such order of sale.

Under Civ. Code *Nebraska*, § 522, it has been held that where a debtor's property is levied on by the sheriff under an order of attachment, and advertised to be sold to satisfy the judgment obtained in the attachment proceedings, such judgment and order of sale will not deprive him of the right to claim the property as exempt. *State v. Carson*, 27 Neb. 501, 20 Am. St. Rep. 681; *Hamilton v. Fleming*, 26 Neb. 240. These decisions in effect overruled in *State v. Sanford*, 12 Neb. 425, and *State v. Krumpus*, 13 Neb. 321. See *supra*, this title, *Waiver, Forfeiture, and Estoppel — Estoppel*.

In Garnishment. — In *Louisiana*, under a statute relating to garnishment (C. P., art. 246), and providing that in case the garnishee confess in his answer that he is indebted to the defendant in any sum of money, the court shall order him forthwith to pay such sum to the sheriff, it has been held that where such an order is made after due notice to the principal defendant, and without opposition by him, he cannot afterwards have the order annulled on the ground that the indebtedness of the garnishee was for exempt wages. *State v. Bermudez*, 39 La. Ann. 622.

In *Alabama* a debtor who claims a garnished debt as exempt must assert his claim before judgment in favor of the garnishing creditor,

After Giving Bond for Dissolution. — The defendant in garnishment may interpose a claim of exemption to the money admitted by the garnishee to be owing after he has given bond for the dissolution of the garnishment and the garnishee has paid the money over to him.¹

c. EXCUSE FOR OMISSION TO CLAIM OR FOR DELAY — (1) *In General.* — Even when a claim of exemption and selection by the debtor are necessary under the rules shown in the preceding paragraphs, an omission to make such claim and selection, or delay, will not operate as a waiver of the right of exemption, if the debtor can show a good excuse for the omission or delay. He may not always be entitled to claim the specific property after it has been sold, but he may do so before sale, notwithstanding excusable delay in claiming his rights, and after a sale he may, under some statutes, claim an exemption out of the proceeds, or he may have his action against the levying officer and the execution creditor.²

and if he fails to do so until after judgment the right of exemption is lost. *Randolph v. Little*, 62 Ala. 396, *overruling Webb v. Edwards*, 46 Ala. 16.

New Mexico. — In *New Mexico Nat. Bank v. Brooks*, (N. Mex. 1897) 49 Pac. Rep. 947, final judgment was rendered against a garnishee without notice to the principal defendant. Three months after the rendition of the judgment the defendant claimed the property garnished as exempt. It was held that by his failure to claim the exemption before the judgment he lost his right thereto, as the right of exemption was *res adjudicata*.

In *Nebraska*, on the other hand, where the statute exempts wages absolutely, it has been held that while an order made by a court in a proceeding in garnishment after judgment cannot be attacked collaterally, yet the garnishee afterwards may set up facts showing the amount owing by such garnishee to the debtor to be exempt from attachment or execution. *Union Pac. R. Co. v. Smersh*, 22 Neb. 757, 3 Am. St. Rep. 290.

In *Arizona* and *Arkansas* the rule seems to be the same. *Wilson v. Lowry*, (Arizona 1898) 52 Pac. Rep. 777; *Blass v. Erber*, 65 Ark. 112.

Attachment Execution in Pennsylvania. — In cases of attachment execution under the Pennsylvania statutes the defendant is not bound to make claim to the three hundred dollars exemption to the officer serving the attachment, for the officer has nothing to do with the collection of the debt and cannot have it appraised, but the claim may be made at the term to which the attachment is returnable, and before the plaintiff has taken any step in the cause to his detriment. *Yost v. Heffner*, 69 Pa. St. 68; *Landis v. Lyon*, 71 Pa. St. 473; *Bittenger's Appeal*, 76 Pa. St. 105. But the claim must be made at the term to which the writ is returnable, and before the plaintiff has taken steps to his detriment for want of notice of the claim, as by incurring costs, counsel fees, etc., if the defendant has notice of the attachment. *Bittenger's Appeal*, 76 Pa. St. 105; *Bancord v. Parker*, 65 Pa. St. 336, *Strouse v. Becker*, 44 Pa. St. 206, *affirming* 38 Pa. St. 190, 80 Am. Dec. 474; *Morris v. Shafer*, 93 Pa. St. 489; *Zimmerman v. Briner*, 50 Pa. St. 535; *Bair v. Steinman*, 52 Pa. St. 423; *Harlan v. Haines*, 125 Pa. St. 48; *Fallon v. Keller*, 1 Lack. Leg. N. (Pa.) 158.

The claim is too late if made by plea to the

scire facias. *Strouse v. Becker*, 44 Pa. St. 206, *affirming* 38 Pa. St. 190, 80 Am. Dec. 474.

The fact that the attachment was levied on the share of the debtor in a fund in the hands of trustees of an estate which he was not entitled to receive, and the creditor could not take, until the death of the debtor's mother and an accounting by the trustees, does not prevent the failure of the debtor to claim his exemption at the term to which the writ was returnable from operating as a waiver. *Harlan v. Haines*, 125 Pa. St. 48, 24 W. N. C. (Pa.) 84.

If the attachment has not been served on the defendant, he may claim his exemption after the first term, and as soon as he has notice of the execution of the writ. *Howard Bldg., etc., Assoc. v. Philadelphia, etc., R. Co.*, 102 Pa. St. 220. See also *Behler's Estate*, 12 Pa. Co. Ct. Rep. 393, 2 Pa. Dist. Rep. 324.

1. After Bond for Dissolution. — *Skews v. Vancleave*, (Ala. 1898) 24 So. Rep. 850, *following* *Guilford v. Reeves*, 103 Ala. 301.

2. Excuse for Omission to Claim or Select — Wrong of Officer. — Thus a failure to select exemptions will not constitute a waiver of the right of exemption if the officer refuses to give to the debtor an opportunity to make his selection, or denies his right to any exemption. *Wicker v. Comstock*, 52 Wis. 315; *Shear v. Reynolds*, 90 Ill. 238; *State v. Romer*, 44 Mo. 99.

In *Bayne v. Patterson*, 40 Mich. 658, a sheriff levying on personal property wrongfully excluded the debtor from his premises, locked them up, and kept the key. It was held that he could not treat the absence of the debtor during the next morning as a waiver of his right to select his exemptions.

If an officer, in levying an execution, disregards a claim of exemption made by the debtor, even though he may do so under the belief that the property is not exempt, because the debt is one against which an exemption cannot be claimed, as a debt for the purchase price, for instance, this is virtually a denial to the debtor of any opportunity to make a selection from the property, and excuses failure on his part to make any selection. *Wells v. Lilly*, 86 Ill. 318.

Misleading the Debtor. — And when the statute requires the claim of exemption to be asserted within a certain number of days after the levy, and the debtor's failure to assert his

(2) *Ignorance of Levy.* — Ordinarily the officer should notify the debtor of the levy, or of his intention to levy, and give him an opportunity to claim his exemptions; and the debtor's ignorance of a levy, without fault on his part, is a sufficient excuse for delay in asserting his rights.¹

(3) *Absence of the Debtor.* — And delay in asserting a claim of exemption is excusable if the debtor was unavoidably absent at the time when it should have been asserted, even though he may have known of the levy or intention to levy.² Clearly both absence and ignorance will excuse delay.³

d. WHO MAY ASSERT CLAIM. — It is a general rule that the right of exemption is a personal privilege of the debtor, and that if he does not claim it no one else can do so for him. The rule, however, is subject to exceptions, and, further than this, the courts have not always agreed in its application.⁴

claim within that time is due to his being misled by the officer, he may assert the claim afterwards. *Morrissey v. Feeley*, 36 Ill. App. 556.

1. *Ignorance of Levy* — *Colorado.* — *Wymond v. Amsbury*, 2 Colo. 213.

Illinois. — *Cook v. Scott*, 6 Ill. 333; *McCluskey v. McNeely*, 8 Ill. 578; *People v. Palmer*, 46 Ill. 398, 95 Am. Dec. 418.

Kansas. — *Dennis v. Benfer*, 54 Kan. 527.

Missouri. — *Finke v. Craig*, 57 Mo. App. 393; *State v. Barada*, 57 Mo. 562; *State v. Romer*, 44 Mo. 99; *Holliday v. Mansker*, 44 Mo. App. 465; *State v. Carroll*, 9 Mo. App. 275.

Vermont. — *Haskins v. Bennett*, 41 Vt. 698.

2. *Absence of Debtor* — *California.* — *Haswell v. Parsons*, 15 Cal. 266, 76 Am. Dec. 480.

Colorado. — *Harrington v. Smith*, 14 Colo. 376, 20 Am. St. Rep. 272; *Wymond v. Amsbury*, 2 Colo. 213.

Illinois. — *People v. Palmer*, 46 Ill. 398, 95 Am. Dec. 418.

Kansas. — *Dennis v. Benfer*, 54 Kan. 527.

Vermont. — *Haskins v. Bennett*, 41 Vt. 698.

Avoidable Absence with Knowledge of Levy. — In *Rogers v. Waterman*, 25 Pa. St. 182, it was held that a defendant's failure to claim his exemption and demand an appraisal of personal property levied upon under an execution, under the *Pennsylvania Act of 1849*, until commencement of the sale, was not excused by the fact that he was absent at a distance of twenty miles at the time of the levy and until the day of sale, where he knew of the intended sale several days before it took place.

Notice in Case of Debtor's Absence. — In *Illinois* the rule established by the Supreme Court requires the officer having a writ of execution in his hands to give notice to the debtor, "if practicable," and thus afford him an opportunity to claim and select his exemptions (see the *Illinois* cases cited in the second note preceding); but it is there held by the Appellate Court that it is not practicable to give such notice if the debtor is absent from the county and the officer is ignorant of his address, and that a levy and sale in such a case, even without an effort to ascertain his address and give notice, does not render the officer liable. *Foote v. People*, 12 Ill. App. 94. And see *People v. Palmer*, 46 Ill. 401, 95 Am. Dec. 418.

Residence in Another County. — But when a debtor resides in one county, to the officer's knowledge, and his property in another county is taken on execution, he is entitled to notice to make a selection of the property exempt

from execution equally as if he resided in the county in which the execution was levied. *McCluskey v. McNeely*, 8 Ill. 578. And see *Finke v. Craig*, 57 Mo. App. 393.

Claim by Others in Absence of Debtor. — It has been held in some states, either under express statutory provisions or independently of such provisions, that the wife of an absent debtor, or a child of sufficient discretion, may assert the debtor's right of exemption. *Freehling v. Bresnahan*, 61 Mich. 540, 1 Am. St. Rep. 617; *Wilson v. McElroy*, 32 Pa. St. 82. See *infra*, this subdivision, *Who May Assert Claim*.

Absence with Intent to Defraud Creditors. — In *Washington* it is expressly provided that the property of a person who has left the state with intent to defraud his creditors shall not be exempt from execution or attachment, and this prevents the wife of such a debtor from asserting a claim. *Carter v. Davis*, 6 Wash. 327.

It seems, however, that it would be otherwise in the absence of such a statute. *Freehling v. Bresnahan*, 61 Mich. 540, 1 Am. St. Rep. 617.

3. *Absence and Ignorance.* — A sheriff has no right to levy on the exempt personal property of a debtor who is temporarily absent from the state. Under such circumstances, the failure of the defendant, who has no knowledge of the levy, to claim his exemption or demand the return of the property before actual sale by the sheriff is not a waiver of his rights, and does not bar him from recovering from the sheriff the value of the property taken. *Dennis v. Benfer*, 54 Kan. 527.

4. *Who May Assert Right of Exemption.* — *Mickles v. Tousley*, 1 Cow. (N. Y.) 114; *Earl v. Camp*, 16 Wend. (N. Y.) 571; *Smith v. Hill*, 22 Barb. (N. Y.) 656; *Eberhart's Appeal*, 39 Pa. St. 509, 80 Am. Dec. 536; *Sherrible v. Chaffee*, 17 R. I. 195, 33 Am. St. Rep. 863. See *supra*, this title, *Persons Entitled to Benefit of Exemption Laws* — *Right of Exemption as a Personal Privilege*.

Assertion of Claim by Garnishee. — Some of the courts apply this rule in garnishment proceedings and hold that the garnishee cannot set up the fact that the debt garnished is exempt. *Moore v. Chicago, etc.*, R. Co., 43 Iowa 385; *Osborne v. Schott*, 67 Mo. 712; *Howland v. Chicago, etc.*, R. Co., 134 Mo. 474; *Conley v. Chilcote*, 25 Ohio St. 320.

Other courts, however, not only allow the garnishee to plead the debtor's right of exemption, but hold that he must do so to pro-

Claim by Agent, Wife, or Child. — A debtor's agent may claim his exemptions for him under an express authority, or under an authority implied from his being left in charge of the property during the debtor's temporary absence.¹ And by express provision in some states, and without such provision in others, the wife or child of an absent debtor or a debtor who fails to assert his right of exemption may claim the same for him.²

e. MODE OF CLAIMING, SELECTING, AND SETTING APART — (1) *In General.* — When a claim and selection are necessary to entitle a debtor to hold property as exempt, as heretofore explained,³ they must not only be made in proper time,⁴ but they must also be made in a proper manner, and with due observance of all statutory requirements. If the debtor does not assert the claim substantially in the manner prescribed by the statute, it is equivalent to no claim at all, and may be disregarded by the officer.⁵ A substantial compliance with the statute is sufficient, however, and technical objections will not defeat his claim.⁶ The statutes are to be liberally construed for the purpose of determining the mode of claiming, selecting, and setting apart of exemptions, as well as for determining whether the right of exemption exists.⁷

(2) *Excessive Claim and Selection.* — The claim and selection by the debtor

to protect himself, in case judgment is rendered against him and paid, against a subsequent action by the debtor. See the title GARNISHMENT.

Questions Elsewhere Treated. — The restriction of the right of exemption to residents and to persons having a particular status or engaged in a particular occupation is elsewhere treated. See *supra*, this title, *Persons Entitled to Benefit of Exemption Laws*.

As to who may sue for infringement of the right of exemption, see *infra*, this section, *Remedies on Denial or Infringement of Right — Persons Entitled to Maintain Action*.

Title to Support Claim. — As a general rule, title to the property is necessary to support a claim of exemption. This rule, with its exceptions, has already been considered. See *supra*, this title, *Property Exempt under the Statutes — Title or Right to Support Claim*.

1. Claim by Agent. — *Wilson v. McElroy*, 32 Pa. St. 82. See also *Waugh v. Burket*, 3 Grant's Cas. (Pa.) 319, where it was held that a debtor's wife and counsel could make a claim of exemption for him. And see the dictum in *Bonnel v. Dunn*, 29 N. J. L. 435.

Bailees. — It has been said that a bailee of exempt property cannot assert the bailor's right of exemption, and in support of this proposition *Mickles v. Tousley*, 1 Cow. (N. Y.) 114, has been cited. That case, however, as far as the actual decision does, merely decides that the bailee cannot maintain an action for seizing and selling exempt property, which is a very different question. There is no good reason why a bailee of exempt property may not assert the debtor's right of exemption as his agent and for him.

2. Claim by Wife or Child. — *Malvin v. Christoph*, 54 Iowa 562; *Bonnel v. Dunn*, 29 N. J. L. 435; *Regan v. Zeeb*, 28 Ohio St. 483. And see the cases cited in the note preceding. See *supra*, this title, *Persons Entitled to Benefit of Exemption Laws — Married Women*.

Under How. Stat. Michigan, § 7686, allowing exemptions and declaring that any chattel mortgage, sale, or other lien created on any part of the property shall be void unless

signed by the wife of the party making the same, if he has a wife, the right to select property as exempt is in the husband, and the wife cannot make the selection unless he refuses or fails to do so. *Harley v. Procnier*, (Mich. 1897) 72 N. W. Rep. 1099.

3. Mode of Claiming, Selecting, and Setting Apart. — See *supra*, this section, *Necessity for Claim and Selection*.

4. See *supra*, this section, *Time of Asserting Claim*.

5. Right of Exemption Lost by Not Following Statutory Requirements — *Alabama.* — *Courie v. Goodwin*, 89 Ala. 569; *Patillo v. Taylor*, 83 Ala. 230; *Mitchell v. Corbin*, 91 Ala. 600.

Arkansas. — *Chambers v. Perry*, 47 Ark. 400; *Surratt v. Young*, 55 Ark. 447; *Scanlan v. Guiling*, 63 Ark. 540; *Settles v. Bond*, 49 Ark. 114; *Weller v. Moore*, 50 Ark. 253.

Colorado. — *Schwartz v. Birnbaum*, 21 Colo. 21.

Illinois. — *Casper v. People*, 6 Ill. App. 28.

Indiana. — *Huseman v. Sims*, 104 Ind. 317; *Graves v. Hinkle*, 120 Ind. 157; *Wagner v. Barden*, 13 Ind. App. 571; *Faulkner v. Jones*, 13 Ind. App. 381; *Boesker v. Pickett*, 81 Ind. 554.

Nebraska. — *Mann v. Welton*, 21 Neb. 541; *Neligh First Nat. Bank v. Lancaster*, 54 Neb. 467.

Pennsylvania. — *Line's Appeal*, 2 Grant's Cas. (Pa.) 197.

South Dakota. — *Longley v. Daly*, 1 S. Dak. 263.

See also the cases cited *supra*, this section, *Necessity for Claim and Selection*; *Time of Asserting Claim*. And see the cases specifically cited in the notes following.

6. Substantial Compliance with Statute Sufficient. — *Schumann v. Pilcher*, 36 Ill. App. 43; *Haas v. Shaw*, 91 Ind. 384, 46 Am. Rep. 607; *Gregory v. Latchem*, 53 Ind. 449; *Astley v. Capron*, 89 Ind. 167; *Eisenbauer v. Dill*, 6 Ind. App. 188; *Wagner v. Barden*, 13 Ind. App. 571; *Farquhar v. Hibben*, 38 Neb. 556.

7. Statutes Liberally Construed. — *Gregory v. Latchem*, 53 Ind. 449; *Astley v. Capron*, 89 Ind. 167.

must not be excessive. He must claim only what the statute allows him to hold.¹

(3) *Form and Language of Claim.* — It is not necessary that a claim of the benefits of the exemption law shall be in any particular form, or in any particular language, unless so required by the statute.²

1. **Excessive Claim.** — Thus in *Brown v. Hoffmeister*, 71 Mo. 411, it was held that a lawyer's claim of exemption of all his professional books, which were of greater value than was allowed by the statute, was not a proper claim and selection, and might for that reason be disregarded by the officer.

2. **Form and Language of Claim.** — The claim need not be in writing, for instance, unless required by the statute, but may be made by parol request to the sheriff; and it may be so made to him when he is absent from his office, if there are no statutory requirements to the contrary. *McCluskey v. McNeely*, 8 Ill. 578; *Mark v. State*, 15 Ind. 98; *Vandibur v. Love*, 10 Ind. 54; *Gregory v. Latchem*, 53 Ind. 449; *Bowman v. Smiley*, 31 Pa. St. 225, 72 Am. Dec. 738; *Diehl v. Holben*, 39 Pa. St. 213; *Hart v. Hart*, 167 Pa. St. 13.

And any words that will apprise the officer that the statutory exemption is the thing claimed are sufficient. *Diehl v. Holben*, 39 Pa. St. 213. And see *Keller v. Bricker*, 64 Pa. St. 379.

For analogous rules and cases, see *infra*, this subdivision, *Schedule or Inventory*; *The Selection*.

In *McCloskey v. Moulder*, 8 Pa. Co. Ct. Rep. 156, it was held that where real estate is levied on, and an exemption is claimed under the Act of 1849, the execution plaintiff is entitled to notice of the claim through the record, and that a verbal notice to the sheriff, not communicated to the execution plaintiff, nor acted upon, is insufficient. But this seems contrary to the cases in the Supreme Court of *Pennsylvania* cited above.

Verification of Claim. — A claim of exemption or notice of claim need not be under oath, unless it is so required by the statute. See the cases above cited. And see *Glover v. Narey*, 92 Iowa 286, holding that the *Iowa* statute (Acts 20th Gen. Assembly, c. 45) requiring notices of claims to attached property to be under oath applies only to claims by third persons, and does not require notice of a claim of property as exempt to be verified.

Claim of Exemption Against Garnishment — When Verification Must Be Made. — When a claim of exemptions is interposed to money in the hands of a garnishee, the law (Code Alabama, 1886, §§ 2525, 2533; Code 1896, §§ 2051, 2059) requires that the claim must contain, or be accompanied by, an inventory of all the personal property, choses in action, and money belonging to the claimant, stating its value and location, and this claim and inventory must be verified by oath, made at the time of filing; and a claim of exemptions and inventory filed two months previous in a garnishment suit cannot be filed in a garnishment suit against the same defendant without being accompanied by a presently verified statement having reference to the property owned by the defendant at the very time of filing in the latter case. *Young v. Hubbard*, 102 Ala. 373.

Specification of Property Claimed. — If the statute does not require the application for an exemption to specify the particular property which the debtor wishes to claim as exempt, it is not necessary. *Kelley v. McFadden*, 80 Ind. 536; *Mark v. State*, 15 Ind. 98. This is required, however, in some states. *Friedman v. Sullivan*, 48 Ark. 213. See *infra*, this subdivision, *The Selection*.

In *Wilson v. McElroy*, 32 Pa. St. 82, it was held that where the apparent value of the goods levied upon is less than the amount exempted by law, it is unnecessary to make any further specification than is implied in the demand for the benefit of the statute, at least until after the appraisement.

Showing as to Right of Exemption. — In *Kilpatrick-Koch Dry Goods Co. v. Callender*, 34 Neb. 727, an affidavit reciting that the debtor was the head of a family, a resident of the state, and had neither lands, town lots, nor barns subject to exemption as a homestead, was held not to meet the requirement of the law, because it failed to show that he did not possess any exempt houses. The second point of the syllabus states the rule thus: "A debtor who swears that he has neither lands, town lots, nor houses subject to exemption must negative the possession of any of these; and if he fails to do so the affidavit will be insufficient." See also *Neligh First Nat. Bank v. Lancaster*, 54 Neb. 467.

Statement as to Character of Debt. — A statement in a claim of exemptions that "the attachment is for debt not due upon contract" is a sufficient statement that the debt was based upon contract and was not due. *Huffman v. Thompson*, 64 Ark. 196.

Statement as to Time When Debt Was Contracted. — Where a statute requires a verified claim of exemption, and property is exempted only as against debts contracted since a certain date, a claim of exemption which fails to state when the debt was contracted is insufficient. *Ely v. Blacker*, 112 Ala. 311. See also *Randolph v. Little*, 62 Ala. 396.

A claim of exemptions must show that the debt against which it is asserted has been contracted since the enactment of the laws providing for the exemption sought to be effectuated. *Young v. Hubbard*, 102 Ala. 373.

Claim Signed by Two Persons. — A notice of a claim of exemptions signed by two persons is sufficient as a claim for either separately. *Stanton v. French*, 83 Cal. 194, 25 Am. St. Rep. 174.

Claim Signed by Husband and Wife. — And the fact that a claim of exemption made and signed by a man is also signed by his wife does not invalidate his claim. *Stanton v. French*, 83 Cal. 194, 25 Am. St. Rep. 174.

Waiver of Objections to Claim. — If the officer gives a reason for refusing a claim of exemptions, he thereby waives all other objections to the manner of making it. *Wilson v. McElroy*, 32 Pa. St. 82. See also *infra*, this subdivision, *Schedule or Inventory*.

(4) *Formal Declaration of Exemptions.* — In *Alabama* the statute provides for the filing by the debtor, either in the office of the probate judge before the levy of an execution, or with the officer after a levy, of a formal declaration or claim in writing claiming certain property as exempt, and describing it; and under such a statute a claim with the formalities required by the statute is essential to the right to hold property as exempt.¹

Claim in Garnishment. — Where a statute requires a defendant in garnishment

In *Alabama*, when a claim of exemption is interposed to personal property on which an attachment has been levied, it should be accompanied by a statement of all the defendant's other personal property, choses in action, etc. (Code 1886, §§ 2521, 2525; Code 1896, §§ 2047, 2051.) But it has been held that the want of such statement is waived if the plaintiff, without objecting to the sufficiency of the claim, makes a written demand for an inventory. *Trager v. Feibleman*, 95 Ala. 60.

Where a claim of exemptions is insufficient, in that it is not made to appear therein that the debt against which the claim was interposed had been contracted since the enactment of the laws providing for the exemption intended to be asserted, such insufficiency is waived by the party contesting it if, without objecting to the claim on this ground, he files an affidavit of contestation. *Young v. Hubbard*, 102 Ala. 373.

1. Formal Declaration of Exemptions in Alabama — Before Levy. — In *Alabama* the statute allows a person claiming an exemption of personal property to make and file in the office of the judge of probate of the county of his residence, before a levy, a declaration in writing, subscribed and sworn to by him, describing the property selected and claimed by him as exempt item by item, with its value, and permits other declarations to be filed from time to time as occasion may require. Code 1896, § 2041.

Effect of Declaration. — After this declaration is filed the property is not subject to levy unless there is indorsed on the process the fact of a waiver of exemptions, or unless the claim is contested as provided in section 2046. See *Block v. George*, 83 Ala. 178; *Beckert v. Whitlock*, 83 Ala. 123; *Tonsmere v. Buckland*, 88 Ala. 312; *Bledsoe v. Gary*, 95 Ala. 70; *Totten v. Sale*, 72 Ala. 488. And see *infra*, this subdivision, *Contest of Claim of Exemptions*.

Failure to File Declaration. — If the declaration is not filed in substantial compliance with the statute, the property is subject to levy, and this is true even though the debtor may have altogether no more property than he is entitled to claim as exempt. *Mitchell v. Corbin*, 91 Ala. 599. And see *Block v. George*, 83 Ala. 178; *Wright v. Grabfelder*, 74 Ala. 460; *Motley v. Jones*, 98 Ala. 443.

Proof of Declaration. — A declaration and claim of exemption verified by affidavit and filed in the office of the probate judge may be proved by a transcript properly certified, or by the record book itself. See *Stevenson v. Moody*, 85 Ala. 33; *Cofer v. Scroggins*, 98 Ala. 342, 39 Am. St. Rep. 54.

Effect of Declaration as Evidence and Notice. — By Code Ala., § 2043, a declaration filed in accordance with section 2041 is declared to be *prima facie* correct, and it operates as notice

of its contents. See *Weis v. Levy*, 69 Ala. 209; *Abbott v. Gillespy*, 75 Ala. 180; *Todd v. McCravey*, 77 Ala. 468; *Jones v. Motley*, 78 Ala. 370; *Block v. George*, 83 Ala. 178.

Filing Declaration or Claim After Levy. — Section 2047 of the *Alabama Code* of 1896 provides that the right of exemption shall not be waived or lost by failure to file a declaration of claim of exemption before levy, as allowed by section 2041, but that the defendant, in person or by his agent or attorney, may at any time after the levy and before sale file with the officer making the levy a claim in writing, verified by oath, to such property, or any part thereof, as exempt, and, if of a part, describing the same. Provision is then made for notice to the plaintiff, and a contest by him, if he sees fit, of the defendant's right to the exemption. If no contest is instituted within ten days after such notice, the levy must be discharged and the property returned to the defendant. The defendant is required to file with his claim, under this section (2047), a statement or inventory of personal property, choses in action, and money, with the value and location thereof, as required by section 2051.

Failure to File. — If the declaration or claim required by this section is not filed with the officer, the right of exemption is lost. *Mitchell v. Corbin*, 91 Ala. 599; *Patillo v. Taylor*, 83 Ala. 230; *Wright v. Grabfelder*, 74 Ala. 460; *Young v. Hubbard*, 102 Ala. 373.

Effect of Filing. — The property is not subject to sale after a proper declaration or claim is filed, unless the claim is sufficiently contested. *Kennedy v. Smith*, 99 Ala. 83; *Block v. George*, 83 Ala. 178.

Sufficiency of Filing of Claim. — Under section 2047, above referred to, providing that a claim of exemption, if made after levy of an execution, shall be made by filing with the officer making the levy a verified claim, it is not a sufficient filing with the officer that the claim is merely handed to him after levy and while the execution is in his hands, and then withdrawn from him before the sale, and filed in the office of the judge of probate, since such filing is made before levy under section 2041. *Schuer v. King*, 100 Ala. 238.

Right of Sheriff to Disregard a Claim of Exemption. — A sheriff has no power to pass on the sufficiency of a claim of exemption, and can disregard no claim, unless interposed by the defendant in an execution on a judgment based on a tort or other demand against which the statute does not authorize a claim of exemption to be interposed. *Kennedy v. Smith*, 99 Ala. 83.

Amendment of Claim. — That the declaration or claim may be amended, see *Kennedy v. Smith*, 99 Ala. 83; *Block v. George*, 83 Ala. 178; *Zelnicker v. Brigham*, 74 Ala. 598.

proceedings claiming exemption to file his claim in writing, verified by oath, in the court in which such proceedings are pending, such claim must be filed in accordance with the statute to entitle the defendant to claim his exemption.¹

(5) *Inventory or Schedule, Appraisement, and Selection*—(a) *In General*.—In some states the statute requires the filing of an inventory or schedule of his property by the debtor, and an appraisement, after which the debtor or his agent is allowed to select the property which he is entitled to hold as exempt, or in his absence the officer may be required to make the selection.² Under such a statute there is no right of exemption unless these formalities are complied with.³ More in detail:—

(b) *Schedule or Inventory*.—A schedule or inventory must be filed or presented by the debtor, when it is required by the statute, and it must be seasonably filed or presented, or no exemption can be claimed,⁴ unless there is good

1. Claim of Exemption Against Garnishment.—See *Todd v. McCravey*, 77 Ala. 468; *Tonsmere v. Buckland*, 88 Ala. 312; *Courie v. Goodwin*, 89 Ala. 569; *Randolph v. Little*, 62 Ala. 396; *Craft v. Louisville, etc., R. Co.*, 93 Ala. 22; *White v. Hobart*, 90 Ala. 368.

Under the *Alabama* statute, Code 1896, § 2051, providing for the filing of an inventory of personal property on demand of the plaintiff on a contest of claim of exemption to personal property, and section 2059, requiring a claim of exemption when money or choses in action or personal property are garnished, and allowing a contest of such claim, as in case of levy on execution, a defendant in garnishment must file an inventory on demand of the plaintiff where articles of personal property or choses in action are garnished and claimed as exempt. *Tonsmere v. Buckland*, 88 Ala. 312; *Buckland v. Tonsmere*, 90 Ala. 503; *Decatur Mercantile Co. v. Deford*, 93 Ala. 347; *Young v. Hubbard*, 102 Ala. 373; *Roden v. Brown*, 103 Ala. 324. An inventory is not necessary, however, when wages are garnished and claimed as exempt. *Courie v. Goodwin*, 89 Ala. 569.

When a garnishment is levied upon any personal property other than money or choses in action, a claim of exemption thereto "must be lodged with the officer making the levy" (Code 1876, § 2834); but when the levy is upon "any money or choses in action" (section 2842), the claim of exemption must be filed, verified by affidavit, in the court where the proceeding is pending; and it may be interposed at any time before the debt is condemned in the hands of the garnishee but subject to reasonable regulation by the court. *Todd v. McCravey*, 77 Ala. 468.

2. Inventory, Appraisement, and Selection.—See, for example, Code Civ. Pro. *Nebraska*, §§ 521-523. There are somewhat similar statutes in other states.

3. Failure to Comply with Statutory Requirements.—*Weller v. Moore*, 50 Ark. 253; *Casper v. People*, 6 Ill. App. 28; *Mann v. Welton*, 21 Neb. 541. And see the other cases cited at the beginning of this subdivision and those cited specifically in the notes following.

4. Schedule or Inventory Necessary—*Alabama*.—*Tonsmere v. Buckland*, 88 Ala. 312; *Ex p. Reed*, 73 Ala. 548.

Arkansas.—*Settles v. Bond*, 49 Ark. 114; *Weller v. Moore*, 50 Ark. 253.

Illinois.—*Casper v. People*, 6 Ill. App. 28; *Camp v. Ganley*, 6 Ill. App. 499; *Chapin v. Hoel*, 11 Ill. App. 309; *Finlen v. Howard*, 126 Ill. 259; *Menzie v. Kelly*, 8 Ill. App. 259; *Ehle v. Deitz*, 32 Ill. App. 547.

Indiana.—*Huseman v. Sims*, 104 Ind. 317.

Nebraska.—*Neligh First Nat. Bank v. Lancaster*, 54 Neb. 467.

Entire Property Within Statutory Limit.—

When the statute requires a schedule to be filed by the debtor in order to claim property as exempt, and makes no exception, failure to file a schedule is not excused by the fact that all the property owned by the debtor does not exceed the amount which he is entitled to claim as exempt. *Settles v. Bond*, 49 Ark. 114; *Blair v. Parker*, 4 Ill. App. 409.

New Schedule on Second Execution.—When a debtor has once presented a schedule of his property to the officer holding an execution, as required by statute, that schedule cannot be used or relied upon as a compliance with the statute when a second execution is levied upon his property. Another schedule is necessary. *Weller v. Moore*, 50 Ark. 253; *Camp v. Ganley*, 6 Ill. App. 499; *Biggs v. McKenzie*, 16 Ill. App. 286; *Finley v. Sly*, 44 Ind. 266.

Delivery to Officer.—The *Illinois* statute and the statutes of some of the other states require the inventory or schedule to be delivered or presented to the officer, and of course a delivery to him is essential. *Miller v. Rolan*, 39 Ill. App. 350.

If it is understood between the debtor and the officer that the schedule shall be left at a certain place for the officer, and that he shall call there for it, this is a sufficient delivery. *Miller v. Rolan*, 39 Ill. App. 350.

A statute requiring a debtor to deliver a schedule to the officer (Comp. Laws *Dakota*, § 5130) is sufficiently complied with where the debtor delivers a proper schedule to the officer, and the latter admits service thereon by copy, and returns the original to the debtor, retaining a copy. *Swenson v. Christofersen*, 10 S. Dak. 188.

Time of Filing or Presenting Schedule or Inventory.—The inventory or schedule must be filed or presented within the time, if any, prescribed by the statute, or within a reasonable time if no time is prescribed. *Griffin v. Maxwell*, 23 Ill. App. 405; *Alden v. Yeoman*, 29 Ill. App. 53.

But if the officer receives a schedule without

excuse for the omission or delay.¹ Sometimes the statute provides for the making of an inventory by the officer.²

Form and Sufficiency of Schedule or Inventory. — The schedule or inventory must comply substantially with the statutory provisions as to form.³ It must, if required by the statute, be properly signed,⁴ and verified,⁵ and must properly

object he cannot afterwards escape its effect on the ground that it was not presented in time. *Taylor v. Beach*, 14 Ill. App. 259.

Claim of Exemptions in Garnishment — Time of Filing Inventory. — In *Alabama*, when a claim of exemption is interposed to personal property, which has been attached in the hands of a garnishee, it must be accompanied by a statutory inventory of the defendant debtor's property (Code 1886, § 2533; Code 1896, § 2059); and if upon the demand of the plaintiff a fuller and more complete inventory is furnished before the issues on the contest are formed, it is in time to prevent a judgment against the defendant or garnishee on the ground that the inventory was not filed within the time prescribed, since the claim of exemption can, under the statute mentioned, be filed any time before the judgment of condemnation against the garnishee. *Roden v. Brown*, 103 Ala. 324.

1. Excuse for Delay in Filing or Presenting Schedule or Inventory. — If the officer levying an execution misleads the debtor in regard to it, so that the debtor for that reason fails to file or present his schedule within the time prescribed by the statute, he may file or present it after that time. *Morrissey v. Feeley*, 36 Ill. App. 556.

The same is true if the officer fails to notify the debtor of the levy or intention to levy. See also *supra*, this section, *Excuse for Omission to Claim or for Delay*.

2. Inventory by Officer. — *Wyckoff v. Wyllis*, 8 Mich. 48. And see *infra*, this section, *Duty of Levying Officers*.

3. Schedule or Inventory Must Comply with Statute as to Form. — *Casper v. People*, 6 Ill. App. 28; *Griffin v. Maxwell*, 23 Ill. App. 405. And see the cases cited specifically in the notes following.

Showing as to Status. — In the verified schedule of property which a statute requires an exemption claimant to deliver to the officer who has levied upon his property, it is not necessary for the claimant to state that he is the head of a family, unless the statute so requires, though the exemption may be allowed to heads of families only. *Webster v. McGauvran*, (N. Dak. 1899) 78 N. W. Rep. 80.

Substantial Compliance with Statute. — It is sufficient if the schedule or inventory complies substantially with the statute. It is a rule that the statute must be liberally construed, and that technical objections will not be allowed to prevail. See *Gregory v. Latchem*, 53 Ind. 449; *Eisenhauer v. Dill*, 6 Ind. App. 188; *Farquhar v. Hibben*, 38 Neb. 556; *Kriesel v. Eddy*, 37 Neb. 63.

Under an *Indiana* statute requiring an inventory, supported by an affidavit, of "all personal property * * * belonging to him [the debtor] or in which he had any interest at the date of the issuing of the writ," it was held that an averment that a schedule con-

tained "a full and true account of all * * * property" of the debtor "and held by him at the date of the issuing of the execution," was sufficient without the words "or in which he then had any interest." *Astley v. Capron*, 89 Ind. 167.

Duty of Officer to Accept Schedule. — If the schedule is not in proper form, the officer is not bound to accept it. See the cases referred to in the notes preceding. But he is bound to accept a proper schedule, and cannot dispute the truth of it. *State v. Read*, 94 Ind. 103; *Douch v. Rahner*, 61 Ind. 64. See *infra*, this section, *Duty of Levying Officers*.

4. Signature. — When the statute requires the debtor to sign the schedule, his signature is essential. See *Griffin v. Maxwell*, 23 Ill. App. 405, where it was said that a schedule not complying with the statute possesses "no more force or effect as a schedule than a piece of blank paper."

Omission of Signature by Mistake. — It has been held, however, that if the debtor is honestly endeavoring to comply with the statute, the officer must act in good faith towards him, and if an unsigned schedule is presented to him by mistake, he should call the debtor's attention to it and give him an opportunity to sign it. If the debtor offers to sign it on discovery of the mistake, the officer must allow him to do so, or his further proceedings will be wrongful, and the debtor may maintain replevin. *Langston v. Murphy*, 31 Ill. App. 188. See also *Cooper v. Payne*, 36 Ill. App. 155.

Sufficiency of Signature. — If the debtor himself writes his name in the body of the affidavit attached to his schedule, this is a sufficient signing of the schedule, under a statute requiring it to be "subscribed," since the name is below the schedule. And it has been held that the fact that the name is written in a different handwriting from that in the rest of the affidavit is enough to put the officer on inquiry so as to charge him with knowledge that it was written by the debtor. *Schumann v. Pilcher*, 36 Ill. App. 43.

5. Verification of Schedule. — If the statute requires the schedule to be verified, the officer may disregard one that is not sworn to. *Casper v. People*, 6 Ill. App. 28; *Griffin v. Maxwell*, 23 Ill. App. 405; *Huseman v. Sims*, 104 Ind. 317.

Signing of Affidavit. — If the statute merely requires the affidavit attached to the schedule to be signed, and does not require it to be "subscribed," it is sufficient if the debtor's name be written by himself in the body thereof. *Schumann v. Pilcher*, 36 Ill. App. 43.

Failure of Officer to Attach Jurat. — If the officer, on delivery of a proper schedule, administers the oath to the debtor, as required by statute, but neglects to reduce to writing and attach a proper jurat, he cannot deprive the debtor of his rights. *Horton v. Smith*, 46 Ill. App. 231.

list or specify the property.¹ An omission of property, however, does not necessarily defeat the right of exemption.²

A Defective Schedule may no doubt be amended or corrected in a proper case,

1. Specification of Property.—It is generally required that the schedule or inventory shall include all of the debtor's property, including money on hand and debts due him. *Biggs v. McKenzie*, 16 Ill. App. 286; *Woodbury v. Tuttle*, 26 Ill. App. 211. As to the effect of omitting property, see *infra*, this note.

Under the *Illinois* statute requiring the debtor to make a schedule of "all of his personal property of every kind and character, including money on hand and debts due and owing to the debtor," and providing that after the appraiser has fixed a fair valuation upon "each article contained in said schedule" the debtor shall then select "from such schedule the articles he may desire to retain," not to exceed a certain value, the schedule should list separately each article of a distinct kind, or of a distinct quality, grade, or description of the same kind, so as to enable the appraisers readily to fix the value of each article. A schedule of property in distinct groups, each containing miscellaneous articles in a lump—as, in a schedule by a saloon keeper, a description of the property as "all glassware and furnishing articles," "all stock in hand, consisting of cigars, liquors, wine, and beer, and all manner of stock," "all empty barrels and kegs," etc.,—is insufficient. *Moffett v. Sheehy*, 52 Ill. App. 376. See also *Friedman v. Sullivan*, 48 Ark. 213.

In *Nebraska* the statute does not expressly require specification of each particular article, but provides that the debtor shall file an inventory under oath "of the whole of the personal property owned by him," etc., after which the officer shall cause the same to be appraised at its cash value, and allow the debtor to select "from such inventory an amount of such property, not exceeding, according to such appraisal," the sum of five hundred dollars. Code Civ. Pro. Neb., §§ 522, 523. Under this statute it was held in *Farquhar v. Hibben*, 38 Neb. 556, that an inventory describing the property as "three barrels of liquor, * * * saloon and fixtures, and cigars, and stock, consisting of bar, liquors, glassware, and mirror," at a certain place, though informal, was not void, and that it was sufficient where it appeared that all the property described was found at the place designated and was appraised.

In *Alabama* an inventory, filed by a debtor with his claim of exemption, specifying "two hundred and twenty-five dollars in the hands of third persons, to whom defendant has loaned it," not stating the name of the borrower, nor the security or evidence of indebtedness taken, was held too general and indefinite. It was also held that an inventory specifying "household and kitchen furniture," but not otherwise describing the various articles of which it consisted, was insufficient. *Tonsmere v. Buckland*, 88 Ala. 312.

When a debt admitted by a garnishee is claimed as exempt by the debtor (Code Ala., 1886, § 2533; Code 1896, § 2059), it is sufficient if the debt is described with such certainty

that its identity is apparent; and the accompanying inventory, or statement of personal property, may be written on the same paper, and verified by the same affidavit; nor is it necessary that the particular debt claimed should be again specified. *Decatur Mercantile Co. v. Deford*, 93 Ala. 347.

In *Roden v. Brown*, 103 Ala. 324, it was held that an inventory filed by a debtor with his claim of exemptions, which specified "the salary due to him from the Louisville & Nashville Railroad Company, one month, \$125; one horse, value \$125; and one watch, worth \$10; and that he has no other property," was a sufficient description of the property sought to be claimed as exempt.

In *Pinkus v. Bamberger*, 99 Ala. 266, it was held that where a debtor claimed as exempt a stock of goods which was in the possession of the sheriff under the levy of an attachment, it was sufficient for him to describe the goods as they were described in the levy and inventory of the sheriff.

Property to Be Included — Time of Ownership.

Under a statute requiring a debtor who desires to claim property as exempt to deliver to the officer a schedule under oath of all his property, but not expressly requiring him to include all property owned at the time when the execution was issued, or at any other time prior to its date, it need include only the property owned by the debtor at the time when it is signed and sworn to. *Taylor v. Beach*, 14 Ill. App. 259.

Specification or Claim of Property as Exempt.

When the statute merely requires the debtor to file or present a schedule of all his property, after which an appraisal is to be made, and property selected up to the statutory limit, the schedule need not specify the articles which the debtor intends to claim as exempt. The debtor has a right to wait until after the appraisal before making any selection. *Kelley v. McFadden*, 80 Ind. 536.

But when the statute requires the debtor to file a schedule of all his property, specifying the particular property which he claims as exempt, a schedule of property which does not claim it or any portion of it as exempt is fatally defective. *Guise v. State*, 41 Ark. 249. See *infra*, this section, *The Selection*.

2. Effect of Omission of Property from Schedule.

—In *Illinois*, by the express terms of the statute, the schedule must include all of the debtor's property, and the protection given by the statute upon a compliance with its terms is withdrawn from all property not scheduled. And it has been held that this is so independently of any question of fraud, inadvertence, or mistake. *Biggs v. McKenzie*, 16 Ill. App. 286; *Blair v. Parker*, 4 Ill. App. 409. The same is true in some of the other states. *Wagner v. Olson*, 3 N. Dak. 69; *Longley v. Daly*, 1 S. Dak. 263; *Paddock v. Balgord*, 2 S. Dak. 100; *Brown v. Edmonds*, 5 S. Dak. 508.

It has been held, however, both in *Illinois* and in other states that the omission of property from the schedule does not, at least in the

at least before it is acted upon,¹ and the officer may be estopped to raise objections.²

(c) **Appraisement — Necessity.** — An appraisement is always necessary, when required by the statute, to entitle the debtor to claim particular property as exempt;³ and generally, if the officer wrongfully sells without an appraisement, the remedy is by action for damages.⁴

Duty of Officer and Remedies of Debtor. — The duty of having the property appraised is generally imposed upon the officer⁵ when the debtor has done all that is required of him;⁶ and he will be liable in damages to the debtor if

absence of fraud or prejudice, deprive the debtor of the right to claim property that is scheduled. *Horton v. Smith*, 46 Ill. App. 241; *Berry v. Hanks*, 28 Ill. App. 51; *Douch v. Rahner*, 61 Ind. 64; *Over v. Shannon*, 91 Ind. 99; *Wagner v. Olson*, 3 N. Dak. 69; *Paddock v. Balgord*, 2 S. Dak. 100. See also *Mikkleson v. Parker*, 3 Wash. Ter. 527.

In some states, but not in all, the debtor does not even forfeit his right to claim property scheduled by fraudulently omitting other property and by perjury in swearing to a false schedule. See *supra*, this title, *Waiver, Forfeiture, and Estoppel—Forfeiture*.

When the execution defendant is absent and a schedule is made out and verified by his wife as is permitted by the *Indiana* statute, and she specifies all the property of her husband, both within and without the state, of which she has any knowledge, the schedule is not invalidated, nor the right of exemption defeated, by the fact that she adds a statement that her husband may own something in some other state of which she has no knowledge. *Eisenhauer v. Dill*, 6 Ind. App. 188.

1. **Amendment of Schedule.** — As the *Illinois* statute made no provision for more than one schedule, and did not make the officer the judge of whether property was omitted from a schedule by mistake, it was held in *Blair v. Parker*, 4 Ill. App. 409, that an officer who had acted on a schedule was not liable for refusal to accept an amended schedule including property which the debtor claimed he had omitted from the first schedule by mistake. It was not decided, however, in this case whether an officer would be justified in allowing an amendment if satisfied as to the mistake.

In *Alabama* when a claim of exemption is interposed to money in the hands of a garnishee it must be accompanied with a statutory inventory of the debtor's property (Code 1886, § 2533; Code 1896, § 2059). And it has been held that if a defective inventory is filed and objected to it is discretionary with the court, after the expiration of the time within which the debtor has a right to file a sufficient inventory, to allow a new or amended inventory to be filed, and its refusal is not revisable. *Buckland v. Tonsmere*, 90 Ala. 503.

Amendment to Cure Mistake of Law. — It has been held that a schedule cannot be amended to cure a mistake of law. *Brown v. Edmonds*, 5 S. Dak. 508. In this case it was held that the debtor's belief that certain property (a watch and chain) omitted by him from his schedule was included in the term "household furniture" was a mistake of law, and was therefore no ground for correcting the schedule.

2. **Estoppel of Officer to Object to Schedule.** — The officer, as has been shown to some extent, may be estopped to raise the objection that a schedule or inventory delivered to him was not actually delivered to him, or was not delivered to him in time, or was defective in form. As a general rule, he is estopped if he has received the schedule or inventory without objection, for "it is no part of the duty of a constable acting under the exemption statute to set a trap to catch a debtor who is honestly and in good faith seeking to avail himself of the benefit of the statute." *Cooper v. Payne*, 36 Ill. App. 155. See also *Taylor v. Beach*, 14 Ill. App. 259; *Miller v. Rolan*, 39 Ill. App. 350; *Schumann v. Pilcher*, 36 Ill. App. 43; *Horton v. Smith*, 46 Ill. App. 241.

3. **Appraisement — Necessity to Render Property Exempt.** — Thus in *Pennsylvania*, where the statute requires that personal property levied upon under execution shall be appraised and set apart to the debtor, it is held that unless this is done no property can be claimed as exempt. The specific property cannot be claimed, because the appraisal and setting apart are necessary to exempt it, and an exemption cannot be claimed out of the proceeds of the execution sale, because the statute allows only the property to be claimed. *Hammer v. Freese*, 19 Pa. St. 255; *Hatch v. Bartle*, 45 Pa. St. 166, 84 Am. Dec. 484; *Line's Appeal*, 2 Grant's Cas. (Pa.) 197.

If an officer wrongfully refuses to have the property appraised, on request by the debtor, and sells the same the purchaser at the sale of the property nevertheless acquires a good title. *Hatch v. Bartle*, 45 Pa. St. 166, 84 Am. Dec. 484. An appraisement is also necessary in other states. *Finlen v. Howard*, 126 Ill. 259; *Menzie v. Kelly*, 8 Ill. App. 259; *Smith v. Dael*, 29 Ill. App. 290.

Successive Executions. — When the statute requires an appraisement, a new appraisement is necessary on each successive execution. *Weller v. Moore*, 50 Ark. 253; *Finley v. Sly*, 44 Ind. 266; *Dodson's Appeal*, 25 Pa. St. 232; *Strouse v. Becker*, 38 Pa. St. 190, 80 Am. Dec. 474, affirmed 44 Pa. St. 206; *Line's Appeal*, 2 Grant's Cas. (Pa.) 197; *Bechtel's Appeal*, 2 Grant's Cas. (Pa.) 375. See *supra*, this section, *Necessity for Claim and Selection*.

4. **Refusal of Officer to Appraise.** — See the *Pennsylvania* cases cited above, and see the notes following.

5. **Duty of Officer.** — *Wyckoff v. Wyllis*, 5 Mich. 48; *Cunningham v. Conway*, 25 Neb. 615. See *infra*, this section, *Duty of Levying Officers*.

6. **Request or Demand of Debtor.** — In some states an appraisement must be demanded by

he wrongfully refuses or fails to cause an appraisalment to be made, or proceeds on an invalid appraisalment.¹ In some states replevin will lie,² or the officer may be compelled by mandamus,³ or, in some cases, restrained by injunction.⁴ In some states he is liable to indictment.⁵

Time and Mode of Appraisalment. — The provisions of the statute as to the time and mode of appraisalment, the qualifications of the appraisers, and as to valuation must always be followed.⁶ But a substantial compliance

the debtor, or he waives his rights. Line's Appeal, 2 Grant's Cas. (Pa.) 197. And see the *Pennsylvania* cases and others cited *supra*, this section, *Necessity for Claim and Selection*.

Time of Demand. — The demand must be seasonably made, as explained in another place, or an appraisalment may be refused. Line's Appeal, 2 Grant's Cas. (Pa.) 197.

A demand for the benefit of the *Pennsylvania* exemption law and for an appraisalment thereunder, in case of an attachment under the Fraudulent Debtor's Act of March 17, 1869 (P. L. 8), may be made before the entry of judgment therein. *Cunningham v. Duncan*, 5 Pa. Dist. Rep. 574, 18 Pa. Co. Ct. Rep. 250. As to the time when demand must be made in such a case, see *supra*, this section, *Time of Asserting Claim*, and the *Pennsylvania* cases there collected.

1. Refusal of Officer to Appraise — Liability for Damages. — Wyckoff *v.* Wyllis, 8 Mich. 48; *Damages*. — *Harrington*, 33 Mo. App. 476; *State v. Wilson*, 31 Neb. 462; *Cunningham v. Conway*, 25 Neb. 615; *Bender v. Bame*, 40 Neb. 521; *Hamilton v. Fleming*, 26 Neb. 240; *Kriesel v. Eddy*, 37 Neb. 63; *People v. McClay*, 2 Neb. 8; *State v. Cunningham*, 6 Neb. 90; *Hatch v. Bartle*, 45 Pa. St. 166, 84 Am. Dec. 484; *Paddock v. Balgord*, 2 S. Dak. 100. See *infra*, this section, *Action for Damages*.

2. Replevin may be maintained against him in *Illinois* and *Nebraska*. *Smith v. Dauel*, 29 Ill. App. 290; *Mann v. Welton*, 21 Neb. 541. See *infra*, this section, *Replevin or Claim and Delivery*.

3. Mandamus will lie to compel an officer to call appraisers, if he wrongfully refuses to do so after the debtor has presented his schedule and otherwise complied with the statute. *Bender v. Bame*, 40 Neb. 521. See *infra*, this section, *Mandamus*.

4. Injunction. — *Cunningham v. Conway*, 25 Neb. 615. See *infra*, this section, *Remedies in Equity — Injunction*.

5. Indictment. — *State v. Carr*, 71 N. Car. 106. See *infra*, this section, *Indictment for Violation of Statute*.

6. Time of Appraisalment. — In *Illinois*, under a statute requiring the debtor to present a schedule of his property and declaring that "thereupon" the officers shall summon appraisers to appraise the property, it is the duty of the officer to summon appraisers without delay after the schedule is presented. He cannot rightfully wait several days, unless there is some good reason for the delay. *Smith v. Dauel*, 29 Ill. App. 290. But the officer is entitled to a reasonable time in which to summon appraisers. *Ehle v. Deitz*, 32 Ill. App. 547.

Delay Excusing Absence of Debtor. — In *Smith v. Dauel*, 29 Ill. App. 290, the officer failed to summon appraisers for three days after a suffi-

cient schedule of his property had been presented by the debtor, and on the third day the debtor went home, taking part of his property with him, without any notice of an intended appraisalment on that day, and an appraisalment was made in his absence. It was held that the departure of the debtor was proper, and that the appraisalment was invalid.

Mode and Sufficiency of Appraisalment — In General. — An appraisalment should be publicly conducted, or it may be set aside. *Huddy v. Sproule*, 4 Phila. (Pa.) 353, 18 Leg. Int. (Pa.) 141.

The plaintiff and his attorney are entitled to be present. *Halle v. Felsing*, 19 Pa. Co. Ct. Rep. 330.

The Appraisers — Interest — Relationship. — Some statutes, as in *Pennsylvania*, expressly require that the appraisers shall be disinterested and competent. And in the absence of express provision, such a requirement would no doubt be implied. Blood relations of the parties are not competent, for they are not disinterested, and if they are appointed their appraisalment will be set aside. *Strasburg First Nat. Bank v. Keen*, 11 Pa. Co. Ct. Rep. 47.

Attorney as Appraiser. — An attorney conducting attachment proceedings cannot be selected as appraiser under an execution in force against the same defendant at the same time. *Bayne v. Patterson*, 40 Mich. 658.

Number of Appraisers. — Where the statute requires the officer to call a certain number of freeholders to appraise property seized on execution or attachment, he must call the number specified. *Johnson v. Bartek*, 54 Neb. 787.

Appraisers "from the Neighborhood." — In *Missouri* the appraisers are required to be summoned "from the neighborhood." In *State v. Jungling*, 116 Mo. 162, the debtor resided in North St. Louis, the appraisers resided from a mile to a mile and a quarter distant from him, and the evidence was that the intermediate country was well settled. Under these circumstances it was objected that the appraisers had not been summoned from the neighborhood, but the court held that *prima facie* the statute had been complied with. "Neighborhood," it was said, "is 'an adjoining or surrounding district.'" *Black's Law Dictionary*. Whether a place is in the vicinity or in the neighborhood of another place depends upon no arbitrary rule of distance or topography. 16 AM. AND ENG. ENCYC. OF LAW 485 note 1. The neighborhood of an individual will, of course, cover a larger space in a sparsely settled country than in a city, but we think this evidence fails to show that these appraisers did not reside in the neighborhood of the plaintiff. The *prima facie* case made by the evidence is that they were of his neighborhood."

with the statute is all that is required.¹

(d) **The Selection** — The necessity for a selection and the time of making it have already been to some extent considered.² In some states it is expressly required by statute.³ Requirements as to the time of selection must be observed.⁴

By Whom Made. — When a selection is necessary, the debtor is entitled to make it for himself, and the officer cannot deprive him of this right by making it for him.⁵ And generally the debtor must make it.⁶ Statutes, however, sometimes require the officer to make it if the debtor refuses or is absent.⁷ Ordinarily the debtor's refusal or inexcusable neglect is a waiver of his right.⁸

Valuation of Property Generally. — The appraisers must value the property at its fair market value, and if the appraisement is manifestly and greatly below such value it may be set aside. *Sleeper v. Nicholson*, 1 Phila. (Pa.) 348, 9 Leg. Int. (Pa.) 54; *Fisher v. Hughes*, 2 Pittsb. Leg. J. (Pa.) 272.

In *Halle v. Felsinger*, 19 Pa. Co. Ct. Rep. 330, where the appraisement was made without notice to the plaintiff in the execution or his attorney, and in their absence, and on the same day the property was sold for four times its appraised value, the appraisement was set aside.

Valuation of Mortgaged Property. — Where mortgaged property is included in the schedule the appraisers must fix its value without regard to the mortgage. *Moffett v. Sheehy* 52 Ill. App. 376.

Necessity to Value Each Article. — When the statute, as in *Illinois*, provides for a schedule of all the debtor's property, and requires the appraiser to fix a "fair valuation upon each article," an appraisement fixing a value, not upon separate articles, but upon groups containing miscellaneous articles, is insufficient. *Moffett v. Sheehy*, 52 Ill. App. 376.

Further as to Valuation, see *supra*, this title, *Property Exempt under the Statutes—Limitations as to Value or Amount of Property*.

Absence of Property. — An appraisement is irregular and invalid if made in the absence of part of the scheduled property. *Smith v. Daue*, 29 Ill. App. 290.

Conclusiveness of Appraisal as to Value. — When the statute requires property levied upon to be appraised, and then permits the debtor to select property at the appraised value to a certain amount as exempt, the appraisal is conclusive as to value, in an action of replevin to recover the property selected, if the debtor is entitled to the property as exempt as belonging to a class specified in the statute. But if the debtor should fail to show that the property, regardless of value, was exempt, then the question of value would be open to proof other than the appraisal, for the law will not permit a debtor to replevy property claimed by him to be exempt, which is not in fact exempt, and obtain an advantage by an under-appraisal value. *Wood v. Bresnahan*, 63 Mich. 614.

Setting Aside Appraisement. — In *Pennsylvania* it has been held that the court has power to set aside for cause an appraisement made under the Act of 1849, though the statute does not expressly confer such power. *Huddy v. Sproule*, 4 Phila. (Pa.) 353, 18 Leg. Int. (Pa.) 141; *Sleeper v. Nicholson*, 1 Phila. (Pa.) 348, 9

Leg. Int. (Pa.) 54; *Halle v. Felsinger*, 19 Pa. Co. Ct. Rep. 330; *Strasburg First Nat. Bank v. Keen*, 11 Pa. Co. Ct. Rep. 47. As to the grounds for setting an appraisement aside, see *infra*, this note.

Waiver of Objections to Appraisement. — The debtor may and does waive objections to the appraisement by accepting it. *Moffett v. Sheehy*, 52 Ill. App. 376.

Service of Appraisement on the Debtor. — Under *How*, Stat. Mich. 1882, §§ 6840, 7687, 7688, requiring the officer to make out an inventory and have the property appraised, and to serve the inventory on the debtor, and then allowing him to select his exemptions, the appraisal need not be served on the debtor. The statutes are sufficiently complied with if the officer serves the inventory and tenders to the debtor the use of the appraisal to enable him to make his selection. *Jones v. Peek*, 101 Mich. 389.

1. Substantial Compliance with Statute Sufficient. — See *supra*, this section, *Mode of Claiming, Selecting, and Setting Apart—In General*.

2. Selection—Necessity. — See *supra*, this section, *Necessity for Claim and Selection; Time of Asserting Claim*.

3. Express Requirement of Selection. — *Finlen v. Howard*, 126 Ill. 259; *Amend v. Smith*, 87 Ill. 198. And see *Finley v. Barker*, 110 Mo. 408; *Davis v. Williamson*, 68 Mo. App. 307.

Actual Selection Necessary. — Thus in *Schwartz v. Birnbaum*, 21 Colo. 21, where some of the property seized on execution was exempt, and some was not, so that a selection by the debtor was required, it was held that it was necessary that there should be an actual selection, and that a mere demand by the debtor of his right to select was not equivalent to a selection.

4. Time of Selection. — If the selection is required to be made before or at the time of the levy, or within a certain time thereafter, it cannot be made at a later time, unless there is sufficient excuse for the delay. *Wright v. Deyoe*, 86 Ill. 490. And see other cases cited *supra*, this section, *Time of Asserting Claim*.

5. Right of Selection Is in the Debtor. — See *supra*, this title, *Property Exempt under the Statutes—Ownership or Possession of Other Property—Right of Selection*.

6. Generally Debtor Must Select. — *Zielke v. Morgan*, 50 Wis. 566. See *supra*, this section, *Necessity for Claim and Selection*.

7. Selection by Officer. — *Jones v. Peek*, 101 Mich. 389; *Murphy v. Mulvena*, 108 Mich. 347.

8. Refusal or Default of Debtor as a Waiver. — See *supra*, this title, *Waiver, Forfeiture, and Estoppel—Waiver*.

Manner of Selection. — In making his selection the debtor must comply with all statutory requirements.¹ In the absence of express requirements no particular formalities are necessary,² but the selection must be made in such a manner as to show the officer that particular property is claimed.³

Pointing Out and Surrendering Other Property. — As was shown in another place, in some states the fact that the debtor owns other property and does not point out or surrender it to the officer does not affect his right to claim and select the property levied upon.⁴ In other states, however, this is required of him.⁵

(e) **Contest of Claim of Exemptions.** — In some states there are statutory provisions under which, after a debtor has claimed exemptions, creditors may come in and contest his right thereto. Most of these provisions will be considered in dealing with homestead exemptions.⁶

In **Alabama** the code contains very elaborate provisions for the contest of claims of exemption in personal property. In that state a debtor is allowed at any time before a levy on his property to make and file in the office of the probate judge of the county of his residence a verified declaration in writing describing the property selected and claimed by him as exempt. If a claim is not filed before a levy, the debtor may file one after a levy with the officer making the same.⁷ In the first case any execution plaintiff may institute a contest of the debtor's right to the exemption.⁸ In the second case, the

1. Valuation. — The property must be selected at its appraised value. *Finlen v. Howard*, 126 Ill. 262; *Moffett v. Sheehy*, 52 Ill. App. 376. Further as to questions of value, see *supra*, this title, *Property Exempt under the Statutes — Limitations as to Value or Amount of Property*.

2. Sufficiency of Selection. — See *Northrup v. Cross*, 2 N. Dak. 433.

3. *Northrup v. Cross*, 2 N. Dak. 433; *Zielke v. Morgan*, 50 Wis. 560.

Where it is necessary for a debtor to select and point out the property which he claims as exempt, a debtor claiming an exemption of a certain amount out of a stock of goods must point out the particular goods which he claims. A demand for two hundred dollars' worth of a stock of goods (the amount which the statute entitles him to claim as exempt) where the stock of goods is worth more than that, is not sufficient to entitle him to his claim. *Eisenberg v. Burchinell*, 10 Colo. App. 457.

In *Schwartz v. Birnbaum*, 21 Colo. 21, the court declared the rule to be: "The mere demand by defendant of his right to select was not equivalent to making the selection. It was not the duty of the constable to set apart the exempt property, unless the claimant pointed out such property, when the seizure embraced other property rightfully taken, and the exempt property was not specifically exempt by the statute, but merely comprised a portion of stock in trade, even though it be less than two hundred dollars in value."

The requirement that a debtor in selecting his exemptions must indicate to the officer the specific property claimed is satisfied by a selection in such a manner that the officer cannot or under the circumstances ought not to misunderstand. *Per Bartholomew, J.*, in *Northrup v. Cross*, 2 N. Dak. 433. And see to the same effect *Keller v. Bricker*, 64 Pa. St. 379; *Clark v. Bond*, 7 Baxt. (Tenn.) 288. See also *Plimpton v. Sprague*, 47 Vt. 467.

In *Northrup v. Cross*, 2 N. Dak. 433, an officer had in his possession an appraisement

upon which certain property was designated as mortgaged and pledged, and the balance was listed without comment. It was held under these circumstances that a selection by the debtor of the "free property," without other specification, was sufficient, as "the term 'free property,' used in connection with the appraisement, could mean nothing else than property that appeared on such appraisement as unencumbered."

In Garnishment Proceedings. — In *Ohio*, where the statute exempts property to a certain amount to be selected by the debtor, it has been held that a motion to discharge money held under a writ of garnishment is a sufficient selection. *Tombow v. Haskins*, 15 Ohio Cir. Ct. Rep. 656, 8 Ohio Cir. Dec. 281.

Specification of Property in Schedule. — In *Arkansas* the debtor, on claiming his exemptions, is required to prepare and file a schedule of all his property, "specifying the particular property which he claims exempt" (Mansf. Dig., § 3006), and it is held that this requires him to specify the particular articles. A selection in a schedule of "household and kitchen furniture valued at \$70" has been held too indefinite. *Friedman v. Sullivan*, 48 Ark. 213.

4. Necessity to Point Out and Surrender Other Property. — *Ross v. Hannah*, 18 Ala. 125; *Baldwin v. Talbot*, 43 Mich. 11; *Wilcox v. Hawley*, 31 N. Y. 648.

5. *Menzie v. Kelly*, 8 Ill. App. 259; *Udell v. Howard*, 28 Ill. App. 124; *McMasters v. Alsop*, 85 Ill. 157; *Smother v. Holly*, 47 Ill. 331; *Bonnell v. Bowman*, 53 Ill. 460. See *supra*, this title, *Property Exempt under the Statutes — Ownership or Possession of Other Property — Right of Selection*.

6. Contest of Claim of Exemption. — See the title **HOMESTEAD**.

7. Alabama Statute — Filing Claim of Exemption by Debtor. — Code Ala., 1896, §§ 2041, 2047. See *supra*, this section, *Mode of Claiming, Selecting, and Setting Apart*.

8. Contest of Right to Exemption — When Claim Is Filed Before a Levy. — When a declaration of

plaintiff in the execution may do so.¹ A contest in the case of a claim of exemption in garnishment proceedings is also provided for.²

Procedure and Determination of Contest. — After setting forth the manner of instituting the contest, the statute goes on to provide in detail for the mode of proceeding to try and determine the same. It provides for the giving of bonds,³ for the possession of the property pending the contest,⁴ for the return of the process and papers into court,⁵ for the filing of an inventory by the defendant,⁶ for the formation of issues and trial of the contest,⁷

exemptions is filed before a levy, the plaintiff in person, or by his agent or attorney, may contest it by filing with the officer holding the process an affidavit that in his belief either (1) the claim is invalid entirely, or (2) is invalid in part, or is excessive, specifying wherein such invalidity or excess consists, and if excessive also specifying the property alleged to be in excess, to be, in all cases, the last named in the claim. Code 1896, § 2046.

When the declaration of exemption is filed in the office of the probate judge, the affidavits of contest must be filed with the sheriff. *Beckert v. Whitlock*, 83 Ala. 123. See *Tonsmere v. Buckland*, 88 Ala. 312.

When a judgment creditor makes an affidavit in due form, contesting a claim of exemption which has been filed of record in the office of the probate judge, it may be the duty of the sheriff to make a levy; but his failure to do so does not affect the lien of the execution, nor disable the plaintiff to maintain the contest, of which the affidavit is the first preliminary step. *Beckert v. Whitlock*, 83 Ala. 123.

Waiver of Irregularities. — Though the affidavit contesting the claim of exemption must properly be filed with the officer whose duty it is to levy the execution, and to indorse on it the substance of the affidavit, yet, if it is filed in the office of the clerk by whom the execution is issued, and is not indorsed thereon, and the defendant, being after wards notified, engages in a contest on the merits, without objection, the irregularities are thereby waived. *Beckert v. Whitlock*, 83 Ala. 123.

1. Contest When Claim Is Filed After Levy. — Code Ala., 1896, § 2047.

2. Contest in Case of Garnishment. — Code 1896, § 2059. See *Todd v. McCravey*, 77 Ala. 468.

3. Bonds in Cases of Contest. — By the express terms of the *Alabama* statute, a bond to secure the payment of costs and damages is required from the plaintiff filing a contest when the declaration of exemption is filed in the office of the probate judge, before a levy, but not where it is filed with the officer after a levy. Code Ala., 1896, §§ 2046, 2047; *Ex p. Reed*, 73 Ala. 548; *Bledsoe v. Gary*, 95 Ala. 70; *Totten v. Sale*, 72 Ala. 488.

4. Delivery of Property to Defendant. — When a contest is instituted the defendant may give a forthcoming bond and obtain possession of the property during the contest. Code 1896, § 2048; *Ex p. Haralson*, 75 Ala. 543.

If the defendant fails to give bond, the plaintiff may obtain possession by giving bond. If he fails to do so, the defendant is entitled to possession without bond. Code Ala., 1896, § 2049; *Ex p. Haralson*, 75 Ala. 543.

5. Return of Process and Papers into Court. — In case of a contest the officer is required,

within fifteen days after it is instituted, to return the process and other papers to the court to which the process is returnable, accompanied with a full statement of the facts. Code Ala., 1896, § 2050.

6. Inventory. — On written demand of the plaintiff at any time before the first day of the term of court to which the process is returned, the defendant is required to file a full and complete inventory, verified by oath, of all his personal property, except certain articles which are specifically exempt, and of all money belonging to him, either in his possession or held by others, and of all debts and choses in action belonging to him, or in which he is beneficially interested, with the value of each. If he does not do so, the plaintiff need not tender an issue on the claim, but the court must render judgment by default against the defendant, unless good excuse is shown. See *Ex p. Reed*, 73 Ala. 548; *Davis v. Hays*, 89 Ala. 563; *Tonsmere v. Buckland*, 88 Ala. 312; *Buckland v. Tonsmere*, 90 Ala. 503; *Decatur Mercantile Co. v. Deford*, 93 Ala. 347; *Trager v. Teibleman*, 95 Ala. 60; *Bledsoe v. Gary*, 95 Ala. 70; *Roden v. Brown*, 103 Ala. 324.

7. Issues in and Trial of Contest. — Section 2052 of the Code of 1896 provides for the formation of issues and trial of the contest as other cases are tried in the particular court.

Time of Making Up and Trying Issue. — Although the statute provides that an issue on the contest shall be made up and tried "at the first term of the court, to which the process is returnable," it is not mandatory in this respect, since the court cannot direct an issue to be made up unless and until both parties appear; and if the defendant does not appear at the first term, he cannot complain that the plaintiff did not tender an issue at that term. *Beckert v. Whitlock*, 83 Ala. 123.

When a garnishee admits an indebtedness, payable on a future contingency, the debtor may at once interpose a claim of exemption, and his claim may be contested by the attaching creditor; but, the answer of the garnishee not being contested, nor further answer required, a trial of the contested claim of exemption is premature, and the judgment rendered on it will not support an appeal. *White v. Hobart*, 90 Ala. 368.

Form of Issue. — The form of the issue on the contest is largely within the discretion of the court, and is not subject to demurrer, nor governed by the rules of formal pleading; and if broad enough to admit any legal evidence as to the validity or invalidity of the claim, in whole or in part, on the grounds specified in the affidavit of contest, it is sufficient. *Beckert v. Whitlock*, 83 Ala. 123.

On a contest of a claim of exemption to personalty, an issue being formed, under the

and for the rendition of judgment.¹

(f) **Setting Apart of Exemption.** — If the statute requires that the property shall be set apart to be exempt, a setting apart is necessary to entitle the debtor to hold specific property.² But if the officer wrongfully refuses to set it apart, he will be liable in damages.³

f. **DUTY OF LEVYING OFFICERS** — (1) *In General.* — The different statutes of exemption impose various duties upon an officer levying a writ of execution, attachment, or garnishment, with a view to protecting the debtor in his right of exemption, and the officer must comply with the statutory requirements in order to put the debtor in default, and in order to escape liability in case he deprives the debtor of his rights.⁴

direction of the court, in which the plaintiffs allege that the property levied upon is subject to their attachment, and is not by law exempted to the defendant, this properly represents the question to be tried, namely, whether the defendant has property, money, or effects not included in his inventory, and if there is error in the refusal of the court to require the defendant to join in other special issues tendered by the plaintiffs, it is error without injury. *Trager v. Feibleman*, 95 Ala. 60.

Burden of Proof. — It is expressly provided that the person in whose favor the levy was made shall be deemed the plaintiff, upon whom shall rest the burden of proof. See *McCrary v. Chase*, 71 Ala. 540; *Kolsky v. Loveman*, 97 Ala. 543; *Ely v. Blacker*, 112 Ala. 311; *Jones v. Motley*, 78 Ala. 370. In the case of garnishment, see *Todd v. McCravy*, 77 Ala. 468.

Relevancy of Evidence in Disproof of Inventory. — When a claim of exemption is interposed to a debt in the hands of a garnishee, and the inventory filed by the debtor on demand is contested by the plaintiff in garnishment (Code 1886, §§ 2530, 2531; Code 1896, §§ 2056, 2057), it is competent for the latter to prove that, about two years and a half before the claim of exemption was filed, the debtor "had a large bank account" with a named banker, no presumption of loss or destruction arising from the lapse of such time. *Davis v. Hays*, 89 Ala. 563.

Exceptions and Appeal. — It is provided that both parties in contest cases shall be entitled to the same right of objection, exception, and appeal as in other cases.

1. **Judgment on Contest.** — If a plaintiff fails to appear in support of his contest, or if on the trial all the property in contest is found exempt, judgment must be rendered against him for costs of the levy and contest, and releasing the property from the levy; but if the defendant fails to appear in support of his claim of exemption, or if on the trial all the property is found liable to process, judgment must be rendered against him for costs, and condemning the property to sale. Code 1896, § 2054.

If the claim is found excessive, the defendant is entitled to so much of the property claimed as is exempt, and to a sufficient sum out of the proceeds of a sale of other property to make up the full amount of one thousand dollars, which he is entitled to claim as exempt. Code 1896, § 2055.

If, on a contest, an inventory filed by the defendant discloses other personal property owned by him and subject to sale under pro-

cess, but not embraced in the claim of exemption, he must deliver it to the officer, and the officer must sell it as in other cases and apply the proceeds to the satisfaction of the execution. Code 1896, § 2056.

Mandamus. — Since mandamus will not lie to dictate the particular judgment which an inferior tribunal should render, it will not lie to compel the Circuit Court to enter judgment, declaring personal property levied on and claimed as exempt subject to the process, on the failure of the defendant to file an inventory as provided by Code Ala., 1876, § 2837 (Code 1896, § 2051). *Ex p. Reed*, 73 Ala. 548.

2. **In Pennsylvania** the statute requires that personal property, to be exempt, shall be appraised and set apart to the debtor, and unless this is done no property can be claimed as exempt. *Hammer v. Freese*, 19 Pa. St. 255; *Hatch v. Bartle*, 45 Pa. St. 166, 84 Am. Dec. 484.

3. See *infra*, this section, *Remedies on Denial or Infringement of Right*.

4. **Duty of Levying Officers.** — *Elliott v. Whitmore*, 5 Mich. 532; *Town v. Elmore*, 38 Mich. 305; *State v. Barada*, 57 Mo. 562; *Hamilton v. Fleming*, 26 Neb. 240.

Entrapment of Debtor. — It is no part of the duty of an officer acting under the exemption laws to set a trap to catch a debtor who is honestly and in good faith seeking to comply with the exemption law for the purpose of securing its benefits. On the contrary, he should call his attention to omissions, and otherwise protect him in his rights. *Langston v. Murphy*, 31 Ill. App. 188; *Cooper v. Payne*, 36 Ill. App. 155; *Miller v. Rolen*, 39 Ill. App. 350. It was said in the case first cited: "It is the duty of a constable, in seeking to enforce an execution, to act fairly and in good faith, and not use the provisions of the exemption law as a trap to catch those debtors who are honestly and in good faith seeking to avail themselves of its benefits."

Thus, it has been held that it is a fraud on the part of a constable to receive and attach his jurat to a schedule without calling the attention of the debtor to the fact that it is unsigned. *Langston v. Murphy*, 31 Ill. App. 188.

Effect of Surrender to Assignee in Bankruptcy or Insolvency. — In an action of trover against an officer for conversion of exempt property, it is no defense that he has surrendered the property under protest to the debtor's assignee in bankruptcy or insolvency, where the assignee had no right to take the property. *Wilkinson v. Wait*, 44 Vt. 508, 8 Am. Rep. 391.

(2) *Right and Duty to Levy.* — The right and duty of an officer to levy upon property that may be claimed as exempt depend upon the terms of the particular statute.

(a) *Property Absolutely Exempt.* — If the property is absolutely exempt he has no right at all to levy. He is chargeable with knowledge of the law, and will be liable for levying on such property even though the debtor asserts no claim of exemption.¹ And by the weight of authority this is true also where the statute exempts property to a certain amount, to be selected by the debtor, and the debtor has no more than he is entitled to hold as exempt.²

(b) *Selection Necessary.* — In the absence, however, of express provision to the contrary, if a selection by the debtor is necessary, as where he has more property than he is entitled to hold, the officer is bound to levy in the absence of a claim of particular property as exempt, and even when a claim is asserted.³ In some states it is otherwise by express provision of the statute.⁴

(3) *Notice to Debtor.* — Some of the statutes expressly require the officer to give notice to the debtor either before or after a levy, so that he may have an opportunity to assert his right of exemption and select the property which he may wish to hold as exempt.⁵ Others have been construed as impliedly

Effect of Payment to Justice. — In an action against an officer for conversion of exempt property, the fact that the defendant, after levying on and selling the property on an execution against the plaintiff, paid the surplus in to the justice who issued the execution, the plaintiff not having received it, is immaterial. *Allen v. Coates*, 29 Minn. 46.

1. Right and Duty to Levy — Property Absolutely Exempt. — *Perry v. Lewis*, 49 Miss. 443.

The fact that an execution directs the officer to levy on all the property of the debtor without expressly excepting such as is exempt does not give him the right to levy on exempt property. *Maxwell v. Reed*, 7 Wis. 582.

In *North Carolina* it has been said that seizure of exempt goods makes the officer a trespasser only where he has knowledge that they are privileged. *State v. Morgan*, 3 Ired. L. (25 N. Car.) 186, 38 Am. Dec. 714. This cannot be true, however, where the statute exempts particular goods absolutely and unconditionally.

Indemnifying Bond in Alabama. — In Alabama the statute authorizes the officer having an execution to demand from the execution plaintiff an indemnifying bond, if there is doubt or dispute as to the liability of the property to levy and sale, and when the indemnity is given the officer is without discretion. He must proceed in the execution of the process. "He cannot refuse to levy, or, having made the levy, to complete it, however cogent may be the evidence furnished him that the property is not from any cause subject to levy and sale." *Alley v. Daniel*, 75 Ala. 403.

2. See *supra*, this section, *Necessity for Claim and Selection.*

3. When Selection Is Necessary. — In *Michigan* the statute requires the officer, when the debtor is entitled to claim a certain amount or value of property as exempt, to levy upon all such property, and then, after an inventory and appraisement, to permit the debtor to select the amount exempt, or select it for him and set it apart. The levy will be invalid, however if the officer afterwards fails to comply with the statute. *Stilson v. Gibbs*, 40 Mich. 42, 46 Mich. 215, 53 Mich. 282.

So in *Nebraska* a levy is made, and afterwards there is an inventory, appraisement, and selection. *State v. Wilson*, 31 Neb. 462.

The same is true in *Nevada*. It is there held that an officer who seizes property exempt from execution is not a trespasser *ab initio*. *Hammersmith v. Avery*, 18 Nev. 225.

In *New Jersey*, also, the officer has a right to levy, and afterwards an inventory and appraisement is made. And he has a reasonable time after the levy to make the inventory and appraisement. *Bonnel v. Dunn*, 29 N. J. L. 435.

The reason of this rule is well expressed in *Twinam v. Swart*, 4 Lans. (N. Y.) 263: "*Prima facie* all property is liable to execution, and it was the duty of the constable, in the first instance, to make the levy. He cannot know intuitively that property is exempt, nor, indeed, that exemption will be claimed if it is. Exemption is a personal privilege, and must be claimed by the party entitled, or it will be deemed in law as waived, and the constable justified in his act of taking and selling."

* * * It would be intolerably oppressive to place the constable in the dilemma of liability to an action if he refuses to levy his execution, and to an action of trespass if he does."

4. Express Statutory Provision. — Thus in *Missouri* the officer has no right to levy on property before an appraisement and setting apart. *Rev. Stat. Mo.* 1889, § 4907.

5. Express Requirement of Notice to Debtor. — *Rev. Stat. Mo.*, 1889, § 4907; *Rev. Stat. Mo.*, 1879, § 2347, *f.*

In this state the officer's failure to give notice to the debtor will render him liable if the debtor is thereby deprived of his rights or will afford ground for setting aside a sale. *Finke v. Craig*, 57 Mo. App. 393; *State v. Barada*, 57 Mo. 562; *State v. Carroll*, 9 Mo. App. 275; *Paddock v. Lance*, 94 Mo. 283; *State v. Romer*, 44 Mo. 99.

There the officer is required to notify the debtor, not only of his right to select property as exempt, but also of the property that is specifically exempted and of his right to claim the same. *Hombs v. Corbin*, 20 Mo. App. 497.

requiring notice.¹ An officer is liable to the debtor if, without sufficient excuse, he fails to give such notice.²

(4) *Inventory, Appraisal, and Setting Apart.* — Sometimes a statute goes farther than merely to require the officer to give notice to the debtor, and requires him, even without any claim by the debtor, to cause an inventory and appraisal, and to set apart to the debtor the amount which he is entitled to hold as exempt.³

(5) *Right to Question Schedule.* — When the statute requires the debtor to file or present a verified schedule of all his property in case of a levy, and then entitles him to select the amount which he is entitled to hold as exempt, and he files or presents a schedule in proper form, the officer cannot question its truth.⁴

(6) *Indemnifying Bonds.* — A bond given to an officer to procure him to levy upon and sell exempt property and to indemnify him against the consequences is illegal and void if the property is such that he has no right to levy.⁵ The statutes, however, sometimes expressly provide for an indemnifying bond and a levy after it is given.⁶

When the statute requires the officer to notify the execution debtor of his intention to levy, or of a levy, or of his rights of exemption, his failure to do so is not excused by the residence of the debtor in another county, where the officer knows his residence, and can reach him by the exercise of reasonable diligence. *Finke v. Craig*, 57 Mo. App. 393.

A statute requiring the officer to notify the debtor does not require notice when it is unnecessary, as when the debtor already has knowledge and is fully aware of his rights. *Brown v. Hoffmeister*, 71 Mo. 411.

The *Missouri* statute above referred to requires the officer to notify the execution debtor of his exemption rights and to protect such rights, not only when he levies an execution on specific property, but also when he summons a person as garnishee to reach debts and wages. *State v. Barada*, 57 Mo. 562; *State v. Carroll*, 9 Mo. App. 275; *State v. Barnett*, 96 Mo. 133.

1. *Implied Requirement of Notice to Debtor.* — *Cook v. Scott*, 6 Ill. 341, *McCluskey v. McNeely*, 8 Ill. 578; *Pyett v. Rhea*, 6 Heisk. (Tenn.) 137. Compare, however, *Seaman v. Luce*, 23 Barb. (N. Y.) 240.

2. See the two notes preceding.

3. *Inventory, Appraisal, and Setting Apart.* — See *supra*, this section, *Schedule or Inventory; Appraisal; Setting Apart of Exemptions.*

In *Michigan* the statute expressly provides that where property which is exempt from execution to a specified amount or value is levied upon, the officer must cause an inventory and appraisal to be made, and allow the debtor to select the amount exempted, or if the debtor is absent the officer must select the amount exempted and set it apart. If he fails to do this the levy and sale are invalid, and the debtor may hold him liable. *Elliott v. Whitmore*, 5 Mich. 532; *Wyckoff v. Wyllis*, 8 Mich. 48; *Town v. Elmore*, 38 Mich. 305; *Stilson v. Gibbs*, 40 Mich. 42, 46 Mich. 215, 53 Mich. 282; *Parker v. Canfield*, (Mich. 1898) 74 N. W. Rep. 296; *Hutchinson v. Whitmore*, 90 Mich. 255, 30 Am. St. Rep. 431; *Ostrander v. Packer*, 35 Mich. 430.

In *Missouri* the officer, besides being required to give notice to the debtor before levy-

ing, is required to summon appraisers and appraise the property and to set apart to the debtor his exemption. Rev. Stat. Mo., 1889, § 4907; Rev. Stat. Mo., 1879, § 2347, *f.*

When the debtor has selected the property which he desires to hold as exempt, and the property selected is not valued on appraisal at more than the amount which he is entitled to hold as exempt, the officer must release it to him. He cannot proceed to sell property so claimed until he has had it appraised. *State v. Kurtzborn*, 2 Mo. App. 335.

The fact that the property claimed as exempt by the execution debtor is not susceptible of division is no excuse for the officer's failure to have it appraised as required by the statute. *State v. Harrington*, 33 Mo. App. 476.

Under the *Missouri* statute, which, after exempting specific property, allows the debtor to "select and hold as exempt from execution any other property real, personal, or mixed, or debts and wages," not exceeding a certain amount in value, and requiring in the next section that the officer, before levying an execution, shall apprise the debtor of the "property" exempt and of his right to hold the same, and shall have the "property" appraised and set apart, etc., it has been held that "debts and wages" are not within the provision for appraisal. *State v. Barada*, 57 Mo. 562.

In *Nebraska* the statute requires the officer to call appraisers and have the property appraised, and if he fails to do so he is liable. He has no discretion in the matter. *People v. McClay*, 2 Neb. 8; *State v. Cunningham*, 6 Neb. 90; *Cunningham v. Conway*, 25 Neb. 615; *Hamilton v. Fleming*, 26 Neb. 240; *State v. Wilson*, 31 Neb. 462; *Neligh First Nat. Bank v. Lancaster*, 54 Neb. 467.

4. *Right to Question Schedule.* — *Douch v. Rahner*, 61 Ind. 64; *State v. Read*, 94 Ind. 103. See *supra*, this section, *Mode of Claiming, Selecting, and Setting Apart.*

5. *Indemnifying Bonds — Illegality.* — *Renfro v. Heard*, 14 Ala. 23, 48 Am. Dec. 82; *Hunter v. Agee*, 5 Humph. (Tenn.) 57. See the titles BONDS, vol. 4, pp. 658, 662; ILLEGAL CONTRACTS; INDEMNITY CONTRACTS.

6. *Bonds Authorized by Statute.* — In *Alabama* the statute expressly allows the execution

(7) *Liability for Failure to Levy or Sell.* — Whether or not an officer whom it is sought to hold liable for failure to levy an execution or failure to sell under it can plead in defense that the execution debtor's property was exempt, depends upon whether he was bound to make a levy or to sell.¹ If he was not, the defense, of course, is good.² If he was bound to make the levy in the absence of a claim of exemption by the debtor, and there was no claim, it is otherwise.³

3. Remedies on Denial or Infringement of Right — *a. REMEDIES AT LAW.* — A debtor's remedy at law when his right of exemption is denied or violated is generally to bring either an action to recover the specific property or an action to recover damages for being deprived of it. As will be shown, however, there are several special remedies which are sometimes resorted to.

(1) *Replevin or Claim and Delivery* — (a) **Action Against Officer.** — **At Common Law** an execution defendant could not maintain replevin against the officer to recover property seized and held by him under the writ, if the writ was valid, as the action would not lie for property in the custody of the law; and this principle was held to prevent a debtor from maintaining replevin against an officer to recover exempt property seized by him under valid legal process.⁴

By Statute, however, in a number of states, this rule of the common law has been so far modified as to allow a debtor whose exempt property has been wrongfully seized by an officer, even under valid legal process against him, to recover possession of it by replevin, or by a proceeding in the nature of replevin known as claim and delivery.⁵

plaintiff to give an indemnifying bond to the officer if there is doubt or dispute as to whether property is exempt, and requires the officer, when the indemnity has been given, to levy and sell the property, however cogent may be the evidence furnished him that it is exempt. See *Alley v. Daniel*, 75 Ala. 403.

1. Liability of Officer for Failure to Levy or Sell under Execution. — See *supra*, this subdivision, *Right and Duty to Levy*. And see the title **SHERIFFS, CONSTABLES, AND MARSHALS**.

2. Thus, if the property is exempted absolutely, without the necessity for any claim or selection by the debtor, the officer, as has been shown, has no right to levy, and he cannot be made liable for failure to do so. *Moss v. Jenkins*, 146 Ind. 589, where it was said that an officer who is sued for a failure to levy an execution issued on a judgment upon contract may defend on the ground that the debtor was a resident householder and his property did not exceed in value the amount allowed by law as exempt from execution, the presumption being that the debtor would have claimed his exemption before sale.

Liberal Construction of Statute. — The statute exempting property from execution, as well as proceedings under it, must be liberally construed, not only in behalf of the defendant, but also of the officer holding the execution, when it is sought to hold him liable for failure to make the money. *State v. Read*, 94 Ind. 103.

3. Property to Be Selected — Failure of Debtor to Assert Claim. — Thus, if the statute exempts a certain amount of property to be selected by the debtor, and the debtor has more than that amount, so that he must claim his exemption and select what he will hold, or be held to waive his rights, the officer must levy, and must sell under the execution in the absence of a claim and selection, and he will be liable

to the execution plaintiff for failure to do so. *Terrell v. State*, 66 Ind. 570.

In *Abbott v. Gillespy*, 75 Ala. 180, it was held that it is no defense in an action against a sheriff for failure to make the money on an execution, that he declined to levy on property in the possession of the execution debtor because he honestly believed it was exempt.

Burden of Proof on Sheriff to Show Property Not Subject to Execution. — In a proceeding against the sheriff for a failure to collect money under an execution, where the sheriff has been indemnified, he assumes, by failing to sell, the burden of showing that the property was not subject to levy and sale under the execution. *Kennedy v. Smith*, 99 Ala. 83.

4. Replevin Against Officer — At Common Law — Arkansas. — *Spring v. Bourland*, 11 Ark. 658, 54 Am. Dec. 243.

Iowa. — *Funk v. Israel*, 5 Iowa 438.

Kentucky. — *Reynolds v. Sallee*, 2 B. Mon. (Ky.) 18; *Saffell v. Wash*, 4 B. Mon. (Ky.) 92.

Maryland. — *Cromwell v. Owings*, 7 Har. & J. (Md.) 55.

Massachusetts. — *Ilsey v. Stubbs*, 5 Mass. 280.

Missouri. — *Buis v. Cooper*, 63 Mo. App. 196. *New Hampshire.* — *Kellogg v. Churchill*, 2 N. H. 412, 9 Am. Dec. 105.

5. Replevin or Claim and Delivery under Statutes — Arkansas. — *Settles v. Bond*, 49 Ark. 114.

California. — See *Lazard v. Wheeler*, 22 Cal. 139; *Richards v. Kirkpatrick*, 53 Cal. 433.

Connecticut. — *Hilton v. Osgood*, 49 Conn. 110. And see *Williams v. Miller*, 16 Conn. 144.

District of Columbia. — *Wallingsford v. Bennett*, 1 Mackey (D. C.) 303.

Florida. — *Allen v. Ingram*, 39 Fla. 239.

Illinois. — *Samuel v. Agnew*, 80 Ill. 556; *Chapin v. Hoel*, 11 Ill. App. 399; *Smith v.*

That a Special Remedy Is Given by Statute to a debtor claiming exempt property

Dauel, 29 Ill. App. 290; Langston v. Murphy, 31 Ill. App. 188.

Indiana. — Astley v. Capron, 89 Ind. 167; Thompson v. Ross, 87 Ind. 156; Douch v. Rahner, 61 Ind. 64; Graham v. Crockett, 18 Ind. 119.

Iowa. — Funk v. Israel, 5 Iowa 438; Bevan v. Hayden, 13 Iowa 122; Wilson v. Stripe, 4 Greene (Iowa) 551, 61 Am. Dec. 138; Cooley v. Davis, 34 Iowa 128.

Kansas. — Westernberger v. Wheaton, 8 Kan. 169; Watson v. Jackson, 24 Kan. 442; Seip v. Tilghman, 23 Kan. 289; Mallory v. Berry, 16 Kan. 293.

Massachusetts. — See Carruth v. Grassie, 11 Gray (Mass.) 211, 71 Am. Dec. 707.

Michigan. — Elliott v. Whitmore, 5 Mich. 532; Maxon v. Perrott, 17 Mich. 332, 97 Am. Dec. 191; Kenyon v. Baker, 16 Mich. 373, 97 Am. Dec. 158; Alvord v. Lent, 23 Mich. 369; McHugh v. Curtis, 48 Mich. 262; Wood v. Bresnahan, 63 Mich. 614; Gass v. Van Wagner, 63 Mich. 610; Murphy v. Mulvena, 108 Mich. 347.

Minnesota. — Carlson v. Small, 32 Minn. 492.

Mississippi. — Moseley v. Anderson, 40 Miss. 49; Ross v. Hawthorne, 55 Miss. 551.

Nebraska. — Frazier v. Syas, 10 Neb. 115, 35 Am. Rep. 466.

New York. — Twinam v. Swart, 4 Lans. (N. Y.) 263; Mallory v. Norton, 21 Barb. (N. Y.) 424.

North Dakota. — Wagner v. Olson, 3 N. Dak. 69; Linander v. Longstaff, 7 S. Dak. 157.

Tennessee. — Wilson v. McQueen, 1 Head (Tenn.) 17; Harris v. Austell, 2 Baxt. (Tenn.) 148.

Particular Statutes. — Where a statute allows replevin to be maintained "to recover any goods or chattels in which the plaintiff has a general or special property with a right to their immediate possession, and which are wrongfully detained from him in any manner," the action will lie for exempt chattels wrongfully held on execution against the plaintiff. Hilton v. Osgood, 49 Conn. 110. See also Wilson v. McQueen, 1 Head (Tenn.) 17.

In the *District of Columbia* a statute defining the substance of the affidavit in replevin, and declaring and defining the functions of the writ, provided in effect that the writ should not issue to recover the possession of property subject to seizure on execution, or property in the custody of a writ of replevin. It was held in Wallingsford v. Bennett, 1 Mackey (D. C.) 303, that the statute should be construed as allowing the writ in all other cases relating to pre-existing process, and that, as property absolutely exempted by statute was not "subject to seizure on execution," the writ of replevin would lie against an officer to recover it when seized by him under an execution authorizing him to levy upon property "not exempt from execution."

In *Missouri*, under the statute relating to replevin, the plaintiff is required to make affidavit that the property which he seeks to recover has not been seized under an execution against him, and it is held, therefore, that a debtor whose exempt property has been taken on execution against him cannot maintain re-

plevin therefor against the officer. Buis v. Cooper, 63 Mo. App. 196.

Failure of Officer to Act on Claim. — It has been held in *South Dakota* that when the defendant in execution or attachment has made a valid claim of exemption, and has scheduled his property and named an appraiser as required by statute, he cannot be deprived of his right of exemption by failure of the officer to act on the claim, and such failure is no defense in an action of replevin or claim and delivery to recover the property. Linander v. Longstaff, 7 S. Dak. 157.

But in *Pennsylvania*, where, by the Act of 1849, property to the value of three hundred dollars, to be selected by the debtor after an appraisement, is exempted from levy and sale on execution and distress for rent, it has been held that a claim by a debtor for the benefit of the act, and an appraisement under it, without any delivery by the officer, do not discharge a levy of an execution so as to entitle the defendant therein to maintain replevin against the officer, and that for refusal of the officer to allow the defendant his exemption the remedy is by action against the officer for damages. Bonsall v. Comly, 44 Pa. St. 442.

In What Court. — When an action of replevin will lie, and there is nothing in the statute to establish a contrary rule, it need not be brought in the court from which the execution issued, but may be brought in any court having jurisdiction. Ross v. Hawthorne, 55 Miss. 551.

Res Adjudicata. — In *Kansas* it has been held that the decision of a motion made before a justice of the peace to discharge from seizure property taken on attachment, on the ground that it was exempt, was not conclusive, as the statute did not commit the question of exemption to the decision of the court, and that the question, therefore, might be raised thereafter in an action of replevin brought by the judgment debtor. Watson v. Jackson, 24 Kan. 442.

In *Iowa*, where property that is exempt from execution is taken on attachment, the defendant may move to dissolve the attachment or to have the property released, but he is not required to do so, and if he fails to avail himself of this remedy a judgment with an order to sell the property under the attachment is not a bar to an action of replevin to recover the property from the officer on the ground that it is exempt. Wilson v. Stripe, 4 Greene (Iowa) 551, 61 Am. Dec. 138.

In Wallingsford v. Bennett, 1 Mackey (D. C.) 303, replevin was brought to recover exempt property seized by an officer on an execution issued upon a judgment *in personam* rendered in a landlord's proceeding by attachment before a justice of the peace. The justice's return to a writ of certiorari showed that the execution in terms authorized a levy on such goods and chattels only as were not exempt, and there was nothing to show that the question whether the property seized was exempt was adjudicated by him. It was held under these circumstances that the question was not *res adjudicata*, and might be raised in the action of replevin.

does not prevent him from bringing replevin, unless the statute makes the special remedy exclusive.¹

Claim or Demand, Selection, Inventory, and Appraisalment. — In any case, to entitle a debtor to maintain replevin to recover exempt property the right of exemption must be complete, so as to give him the right to immediate possession and make the officer's possession wrongful. Therefore, when a claim or demand, or a selection, or an inventory and appraisalment are required under the particular statute, in accordance with the rules heretofore stated,² replevin cannot be maintained until they have been made.³

(b) **Action Against Purchaser at Execution Sale.** — The common-law rule above stated does not prevent the owner of exempt property from maintaining replevin against a purchaser at an execution sale, for the property is not then in the custody of the law.⁴

(c) **Action Against Execution Creditor.** — As a rule the action will not lie against the execution creditor who is not in possession of the property, for a person can be sued in replevin only when he has actual or constructive possession and control of the property.⁵

(2) **Action for Damages** — (a) **Action Against Officer.** — When exempt property is wrongfully seized or seized and sold on execution, the debtor need

1. **Special Remedy Not Exclusive.** — See *Ross v. Hawthorne*, 55 Miss. 551.

And in *Florida* it has been held that the remedy by replevin given by statute (McClell. Dig., p. 860, § 3), to recover exempt property was not taken away by the statute (Act of 1881, c. 3246) giving to the Circuit Courts equity jurisdiction to enjoin the sale of property exempt by law, and to decree the setting aside, or to restrain the setting aside, of exempt property from forced sale. *Allen v. Ingram*, 39 Fla. 239.

2. **Necessity for Claim, Demand, Selection, Inventory, and Appraisalment.** — See *supra*, this section, *Claiming, Selecting, and Setting Apart of Exemption*.

3. *Gass v. Van Wagner*, 63 Mich. 610; *Tullis v. Orthwein*, 5 Minn. 377; *Mann v. Welton*, 21 Neb. 541.

Property Absolutely Exempt. — But when the property seized by an officer is absolutely exempt, and the debtor has no other property of the kind, so that no selection or separation is necessary, no notice to the officer at the time of the levy that it is exempt, and no demand for its return, are necessary in order to entitle the debtor to maintain replevin. *Seip v. Tilghman*, 23 Kan. 289. See *supra*, this section, *Claiming, Selecting, and Setting Apart of Exemption*.

4. **Replevin Lies Against Purchaser at Execution Sale.** — *Cromwell v. Owings*, 7 Har. & J. (Md.) 59.

And such an action will lie under the statutes relating to replevin if the debtor is entitled to possession of the property notwithstanding the sale. *Watson v. Jackson*, 24 Kan. 442. And see *Williams v. Miller*, 16 Conn. 144.

Where an Execution Creditor causes an execution to be levied upon exempt personal property of the debtor and it is advertised and sold and bought in by the creditor, but before the sale he is notified by the owner not to buy it, and that he claims it as exempt property, the debtor may sue to recover the property. *Gardner v. King*, 37 Kan. 671.

The purchaser at an execution sale of prop

erty exempt from execution is not liable in an action for its recovery if a claim of exemption was necessary to prevent the sale and the debtor has waived his rights by failure to assert a claim. *Twinam v. Swart*, 4 Lans. (N. Y.) 263. See *supra*, this section, *Claiming, Selecting, and Setting Apart of Exemption*.

In Pennsylvania it is held that the debtor's right to hold property as exempt under the Act of 1849 extends to such property only as is appraised and set apart to him in accordance with the statute. If the officer disregards his demand for an appraisalment and claim of exemption and sells the property, replevin will not lie against the purchaser, but the remedy is by an action for damages against the officer, or against both the officer and the execution plaintiff, if the latter directed or participated in the wrong. *Hatch v. Bartle*, 45 Pa. St. 166. 84 Am. Dec. 485; *Bonsall v. Comly*, 44 Pa. St. 442.

In Georgia personalty sold by the sheriff subject to the exemption right, pending an application to set apart the property, may be recovered of the purchaser, though the pending application failed, if a subsequent application succeeded. But, if the sale was made subject, not to the right itself, but only to the result of the pending application, there can be no recovery. The question is for the jury, and to be determined by the value of the property, the price paid, the terms of notice given, and all the facts and circumstances of the transaction. *Prima facie*, a reservation would be of the right, and not merely of the pending remedy. *Robson v. Rawlings*, 79 Ga. 354.

5. **Replevin Against Execution Creditor.** — The action, therefore, will not lie against an execution creditor where the property is in the actual possession of the officer under the execution. The actual possession of the officer in such a case is not the constructive possession of the creditor, though the property may have been seized by direction of the creditor. *Mitchell v. Roberts*, 50 N. H. 486.

Such an action seems to have been sustained in *Kansas*. See *Mullaney v. Humes*, 48 Kan. 368.

not necessarily sue in equity to enjoin the officer, nor need he sue to recover the specific property. He may bring an action against the officer to recover damages.¹

Effect of Special Remedy. — The fact that a statute has given a special remedy to debtors to enable them to retain or recover exempt property levied upon under execution, does not bar an action to recover damages for wrongfully seizing and selling such property, unless the special remedy is made exclusive.²

Claim or Demand, Selection, Inventory, and Appraisement. — Of course an action for damages for seizing and selling property on execution cannot be maintained on the ground that the property was exempt, unless the debtor has taken the steps required by the statute to perfect his right, as by making a proper claim or selection, filing an inventory, etc., when this is necessary, as heretofore explained.³

Waiver or Forfeiture of Right. — Nor can such an action be maintained by a debtor who has waived or forfeited his right to an exemption under the rules stated in a previous section.⁴

(b) **Action Against Creditor** — *aa. IN GENERAL.* — If a creditor wrongfully directs an officer to levy upon and sell exempt property under execution or attachment, or otherwise participates therein, he is liable for the trespass or conversion to the same extent as the officer, and the debtor may maintain an action for damages either against him alone or against him and the officer jointly.⁵

1. Action to Recover Damages — Against Officer. — *Eisenhauer v. Dill*, 6 Ind. App. 188; *Whittington v. Pence*, (Ky. 1897) 38 S. W. Rep. 843; *Wyckhoff v. Wyllis*, 8 Mich. 48; *Castile v. Ford*, 53 Neb. 507; *Livor v. Orser*, 5 Duer (N. Y.) 501; *Hoyt v. Van Alstyne*, 15 Barb. (N. Y.) 568; *Fuller v. Sparks*, 39 Tex. 136. And see the cases specifically cited in the notes following.

Liability of Sheriff for Acts of Deputy. — It is a general principle that a sheriff is liable for acts done by his deputy under color of his office, and this principle renders him liable for the trespass of his deputy in seizing and selling exempt property on attachment or execution. *State v. Moore*, 19 Mo. 369, 61 Am. Dec. 563. And see, to the same effect, *Com. v. Stockton*, 5 T. B. Mon. (Ky.) 192. See the title SHERIFFS, MARSHALS, AND CONSTABLES.

Return of Property No Defense. — The ultimate return of exempt property wrongfully seized under an execution may mitigate the damages in an action against the officer and the execution creditor, but it is no bar to the action. *Castile v. Ford*, 53 Neb. 507.

2. Special Remedy Not Exclusive. — *Ross v. Hawthorne*, 55 Miss. 551; *Moseley v. Anderson*, 40 Miss. 50.

3. Claim, Demand, Selection, Inventory, etc. — See *supra*, this section, *Necessity for Claim and Selection*.

4. Waiver and Forfeiture of Exemptions. — *Hewes v. Parkman*, 20 Pick. (Mass.) 90. See *supra*, this title, *Waiver, Forfeiture, and Estoppel*.

Waiver After Levy. — Assent on the part of the debtor after an attachment of exempt property renders the attachment valid *ab initio*, and exempts the officer from liability therefor. *Hewes v. Parkman*, 20 Pick. (Mass.) 90.

5. Action Against Creditor for Damages — Alabama. — *Mitchell v. Corbin*, 91 Ala. 599.

Arkansas. — *Atkinson v. Gatcher*, 23 Ark. 101.

California. — *Haswell v. Parsons*, 15 Cal. 266, 76 Am. Dec. 480.

Indiana. — *Pate v. Swann*, 7 Blackf. (Ind.) 500. And see *Huseman v. Sims*, 104 Ind. 317; *Douch v. Rahner*, 61 Ind. 64.

Kansas. — *Mullaney v. Humes*, 48 Kan. 368. *Kentucky.* — *Collett v. Jones*, 7 B. Mon. (Ky.) 586.

Maine. — *Spencer v. Brighton*, 49 Me. 326. *Massachusetts.* — *Walcot v. Pomeroy*, 2 Pick. (Mass.) 121.

Minnesota. — *Murphy v. Sherman*, 25 Minn. 196.

Mississippi. — *Matthews v. Redwine*, 25 Miss. 99.

Nebraska. — *Albrecht v. Treitschke*, 17 Neb. 205; *Union Pac. R. Co. v. Smersh*, 22 Neb. 751, 3 Am. St. Rep. 290; *O'Connor v. Walter*, 37 Neb. 267, 40 Am. St. Rep. 486; *Murray v. Mace*, 41 Neb. 60; *Castile v. Ford*, 53 Neb. 507.

Nevada. — *Elder v. Frevert*, 18 Nev. 446.

New Jersey. — *Bonnel v. Dunn*, 29 N. J. L. 435.

New York. — *Pozzoni v. Henderson*, 2 E. D. Smith (N. Y.) 146.

Pennsylvania. — *Wilson v. McElroy*, 32 Pa. St. 82. And see *Gilleland v. Rhoads*, 34 Pa. St. 187.

Texas. — *Alsup v. Jordan*, 69 Tex. 300, 5 Am. St. Rep. 531.

Vermont. — *Hart v. Hyde*, 5 Vt. 328.

Levy Not Directed. — In *Parkerson v. Wightman*, 4 Strobb. L. (S. Car.) 363, a landlord was held liable for the act of his bailiff in distraining for rent in arrear the exempted tools of his tenant, on the ground, it seems, that a principal, though not generally liable for the wilful trespass of his agent, is liable for all acts done in the course of his employment. This decision, however, is very doubtful, and would not be followed by other courts to the extent of holding an execution creditor liable for a sheriff's act in levying on exempt property where he did not direct or authorize such a levy. See the dissenting opinion of Withers, J., in *Parkerson v. Wightman*, 4 Strobb. L. (S. Car.) 363, *supra*, concurred in by O'Neill, J.

Garnishment of Wages. — A creditor is also liable if he wrongfully obtains by garnishment exempt wages due his debtor and applies them to the satisfaction of his judgment.¹

Other Choses in Action. — The same rule applies to other exempt choses in action.²

bb. SENDING CLAIM OUT OF STATE TO EVADE THE STATUTE. — In some states it is held that when a creditor and his debtor both reside in the state, the creditor will be liable to an action for damages if he assigns the claim to a nonresident for the purpose of evading the exemption laws, and thereby collects the claim out of property or money which the debtor might have claimed as exempt if the action or proceeding had been brought in the state; but on this point there is some conflict of opinion.³

Most of the cases cited above expressly recognize the principle that participation by the creditor to some extent, as by direction of the levy, is necessary.

Signing Indemnifying Bond. — If a creditor signs an indemnifying bond directing an officer to levy on specific property, and the levy is wrongful, he, as well as the officer, is a trespasser and liable in damages; but he cannot be held liable merely because he signed an indemnifying bond if the bond did not direct or authorize a levy on the exempt property. See *Pozzoni v. Henderson*, 2 E. D. Smith (N. Y.) 146.

Ratification by Creditor — Receipt of Benefits. — It has been held that when a debtor, before a sale of property that has been levied on, presents a schedule of his property to the officer in accordance with the exemption law, and demands that the amount exempted from sale be set off to him, and the officer disregards his claim and sells the property, the debtor is not necessarily limited to an action against the officer, but may also sue the creditor for the amount of his exemption if, with full knowledge of the debtor's rights, he receives the benefit of the officer's wrong. *Eisenhauer v. Dill*, 6 Ind. App. 188.

Purchase by Creditor at Execution Sale. — If a plaintiff in an attachment purchases exempt property levied upon at a sale on the execution in the action, knowing that it is exempt and afterwards sells it, his act is a ratification of the original taking by the officer, and renders him liable with the officer. *Murphy v. Sherman*, 25 Minn. 196.

1. Creditor Liable for Garnishing Exempt Wages. — *Albrecht v. Treitachke*, 17 Neb. 205; *Union Pac. R. Co. v. Smersh*, 22 Neb. 751, 3 Am. St. Rep. 290; *Schaller v. Kurtz*, 25 Neb. 655; *O'Connor v. Walter*, 37 Neb. 267, 40 Am. St. Rep. 486.

2. Other Exempt Choses in Action. — *Schaller v. Kurtz*, 25 Neb. 655.

3. Assignment to Nonresident to Defeat Right of Exemption. — *Kansas*. — *Stark v. Bare*, 39 Kan. 100, 7 Am. St. Rep. 537.

Nebraska. — There is a decision in Nebraska to the same effect. *O'Connor v. Walter*, 37 Neb. 267, 40 Am. St. Rep. 486. See also *Karnes v. Dovey*, 53 Neb. 725. Such an action cannot be defeated on the ground that the right of exemption is *res adjudicata*, where the plaintiff was not a party to the proceedings in the other state. *O'Connor v. Walter*, 37 Neb. 267, 40 Am. St. Rep. 486.

Kentucky. — There is also a decision in Kentucky that an action will lie against a creditor for going out of the state and bringing proceedings there so as to avoid the effect of the exemption laws. *Stewart v. Thomson*, 97 Ky. 575.

In *Georgia* the Supreme Court has taken a contrary view, and has held that the fact that a creditor had transferred to his attorney a just debt and caused attachment and garnishment to issue and be prosecuted in an adjacent state, thus coercing payment out of the debtor's exempt wages, did not give to the debtor a cause of action against the creditor, though both parties were citizens of Georgia, and though the motive for proceeding elsewhere was to evade the exemption laws of Georgia. *Harwell v. Sharp*, 85 Ga. 124, 21 Am. St. Rep. 149.

In *Indiana* there are conflicting decisions on the question whether a debtor may recover damages from his creditor for assigning his claim to a nonresident for the purpose of collecting it out of earnings which would be exempt if proceedings were instituted in Indiana, and thereby reaching such earnings and defeating the debtor's right of exemption.

In *Uppinghouse v. Mundel*, 103 Ind. 238, it was held squarely by the Supreme Court of Indiana, on demurrer to a complaint, that such an action could not be maintained in the absence of a statute, on the ground that a creditor has a right to assign his claim, and that the debtor's loss of his right of exemption caused thereby was *damnum absque injuria*. It was further held that it made no difference that a statute made it a misdemeanor for a creditor to assign or transfer a claim for debt against a citizen of the state for the purpose of having it collected out of exempt wages or earnings by proceedings in another state, as the statute was enacted to promote the public welfare, and not to redress merely private grievances."

In the later case of *Wilson v. Joseph* 107 Ind. 490, it was held by the same court that an injunction would lie to prevent a resident of Indiana from prosecuting an attachment proceeding against another resident in the courts of another state in violation of such statute, and it was expressly said that the decision was not in conflict with the case of *Uppinghouse v. Mundel*, 103 Ind. 238. See also *infra*, this section, *Remedies in Equity — Injunction*.

In *Kestler v. Kern*, 2 Ind. App. 488, the Ap-

(c) **Action Against Surety on Indemnifying Bond.** — No doubt one who signs as surety an indemnifying bond which directs a wrongful levy on exempt property will be liable in damages for the levy, but there is no such liability if the bond does not direct or authorize the levy.¹

(d) **Action Against Purchaser at Execution Sale.** — When property sold on execution is exempt, so that the purchaser acquires no title or right to possession, he is liable to an action by the debtor for damages if he takes and carries away the property.²

(e) **Form of Action at Law for Damages** — *aa.* **TRESPASS** — **Action Against Officer** — **Property Absolutely Exempt.** — It is well settled that an officer who seizes under execution or attachment property which is absolutely exempt, and upon which he therefore has no right at all to levy, is a trespasser, and is liable to the debtor in an action of trespass for damages. In such a case the writ of execution or attachment is no justification.³

Property to Be Selected — **Trespass Ab Initio.** — And it is equally well settled that when property is subject to levy, but the debtor has a right afterwards to claim and select a part or all of it as exempt, and to have the same set apart to him, the officer is liable as a trespasser *ab initio* if he denies him this right and proceeds to sell the property notwithstanding a valid claim.⁴

pellate Court of Indiana held, in direct conflict with the decision of the Supreme Court in *Uppinghouse v. Mundel*, 103 Ind. 238, that a debtor not only could enjoin his creditor from violating the statute, but could maintain an action against him for damages.

In *Pennsylvania* a right of action in such a case is expressly given by statute. Act May 23, 1887, P. L. 164. See *Steel v. McKerrihan*, 172 Pa. St. 280.

Nonresident Not Liable. — There is no liability on the part of a nonresident creditor for proceeding either in his own state or in some other state, though he may have done so for the purpose of avoiding the exemption laws of the state of the debtor's residence. *Atchison, etc., R. Co. v. Hamilton*, 6 Kan. App. 447.

Proof of Fact of Exemption. — A judgment for damages because of an assignment of a cause of action to a resident of another state for the purpose of evading the exemption laws cannot be sustained unless there was proof that the right of exemption which was controverted existed. *Stull v. Miller*, (Neb. 1898) 75 N. W. Rep. 239.

1. Liability of Surety on Indemnifying Bond. — *Pozzoni v. Henderson*, 2 E. D. Smith (N. Y.) 146. See *Mitchell v. Corbin*, 91 Ala. 599.

2. Action Lies Against Purchaser at Execution Sale. — *Stewart v. Welton*, 32 Mich. 56. *Hart v. Hyde*, 5 Vt. 328.

3. Property Absolutely Exempt — *Arkansas*. — *Atkinson v. Gatcher*, 23 Ark. 101.

Colorado. — *Wymond v. Amsbury*, 2 Colo. 213.

Connecticut. — *Patten v. Smith*, 4 Conn. 450, 10 Am. Dec. 166, *Williams v. Miller*, 16 Conn. 144.

Illinois. — *Pace v. Vaughn*, 6 Ill. 30; *Cornelia v. Ellis*, 11 Ill. 584; *Amend v. Murphy*, 69 Ill. 337.

Indiana. — *Pate v. Swann*, 7 Blackf. (Ind.) 500.

Kentucky. — *Faulkner v. Bradley*, 2 Dana (Ky.) 141.

Maine. — *Foss v. Stewart*, 14 Me. 312; *Blake v. Baker*, 41 Me. 78.

Massachusetts. — *Gibson v. Jenney*, 15 Mass. 205, *Howard v. Williams*, 2 Pick. (Mass.) 80; *Bean v. Hubbard*, 4 Cush. (Mass.) 85; *Davlin v. Stone*, 4 Cush. (Mass.) 359; *Woods v. Keyes*, 14 Allen (Mass.) 236 92 Am. Dec. 767. *Minnesota*. — *Lynd v. Pickett*, 7 Minn. 184, 82 Am. Dec. 79.

Mississippi. — *Moseley v. Anderson*, 40 Miss. 49; *Perry v. Lewis*, 40 Miss. 443.

Missouri. — *State v. Moore*, 19 Mo. 369 61 Am. Dec. 563.

New Hampshire. — *Hill v. Loomis*, 6 N. H. 263.

New York. — *Hall v. Penney*, 11 Wend. (N. Y.) 44, 25 Am. Dec. 601, *Hoyt v. Van Alstyne*, 15 Barb. (N. Y.) 568.

Pennsylvania. — *Freeman v. Smith*, 30 Pa. St. 264.

Tennessee. — *Bachman v. Crawford*, 3 Humph. (Tenn.) 213, 39 Am. Dec. 163.

Vermont. — *Dow v. Smith*, 7 Vt. 465, 29 Am. Dec. 202; *Hart v. Hyde*, 5 Vt. 328.

And see *Crocker v. Spencer*, 2 D. Chip (Vt.) 68, 15 Am. Dec. 652, *Leavitt v. Metcalf*, 2 Vt. 342, 19 Am. Dec. 718; *Kilburn v. Demming*, 2 Vt. 404, 21 Am. Dec. 543; *Spooner v. Fletcher*, 3 Vt. 133, 21 Am. Dec. 579; *Fry v. Canfield*, 4 Vt. 9; *Haskill v. Andros*, 4 Vt. 609, 24 Am. Dec. 645.

4. Property Exempt When Selected — **Trespass Ab Initio** — *Indiana*. — *Stephens v. Lawson*, 7 Blackf. (Ind.) 275; *Pate v. Swann*, 7 Blackf. (Ind.) 500.

Kentucky. — *McGee v. Anderson*, 1 B. Mon. (Ky.) 187, 36 Am. Dec. 570.

Massachusetts. — *Bean v. Hubbard*, 4 Cush. (Mass.) 85.

Pennsylvania. — *Wilson v. Ellis*, 28 Pa. St. 238; *Freeman v. Smith*, 30 Pa. St. 264; *Van Dresor v. King*, 34 Pa. St. 201, 75 Am. Dec. 643.

Compare Bonnel v. Dunn, 29 N. J. L. 435, reversing 28 N. J. L. 153, where it seems to have been held, contrary to the weight of authority, that where an officer has a right to levy on property and does so he does not become a trespasser by afterwards failing to have

Action Against Creditor. — Trespass is also a proper form of action to recover damages from a creditor who directs or otherwise participates in a wrongful seizure and sale of exempt property.¹

Action Against Purchaser at Execution Sale. — And the action may be maintained against the purchaser at an execution sale for taking and carrying away the property, if it was exempt so that no title passed.²

bb. TRESPASS ON THE CASE — **Distinguished from Trespass.** — At common law trespass is the proper form of action for an injury to property resulting immediately from force wrongfully applied, and ordinarily trespass on the case will not lie, the latter form of action being proper only where there has been no force, or where, though there has been force, the injury is merely consequential, and not the immediate result of the force.³

As a Remedy for Seizure or Sale of Exempt Property. — It would seem to follow that, at common law, case will not lie against an officer for wrongfully seizing and selling property which was absolutely exempt, and upon which there was no right at all to levy,⁴ but there are cases allowing waiver of the trespass and an action on the case.⁵ Under statutes authorizing a levy, and giving the debtor a right afterwards to claim and select property as exempt, case will lie against an officer for the consequential injury, if he refuses to regard a valid claim and selection and sells the property.⁶

By Statute, in some states, the distinction between trespass and case has been abolished so as to make them concurrent remedies.⁷

Action Against Creditor. — An action on the case will lie against a creditor for directing a levy upon exempt property.⁸

cc. TROVER. — Though the action of trespass has been the action usually resorted to for the purpose of recovering damages for the seizure and sale of exempt property, there seems to be no doubt that the action of trover may be maintained on the theory that the seizure and sale amount to a conversion.⁹

the property appraised in accordance with the directions of the statute.

1. Trespass Lies Against Creditor — *Alabama.* — *Mitchell v. Corbin*, 91 Ala. 599.

Arkansas. — *Atkinson v. Gatcher*, 23 Ark. 101.

Indiana. — *Pate v. Swann*, 7 Blackf. (Ind.) 500.

Kentucky. — *Collett v. Jones*, 7 B. Mon. (Ky.) 586.

Massachusetts. — *Walcot v. Pomeroy*, 2 Pick. (Mass.) 121.

Nevada. — *Elder v. Frevert*, 18 Nev. 446.

New York. — *Pozzoni v. Henderson*, 2 E. D. Smith (N. Y.) 146.

Pennsylvania. — *Wilson v. McElroy*, 32 Pa. St. 82.

Vermont. — *Hart v. Hyde*, 5 Vt. 328.

2. Trespass Lies Against Purchaser. — *Stewart v. Welton*, 32 Mich. 56; *Hart v. Hyde*, 5 Vt. 328.

3. Trespass on the Case. — See the title TRESPASS.

4. When Remedy Lies Against an Officer. — See *Dow v. Smith*, 7 Vt. 465, 29 Am. Dec. 202.

5. See the titles SHERIFFS, MARSHALS, AND CONSTABLES; TRESPASS. And see ENCYC. OF PL. AND PR., title TRESPASS ON THE CASE.

In *Spencer v. Brighton*, 49 Me. 326, an action on the case was brought against an officer to recover damages for levying upon and selling exempt lands, but this case cannot be regarded as authority for saying that case will lie for an actual seizure of personal property.

6. Where Seizure Was Lawful. — *Van Dresor*

v. King, 34 Pa. St. 201, 75 Am. Dec. 643. See also *Stilson v. Gibbs*, 40 Mich. 42, 46 Mich. 215, 53 Mich. 280 and the dictum in *Moseley v. Anderson*, 40 Miss. 49.

7. Effect of Statutes. — Thus in *Virginia* it is provided that "in any case in which an action of trespass will lie, there may be maintained an action of trespass on the case." Code 1873, c. 145, § 6; Code 1887, § 2901.

In *Mississippi* an action on the case for seizure of exempt property was expressly authorized by statute. *Moseley v. Anderson*, 40 Miss. 49; *Perry v. Lewis*, 49 Miss. 443. Forms of action are now abolished in that state. Code 1892, § 671. *Evans v. Miller*, 58 Miss. 120, 38 Am. Rep. 313.

8. Action on the Case Against Creditor. — *Par-kerson v. Wightman*, 4 Strobb. L. (S. Car.) 363.

9. Trover — *Alabama.* — *Noland v. Wickham*, 9 Ala. 169, 44 Am. Dec. 435. *Ross v. Hannah*, 18 Ala. 125.

Connecticut. — *Williams v. Miller*, 16 Conn. 144.

Michigan. — *Wyckoff v. Wyllis*, 8 Mich. 48; *Town v. Elmore*, 38 Mich. 305; *McCoy v. Brennan*, 61 Mich. 362, 1 Am. St. Rep. 589.

New Hampshire. — *Towns v. Pratt*, 33 N. H. 345, 66 Am. Dec. 726; *Cooper v. Newman*, 45 N. H. 339.

New Jersey. — *Bonnel v. Dunn*, 29 N. J. L. 435.

New York. — See *Shaw v. Davis*, 55 Barb. (N. Y.) 359.

Tennessee. — *Pollard v. Thomason*, 5 Humph. (Tenn.) 56; *Hawkins v. Pearce*, 11 Humph.

ad. ASSUMPSIT. — If an officer or creditor wrongfully obtains exempt wages or other exempt money due to a debtor by garnishment proceedings, the debtor may waive the tort at common law and sue in assumpsit for money had and received.¹ An action for money had and received may also be brought when exempt goods are wrongfully obtained and converted into money.² And in some jurisdictions assumpsit could be maintained for the value of exempt goods wrongfully taken on execution, as upon an implied contract of sale.³

ee. FORMS OF ACTION ABOLISHED. — In a great many states the common-law forms of action have been abolished, and an action to recover for the wrongful seizure and sale of exempt property is simply an action for damages.⁴

(3) *Statutory Action for Penalty.* — By statute in some states, where an officer seizes exempt property under execution or attachment the debtor may maintain an action for double or treble the value of the property.⁵ And there

(Tenn.) 44; *Wolfenbarger v. Standifer*, 3 Sneed (Tenn.) 659; *McCoy v. Dail*, 6 Baxt. (Tenn.) 137.

Vermont. — *Wilkinson v. Wait*, 44 Vt. 508, 8 Am. Rep. 391; *Mundell v. Hammond*, 40 Vt. 641.

Wisconsin. — See *Below v. Robbins*, 76 Wis. 600, 20 Am. St. Rep. 89.

In *Massachusetts* the statute of 1839, c. 151, § 4, provided that in all actions on the case it should be no objection to maintaining such actions that but for that act the form should have been trespass, and it was held that trover could be maintained for seizing and selling exempt property, though at common law the proper form of action was trespass. *Davlin v. Stone*, 4 Cush. (Mass.) 359. And see *Baker v. Willis*, 123 Mass. 194, 25 Am. Rep. 61; *Mulligan v. Newton*, 16 Gray (Mass.) 211. See also *Hewes v. Parkman*, 20 Pick. (Mass.) 90, where trover was brought before the statute of 1839 was enacted.

Surrender to Assignee in Bankruptcy or Insolvency. — The fact that an officer who has seized property exempt from execution has surrendered it to an assignee in bankruptcy or insolvency of the debtor, who had no right to the possession of it, does not relieve him from liability in trover. *Wilkinson v. Wait*, 44 Vt. 508, 8 Am. Rep. 391.

1. *Assumpsit — Money Had and Received.* — *Kestler v. Kern*, 2 Ind. App. 497. See ENCYC. OF PL. AND PR., title ASSUMPSIT, vol. 2, p. 987.

2. There seems to be no reported case in which this form of action has been adopted to recover from an officer who has wrongfully sold exempt property on execution. But there is no reason why the case should not fall within the general rule that where goods are wrongfully obtained and converted into money, an action will lie by the owner to recover money received as money had and received for his use. See ENCYC. OF PL. AND PR., title ASSUMPSIT, vol. 2, p. 987.

3. *Assumpsit for Value of Goods.* — In some jurisdictions when a person's goods are wrongfully obtained and converted into money, the owner has been allowed to waive the tort and maintain an action of assumpsit for the value of the goods as on an implied contract to buy, the case being treated as a case of sale. *Russell v. Bell*, 10 M. & W. 340; *Evans v. Miller*, 58 Miss. 120, 38 Am. Rep. 313; *Willson v. Foree* 6 Johns. (N. Y.) 110, 5 Am. Dec. 195.

Some courts, however, have denied the right to maintain assumpsit in such a case, and have restricted the owner of the goods to his remedy by an action for the tort. *Jones v. Hoar*, 5 Pick. (Mass.) 285; *Androscoggin Water Power Co. v. Metcalf*, 65 Me. 40. On this question see ENCYC. OF PL. AND PR., title ASSUMPSIT, vol. 2, p. 987.

There is no reason why the same principle should not apply where exempt property is wrongfully seized and converted.

4. *Forms of Action Abolished.* — See the cases cited *supra*, this subdivision.

5. *Action for Double or Treble Damages.* — *Wymond v. Amsbury* 2 Colo. 213; *Cornelia v. Ellis*, 11 Ill. 585; *McCluskey v. McNeely*, 8 Ill. 578.

Sale on Credit. — That the officer gave credit to the purchaser at an execution sale of exempt property is no defense in an action under the statute for treble damages for making the sale. *McCluskey v. McNeely*, 8 Ill. 578.

Liability of Sureties on Bond. — As to the liability of the sureties on the officer's official bond, see *infra*, this subdivision, *Action on Bond of Officer*.

Failure to Turn Over Other Property. — It is held in *Illinois* that a debtor whose property has been seized and sold in disregard of his right of exemption cannot maintain an action for the statutory penalty if he failed to offer to turn over the balance of his property to satisfy the execution. *Udell v. Howard*, 28 Ill. App. 124. This, however, would not be held in some states. See *supra*, this title, *Property Exempt under the Statutes — Ownership or Possession of Other Property*.

Strict Construction of Penal Statutes. — Penal statutes are strictly construed, and to recover thereunder the plaintiff must bring his case clearly within their terms. This rule was applied by the Supreme Court of *Minnesota* in construing a statute declaring that whoever should "carry off, use, or destroy any wood, timber, lumber, hay, grass, or other personal property of another person, without lawful authority" should be liable to the owner thereof for treble the amount of damages assessed therefor. It was held that the words "other personal property" should be confined to things *ejusdem generis* with those enumerated, that is, such as are produced by or grown upon land, and that the statute did not render an officer or an execution creditor liable for treble damages for wrongfully seizing and

are statutes in several states subjecting a creditor to an action for a penalty for defeating or evading the exemption laws.¹

Waiver of Penalty. — But the debtor may waive the penalty if he chooses, and bring an ordinary action for single damages.²

Action Against Creditor. — A statute in terms rendering the officer alone liable to such a penalty for seizing and selling exempt property does not authorize an action therefor against the execution creditor, though he may have directed the levy.³

(4) **Action on Bond of Officer.** — The official bond of a sheriff or constable is conditioned for the faithful discharge of the duties of his office, and a trespass in wrongfully seizing and selling exempt property is a breach of such duties. It follows that for such a trespass the debtor may maintain an action on the bond against the officer and his sureties.⁴

Penalties. — But the sureties on such a bond are not liable for penalties imposed by statute in terms upon the officer alone.⁵

(5) **Motion to Quash Execution or Sale.** — If an execution is levied upon exempt property the levy may be quashed or vacated on motion in the court from which the execution issued, for a court has control of its processes,⁶ and a sale of exempt property may be set aside on motion.⁷ But a levy or intention to levy on exempt property is no ground for quashing the writ of execution.⁸

selling an exempt yoke of oxen. *Berg v. Baldwin*, 31 Minn. 541.

1. Penalty for Evading Exemption Laws. — Thus in *Nebraska* creditors are in substance prohibited from transferring or otherwise disposing of claims against laborers, etc., or from instituting or prosecuting garnishment proceedings thereon in the state or elsewhere, for the purpose of avoiding the effect of the exemption laws of Nebraska, and if they violate the statute they are made liable to the party injured for the amount of the claim transferred or sued upon, with all costs and expenses, and a reasonable attorney's fee.

2. Debtor May Waive Penalty. — *Pace v. Vaughn*, 6 Ill. 30; *Cornelia v. Ellis*, 11 Ill. 584; *Amend v. Murphy*, 69 Ill. 337.

If the debtor declares only in the common form of an action of trespass, without reference to the statute, he thereby waives the penalty and can recover single damages only. If he claims to recover the penalty, he must declare specially on the statute. *Pace v. Vaughn*, 6 Ill. 30; *Race v. Olbridge*, 90 Ill. 250, 32 Am. Rep. 27; *Camp v. Ganley*, 6 Ill. App. 499.

3. Liability of Creditor to Penalty. — *Pace v. Vaughn*, 6 Ill. 30. See *Casper v. People*, 6 Ill. App. 28.

4. Action on Official Bond — Illinois. — See *Casper v. People*, 6 Ill. App. 28; *People v. Zingraf*, 43 Ill. App. 337.

Kentucky. — See *Com. v. Stockton*, 5 T. B. Mon. (Ky.) 192.

Missouri. — *State v. Moore*, 19 Mo. 369, 61 Am. Dec. 563; *State v. Farmer*, 21 Mo. 160; *Meier v. Lester*, 21 Mo. 112; *State v. Carroll*, 9 Mo. App. 275; *State v. Harrington*, 33 Mo. App. 476. And see *State v. Shacklett*, 37 Mo. 280; *State v. Dulle*, 48 Mo. 288.

Nebraska. — *Kriesel v. Eddy*, 37 Neb. 63.

North Carolina. — *Scott v. Kenan*, 64 N. Car. 290.

Ohio. — *Butt v. Green*, 29 Ohio St. 667.

Pennsylvania. — See *Carmack v. Com.*, 5 Binn. (Pa.) 184.

5. Double or Treble Damages — Liability of Sureties. — Thus when a statute making an officer liable to an action for double or treble damages for seizing and selling exempt property in terms applies to the officer alone, it cannot be construed as rendering the sureties on his official bond liable for the penalty. They are liable only for single damages. "Penalties are never extended by implication, nor are sureties ever held beyond what is clearly within the scope and purpose of their undertaking." *Casper v. People*, 6 Ill. App. 28.

6. Vacating or Quashing Levy. — *Totten v. Sale*, 72 Ala. 488; *Catron v. Lafayette County*, 125 Mo. 67. And see the dictum in *Jacks v. Bigham*, 36 Ark. 481. See also *Farrell v. McKee*, 36 Ill. 225.

Certiorari to Justice of the Peace. — In *Tennessee* it was held that when property which was exempt had been levied upon under an execution issued by a justice of the peace, who had no power to quash a levy thereon, a proper remedy for the defendant in the execution was to remove the proceeding into the Circuit Court by certiorari and there have the levy quashed. *Jones v. Williams*, 2 Swan (Tenn.) 105.

7. Vacating Sale on Execution. — *Finke v. Craig*, 57 Mo. App. 393. And see *Jacks v. Bigham*, 36 Ark. 481.

8. Quashing Writ. — The rule is that an execution that is regular in all respects upon its face will not be set aside for alleged acts of omission or commission on the part of the officer after the writ has been placed in his hands. *Nixon v. Harrell*, 5 Jones L. (50 N. Car.) 76. See ENCYC. OF PL. AND PR., title EXECUTIONS AGAINST PROPERTY, vol. 8, p. 468. And it has been held, therefore, that the fact that exempt property has been levied upon, or is about to be levied upon, is no ground for quashing the execution. *Roth v. Insley*, 86 Cal. 134; *Catron v. Lafayette County*, 125 Mo. 67; *Hasty v. Simpson*, 84 N. Car. 590.

In *Jacks v. Bigham*, 36 Ark. 481, it was said

(6) *Motion in Attachment.* — When exempt property is taken on attachment, the defendant may move to dissolve the attachment or to have the property released.¹

(7) *Trial of Right of Property.* — In some states there are statutes providing for a trial of the right to property wrongfully seized on execution,² but these are not intended to provide a remedy for the recovery of exempt property by the defendant in an execution. They apply only where a stranger to the execution claims the property.³

b. REMEDIES IN EQUITY — (1) *In General.* — In some states there are statutes expressly conferring upon courts of equity jurisdiction in matters relating to the exemption of personal property from sale on execution or other process.⁴ In the absence of such a statute the question of jurisdiction is governed by the general principle that equity will not assume jurisdiction when there is a plain and adequate remedy at law.⁵

(2) *Injunction* — (a) *In General.* — Under ordinary circumstances a debtor cannot maintain a bill in equity to enjoin an officer from selling his exempt property on execution or other process, for he generally has an adequate remedy at law by motion to quash the levy or set aside the sale, or by an action to recover the property or to recover damages.⁶ Sometimes this remedy is expressly given by statute.⁷ And independently of any statute such a bill may be maintained where the circumstances are so extraordinary as to render the remedy at law inadequate.⁸

(b) *Injunction Against Proceedings in Another State.* — It may be regarded as settled that a court of equity has jurisdiction to enjoin a resident creditor from instituting or prosecuting an action or proceeding in another state for the purpose of evading the exemption laws of his state, and of collecting his claim by

that a court from which an execution issues may quash "the execution," when it is levied upon exempt property, but it is probable that the court meant the levy of the execution, and not the writ.

1. *Motion to Dissolve Attachment.* — *Wilson v. Stripe*, 4 Greene (Iowa) 551, 61 Am. Dec. 138.

2. *Statutes Providing for Trial of Right of Property.* — See the title EXECUTIONS, vol. 11, p. 604.

3. *Swope v. Ross*, 29 Ark. 370; *Prewitt v. Walker*, 7 J. J. Marsh. (Ky.) 332. And see *Ross v. Hawthorne*, 55 Miss. 553.

4. *Remedy in Equity — Statutes.* — See Rev. Stat. *Florida*, 1892, §§ 2005-2007. A suit in equity cannot be maintained by a creditor, under the last section, to enjoin a sheriff from taking proceedings to appraise and set apart personal property levied upon, and which is wrongfully claimed by a debtor to be exempt from forced sale, unless the sheriff actually does or threatens to do upon such wrongful claim some act tending to the injury of the creditor. *Cathcart v. Turner*, 18 Fla. 837.

5. *In the Absence of Statute.* — See *Jacks v. Bigham*, 36 Ark. 481; *Farrell v. McKee*, 36 Ill. 226.

6. *Injunction — Cases Denying Jurisdiction.* — *Jacks v. Bigham*, 36 Ark. 481; *Driggs' Bank v. Norwood*, 49 Ark. 136, 4 Am. St. Rep. 30. See *Richards v. Kirkpatrick*, 53 Cal. 433; *Farrell v. McKee*, 36 Ill. 226; *Hughes v. Melville*, 60 Ill. App. 419.

In *Indiana* and *Texas* an injunction to restrain the sale of exempt property on execution has been sustained, but, in so far as the reports of the cases show, without any question having been raised as to the jurisdiction. *Robinson*

v. Hughes, 117 Ind. 293, 10 Am. St. Rep. 45; *Nichols v. Claiborne*, 39 Tex. 363.

In *Nebraska*, when a debtor duly claims his exemption, and the officer is proceeding to sell in disregard of his right, injunction is a proper remedy. *Cunningham v. Conway*, 25 Neb. 615.

7. In *Florida* it is expressly declared by statute that "Circuit Courts shall have equity jurisdiction to enjoin the sale of all property, real and personal, that is exempt from forced sale." Act March 7, 1881; Rev. Stat. 1892, § 2006; *McMichael v. Grady*, 34 Fla. 219; *Smith v. Gufford*, 36 Fla. 481.

Injunctions granted simply to restrain the forced sale of property that is exempt from sale under any process of law by the Constitution of *Florida* are not injunctions to stay proceedings at law, within the meaning of the statute prohibiting the granting of injunctions to stay proceedings at law unless bond is given. *Lewton v. Hower* 18 Fla. 879; *Smith v. Gufford*, 36 Fla. 481.

8. *Extraordinary Circumstances — Remedy at Law Inadequate.* — *Farrell v. McKee*, 36 Ill. 230.

In *Driggs' Bank v. Norwood*, 49 Ark. 136, 4 Am. St. Rep. 30, it was held that the remedy at law was not inadequate, so as to give to a court of equity jurisdiction to interfere by injunction, merely because the debtor was prevented by causes over which he had no control from giving notice of his claim of exemption and filing a schedule of his property, as required by the statute, since he had an ample remedy at law by applying to the court to stay proceedings under the execution until the claim of exemption could be duly made and determined. See also the title INJUNCTIONS.

subjecting to its satisfaction property or credits which the debtor could claim as exempt if the action or proceeding were brought within the state.¹ And in such a case an injunction should generally be granted.²

(c) **Restitution on Violation of Injunction.** — If a creditor prosecutes an action or proceeding in violation of an injunction, and thereby obtains and appropriates exempt property or money, the court which granted the injunction has the power to render a judgment against him and in favor of the debtor for the amount so appropriated.³

c. **MANDAMUS.** — A writ of mandamus is a proper remedy to compel an officer to appoint appraisers, to set apart property, or to perform other ministerial duties imposed upon him by the statute to enable a debtor to select and hold the property which he is entitled to claim as exempt.⁴ But the writ will

1. Proceedings in Another State — *Alabama.* — *Allen v. Buchanan*, 97 Ala. 399, 38 Am. St. Rep. 187.

Iowa. — *Teager v. Landsley*, 69 Iowa 725; *Hager v. Adams*, 70 Iowa 746; *Mumper v. Wilson*, 72 Iowa 163, 2 Am. St. Rep. 242.

Kansas. — *Zimmerman v. Franke*, 34 Kan. 650; *Wilkinson v. Colter*, (Super. Ct.) 2 Kan. L. J. 202, cited in 21 Cent. L. J. 521.

Kentucky. — *Stewart v. Thomson*, 97 Ky. 575; *Brown v. Simmet*, 13 Ky. L. Rep. 831.

Maryland. — *Keyser v. Rice*, 47 Md. 203, 28 Am. Rep. 448.

Ohio. — *Snook v. Snetzer*, 25 Ohio St. 516.

Texas. — *Moton v. Hull*, 77 Tex. 80.

Wisconsin. — *Griggs v. Docter*, 89 Wis. 161, 46 Am. St. Rep. 824.

In *Indiana* it is made a misdemeanor for a resident creditor to send a claim against a resident debtor out of the state by assignment or otherwise for the purpose of evading the exemption laws of the state and collecting the debt out of property or wages which under such laws the debtor is entitled to claim as exempt. And it is settled in that state that an injunction will lie to restrain a resident of *Indiana* from prosecuting an attachment or garnishment proceeding against another resident in the courts of another state in violation of the statute. *Wilson v. Joseph*, 107 Ind. 490.

Application of the Rule — Exempt Wages. — In most of the cases cited above the creditor was enjoined from proceeding by garnishment in another state to reach and subject exempt wages due the debtor from a railroad company owning and operating a railroad in several states. See the cases cited above. But the doctrine is not limited to such cases.

Money Due from Insurance Company. — In *Allen v. Buchanan*, 97 Ala. 399, 38 Am. St. Rep. 187, a resident of *Alabama* was enjoined from collecting a debt due him by another resident of that state by garnishment in *Louisiana* of a debt due by an insurance company of that state to the debtor.

Tangible Property Temporarily in the Other State. — And in *Mumper v. Wilson*, 72 Iowa 163, 2 Am. St. Rep. 242, the same doctrine was applied to a case in which a debtor residing in *Iowa* took an exempt team into *Nebraska* for a temporary purpose, and a creditor, also a resident of *Iowa*, sought to subject the team to the satisfaction of his demand by proceeding in *Nebraska*.

Not an Interference with Courts of the Other State. — Such a suit is not within the rule that the courts of one state cannot enjoin the pro-

ceedings of a court in another state, for the injunction merely acts upon the personal conduct of the creditor who is within the jurisdiction of the court. *Cole v. Cunningham*, 133 U. S. 107; *Engel v. Scheuerman*, 40 Ga. 206, 2 Am. Rep. 573; *Dehon v. Foster*, 4 Allen (Mass.) 545, 7 Allen (Mass.) 57.

Elsewhere Treated. — For further treatment of this doctrine, see the title **INJUNCTIONS**.

2. Injunction Should Generally Be Granted. — See the cases cited in the note preceding.

Want of Equity. — In *Cole v. Young*, 24 Kan. 435, it was held that a court of equity ought not to interfere in such cases as those above referred to unless it appears from the relations and circumstances of the parties that it would be inequitable to permit the institution or continuance of the foreign action or proceeding. In this case a debtor residing in *Kansas* went to *Missouri* temporarily, taking with him personal property which was exempt under the laws of *Kansas*. His creditor, also a resident of *Kansas*, commenced an action in *Missouri* by attachment and seized this property, and the debtor sued for an injunction. It was held that the injunction would not be granted upon a mere showing that the property was exempt, and without any showing as to the debtor's inability to pay, or his possession of none save exempt property, or as to whether the debt was or was not fraudulently contracted.

3. Violation of Injunction — Restitution. — *Teager v. Landsley*, 69 Iowa 725; *Hager v. Adams*, 70 Iowa 746; *Snook v. Snetzer*, 25 Ohio St. 516; *Griggs v. Docter*, 89 Wis. 161, 46 Am. St. Rep. 824.

4. Mandamus Against Officer — To Compel Appointment of Appraiser, etc. — *Florida.* — *State v. Bowden*, 18 Fla. 17.

Indiana. — *Pudney v. Burkhart*, 62 Ind. 179; *State v. Read*, 94 Ind. 103; *Young v. Baxter*, 55 Ind. 188.

Nebraska. — *People v. McClay*, 2 Neb. 7; *State v. Cunningham*, 6 Neb. 90; *State v. Sanford*, 12 Neb. 425; *State v. Krumpus*, 13 Neb. 321; *State v. Wilson*, 31 Neb. 462; *State v. Houck*, 32 Neb. 525; *Cunningham v. Conway*, 25 Neb. 615; *State v. Carson*, 27 Neb. 501, 20 Am. St. Rep. 681; *Bender v. Bame*, 40 Neb. 521; *Neligh First Nat. Bank v. Lancaster*, 54 Neb. 467.

South Dakota. — *Meyer v. Beaver*, 9 S. Dak. 168.

Washington. — *State v. Creech*, 18 Wash. 186.

See the title **MANDAMUS**.

not lie after the officer has sold and delivered the property.¹

d. INDICTMENT FOR VIOLATION OF STATUTE. — In several states, better to protect the right of exemption, statutes have been enacted making it a criminal offense for an officer wrongfully to levy upon or sell exempt property.² And in some states, to prevent evasion of the laws by proceedings in another state, it is made an offense for creditors residing in the state to transfer their claims or institute or prosecute proceedings in the state or elsewhere for the purpose of avoiding the effect of the exemption laws.³

e. PERSONS ENTITLED TO MAINTAIN ACTION. — From the rule that the right of exemption is a personal privilege of the debtor it follows that ordinarily no one but the debtor himself can maintain an action to recover damages for seizing or seizing and selling his exempt property, or to recover the property itself.⁴

Receivers, and Assignees in Bankruptcy or Insolvency, as a rule, acquire no title to the debtor's or bankrupt's exempt property, and cannot sue to recover it from an officer who has wrongfully taken it on execution or attachment, or to recover damages for taking and selling it.⁵

Title and Possession to Support Action. — Title, as a rule, is necessary to support an action to recover property as exempt, or to recover damages for wrongfully seizing or selling it.⁶ But an equitable title may be sufficient.⁷

Possession at the time of the seizure is, of course, necessary to support trespass, but a constructive possession is sufficient.⁸

1. After Sale Mandamus Will Not Lie. — *State v. Bowden*, 18 Fla. 17.

2. Indictment Against Officer. — Code Civ. Pro. N. Car., 1891, § 516. See *State v. Carr*, 71 N. Car. 106. And see, under the early *Tennessee* statute, *State v. Haggard*, 1 Humph. (Tenn.) 390; *Hunter v. Agee*, 5 Humph. (Tenn.) 58; *Hawkins v. Pearce*, 11 Humph. (Tenn.) 46.

3. Indictment Against Creditor — Evasion of Exemption Laws. — See *supra*, this title, *Operation of Statutes with Respect to Territorial Limits*.

4. Persons Entitled to Maintain Action — General Rule — *Indiana*. — *State v. Melogue*, 9 Ind. 196.

Minnesota. — *Howland v. Fuller*, 8 Minn. 50; *Orr v. Box*, 22 Minn. 485.

Missouri. — *Terry v. Wilson*, 63 Mo. 497; *Osborne v. Schutt*, 67 Mo. 712.

New York. — *Mickles v. Tousley*, 1 Cow. (N. Y.) 114; *Twinam v. Swart*, 4 Lans. (N. Y.) 264; *Lockwood v. Younglove*, 27 Barb. (N. Y.) 508; *Smith v. Hill*, 22 Barb. (N. Y.) 656; *Baker v. Brintnall*, 52 Barb. (N. Y.) 188. See also *Earl v. Camp*, 16 Wend. (N. Y.) 563.

Ohio. — *Butt v. Green*, 29 Ohio St. 670.

Pennsylvania. — *Hess v. Beates*, 78 Pa. St. 431.

Bailee or Agent. — Thus it has been held that an action cannot be maintained by an agent or bailee of the debtor. *Mickles v. Tousley*, 1 Cow. (N. Y.) 114.

5. Receiver, Assignee. — *Williams v. Miller*, 16 Conn. 144; *Andrews v. Rowan*, 28 How. Pr. (N. Y. Supreme Ct.) 126; *Finnin v. Malloy*, 33 N. Y. Super. Ct. 382. See also *Woods v. Sanford*, 9 Gray (Mass.) 16.

6. Title Necessary to Support Action. — *State v. Springate*, 51 Mo. App. 619; *Hoyt v. Van Alstyne*, 15 Barb. (N. Y.) 568.

Prima Facie Evidence of Title. — If it is sought to defeat an action against an officer for damages for taking exempt property on the ground that the plaintiff has no title to the property, it

is *prima facie* sufficient if he shows that he was in possession claiming title. No one but the true owner or some one connecting himself with the true owner is at liberty to impeach his claim of title. *Hoyt v. Van Alstyne*, 15 Barb. (N. Y.) 568.

Estoppel of Officer by Return. — In an action by an execution defendant against the levying officer for levying on property which the plaintiff claims was exempt, the officer is not precluded by the return of the levy from showing that the plaintiff had no title to the property. *State v. Springate*, 51 Mo. App. 619.

7. Equitable Title. — A debtor having an equitable interest in personal property, coupled with actual possession, may maintain an action for trespass against the sheriff for wrongful seizure thereof, though he is not the absolute owner. *Frost v. Mott*, 34 N. Y. 253.

8. Possession Necessary. — The general owner of goods cannot maintain an action of trespass or trover for them where there is an outstanding possession in another accompanied with a special property. For this reason, where a person brought an action of trespass for the attachment of property in the hands of his bailee, who held such property as security for a liability assumed by him, a judgment for the plaintiff was reversed. *Bourne v. Merritt*, 22 Vt. 429.

Constructive Possession Sufficient. — *Walcot v. Pomeroy*, 2 Pick. (Mass.) 121.

In *Hart v. Hyde*, 5 Vt. 328, which was an action of trespass to recover the value of exempt property taken upon attachment and sold, it was insisted that the plaintiff could not recover for want of possession in him at the time of the trespass. In passing upon the question the court said: "The ownership of chattels draws after it the legal or constructive possession, and this is sufficient for the purposes of this action. If, indeed, the owner had parted with the right of possession for a specified period, he cannot maintain trespass

Action by Purchaser from Debtor. — A purchaser of exempt property from an execution defendant may maintain an action against an officer for a subsequent levy and sale.¹

Action by Mortgagor. — A mortgagor of exempt personal property who is rightfully in possession when it is wrongfully attached or taken on execution may maintain an action for damages.²

Action by Husband. — A debtor may sue in his own name to recover his exempt property, or damages for its seizure or sale, without joining his wife as a plaintiff, though the statute may give the exemption for the benefit of both.³

Action by Wife. — In some states the statute expressly provides that an action may be brought by the wife of an execution defendant, if he is absent, or if he fails or refuses to assert his right.⁴

f. PRESUMPTION AND BURDEN OF PROOF. — The presumption is that all the personal property of a debtor is liable to seizure and sale for the payment of his debts, and if he claims particular property as exempt, the burden is

for an act done during that period; but if he have the right of resuming the possession at pleasure the action lies. Hence it is not necessary that the plaintiff have actual possession." See the title *TRESPASS*.

1. Action by Purchaser. — *Cook v. Baine*, 37 Ala. 350. See *supra*, this title, *Sales and Other Transfers, and Incumbrances*.

Affidavit. — And in such a case the plaintiff need not have made an affidavit that the property is exempt, required by statute (Code Ala. § 2466), from the defendant in execution only, or some one for him. *Cook v. Baine*, 37 Ala. 350.

2. Action May Be Maintained by Mortgagor in Possession. — *Vaughan v. Thompson*, 17 Ill. 78; *Evans v. St. Paul Harvester Works*, 63 Iowa 204; *Collett v. Jones*, 2 B. Mon. (Ky.) 19, 36 Am. Dec. 586; *Copp v. Williams*, 135 Mass. 401; *Livor v. Orser*, 5 Duer (N. Y.) 501. See *supra*, this title, *Sales and Other Transfers, and Incumbrances*.

Action After Breach of Condition of Mortgage. — The right of a mortgagor of exempt property in possession to maintain an action for its wrongful seizure or sale is not defeated by the fact that the attachment constitutes a breach of the condition of the mortgage. *Copp v. Williams*, 135 Mass. 401.

Mortgage to Secure Debt Payable on Demand. — The fact that a mortgage of exempt property is to secure a debt payable on demand does not prevent the mortgagor from maintaining an action to recover the property or damages, when it is seized on execution against him, if the mortgage contains a clause giving him the right to possession until default in payment, and there has been no demand of a payment, and therefore no default. *Livor v. Orser*, 5 Duer (N. Y.) 501.

Joinder of Mortgages. — In *Iowa* it has been held that the mortgagee should be joined as a party in an action against the officer for damages, lest the officer should be subjected to a double liability. *Evans v. St. Paul Harvester Works*, 63 Iowa 204.

3. Action by Husband Alone. — In *Georgia* a person who has procured an exemption of personal property, and invested it wholly or partly in business, and who has acquired title to other property in his business dealings pay-

ing for it with the exempt property, may sue in his own name to recover it from a wrongdoer. *McDuffie v. Irvine*, 91 Ga. 748.

4. Action by Debtor's Wife. — *Eisenhauer v. Dill*, 6 Ind. App. 188; *Astley v. Capron*, 89 Ind. 167; *King v. Moore*, 10 Mich. 539; *Singer Mfg. Co. v. Cullaton*, 90 Mich. 639; *State v. Dill*, 60 Mo. 433; *Lindsey v. Dixon*, 52 Mo. App. 291; *Noyes v. Belding*, 5 S. Dak. 603.

Partnership Exemption — Claim by Wife of Partner. — Under a statute allowing a firm, as such, to claim an exemption out of the partnership property, and a statute allowing the wife of a debtor to claim his exemptions when he fails or refuses to do so, the wife of a partner may assert his right to the partnership exemption, if he fails or refuses to do so. *Noyes v. Belding*, 5 S. Dak. 603.

Waiver by Husband. — The action of the wife, under a statute, for exempt property taken on execution cannot be defeated by showing that the property was turned out by the husband to be levied upon. *King v. Moore*, 10 Mich. 538. See *supra*, this title, *Waiver, Forfeiture, and Estoppel*.

How. Stat. Michigan, § 6297, providing that when a husband's property "is exempted by law from sale on execution or other final process issued from any court against him, his wife may bring an action in her own name," applies only when the property is taken by some process adversary to the husband. *Singer Mfg. Co. v. Cullaton*, 90 Mich. 639.

In *Ohio*, by the express provision of the former statute, where the husband had sold property exempt from sale under execution, the wife might maintain an action in her own name to recover the property or its value. *Slanker v. Beardsley*, 9 Ohio St. 590.

Where a husband executed a chattel mortgage on all his personal property, which did not exceed three hundred dollars in value, and the mortgagee caused the property to be seized upon execution on a judgment for the debt which the mortgage was given to secure, it was held that this was such a disposing of and parting with the property on the part of the husband that the wife could maintain an action against the officer for its recovery. *Colwell v. Carver*, 15 Ohio St. 279.

upon him to show that his status or occupation is such as to entitle him to the benefit of the statute,¹ that the property is within the statute,² and, by the

1. Presumption and Burden of Proof — Status as Head of Family or Householder. — Thus, the burden is on a debtor claiming property as exempt to show that he is the head of a family, or a householder, where this status is necessary to entitle him to the exemption. *Alabama Conference v. Vaughan*, 54 Ala. 443; *McMasters v. Alsop*, 85 Ill. 157; *Wolfenbarger v. Standifer*, 3 Sneed (Tenn.) 659; *Pollard v. Thomason*, 5 Humph. (Tenn.) 56. And see *Prewitt v. Walker*, 7 J. J. Marsh. (Ky.) 332.

Married Woman as Head of Family. — As was shown in another place (see *supra*, this title, *Persons Entitled to Benefit of Exemption Laws*), a married woman may have a status as a head of a family under some circumstances, even when she is living with her husband. The presumption, however, is that the husband is the head of the family, and if the wife claims an exemption as such she must show the circumstances entitling her to the benefit of the law. *Clinton v. Kidwell*, 82 Ill. 427, *Farwell Co. v. Martin*, 65 Ill. App. 55.

Partnership Property. — The burden is on a partner to show that property claimed by him as exempt is such as to entitle him to assert the claim. *Porch v. Arkansas Milling Co.*, 65 Ark. 40. See *supra*, this title, *Property Exempt under the Statutes — Partnership Property*.

Occupation. — The burden is on one claiming an exemption allowed to persons engaged in a particular occupation only to show that his occupation is such as to bring him within the statute. *Murphy v. Harris*, 77 Cal. 194. And see, to the same effect, *Calhoun v. Knight* 10 Cal. 393; *Dowling v. Clark*, 3 Allen (Mass.) 570; *Murphy v. Mulvena*, 108 Mich. 347.

Residence. — When the statute requires residence in the state to entitle one to an exemption, a debtor claiming the benefit of the statute must affirmatively show his residence, so as to show that he is within the statute. *Blythe v. Jett*, 52 Ark. 547; *Post v. Bird*, 28 Fla. 1.

Presumption of Continuance of Residence. — When a person claiming the benefit of the exemption laws shows that he was a resident of the state at a certain time, it will be presumed that his residence therein continued until the opposite party shows that it has been lost. And the mere fact that he has gone to another state and engaged in business there is not alone sufficient to rebut the presumption. *Astley v. Capron*, 89 Ind. 167. See also *Caldwell v. Pollak*, 91 Ala. 353; *Green v. Simon*, 17 Ind. App. 360; *Freehling v. Bresnahan*, 61 Mich. 540, 1 Am. St. Rep. 617.

2. Character of Property as Exempt — Arkansas. — *Blythe v. Jett*, 52 Ark. 547.

California. — *Briggs v. McCullough*, 36 Cal. 542.

Illinois. — *McMasters v. Alsop*, 85 Ill. 157. **Massachusetts.** — *Clapp v. Thomas*, 5 Allen (Mass.) 158.

Minnesota. — *Fletcher v. Staples*, 62 Minn. 471.

Missouri. — *Hombs v. Corbin*, 34 Mo. App. 393.

New York. — *Van Sickler v. Jacobs*, 14 Johns. (N. Y.) 434; *Bowne v. Witt*, 19 Wend. (N. Y.) 475; *Griffin v. Sutherland*, 14 Barb. (N. Y.) 456; *Carnrick v. Myers*, 14 Barb. (N. Y.) 9; *Dains v. Prosser*, 32 Barb. (N. Y.) 290; *Tuttle v. Buck*, 41 Barb. (N. Y.) 417; *Brown v. Davis*, 9 Hun (N. Y.) 43; *Twinam v. Swart*, 4 Lans. (N. Y.) 263.

Oregon. — *Stewart v. McClung*, 12 Oregon 431, 53 Am. Rep. 374.

Tennessee. — *Wolfenbarger v. Standifer*, 3 Sneed (Tenn.) 659.

Vermont. — *Bourne v. Merritt*, 22 Vt. 429; *Connell v. Fisk*, 54 Vt. 381; *Rollins v. Allison*, 59 Vt. 188; *Chamberlain v. Whitney*, 65 Vt. 488.

Use of Property. — When it is necessary under the statute that furniture and household goods, or other property, to be exempt, shall be kept and used by the debtor and his family or used by the debtor in his business or for a particular purpose, the burden is on the debtor to show affirmatively that they were so kept and used. *Fletcher v. Staples*, 62 Minn. 471. And see *Calhoun v. Knight*, 10 Cal. 393; *Wymond v. Amsbury*, 2 Colo. 213; *Corp v. Griswold*, 27 Iowa 379; *Clapp v. Thomas*, 5 Allen (Mass.) 158; *Brown v. Davis*, 9 Hun (N. Y.) 43; *Bourne v. Merritt*, 22 Vt. 429; *Connell v. Fisk*, 54 Vt. 381.

Excessive Claim — Necessary Articles. — In *Heath v. Keyes*, 35 Wis. 668, it was held in effect that when the articles levied upon and claimed as exempt are household furniture, they are presumptively exempt under a statute exempting necessary household furniture, or a certain amount of household furniture, and that the burden of showing that the claim of exemption is excessive is upon the levying officer or creditor. The weight of authority, however, is against this decision.

In *Van Sickler v. Jacobs*, 14 Johns. (N. Y.) 434, under a statute exempting "necessary cooking utensils," it was held that the burden was on a debtor claiming cooking utensils as exempt to show affirmatively that they were in fact necessary.

And in *Dowling v. Clark*, 3 Allen (Mass.) 570, it was held that the burden was on a debtor claiming a sewing machine, under a statute exempting such a machine when necessary to enable him to carry on his business, to show that it was necessary. See to the same effect, *Willson v. Ellis*, 1 Den. (N. Y.) 462; *Smith v. Slade*, 57 Barb. (N. Y.) 637; *Tuttle v. Buck*, 41 Barb. (N. Y.) 417; *Stewart v. McClung*, 12 Oregon 431, 53 Am. Rep. 374.

Ownership of Homestead. — A debtor must affirmatively show that he is not the owner of a homestead, when he claims an exemption of personal property which is allowed only to persons who are not owners of a homestead. *Louis Voight Sons' Co. v. Lafkin*, 2 Ohio Dec. 251.

Value. — When the statute limits the value of the property that may be claimed as exempt, the debtor must show affirmatively that property claimed by him as exempt does not exceed such value. *Wymond v. Amsbury*, 2

better opinion, that the debt or judgment on which the execution was issued is one as against which an exemption may be claimed.¹

A Waiver by a debtor of his right of exemption will not be presumed, but must be affirmatively proved.²

Forfeiture for Fraud. — The burden is also upon the creditor to show that the debtor has been guilty of such fraud as to forfeit his right of exemption. Fraud can never be presumed.³

Persons Claiming Through the Debtor, on the ground that property owned by him was exempt, have the burden of affirmatively showing such fact.⁴

Action Against Officer for Failure to Levy. — And when an officer sets up the fact of exemption to defeat an action against him by an execution creditor for failure to levy the execution, he has the burden of proof.⁵

g. QUESTIONS OF LAW AND FACT — Construction of Statutes. — In actions to enforce or protect the right of exemption or to recover damages for infringement thereof in which there is a trial before a jury, the construction of the statute under which the exemption is claimed is clearly a question of law for the court.⁶

Colo. 213; *Dains v. Prosser*, 32 Barb. (N. Y.) 290; *Tuttle v. Buck*, 41 Barb. (N. Y.) 417; *Stewart v. McClung*, 12 Oregon 431, 53 Am. Rep. 374. And see *Swan v. Stephens*, 99 Mass. 7.

Proceeds of Insurance on Exempt Property. — Under the principle that the proceeds of exempt property involuntarily converted may be claimed as exempt to the same extent as the property converted, it is settled by the great weight of authority that money due under a policy of insurance on exempt property may be claimed as exempt. When such a claim is made, however, the burden is on the debtor to show that the property insured was exempt. *Fletcher v. Staples*, 62 Minn. 471; *Donnelly v. O'Connor*, 22 Minn. 309; *Winsor v. McLachlan*, 12 Wash. 154.

Claim and Selection. — The burden is on the debtor or one claiming under him, in an action of replevin to recover property seized on execution, on the ground that it is exempt, to show a claim and selection of the property by the debtor as exempt, when a claim and selection were necessary to render the property exempt. *Hombs v. Corbin*, 34 Mo. App. 393.

In Contest under Alabama Statute. — The burden is on the plaintiff in a contest of the right of exemption under the Alabama statute. *Kolsky v. Loveman*, 97 Ala. 543. See *supra*, this section, *Mode of Claiming, Selecting, and Setting Apart*.

1. Nature of Debt. — Thus, where a statute exempts property from liability to seizure and sale under execution on a judgment rendered upon a contract, express or implied, and a debtor brings replevin for property seized under an execution, he has the burden of showing that the judgment was on a contract express or implied. This fact will not be presumed. *Thompson v. Ross*, 87 Ind. 156.

And in *Ely v. Blacker*, 112 Ala. 311, it was held in effect that the burden is on the debtor to show when the debt against which the exemption is claimed was contracted.

Decision to the Contrary. — *Wagner v. Olson*, 3 N. Dak. 69, is to the contrary. It was there held that where a debtor whose property has been seized on execution brings an action of claim and delivery on the ground that it is ex-

empt, the burden is on the officer to show that it is not exempt because the judgment was for the purchase price.

2. Waiver of Exemption Not Presumed. — *State v. Haggard*, 1 Humph. (Tenn.) 390. In this case the question arose in a prosecution of an officer for levying on and seizing exempt property in violation of a statute making such a seizure a misdemeanor, but there is no reason why the same rule should not apply in other cases.

3. Burden as to Fraud. — *Martin v. Kohr*, 19 Pa. Co. Ct. Rep. 513.

4. Persons Claiming Through Debtor — Fraudulent Conveyances. — Thus, where a sale of property by a debtor is attacked by his creditors as fraudulent, the purchaser has the burden of proof if he claims that the property was exempt, and thus seeks to defeat the attack. *Blythe v. Jett*, 52 Ark. 547, *overruling Erb v. Cole*, 31 Ark. 554.

5. Failure of Officer to Make Execution. — *Bonnell v. Bowman*, 53 Ill. 460.

6. Questions of Law and Fact. — *Patten v. Smith*, 4 Conn. 450, 10 Am. Dec. 166; *Wildner v. Ferguson*, 42 Minn. 112, 18 Am. St. Rep. 495. See the title QUESTIONS OF LAW AND FACT.

In *Amend v. Smith* 87 Ill. 198, it was held erroneous for the court to instruct the jurors that in determining the exemption to which a debtor was entitled it was their duty, under the law, to construe the exemption laws liberally towards the debtor.

Right to Jury Trial. — In the absence of a statute a debtor cannot claim the right to a jury trial on the question of his right to claim property as exempt. *New Mexico Nat. Bank v. Brooks*, (N. Mex. 1897) 49 Pac. Rep. 947.

Pennsylvania Statute. — On exceptions to an appraisal under the Pennsylvania Act of 1849, the defendant cannot be deprived by the summary action of the court of his right of exemption. Whether the defendant in an execution has waived his right to exemption, or forfeited it by neglect, or deprived himself of it for any reason, depends upon questions of fact to be determined by a jury, unless such facts are admitted by record, and the court cannot pass upon them in a summary manner

Whether the Debtor Is Within the Statute.—Where the question whether the occupation or status of a debtor is such as to entitle him to the benefit of the statute depends merely upon a construction of the statute, the question is one of law for the court; but where his status or occupation is disputed, and the question is as to what is his status or occupation, it is one of fact for the jury.¹

Whether the Property Claimed Is Within the Statute.—The same distinction applies to the question whether particular property is within the statute. If it depends merely upon a construction of the statute, it is a question of law for the court; but whether particular articles are "necessary" for the use of the debtor or his family, and the character of particular articles, etc., where there is any room for doubt—but not otherwise—are questions of fact for the jury.²

and thus deprive the defendant of his right to demand exemption, and, upon the neglect or refusal of the officer to comply with the demand, to assert that right in an action at law. *Tasker v. Sheldon*, 115 Pa. St. 107.

1. Question Whether a Debtor Is Within the Statute.—In *Wildner v. Ferguson*, 42 Minn. 112, 18 Am. St. Rep. 495, it was held that when the occupation of one claiming an exemption as a "laborer" is shown, the question whether he comes within the term is a question of law for the court, and not one of fact for the jury.

Question of Fact.—See *Root v. Gay*, 64 Iowa 399.

Head of Family.—In *Race v. Oldridge*, 90 Ill. 250, 32 Am. Rep. 27, it was said that whether a person is the head of a family is a question of fact for the jury. And see *Barnes v. Rogers*, 23 Ill. 350. This, however, as a general proposition, is contrary to the weight of authority. In any number of cases, where the facts have been shown, the courts have decided as a matter of law whether the debtor was the head of a family within the meaning of the statute. It is clearly a question of law and not of fact. See the numerous cases cited *supra*, this title, *Persons Entitled to Benefit of Exemption Laws*—"Head of a Family," "Householder," etc.

Occupation of Debtor.—The question whether a debtor "habitually" earns his living by peddling, or by any other occupation, so as to come within a statute of exemption containing such a requirement, is one of fact for the jury. *Stanton v. French*, 91 Cal. 274, 25 Am. St. Rep. 174. And generally, if there is any conflict in the evidence as to whether a person claiming an exemption was engaged in a particular occupation, the question must be submitted to the jury. *Hickman v. Cruise*, 72 Iowa 528, 2 Am. St. Rep. 256.

"Principal" Occupation.—Whether one or the other of several occupations in which a debtor is engaged is his principal occupation or business, so as to bring him within a statute of exemption, is ordinarily a question of fact for the jury. *Morrill v. Seymour*, 3 Mich. 64.

2. Whether Article Is Necessary or a Luxury.—Whether an article of wearing apparel or household furniture attached or levied upon is a necessary article or a luxury is a question of fact for the jury, when there is any room for doubt, depending on the situation of the debtor, and the character and uses of the article, and perhaps on its cost. *Towns v. Pratt*, 33 N. H. 345, 66 Am. Dec. 726.

The courts, said the *Connecticut* court, cannot prescribe or specify the kind, quantity, or quality of articles of furniture which would be exempt under a statute exempting necessary household furniture. "Each case, as it arises, will depend on its own particular circumstances and present the question as one of fact for the jury." *Montague v. Richardson*, 24 Conn. 338, 63 Am. Dec. 173. And see to the same effect *Weed v. Dayton*, 40 Conn. 296; *Davlin v. Stone*, 4 Cush. (Mass.) 359; *Willson v. Ellis*, 1 Den. (N. Y.) 462; *Seaman v. Luce*, 23 Barb. (N. Y.) 251.

"Necessary" Provisions.—Whether a debtor had more provisions on hand than were necessary for the use of his family, within the meaning of a statute exempting provisions, is a question of fact for the jury. *Atkinson v. Gatcher*, 23 Ark. 101. And see to the same effect *Shaw v. Davis*, 55 Barb. (N. Y.) 389.

Provisions for Home Consumption.—It is for the jury to determine whether provisions were held for home consumption so as to come within a statute. *Ward v. Gibbs*, 10 Tex. Civ. App. 287.

Necessary Tools.—Whether tools are necessary for upholding life or to carry on a trade or business may be a question of fact for the jury. *Patten v. Smith*, 4 Conn. 450, 10 Am. Dec. 166. And see *Matter of Mitchell*, 102 Cal. 534; *Cronfeldt v. Arrol*, 50 Minn. 327, 36 Am. St. Rep. 648; *Woods v. Keyes*, 14 Allen (Mass.) 236, 92 Am. Dec. 766; *Sammis v. Smith*, 1 Thomp. & C. (N. Y.) 444. In the case first cited it was held that an apparatus for printing, consisting of a printing press, cases, types, etc., used by a printer in his business, may be tools necessary for upholding life, within the meaning of an exemption law, and that whether they are necessary or not is a question of fact for the jury.

It has been held, however, that when the facts are undisputed the court may decide whether a particular implement is a necessary tool of a trade. *McDowell v. Shotwell*, 2 Whart. (Pa.) 26; *Fischer v. McIntyre*, 66 Mich. 681.

"Suitable" Property.—Except in a clear case, it is a question of fact for the jury whether property claimed as exempt is "suitable" to the debtor's "condition or occupation in life." *Cornelia v. Ellis*, 11 Ill. 584.

Use of Property.—Whether a horse was kept and used for team work, so as to be exempt, is a question of fact for the jury. *Webster v. Orne*, 45 Vt. 40; *Hickok v. Thayer*, 49 Vt. 372; *Rowell v. Powell*, 53 Vt. 302.

Whether a wagon and harness, etc., are ex-

Waiver of Exemption. — Whether an exemption has been waived, the question, being one of intention, has been held to be a question of fact for the jury, where the facts are not conclusive on the question of intention.¹

Fraud. — Whether a debtor has been guilty of fraud so as to forfeit his right of exemption, in those jurisdictions in which it is held that fraud operates as a forfeiture,² is a question of fact.³

4. DAMAGES FOR INFRINGEMENT OF RIGHT.—(1) *In General.* — If exempt property is wrongfully seized and sold or otherwise converted, the measure of damages, whatever the form of action, is the value of the property,⁴ with interest from the time when the property was taken,⁵ unless, as may be the case, the evidence shows greater or less actual damage.⁶

empt as farming tools, or as tools of a debtor's occupation, has been held a question of fact. *Rice v. Wadsworth*, 59 N. H. 100, Hall *v. Nelson*, 59 N. H. 573; *Richards v. Hubbard*, 59 N. H. 158, 47 Am. Rep. 188.

And so it has been held of the question whether a horse is required by a debtor for use in his business, so as to be exempt. *Jaquith v. Scott*, 63 N. H. 5, 56 Am. Rep. 476; *Somers v. Emerson*, 58 N. H. 48; *Towne v. Marshall*, 64 N. H. 460; *George v. Fellows*, 59 N. H. 206. And see *Dains v. Prosser*, 32 Barb. (N. Y.) 290.

In *Walker v. Carlin*, 88 Me. 302, where there was evidence that a debtor used a vehicle for the transportation to his customers of butter, eggs, and other products of his farm, and transported home in it his grain, it was held a question for the jury whether the vehicle was exempt as an "express wagon."

Use of Property to Earn Living. — Whether a debtor uses particular property, as tools, or a team, etc., or habitually uses the same, to earn his living, is a question of fact for the jury. *Root v. Gay*, 64 Iowa 399. And see to the same effect *Stanton v. French*, 91 Cal. 274, 25 Am. St. Rep. 174.

"Work Horse." — It has been held that it is for the jury to say whether a stallion is exempt as a "work horse" when there is any conflict in the evidence as to whether he is kept for work. *Allman v. Gann*, 29 Ala. 240.

Property Clearly Not Within the Statute. — If a particular article is such that it could not under any circumstances be regarded as requisite for the comfort or convenience of the debtor or if it clearly does not come within the class exempted by the statute, the court may hold as a matter of law that it is not exempt. See *Towns v. Pratt*, 33 N. H. 345, 66 Am. Dec. 726, where the court drew this distinction, and held as a matter of law that a trunk and a cabinet box were not within a statute exempting necessary household furniture, and that a breastpin was not within a statute exempting necessary wearing apparel. And see *Dunlap v. Edgerton*, 30 Vt. 224, where it was held as a matter of law that a piano was not within a statute exempting household furniture necessary for upholding life. See also *Hitchcock v. Holmes*, 43 Conn. 528.

Property Clearly Within the Statute. — It has been held that if an article comes within the class that is exempted by the statute it is to be held as a matter of law that it is exempt, and it is not for the jury to say whether it is necessary in the particular case or not. *Dunlap v.*

Edgerton, 30 Vt. 224. See also *Fischer v. McIntyre*, 66 Mich. 681.

1. Whether Exemption Has Been Waived. — *Marchildon v. O'Hara*, 52 Mo. App. 523; *Ehrlich v. Aetna L. Ins. Co.*, 88 Mo. 249. And see *Fogg v. Littlefield*, 68 Me. 52.

2. Fraud. — See *supra*, this title, *Waiver, Forfeiture, and Estoppel — Forfeiture.*

3. Brackett v. Watkins, 21 Wend. (N. Y.) 68.

4. Measure of Damages in General — Value of Property — Alabama. — *Alley v. Daniel*, 75 Ala. 403.

California. — *Spencer v. Long*, 39 Cal. 700.

Maine. — *Spencer v. Brighton*, 49 Me. 326.

Michigan. — *Wyckoff v. Wyllis*, 8 Mich. 48, *Town v. Elmore*, 38 Mich. 305; *Stilson v. Gibbs*, 53 Mich. 280.

Minnesota. — *Murphy v. Sherman*, 25 Minn. 196.

Missouri. — *State v. Harrington*, 33 Mo. App. 477.

New Hampshire. — *Hill v. Loomis*, 6 N. H. 263.

New York. — *Pozzoni v. Henderson*, 2 E. D. Smith (N. Y.) 146; *Livor v. Orser*, 5 Duer (N. Y.) 501. And see *Twinam v. Swart*, 4 Lans. (N. Y.) 263.

Texas. — *Cone v. Lewis*, 64 Tex. 331, 53 Am. Rep. 767; *Low v. Tandy*, 70 Tex. 745.

The rules governing the measure of damages for wrongfully seizing or tor seizing and selling exempt property are substantially the same as those which govern other cases of trespass and conversion. As to these see the titles DAMAGES, vol. 8, p. 537; TRESPASS; TROVER AND CONVERSION.

Amount Received by Officer at Sale. — The amount received by an officer on a sale of exempt property on execution is not a proper standard of the value of the property in an action for damages for seizing and selling it for property does not generally bring its full value at a forced sale. *Pozzoni v. Henderson* 2 E. D. Smith (N. Y.) 146.

5. Interest — Alabama. — *Alley v. Daniel*, 75 Ala. 407.

Maine. — *Spencer v. Brighton*, 49 Me. 326.

Minnesota. — *Murphy v. Sherman*, 25 Minn. 196.

Missouri. — *State v. Harrington*, 33 Mo. App. 477.

New York. — See *Twinam v. Swart*, 4 Lans. (N. Y.) 263.

Texas. — *Bailey v. Oliver* (Tex. 1888) 9 S. W. Rep. 606; *Low v. Tandy*, 70 Tex. 745.

6. Damages Less or More than Value. — *Parham v. McMurray*, 32 Ark. 261, *McGuire v.*

(2) *Garnishment of Wages.* — And if a creditor wrongfully procures the exempt wages of his debtor to be garnished and applied in payment of his claim, the measure of damages is the amount of the exempt wages so appropriated, with interest.¹

(3) *When Property Is Returned or Recovered.* — The full value of the property is not the proper measure of damages when the property itself is returned or recovered by action of replevin or otherwise. In such a case, if the property is valuable for present use, as in the case of a team, the measure of damages is compensation for the loss of the use, and this is the value of such use during the time of detention.² If the property is not of value for use, interest on its value should be allowed.³ And of course there should always be an allowance for any deterioration in value by reason of the seizure.⁴

(4) *Exemplary Damages.* — In proper cases, a debtor may also recover

Galligan 57 Mich. 38; Cooper v. Newman, 45 N. H. 339.

Mitigation of Damages — Nominal Damages. — If a debtor has sustained less damage from the wrongful seizure of his exempt property than the value of the property, he cannot recover the full value; and if he has sustained no actual damage, he can recover nominal damages only. Therefore where the property attached is subject to a mortgage, and, after the attachment, is, by direction of the attaching creditor, who has become the legal owner of the mortgage, duly sold by the officer on the mortgage, and the proceeds of the sale, being less than the amount of the mortgage debt, are properly applied on that debt, the sum for which the property was thus sold should go in mitigation of damages. Cooper v. Newman 45 N. H. 339.

Purchase by Debtor at Execution Sale. — If exempt property is wrongfully levied upon and sold, but is not taken out of the debtor's possession, and is bid in by or for the debtor at the sale, the value of the property is not the measure of damages in an action against the officer for the wrongful levy and sale. The proper measure is the amount the debtor is required to pay on the bid, with interest, of course, as in other cases. Parham v. McMurray, 32 Ark. 261.

Mortgaged Property — Mortgagor's Damages. — In an action by a mortgagor of exempt property in possession under the terms of the mortgage to recover damages from an officer for wrongfully seizing and selling the property on execution against him, the property, as between him and the officer, is to be taken at its full value in assessing the damages, and no deduction of the amount of the mortgage is to be made. Livor v. Orser, 5 Duer (N. Y.) 501.

It can make no difference that the debt secured by the mortgage is payable on demand, if no demand has been made, and there is therefore no default. Livor v. Orser, 5 Duer (N. Y.) 501.

In *Michigan* there is a decision to the contrary, holding that the amount of the mortgage should be deducted. McGuire v. Galligan, 57 Mich. 38.

Levy on Wheat — Waste in Threshing. — If an officer wrongfully levies upon a crop of wheat which is exempt, and threshes and sells it, he is liable for what has been wasted in threshing, as well as for what has been sold. Stillson v. Gibbs, 53 Mich. 280.

Loss of Business. — Whether damages can be recovered for loss of business occasioned by the seizure and consequent loss of profits is not clear. Perhaps they could not under the doctrine of Cushing v. Seymour, 30 Minn. 301. But there are many cases which allow such a recovery. See Donnell v. Jones, 17 Ala. 689, 52 Am. Dec. 194; Shelbyville Lateral Branch R. Co. v. Lewark, 4 Ind. 471; Allison v. Chandler, 11 Mich. 548; Hammersmith v. Avery, 18 Nev. 225. And see generally the title DAMAGES, vol. 8, pp. 616-627. In any case, to authorize the allowance of such damages, the loss of business must be shown. McGuire v. Galligan, 57 Mich. 38.

In an action against an officer for levying upon exempt barber's implements and closing up the shop, damages may be recovered for the interruption of business. But evidence of the customary wages of journeymen barbers is inadmissible to establish such damages, for "there is no necessary relation between the profits of a principal and the wages of a journeyman." Hammersmith v. Avery, 18 Nev. 225.

As to evidence of profits, etc., see the title DAMAGES, vol. 8, pp. 616-627.

1. Garnishment of Exempt Wages. — Albrecht v. Treitschke, 17 Neb. 205.

2. When Property Is Returned or Recovered. — Elder v. Frevert, 18 Nev. 446 [citing Allen v. Fox, 51 N. Y. 562, 10 Am. Rep. 641; Williams v. Phelps, 16 Wis. 80; Crabtree v. Clapham, 67 Me. 326]. And see Butler v. Mehrling, 15 Ill. 488; Dorsey v. Gassaway, 2 Har. & J. (Md.) 413, 3 Am. Dec. 557.

3. Interest on the Value of the Property. — It has been said that interest on the value of the property during the period of detention is the proper measure of damages where the property is wrongfully taken and afterwards returned or recovered. Twinam v. Swart, 4 Lans. (N. Y.) 263, and cases there cited not involving any question of exemption. But while this may be a proper measure in the case of property which has no value for present use, it might not afford adequate compensation if the property has such a value. And in such a case the value of the use should be allowed. Elder v. Frevert, 18 Nev. 453.

Further on this Question see the titles REPLEVIN · TRESPASS.

4. Deterioration in Value. — See Alley v. Daniel, 75 Ala. 403. And see the titles REPLEVIN; TRESPASS.

exemplary damages for a wrongful seizure of his exempt property.¹

(5) *Double or Treble Damages*. — In some states, as was shown in a preceding paragraph, there are statutes allowing a debtor to recover double or treble damages as a penalty for the infringement or denial of his right of exemption.²

(6) *Set-off and Counterclaim*. — In an action against an officer or execution creditor, or both, for wrongfully seizing and selling exempt property, the amount of the debt for which the property was seized cannot be pleaded as a set-off or counterclaim, or otherwise deducted from the amount of damages which the plaintiff is entitled to recover, for this would be an indirect way of defeating the right of exemption altogether.³

1. Recovery of Exemplary Damages — Alabama. — *Alley v. Daniel*, 75 Ala. 403.

Michigan. — *Stilson v. Gibbs*, 53 Mich. 280.
Minnesota. — *Lynd v. Pickett*, 7 Minn. 184,
82 Am. Dec. 79; *Cronfeldt v. Arrol*, 50 Minn.
327, 36 Am. St. Rep. 648.

New York. — *Twinam v. Swart*, 4 Lans. (N. Y.) 263.

Pennsylvania. — *Knabb v. Drake*, 23 Pa. St. 489, 62 Am. Dec. 352.

Texas. — *Cone v. Lewis*, 64 Tex. 331, 53 Am. Rep. 767.

Necessity of Wantonness and Malice. — Exemplary damages cannot be recovered merely because the seizure or sale of exempt property was wrongful. It must also have been wanton and malicious.

Alabama. — *Alley v. Daniel*, 75 Ala. 403.

Minnesota. — *Haugen v. Younggren*, 57 Minn. 170.

Missouri. — *State v. Jungling*, 116 Mo. 162.

New York. — *Twinam v. Swart*, 4 Lans. (N. Y.) 263.

Texas. — *Cone v. Lewis*, 64 Tex. 331, 53 Am. Rep. 767.

See the title EXEMPLARY DAMAGES, *ante*, p. 2.

Knowledge that Property Is Exempt. — Malice may be implied for the purpose of awarding exemplary damages if it appears that the officer seized the property when he knew that it was exempt and that he had no right to levy upon it. *Cronfeldt v. Arrol*, 50 Minn. 327, 36 Am. St. Rep. 648; *Lynd v. Pickett*, 7 Minn. 184, 82 Am. Dec. 79. And see *Alley v. Daniel*, 75 Ala. 403.

When the statute, as in *Alabama*, makes it the duty of the officer to levy upon and sell property when indemnified by the execution plaintiff he cannot be made liable in exemplary damages for such a levy and sale merely because he knew that the property was exempt. *Alley v. Daniel*, 75 Ala. 403 [*citing* *Leinkauf v. Morris*, 66 Ala. 406; *Pacific Ins. Co. v. Conard*, 1 Baldw. (U. S.) 138; *Phelps v. Owens*, 11 Cal. 22].

Action Against Creditor. — An execution

plaintiff is not liable for exemplary damages for the seizure and sale of exempt property if he directed the same to be made under the honest belief that the property was not exempt, and the evidence rebuts any reasonable inference of an improper motive or oppressive conduct. *Burris v. Booth*, (Tex. Civ. App. 1897) 40 S. W. Rep. 186. But he is equally liable with the officer if he acts oppressively or maliciously, or with knowledge that the property is exempt. *Cronfeldt v. Arrol*, 50 Minn. 327, 36 Am. St. Rep. 648.

Further on this Point see the title EXEMPLARY DAMAGES, *ante*, p. 2.

2. Penalty — Double or Treble Damages. — See *supra*, this section, *Statutory Action for Penalty*.

3. The Debt Cannot Be Pleaded as a Set-off or Counterclaim against the claim for damages, or otherwise deducted from the amount of damages. *Elder v. Frevert*, 18 Nev. 447; *Wilson v. McElroy*, 32 Pa. St. 82. Compare *Temple v. Scott*, 3 Minn. 419; *Mallory v. Norton*, 21 Barb. (N. Y.) 424.

Generally as to the right to claim exemptions as against a set-off or counterclaim, see *supra*, this title *Proceedings and Process in or Against Which Exemptions May Be Claimed — Claim of Exemption as Against Set-off*.

Deduction of Proceeds Applied on Debt. — In ordinary cases, when the property of a debtor is wrongfully attached and sold, and the proceeds applied to the payment of his indebtedness, the amount so applied should be deducted from the damages recoverable from the attaching creditor or officer. *Scanlan v. Guiling*, 63 Ark. 540; *Camp v. Ganley*, 6 Ill. App. 500.

But this rule does not apply where the property was exempt, so that the creditor had no right to subject it to the satisfaction of his claim, for it is obvious that to allow this would defeat the object of the statute. *Parham v. McMurray*, 32 Ark. 261; *Hill v. Loomis*, 6 N. H. 263; *Wilson v. McElroy*, 32 Pa. St. 82; *Cone v. Lewis*, 64 Tex. 331, 53 Am. Rep. 767.

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CROSS-REFERENCES.

For matters of PROCEDURE, see the title TAXATION, ENCYC. OF PLEADING AND PRACTICE.

As to what is within and what beyond the taxing power, and the general limits of such power, see the title TAXATION, in this work.

As to exemption from succession and inheritance taxes, see the title SUCCESSION TAXES.

As to exemption from income taxes, see the title INCOME TAXES.

As to exemption from imposition of license taxes, etc., see the title OCCUPATION, BUSINESS, AND PRIVILEGE TAXES.

As to exemption from franchise taxes, see the title TAXATION (CORPORATE).

As to exemptions from special or local assessments for municipal improvements, see the title SPECIAL OR LOCAL ASSESSMENTS.

For questions of exemptions in relation to national and savings banks, see the titles NATIONAL BANKS; SAVINGS BANKS.

As to deduction of indebtedness from the valuation of property for taxation, see the title TAXATION.

As to the taxing power of a state over foreign corporations, see the title TAXATION (CORPORATE).

That an assignment for the benefit of creditors does not have the effect of exempting the assigned property from taxation, see the title ASSIGNMENTS FOR THE BENEFIT OF CREDITORS, vol. 3, p. 106.

As to the application of the same rule in reference to property in the hands of a receiver, see the title RECEIVERS.

And for other matters of SUBSTANTIVE LAW and EVIDENCE related to this subject, see generally the titles CONSTITUTIONAL LAW, vol. 6, p. 882; POLICE POWER; TAXATION; TAXATION (CORPORATE).

I. INTRODUCTORY — DEFINITION — SCOPE OF ARTICLE. — The term "exemption," as generally used, means freedom from some undesirable requirement or condition,¹ and in this sense any subject over which the taxing power does not extend is exempt from taxation.² But an adoption of this general meaning is objectionable for the reason that it would naturally lead to the further inclusion within the term of property which has never been expressly subjected to taxation, though it may at any time be made liable thereto.³

True Definition. — It is considered that the true meaning of exemption from taxation is immunity, by virtue of some express grant of the sovereign power, from liability to taxation to which the object or subject of the grant would otherwise be liable; thus embracing the two ideas of liability and express release from such liability.⁴

1. Century Dictionary.

In Black's Law Dictionary the term is defined as meaning "immunity from a general burden, tax, or charge."

2. Subjects Over Which Sovereign Power of State Does Not Extend Considered Exempt from Taxation. — In *M'Culloch v. Maryland*, 4 Wheat. (U. S.) 429, Marshall, C. J., said: "All subjects over which the sovereign power of a state extends are objects of taxation; but those over which it does not extend are, upon the soundest principles, exempt from taxation. This proposition may almost be pronounced self-evident." See also *Wheeling, etc., Transp. Co. v. Wheeling*, 99 U. S. 273; *Howell v. State*, 3 Gill (Md.) 14; *Wisconsin Cent. R. Co. v. Taylor County*, 52 Wis. 37.

3. Omission to Provide for Taxation of Property Considered an Exemption. — In *Brewster v. Hough*, 10 N. H. 138, Chief Justice Parker, delivering the opinion of the court, said: "There is no doubt that the legislature may provide, by general laws, for the exemption of certain classes of property from taxation, as well as exempt it in fact by omitting it in the description of property required to be taxed."

In *Martin v. Charleston*, 13 Rich. Eq. (S. Car.) 50, Inglis, J., delivering the opinion of the court, said: "It is difficult to distinguish between such an instance of expressed forbearance to tax, and a tacit forbearance such as occurs in the common case of omission from an enumeration of the subjects of taxation. The necessity, in the one case, of expression, in order to take the particular class intended to be omitted out of a general class which is taxed, and in the terms of description of which it would otherwise be included, makes the only difference. When no general class in the enumeration embraces in its terms the favored particulars, a silent omission accomplishes the purpose."

Contrary Doctrine. — But in *St. Philip's Church v. Charleston*, McMull. Eq. (S. Car.) 139, Chancellor Harper expressed a contrary view in the following language: "I do not suppose that the mere circumstance of the legislature's never having thought proper, in fact, to tax any particular sort of property would exempt it from city taxation."

And in *Hope Min. Co. v. Kennon*, 3 Mont. 35, the court considered that the enumeration in a tax law of certain kinds of property liable to taxation could not be construed as exempting other species of property not enumerated.

In *Mississippi Mills v. Cook*, 56 Miss. 40, it was held that the provision of art. 12, § 13, of the *Mississippi Constitution of 1869*, that "the property of all corporations for pecuniary profits shall be subject to taxation the same as that of individuals," was not intended to exempt from taxation the property of corporations other than those for pecuniary profit.

4. True Meaning of Exemption. — In *Matter of Hamilton*, 148 N. Y. 310, O'Brien, J., delivering the opinion of the court, said: "Exemption implies that the person or corporation to which it applies is or would otherwise be taxable."

The distinction indicated in the text is well brought out in the case of *Union, etc., Bank v. Memphis*, (Tenn. 1898) 46 S. W. Rep. 557, in which case *McAlister, J.*, delivering the opinion of the court, concluded as follows: "In our opinion the capital stock of this bank is not exempt from taxation, but is not liable in the present case because the legislature has made no provision for its assessment."

In *Church Charity Foundation v. People*, 6 Dem. (N. Y.) 154, it was considered that the term "exempted by law from taxation," as used in the collateral inheritance tax law, meant a positive affirmative exemption granted by some specific provision of law and not a mere absence of any provision for taxation of the institutions referred to.

See also *U. S. v. Perkins*, 163 U. S. 625; *U. S. v. Fitch*, 163 U. S. 631, in which cases it was held that the United States were not a corporation "exempted by law from taxation" within the meaning of such a statute.

The phrase "exempt from taxation by the laws of this state" means "declared by the laws of this state to be exempt from taxation," and not "exempt from the operation of the tax laws of this state." *Smalley v. Burlington*, 63 Vt. 443.

In *Humphrey v. Pegues*, 16 Wall. (U. S.) 244, Mr. Justice Hunt, delivering the opinion of the court, said that an exemption from

Scope of Article. — The above definition and the cross-references given indicate with sufficient clearness the general scope of the present article. But this limitation will be exceeded in one particular, for the reasons about to be set forth.

Public Property and Instrumentalities of Government. — It is well established that public property and the various instrumentalities of government are not subjects of taxation,¹ but this immunity, though it rests on principle and necessity, independent of any express grant, is usually confirmed by constitutional or statutory provisions that such property shall be exempt.² Such exemptions are clearly within the scope of this article, and it has been thought proper, in order to avoid duplication of matter, to treat, in connection therewith, of the general immunity of public property and the instrumentalities of government.

II. THE POWER TO CREATE EXEMPTIONS — 1. Constitutional Exemptions. — The power to exempt from taxation, like all powers under our form of government, resides, in the first instance, in the people, and their will, when expressed in the constitutions adopted by the various states, must govern in this matter. Therefore, where the constitution of a state provides in mandatory form that certain property shall be exempt from taxation, no question can ever arise as to the existence of such exemption.

Provisions Authorizing Legislature to Create Exemptions. — Many of the constitutions, however, contain exemptions in a permissive instead of a mandatory form, as by a provision that the legislature may exempt certain specified classes of property. Such a provision is not self-executing, but only authorizes legislation creating exemptions, and until the legislature has exercised this power no exemption exists.³

taxation "contains the essential idea of a peculiar benefit or advantage, of a special exemption from a burden falling upon others."

In a case where public lands have been granted to a railroad company, and an exemption from taxation has been given in reference to such lands, which exemption is to terminate upon the happening of certain specified contingencies, and it is attempted to subject such lands to taxation, the question is, "has the land ever become taxable?" not "has it, at one time liable to taxation, been exempted therefrom?" And in such case there is no question arising of exemption, at least in the ordinary sense, which is the withdrawing of particular property from taxation to which other property remains subject. *Canadian Pac. R. Co. v. Burnett*, 5 Manitoba L. Rep. 395; *Reg. v. Victoria Lumber, etc., Co.*, 5 British Columbia 288, 17 Can. L. T. 443.

Distinction Between Exemption and Contract Offsetting Services Against Taxes. — A contract between a city and a water company provided that the city should have the right to use the water free of charge for certain specified purposes, "in consideration for all of which the property of the city water company shall be, and the same is hereby, exempted from municipal taxation during the full term for which this contract is executed." It was held that the transaction was not an exemption from taxation (it being claimed that such an exemption was contrary to law), but was a contract between the two parties that, the value of the water furnished and of the taxes due being considered to be equal, the one should be offset by the other. *Bartholomew v. Austin*, 85 Fed. Rep. 359.

1. Public Property Not Taxable. — "Public property is nontaxable, not upon the theory of exemption, but for the obvious reason that

there is no law and practically never can be a law making it taxable." *Matter of Hamilton*, 148 N. Y. 310, *per O'Brien, J.* See *infra*, this title, *Particular Subjects of Exemption — Public Property and the Instrumentalities of Government*.

2. Principle of Immunity of Public Property — Reasons for Express Exemption. — *West Hartford v. Water Com'rs*, 44 Conn. 360.

3. Provisions Merely Authorizing Exemptions Not Self-executing. — *People v. Anderson*, 117 Ill. 50; *Matter of Swigert*, 123 Ill. 267; *Sanitary Dist. v. Martin*, 173 Ill. 243; *White v. Smith*, 43 W. N. C. (Pa.) 342; *Philadelphia v. Barber*, 160 Pa. St. 123, 34 W. N. C. (Pa.) 155; *Wagner Free Institute v. Philadelphia*, 132 Pa. St. 612, 25 W. N. C. (Pa.) 437; *Donohugh's Appeal*, 86 Pa. St. 306, *affirming* 35 Leg. Int. (Pa.) 4, 12 Leg. Int. (Pa.) 284; *St. Edward's College v. Morris*, 82 Tex. 1.

That such a provision prohibits exemptions other than those expressly authorized, see *infra*, this section, *Effect of Various Constitutional Provisions*.

Power of Legislature under Constitutional Authorization of Exemptions. — A constitutional provision that the General Assembly "may" exempt from taxation property held for certain purposes leaves the legislature free to exercise the power to its full extent, or partially, or to decline to make any exemptions. *United Brethren of Salem v. Forsyth County*, 115 N. Car. 489; *Matlack v. Jones*, 2 Disney (Ohio) 2.

Under such a provision the legislature may exempt one kind of property held for such purposes, either realty or personalty, and tax other kinds; or it can exempt partially, as, for instance, upon a certain value, and tax all above that value. And where the constitutional grant is in the disjunctive (as authorized by the legislature to exempt property

Provision Authorizing Exemption of Public Property.—And the *Illinois* court has considered that such a provision in reference to public property plainly implies that it is subject to taxation until the legislature has passed a law exempting it.¹

2. Power of the Legislature—*a*. **PLENARY POWER IN THE ABSENCE OF CONSTITUTIONAL RESTRICTIONS.**—In the absence of constitutional restrictions, or, if such restrictions exist, within the limits laid down by the fundamental law, the legislature has plenary power to create whatever exemptions it may deem expedient.² This doctrine is too well established by authority

held "for educational, scientific, literary, charitable, or religious purposes"), the legislature may exempt property held for one or more of such purposes and tax that held for others. *United Brethren of Salem v. Forsyth County*, 115 N. Car. 489.

A constitutional grant of power to exempt property used for certain enumerated purposes carries with it the power to exempt property the proceeds of which are devoted to any of those purposes. *Petersburg v. Petersburg Benev. Mechanics' Assoc.*, 78 Va. 431, 8 Am. & Eng. Corp. Cas. 484.

Under the provisions of the *Illinois* Constitution of 1848 that the General Assembly might exempt from taxation such property as it might "deem necessary for school, religious, and charitable purposes," the General Assembly had a right to exempt any land or property owned by a school, and the right to exempt was not confined to that property which was actually used for the school as it is under the Constitution of 1870, giving the legislature power to exempt such property as may be "used exclusively for agricultural and horticultural societies, for school, religious, cemetery, and charitable purposes." *Northwestern University v. People*, 99 U. S. 399.

1. Public Property Subject to Taxation Until Expressly Exempted by Legislature.—*Sanitary Dist. v. Martin*, 173 Ill. 243; *Matter of Swigert*, 123 Ill. 267.

2. Legislative Power to Create Exemptions—*United States*.—*Home of Friendless v. Rouse*, 8 Wall. (U. S.) 430; *Wells v. Central Vermont R. Co.*, 14 Blatchf. (U. S.) 426; *Wilmington, etc., R. Co. v. Reid*, 13 Wall. (U. S.) 264; *Tomlinson v. Branch*, 15 Wall. (U. S.) 460; *Pacific R. Co. v. Maguire*, 20 Wall. (U. S.) 36; *Bailey v. Magwire*, 22 Wall. (U. S.) 215; *Magoun v. Illinois Trust, etc., Bank*, 170 U. S. 283; *Drake v. Kochersperger*, 170 U. S. 303; *Railroad Companies v. Gaines*, 97 U. S. 697; *Gilman v. Sheboygan*, 2 Black (U. S.) 510; *Delaware R. Tax*, 18 Wall. (U. S.) 206, *affirming* *Minot v. Philadelphia, etc., R. Co.*, 2 Abb. (U. S.) 323; *Hoge v. Richmond, etc., R. Co.*, 99 U. S. 348. See also *Louisville, etc., R. Co. v. Gaines*, 2 Flipp. (U. S.) 621.

Alabama.—*Mobile v. Stonewall Ins. Co.*, 53 Ala. 570; *Mobile, etc., R. Co. v. Kennerly*, 74 Ala. 566.

Arkansas.—*Oliver v. Memphis, etc., R. Co.*, 30 Ark. 128.

California.—*People v. McCreery*, 34 Cal. 432.

Colorado.—*Stanley v. Little Pittsburg Min. Co.*, 6 Colo. 415. See also *County Com'rs v. Colorado Seminary*, 12 Colo. 497.

Dakota.—*Winona, etc., R. Co. v. Deuel*

County, 3 Dakota 1; *Farris v. Vannier*, 6 Dakota 186.

Delaware.—See *State v. Smyrna Bank*, 2 Houst. (Del.) 99, 73 Am. Dec. 699.

District of Columbia.—*Baltimore, etc., R. Co. v. District of Columbia*, 3 MacArthur (D. C.) 122.

Illinois.—*Illinois Cent. R. Co. v. McLean County*, 17 Ill. 291; *Neustadt v. Illinois Cent. R. Co.*, 31 Ill. 484; *Illinois Cent. R. Co. v. Irvin*, 72 Ill. 452; *Illinois Cent. R. Co. v. Goodwin*, 94 Ill. 262.

Kentucky.—See *Kentucky Cent. R. Co. v. Bourbon County*, 82 Ky. 497; *Bank Tax Cases*, 97 Ky. 590.

Louisiana.—*Citizens' Bank v. Bouny*, 32 La. Ann. 239.

Maine.—*Brewer Brick Co. v. Brewer*, 62 Me. 62.

Maryland.—*Tax Cases*, 12 Gill & J. (Md.) 117; *Buchanan v. Talbot County*, 47 Md. 286.

Massachusetts.—See *Minot v. Winthrop*, 162 Mass. 113.

Michigan.—*People v. Detroit, etc., R. Co.*, 1 Mich. 458.

Mississippi.—*Mississippi Mills v. Cook*, 56 Miss. 40.

Missouri.—*St. Vincent's College v. Schaefer*, 104 Mo. 261; *Washington University v. Rowse*, 42 Mo. 308; *Scotland County v. Missouri, etc., R. Co.*, 65 Mo. 123.

New Hampshire.—*Brewster v. Hough*, 10 N. H. 138.

New Jersey.—*State v. Collectors*, 26 N. J. L. 519, *affirming* 25 N. J. L. 315.

New York.—*People v. Carter*, 52 Hun (N. Y.) 458, *affirmed* by 117 N. Y. 625.

Ohio.—*Zanesville v. Richards*, 5 Ohio St. 589.

Oregon.—*Crawford v. Linn County*, 11 Oregon 482; *Hogg v. Mackay*, 23 Oregon 339, 37 Am. St. Rep. 682.

Pennsylvania.—*Butler's Appeal*, 73 Pa. St. 448; *Durach's Appeal*, 62 Pa. St. 491. See also *Erie County v. Erie Waterworks*, 18 W. N. C. (Pa.) 310.

South Carolina.—*St. Philip's Church v. Charleston, McMull. Eq. (S. Car.)* 139.

Tennessee.—*McCallie v. Chattanooga*, 3 Head (Tenn.) 317; *Memphis, etc., R. Co. v. Gaines*, 3 Tenn. Ch. 604; *Memphis v. Memphis City Bank*, 91 Tenn. 574; *State v. Butler*, 13 Lea (Tenn.) 400; *Knoxville, etc., R. Co. v. Hicks*, 9 Baxt. (Tenn.) 442; *State v. Whitworth*, 8 Lea (Tenn.) 594; *State v. Bank of Commerce*, 95 Tenn. 221; *University of the South v. Skidmore*, 87 Tenn. 155. See also *Turley, etc., Institute v. Memphis*, 8 Heisk. (Tenn.) 845.

Vermont.—*Rutland Sav. Bank v. Rutland*, 52 Vt. 463.

to admit of discussion or to be called in question.¹

Power of Congress. — Similarly, Congress has power to exempt any agencies which it may employ in the conduct of or for services to the general government, from such taxation as will, in its judgment, impede or prevent the performance of such services.²

b. LIMITATION. — This power must, however, be exercised within reasonable limits. The legislature cannot, under the pretext of granting exemptions to different classes of property, so reduce the amount of taxable property as to discriminate unfairly against what is left.³

Virginia. — *Richmond v. Richmond, etc., R. Co.*, 21 Gratt. (Va.) 604; *Whiting v. West Point*, 88 Va. 905, 29 Am. St. Rep. 750; *Williamson v. Massey*, 33 Gratt. (Va.) 237; *Com. v. Richmond, etc., R. Co.*, 81 Va. 355, 24 Am. & Eng. R. Cas. 482; *Petersburg v. Petersburg Benev. Mechanics' Assoc.*, 78 Va. 431, 8 Am. & Eng. Corp. Cas. 434.

Washington. — *Thurston County v. Sisters of Charity*, 14 Wash. 264.

West Virginia. — *Chesapeake, etc., R. Co. v. Miller*, 19 W. Va. 408.

Wisconsin. — *Milwaukee Electric R., etc., Co. v. Milwaukee*, 95 Wis. 42; *Wisconsin Cent. R. Co. v. Taylor County*, 52 Wis. 37.

"For a Consideration." — In *Whiting v. West Point*, 88 Va. 905, 29 Am. St. Rep. 750, the court, *per Lewis, P.*, said: "Undoubtedly, unless forbidden by the fundamental law, the legislature of a state may for a consideration grant away the power of taxation, either for a specified period or permanently." See also *State v. Petway*, 2 Jones Eq. (55 N. Car.) 396.

Exemption by Two-thirds Vote. — Under the *Texas* Constitution of 1870, the legislature had power to exempt property from taxation by a law receiving the assent of two-thirds of the members of both houses. *International, etc., R. Co. v. Anderson County*, 59 Tex. 666. See also *International, etc., R. Co. v. Smith County*, 65 Tex. 21.

Constitutional Restriction of Exempting Power Does Not Abrogate Pre-existing Exemptions. — A constitutional provision restricting the power of the legislature to create exemptions does not affect an exemption previously granted to a corporation, and upon the renewal of the grant after the adoption of such constitutional provision the legislature may change and modify its terms and conditions. *St. Paul v. St. Paul, etc., R. Co.*, 23 Minn. 469.

Illustrations of Exemptions Which Have Been Sustained. — The territorial legislature of *Minnesota* had power to exempt the property of an educational institution from taxation. *Nobles County v. Hamline University*, 46 Minn. 316.

Section 6 of the organic act of the territory of *Minnesota*, which provided that "the legislative power of the territory shall extend to all rightful subjects of legislation consistent with the Constitution of the United States and the provisions of this act," was ample to sustain a grant by the territorial legislature to a railroad company of exemption from taxation. *First Div. St. Paul, etc., R. Co. v. Parcher*, 14 Minn. 297.

Act No. 1, *Vermont* Laws, 1874, providing for the taxation of the property of railroads, is not invalid because under its provisions lands improved by having a railroad built on them are not taxed until they have been so improved

for ten years. *Wells v. Central Vermont R. Co.*, 14 Blatchf. (U. S.) 426.

Pub. Stat. Massachusetts, c. 11, § 5, cl. 6, exempting "the wearing apparel and farming utensils of every person; his household furniture, not exceeding one thousand dollars in value; and the necessary tools, not exceeding three hundred dollars in value, of a mechanic," is constitutional. *Bay v. Lawrence*, 167 Mass. 371.

By *New York* Laws 1886, c. 679, § 4, it is provided that "the personal property, franchise, and business of all insurance companies incorporated under the laws of this state, or any other state or country, and doing business in this state, and the shares of stock of said companies, shall hereafter be exempt from all assessment or taxation, except as in this act prescribed; provided that this section shall not affect the fire-department tax of two per cent. now required to be paid." This act is not unconstitutional. *Dutchess County Mut. Ins. Co. v. Poughkeepsie*, 51 Hun (N. Y.) 595.

The provision of the charter of the Bank of the State of *Indiana* that "the capital stock of said bank or branches shall not be taxable for municipal purposes" has been decided to be valid. *King v. Madison*, 17 Ind. 48.

A provision in the charter of a city exempting from the payment of any taxes levied for fire-department purposes, parcels of land of ten acres or more used exclusively for farming purposes and not laid out in city lots, is a reasonable and valid one and cannot be disregarded by the city authorities without a breach of faith, which the courts will not permit. *Bladwin v. Hastings*, 83 Mich. 639.

1. Doctrine Established Beyond Question. — *Harrison, J.*, in *Oliver v. Memphis, etc., R. Co.*, 30 Ark. 128; *Day v. Lawrence*, 167 Mass. 371.

In *Richmond v. Richmond, etc., R. Co.*, 21 Gratt. (Va.) 613, the court, *per Staples, J.*, said: "The right of a legislature to surrender the power of taxation in specific cases * * * is now regarded as established upon the most solid foundations of public policy and expediency."

2. Power of Congress. — *Santa Clara R. Tax Case*, 9 Sawy. (U. S.) 165, 18 Fed. Rep. 385; *Thomson v. Union Pac. R. Co.*, 9 Wall. (U. S.) 579; *New York Bank v. Supervisors*, 7 Wall. (U. S.) 26; *Hubbard v. Johnson County*, 23 Iowa 130.

It was within the power of Congress to grant public lands to the Northern Pacific Railroad Company and to exempt its right of way over such lands from taxation. *Northern Pac. R. Co. v. Carland*, 5 Mont. 146, 17 Am. & Eng. R. Cas. 364.

3. Limitation of Power. — *Wells v. Hyattsville*, Volume XII.

c. SURRENDER OF EXEMPTING POWER NEVER IMPLIED. — The sovereign power of a legislature to exempt from taxation whatever property it sees fit should never be held to be surrendered by mere implication, or in the absence of plain and express language showing a legislative intent to surrender it.¹ Thus, a grant to a municipality of the power of taxation does not constitute a contract between the municipality and the state which is violated by a subsequent exemption of property which might otherwise be taxed under the power so granted.²

d. EXEMPTIONS PRESUMED CONSTITUTIONAL. — Where the legislature has clearly intended to create an exemption, the validity of that act must be assumed, like all others, until clearly shown to be beyond the legislative authority.³

e. EFFECT OF VARIOUS CONSTITUTIONAL PROVISIONS — (1) *General Rule of Construction.* — A constitutional provision purporting to deprive the legislature of the power to create exemptions from taxation amounts to a restriction upon a legislative power which would otherwise be unlimited and unquestionable. It is a tying up of the legislative hands, and should, therefore, be construed in a liberal spirit, so as to remedy the mischief at which it was aimed, but not to further and unnecessarily fetter the proper governmental powers of the people's representatives.⁴ On the other hand, where the general exempting power is clearly taken away, exceptions will not be implied,⁵ and, when expressly made, will be strictly construed.⁶

(2) *Requirement of Equal and Uniform Taxation.* — There is no prohibition of exemptions, but simply a requirement of equality in the assessment and valuation of such property as the legislature may see fit to tax, in such constitutional requirements as that "taxation shall be equal and uniform,"⁷

77 Md. 125. See also *O'Kane v. Treat*, 25 Ill. 557.

1. Surrender of Exempting Power Not Implied. — *Gilman v. Sheboygan*, 2 Black (U. S.) 510.

2. Grant of Taxing Power to Municipalities Not a Contract Which May Be Violated by Subsequent Exemptions. — *Williamson v. New Jersey*, 130 U. S. 189, affirming 44 N. J. L. 165; *State v. Parker*, 32 N. J. L. 426; *Richmond v. Richmond*, etc., R. Co., 21 Gratt. (Va.) 604. See also *State Bank v. Madison*, 3 Ind. 43; *King v. Madison*, 17 Ind. 48.

3. Exemptions Presumed Constitutional. — *Clark v. Louisville Water Co.*, 90 Ky. 515; *Donohugh's Appeal*, 86 Pa. St. 306, affirming 35 Leg. Int. (Pa.) 4, 12 Phila. (Pa.) 284; *Petersburg v. Petersburg Benev. Mechanics' Assoc.*, 78 Va. 431, 8 Am. & Eng. Corp. Cas. 484.

4. Rule for Construction of Constitutional Provisions Against Exemptions. — *Mitchell, J.*, in *Philadelphia Library Co. v. Donohugh*, 35 Leg. Int. (Pa.) 4, 12 Phila. (Pa.) 284, affirmed by *Donohugh's Appeal*, 86 Pa. St. 306. See also *Fletcher v. Oliver*, 25 Ark. 289; *People v. Solomon*, 51 Ill. 37; *State Bank v. New Albany*, 11 Ind. 139.

5. Exceptions Not Implied. — The authority given to the legislature by the *Tennessee Constitution of 1870* to increase the "powers" of existing corporations must be construed with the provision forbidding any exemptions of property except those enumerated therein; and therefore the power did not extend to the granting of an exemption from taxation, as an increase of power, and did not include a grant of such immunity. *Memphis v. Memphis City Bank*, 91 Tenn. 574 [citing *East Tennessee, etc., R. Co. v. Hamblen County, MS. Knox-*

ville, Tenn., 1877; *M. & C. R. Co. v. Gaines MS. Nashville, Tenn.*, 1878].

6. Exceptions Strictly Construed. — *State v. Daniel*, 17 Wash. 111.

7. Requirement of Uniform and Equal Taxation Does Not Prohibit Exemptions — *United States*. — *Gilman v. Sheboygan*, 2 Black (U. S.) 510; *Mobile, etc., R. Co. v. Tennessee*, 153 U. S. 486. See also *Magoun v. Illinois Trust, etc., Bank*, 170 U. S. 283; *Drake v. Kochersperger*, 170 U. S. 303.

Georgia. — See *Athens v. Long*, 54 Ga. 330; *Waring v. Savannah*, 60 Ga. 93.

Kansas. — *Ottawa County v. Nelson*, 19 Kan. 234, 27 Am. Rep. 101; *Francis v. Atchison, etc., R. Co.*, 19 Kan. 303.

Louisiana. — *State v. Poydras*, 9 La. Ann. 165; *New Orleans v. Commercial Bank*, 10 La. Ann. 735; *New Orleans v. Fourchy*, 30 La. Ann. 910; *New Orleans v. Kennard*, 34 La. Ann. 851; *Reynolds, etc., Constr. Co. v. Police Jury*, 44 La. Ann. 863.

Minnesota. — *Faribault v. Misener*, 20 Minn. 396.

Mississippi. — *Mississippi Mills v. Cook*, 56 Miss. 40.

Montana. — See *Northern Pac. R. Co. v. Garland*, 5 Mont. 146, 17 Am. & Eng. R. Cas. 364.

Oregon. — *Crawford v. Linn County*, 11 Oregon 482.

Virginia. — *Williamson v. Massey*, 33 Gratt. (Va.) 237.

Washington. — *Columbia, etc., R. Co. v. Chilberg*, 6 Wash. 612.

Contrary Doctrine in California. — The provisions of art. 11, § 13, of the former Constitution of California, that "taxation shall be

or that there shall be "a uniform rule of taxation."¹

Special Exemptions Prohibited. — But it is considered that such provisions do have the effect of making it imperative that whatever exemptions are granted shall be general in their nature,² and prohibit grants of exemption by special or local statutes.³

equal and uniform throughout the state," and that "all property in this state shall be taxed in proportion to its value," deprived the legislature of power to exempt from taxation any particular class or species of property held in private ownership. *People v. McCreery*, 34 Cal. 432; *People v. Whartenby*, 38 Cal. 461; *People v. Eddy*, 43 Cal. 331, 13 Am. Rep. 143. See also *Savings, etc., Soc. v. Austin*, 46 Cal. 416; *People v. Whyler*, 41 Cal. 351; *Wilson v. Sutter County*, 47 Cal. 91. And see *infra*, this section, *Requirement that All Property Shall Be Taxed in Proportion to Its Value*.

In *Crosby v. Lyon*, 37 Cal. 242, it was held that a statute having the effect of devoting all taxes paid to a county by a railroad company to the redemption of county bonds issued to pay for a subscription to its stock would have the effect of exempting the company from the tax for the support of schools to which all other property in the county was subject, and would, therefore, be obnoxious to the provision of art. 11, § 13, of the Constitution then in force, that "taxation shall be equal and uniform throughout the state."

The Fourteenth Amendment to the Federal Constitution prohibits unequal taxation by the states so far as it may be prevented, but it does not prevent the states from exempting from taxation property which is devoted to public uses in which all the people are equally benefited, and where the public benefit to be derived from such exemptions is equivalent to the tax that would otherwise be exacted. *Northern Pac. R. Co. v. Garland*, 5 Mont. 146, 17 Am. & Eng. R. Cas. 364.

1. Uniform Rule of Taxation. — *Crawford v. Linn County*, 11 Oregon 482; *People v. Auditor-Gen.*, 7 Mich. 84; *Chippewa County v. Auditor-Gen.*, 65 Mich. 408; *Green Bay, etc., Canal Co. v. Outagamie County*, 76 Wis. 537.

Chapter 21 of the *Wisconsin Laws of 1877*, extending the time of exemption from assessment and taxation of certain lands, fixed in the act incorporating certain railroad companies, was not in conflict with the provision of article 8, § 1, of the constitution, that "the rule of taxation shall be uniform, and taxes shall be levied upon such property as the legislature shall prescribe;" for such provision did not curtail the power of the legislature to exempt property from taxation. *Wisconsin Cent. R. Co. v. Taylor County*, 52 Wis. 37, *approving Milwaukee, etc., R. Co. v. Waukesha County*, 9 Wis. 431, note; and *disapproving*, so far as they are inconsistent with such case, *Knowlton v. Rock County*, 9 Wis. 410; *Weeks v. Milwaukee*, 10 Wis. 242; *Lumsden v. Cross*, 10 Wis. 282; *State v. Winnebago Lake, etc., Plankroad Co.*, 11 Wis. 35, and *Kneeland v. Milwaukee*, 15 Wis. 454.

In *Wisconsin Cent. R. Co. v. Taylor County*, 52 Wis. 37, the court shows that the decision in *Milwaukee, etc., R. Co. v. Waukesha County*, 9 Wis. 431, note, was in support of the princi-

ple above applied, and that the Supreme Court of the state, after for some time departing from that principle, had finally returned to it, in *Kneeland v. Milwaukee*, 15 Wis. 454, on a rehearing of the case.

"The Burdens of the State Ought to Be Fairly Distributed." — The provision of article 1, section 2, of the *Rhode Island Constitution of 1842*, that "the burdens of the state ought to be fairly distributed among its citizens," does not deprive the General Assembly of the power to exempt property from taxation and does not affect property theretofore exempted by charter. *Brown University v. Granger*, 19 R. I. 704.

"All Taxes Shall Be Proportioned and Assessed Equally." — The provision of article 9, section 8, of the *Maine Constitution*, that "all taxes upon real estate assessed by authority of this state shall be apportioned and assessed equally, according to the just value thereof," does not require that all real estate shall be assessed, but that whatever is assessed shall be proportioned and assessed equally. *Portland v. Portland Water Co.*, 67 Me. 135.

Exemption Must Be Total. — *Hale v. Kenosha*, 29 Wis. 599, *per Lyon*, J.

2. Exemptions Must Be General. — *Newark v. Mt. Pleasant Cemetery Co.*, 58 N. J. L. 168, *per Magie*, J.

The requirement of the *Arkansas Constitution* that taxation shall be uniform is violated by exempting from levee taxation certain lands simply because no levee work has been done on their river front prior to the passage of the law. *Davis v. Gaines*, 48 Ark. 370.

The constitutional requirement of equality and uniformity in taxation forbids special exemptions, and requires that all, that is, the entire class, shall be exempt, or that all composing such class shall be subject to the same imposition. *New Orleans v. Louisiana Sav. Bank, etc., Co.*, 31 La. Ann. 637.

Where the exemption from taxation fixed by the law applies equally and uniformly to all taxpayers, it cannot be said to contravene the constitutional requirement of equality and uniformity of taxation. *New Orleans v. Davidson*, 30 La. Ann. 554.

Although the provision of the Constitution of *Wisconsin* that "the rule of taxation shall be uniform" does not prevent the legislature from exempting property from all taxation, it does require that all property not absolutely exempt must be taxed alike. Therefore a tax for a special purpose in a city, which is levied exclusively upon the real property, is in effect a special exemption in favor of personal property and cannot be sustained. *Gilman v. Sheboygan*, 2 Black (U. S.) 510.

3. Special Exemptions Prohibited. — *Sisters of Charity v. Chatham Twp.*, 51 N. J. L. 89, 52 N. J. L. 373.

Classification. — The provision in the *Pennsylvania Act of June 30, 1885*, limiting the exemption from taxation of the capital stock of

(3) *Requirement that All Property Shall Be Taxed in Proportion to Its Value.* — It is usually considered that a constitutional provision that "all property shall be taxed in proportion to its value," or of similar import, does not of itself deny to the legislature the right to create exemptions, but merely establishes a rule of uniformity in regard to such property as is taxed.¹

manufacturing corporations to corporations not engaged in the manufacture of malt, spirituous, or vinous liquors, or in the manufacture of gas, is not in contravention of the constitutional provision that taxes must be uniform on the same class of subjects, as the statute clearly divides manufacturing corporations into two classes, one including corporations which manufacture liquor and gas, and the other including all other manufacturing corporations. *Com. v. Germania Brewing Co.*, 145 Pa. St. 83, 34 Am. & Eng. Corp. Cas. 262.

Relief from Special Tax for a Consideration. — An agreement relieving a corporation from the payment of a special tax for a consideration is not in contravention of art. 203 of the *Louisiana* Constitution (Const. 1898, art. 225), providing that "taxation shall be equal and uniform throughout the territorial limits of the authority levying the tax," so long as no injury arises therefrom. *Reynolds, etc., Constr. Co. v. Police Jury*, 44 La. Ann. 863.

Prohibition Against "Discrimination in Taxing the Different Kinds of Property." — The act of the territorial legislature of *Dakota* of March 7, 1889, provided that "in lieu of any and all other taxes upon any railroads * * * within this territory, or upon the equipment, appurtenances, or appendages thereof, or upon any other property situated in this territory belonging to the corporation owning or operating such railroads, upon the capital stock or business transactions of said railroad company there shall hereafter be paid into the treasury of this territory an amount equal to a percentage [fixed in a subsequent part of the act] of all the gross earnings of the corporation owning or operating such railroad, arising from the operating of such railroad." It was held that the effect of this act was to exempt entirely from taxation the property owned by the railroads and not used for railroad purposes, as the percentage was of the earnings arising from the operation of the road, and no mention was made of income arising from the other lands; and that this exemption was in violation of the Fourteenth Amendment of the Federal Constitution and of the organic act of the territory, which latter prohibited the making of "any discrimination in taxing different kinds of property," and thereby necessarily implied a prohibition against any discrimination in taxing the same kind of property. The court considered that even granting that railroads might be classed by themselves for the purposes of taxation, the classification and method of taxation must be restricted to what was railroad property, and could not be extended to lands which had no relation to the railroads in their use or operation. *Northern Pac. R. Co. v. Walker*, 47 Fed. Rep. 681.

1. **Requirement that All Property Shall Be Taxed in Proportion to Its Value Does Not Prohibit Exemptions** — *United States*. — *Mobile, etc., R. Co. v. Tennessee*, 153 U. S. 486.

Arkansas. — *State v. County Ct.*, 19 Ark. 360,

overruling so much of *Pike v. State*, 5 Ark. 205, as declared a contrary doctrine.

Minnesota. — See *State v. Winona, etc., R. Co.*, 21 Minn. 315.

Mississippi. — See *Mississippi Mills v. Cook*, 56 Miss. 40; *Natchez, etc., R. Co. v. Lambert*, 70 Miss. 779.

Missouri. — See *State v. North*, 27 Mo. 464.

Virginia. — *Williamson v. Massey*, 33 Gratt. (Va.) 237.

Contrary Doctrine in California. — Under the provision of art. 11, § 13, of the former Constitution of California, which provided that "all property in this state shall be taxed in proportion to its value, to be ascertained as directed by law," the legislature had no power to exempt any private property in the state from taxation. *Minturn v. Hays*, 2 Cal. 590, 56 Am. Dec. 366; *People v. Eddy*, 43 Cal. 331, 13 Am. Rep. 143; *People v. Gerke*, 35 Cal. 677; *People v. Black Diamond Coal Min. Co.*, 37 Cal. 54; *People v. Whartenby*, 38 Cal. 465; *People v. McCreery*, 34 Cal. 432, *overruling* *People v. Coleman*, 4 Cal. 46, 60 Am. Dec. 581, and *High v. Shoemaker*, 22 Cal. 363. See also *People v. Latham*, 52 Cal. 598, in which the court recognized the doctrine set out, but held that a provision in an act of the legislature that amounts which had been paid on certain property in pursuance of a previous invalid levy of taxes should be credited as a payment *pro tanto* of taxes levied by the act did not amount to an exemption of such property from taxation.

While the decision in the case of *People v. Gerke*, 35 Cal. 677, that a statute exempting growing crops from taxation was unconstitutional, was correct under the then existing constitution, it is to be noticed that under art. 13, § 1, of the *California* Constitution of 1879, growing crops are exempt.

Effect of Other Similar Provisions. — The provision of article 15 of the Declaration of Rights in the *Maryland* Constitution of 1867, that "every person in the state or person holding property therein ought to contribute his proportion of public taxes for the support of the government according to his actual worth in real or personal property," constitutes no bar to the right of the legislature to exempt certain kinds of property from taxation when that exemption is not an arbitrary discrimination in favor of a particular class. And the exemption of the mortgage debt of an individual and taxation of the mortgage bonds of a corporation in the hands of the respective creditors, under article 81 of the Code, is not an arbitrary and unreasonable discrimination between the same classes of property, but is constitutional. *Simpson v. Hopkins*, 82 Md. 478.

A constitutional provision that "all lands liable to taxation held by deed or entry, town lots, bank stock, etc., and such other property as the legislature may from time to time deem expedient, shall be taxable," does not restrict the power of the legislature to create exemp-

Effect of Provision for Specified Exemptions. — Frequently, however, such a provision is modified by the addition of, "except such property as may be expressly exempted" by the constitution, or a similar provision; or the constitution in some other place makes or authorizes certain specified exemptions. In either of these cases it is considered that a provision such as that first quoted must be construed as positively requiring the taxation of all other property.¹

(4) *Prohibition Against Discrimination in Favor of Corporations.* — A constitutional provision that "the property of corporations for pecuniary profit shall be subject to taxation the same as that of individuals," or of similar import, precludes any power of the legislature to exempt such corporations from a tax to which private individuals are subject.²

(5) *Prohibition Against Grants of Special Privileges and Immunities.* — It has been considered that a constitutional prohibition against the granting of any "privileges or immunities which upon the same terms shall not equally belong to all citizens" does not forbid the granting of an exemption where any citizen may bring himself within its protection or procure the exempt property,³ but it would be contravened by a grant of exemption to the property of a particular individual.⁴

tions. *Knoxville, etc., R. Co. v. Hicks*, 9 Baxt. (Tenn.) 442.

Cases Reconciled. — The cases of *Jacksonville v. McConnel*, 12 Ill. 138; *Zanesville v. Richards*, 5 Ohio St. 589; *Ellis v. Louisville, etc., R. Co.*, 8 Baxt. (Tenn.) 530; *Chattanooga v. Nashville, etc., R. Co.*, 7 Lea (Tenn.) 561, and *Memphis, etc., R. Co. v. Gaines*, 3 Tenn. Ch. 604, are, so far as the reported opinions show, in direct conflict with the rule set out in the text; but they may be reconciled therewith on the ground that the state constitutions under which they were decided contained provisions such as are indicated in the next paragraph of the text. The *California* case of *Mackay v. San Francisco*, 113 Cal. 392, decided under the California Constitution of 1879, might be reconciled on the same ground were it not for the fact that, as has been shown in this note, the California doctrine is directly opposed to the rule set out in the text.

1. Effect of Provision for Specified Exemptions. — *Oswalt v. Hallowell*, 15 Kan. 154; *South Covington, etc., R. Co. v. Bellevue*, (Ky. 1899) 49 S. W. Rep. 23; *Le Duc v. Hastings*, 39 Minn. 110; *State v. Pioneer Sav., etc., Co.*, 63 Minn. 80; *State v. Carson City Sav. Bank*, 17 Nev. 146; *Louisville, etc., R. Co. v. State*, 8 Heisk. (Tenn.) 663; *Reelfoot Lake Levee Dist. v. Dawson*, 97 Tenn. 151. See also *infra*, this section, *Effect of Constitutional Exemptions*.

2. Effect of Requirement that Corporations Be Taxed "the Same as Individuals." — *Iowa Homestead Co. v. Webster County*, 21 Iowa 221; *Davenport v. Chicago, etc., R. Co.*, 38 Iowa 633; *Adams v. Yazoo, etc., R. Co.*, (Miss. 1898) 24 So. Rep. 215, overruling *Mississippi Mills v. Cook*, 56 Miss. 40, in which case it was considered that the provision of the Mississippi Constitution of 1869, art. 12, § 13, that "the property of all corporations for pecuniary profit shall be subject to taxation the same as that of individuals," did not deprive the legislature of the power to exempt such corporations, though it did deprive it of the power to grant them any irrepealable exemptions, on the ground that the provision meant that the property should always be subject, that is, liable,

to taxation; not that it should invariably be subjected thereto.

The *Alabama* Act of February 23, 1875, prohibiting municipal corporations from levying on or collecting from banking and insurance corporations a greater tax than sixty cents on the hundred-dollar value of capital stock, was in conflict with the provision of art. 13, § 4, of the Constitution of 1868, which provided that "the property of corporations now existing, or hereafter created, shall forever be subject to taxation, the same as property of individuals, except corporations for educational and charitable purposes." *Mobile v. Stonewall Ins. Co.*, 53 Ala. 570.

Rule Does Not Apply to Quasi-public Corporations. — Art. 12, § 13, of the *Missouri* Constitution provides that "the property of all corporations for pecuniary profits shall be subject to taxation, the same as that of individuals." Section 20 provides that "taxation shall be equal and uniform throughout the state. All property shall be taxed in proportion to its value, to be ascertained as directed by law." These sections have been held by the state court of last resort to take away from the legislature the power of granting an irrepealable exemption (see *Mississippi Mills v. Cook*, 56 Miss. 40), but they apply only to corporations in which the public has no special interest, such as banks, manufacturing companies, etc., and not to those of a quasi-public character, which are necessary for commerce, public convenience, and the development of the resources of the state. Therefore, an exemption from taxation in the charter of a railroad company, granted in order to induce persons to invest their money in the enterprise, which would be for the benefit of the state at large, is a valid contract and is irrepealable under the Constitution of the United States. *Yazoo, etc., R. Co. v. Levee Com'rs*, 37 Fed. Rep. 24.

3. Exemption Open to All Citizens Not Forbidden. — *Indianapolis v. Sturtevant*, 24 Ind. 391; *State Bank v. New Albany*, 11 Ind. 130.

4. Exemption of Property of Individual Prohibited. — An act of the legislature exempting the property of an individual from taxation is

No Exclusive Privileges Save "in Consideration of Public Services." — The provision of the *Kentucky* Constitution that "no man or set of men are entitled to exclusive, separate public emoluments or privileges from the community but in consideration of public services" has been held to prohibit not only the exemption of private property not affected with a public use,¹ but even an exemption of property of a municipality where such property is used for convenience or profit merely, and is not necessary for the carrying on of the municipal government.²

Exemptions Attached to Property. — In *Iowa* and *Mississippi* it is considered that such provisions do not prohibit an exemption in favor of certain kinds of property regardless of ownership.³

(6) *Direct Prohibition of Exemptions.* — Of course, when a constitution contains a direct prohibition of exemptions the legislature is absolutely without power to make any.⁴ These prohibitions frequently occur in conjunction with a provision making, or authorizing the legislature to make, certain specified exemptions, and are considered as precluding all legislative power to create exemptions other than those specified.⁵

forbidden by a constitutional provision that the legislature shall not pass any law granting to any individual or individuals rights, privileges, immunities, or exemptions other than such as may be by the same law extended to any member of the community who may be able to bring himself within the provisions of such law. *Nashville v. Ward*, 16 Lea (Tenn.) 27.

1. **Private Property Not Affected with a Public Use Cannot Be Exempted.** — Under the provision quoted in the text it has been held that exemption could not be granted to the property of the Louisville Board of Trade, *Barbour v. Louisville Board of Trade*, 82 Ky. 645; to a hotel, *Lancaster v. Clayton*, 86 Ky. 373; or to a school conducted for private gain, *Henderson v. McCullagh*, 89 Ky. 448.

2. **Municipal Property Used for Convenience or Profit Merely.** — *Com. v. Makibben*, 90 Ky. 384, 29 Am. St. Rep. 382. See also *Clark v. Louisville Water Co.*, 90 Ky. 515.

3. **Exemption in Favor of Property Regardless of Ownership.** — The *Iowa* statute exempting from taxation for municipal purposes lots containing more than ten acres, included within the territory annexed to a city and used for agricultural and horticultural purposes, is not in violation of the provision of art. I, § 6, of the constitution, that "all laws of a general nature shall have a uniform operation. The General Assembly shall not grant to any citizen or class of citizens privileges or immunities which, upon the same terms, shall not equally belong to all citizens." This is true because the act "was not made to apply to specific property nor to specific persons. It was made to apply to a certain class of property, and to the owners of such property, whoever they might be. It is true that privileges and immunities cannot be granted to a class of citizens. But those who happen to be owners of a certain class of property do not themselves become a class in any proper sense. They do not sustain a relation to each other, but a mere property relation. They are affected by the statute in consequence merely of the circumstances in which they happen to be." *Leicht v. Burlington*, 73 Iowa 29.

An act of the legislature providing for a tax

for levee purposes, but exempting from the payment of such tax lands lying between the line of the levee and the river, is not in violation of the constitutional provision that "no man or set of men are entitled to exclusive, separate public emoluments or privileges from the community but in consideration of public services." Such an exemption operates upon the thing, not upon the person, and is neither an emolument nor a privilege to any particular individual or class of men. The mere fact that other lands subject to the tax are not benefited by the levee, but may be even injured, does not render the act unconstitutional. *Williams v. Cammack*, 27 Miss. 209, 61 Am. Dec. 508.

4. **Express Prohibition.** — *Jack v. Wiennett*, 115 Ill. 105, 56 Am. Rep. 129.

5. **Prohibition of Exemptions Other than Those Specified in Constitution** — *United States*. — *Huntington v. Worthen*, 120 U. S. 97; *Chicago, etc., R. Co. v. Guffey*, 120 U. S. 569; *Trask v. Maguire*, 18 Wall. (U. S.) 391. See also *Taylor v. Robinson*, 34 Fed. Rep. 678.

Arkansas. — *Memphis, etc., R. Co. v. Berry*, 41 Ark. 436.

Colorado. — *People v. Henderson*, 12 Colo. 369.

Florida. — *Bloxham v. Florida Cent., etc., R. Co.*, 35 Fla. 625.

Georgia. — *Athens City Waterworks Co. v. Athens*, 74 Ga. 413; *St. Mark's Church v. Brunswick*, 78 Ga. 541; *Smith v. Americus*, 89 Ga. 810.

Kansas. — *Oswalt v. Hallowell*, 15 Kan. 154.

Louisiana. — *Tulane Education Fund v. Board of Assessors*, 38 La. Ann. 292; *Shreveport First Nat. Bank v. Board of Reviewers*, 41 La. Ann. 181; *Board of Liquidation v. Thoman*, 42 La. Ann. 605; *New Orleans v. Lafayette Ins. Co.*, 28 La. Ann. 756, 27 La. Ann. 376; *New Orleans v. People's Bank*, 27 La. Ann. 646; *New Orleans v. Metropolitan Loan, etc., Bank*, 27 La. Ann. 648; *New Orleans v. Lafayette Bank*.

Missouri. — *Life Assoc. of America v. Board of Assessors*, 49 Mo. 512; *St. Louis Mut. L. Ins. Co. v. Board of Assessors*, 56 Mo. 503; *Copeland v. St. Joseph*, 126 Mo. 417, *distinguishing* *Kansas City v. Cook*, 69 Mo. 127;

(7) *Effect of Constitutional Exemptions.* — It is very generally considered, however, that the mere enumeration in a constitution of certain classes of property which shall be exempt or may be exempted from taxation has the effect of depriving the legislature of power to create any exemptions other than those specified, without any necessity for an express prohibition of such grants,¹ though the courts of *Virginia* and *Kansas* do not

Westport v. McGee, 128 Mo. 152; *St. Louis v. Wenneker*, 145 Mo. 230.

Pennsylvania. — *Londonderry Tp. v. Berger*, 2 Pearson (Pa.) 230; *Fox's Appeal*, 112 Pa. St. 337.

South Dakota. — *In re Construction of Revenue Law*, 2 S. Dak. 58.

Distinction Between Exemption and Abatement as a Mode of Equalization. — An ordinance passed under the authority contained in the charter of a city, providing that in the levy and assessment of city taxes upon lots fronting upon streets which shall be paved from curb to curb at the expense of owners of property fronting thereon there shall be an annual abatement of five per centum of the cost of the paving for ten years, is not in conflict with the provisions of the *Pennsylvania* Constitution of 1874, art. 9, §§ 1, 2, prohibiting all exemptions from taxation other than specified therein. Such an ordinance does not exempt property from taxation, but simply provides a mode of equalizing the taxation, and makes each citizen bear his due proportion, the taxpayers who are allowed the abatement being simply repaid for what they have advanced to the city. *Erie v. Griswold*, 5 Pa. Super. Ct. Rep. 132, *affirmed* on opinion of court below, 184 Pa. St. 435.

When Constitutional Exemption May Be Extended. — Section 6 of art. 10 of the Constitution of *Colorado* provided that "all laws exempting from taxation property other than that hereinbefore mentioned shall be void." Section 3 of the same article provided that "mines and mining claims bearing gold, silver, and other precious metals (except the net proceeds and surface improvements thereof) shall be exempt from taxation for the period of ten years from the date of the adoption of this constitution, and thereafter may be taxed as provided by law." It was held that the proper construction of this provision was as follows: "First, to exempt the property mentioned wholly from taxation for the period of ten years, beginning with the date of the adoption of the constitution; and second, to vest in the legislature a discretionary power to say whether, after the expiration of this period, it shall be subjected to taxation or whether the exemption shall be continued." *People v. Henderson*, 12 Colo. 369.

1. **Creation or Authorization of Enumerated Exemptions Impliedly Prohibits All Others** — *Arkansas* — *Fletcher v. Oliver*, 25 Ark. 289.

Illinois. — *People v. Barger*, 62 Ill. 452; *Northwestern University v. People*, 80 Ill. 333; *Chicago v. Baptist Theological Union*, 115 Ill. 245, *People's Loan, etc., Assoc. v. Keith*, 153 Ill. 609; *Ex p. People's Loan, etc., Assoc.*, 153 Ill. 655.

Indiana. — *State v. Indianapolis*, 69 Ind. 375, 35 Am. Rep. 223; *Warner v. Curran*, 75 Ind. 309; *Deniston v. Terry*, 141 Ind. 677. See also *Harn v. Woodard*, (Ind. 1898) 50 N. E. Rep. 33.

Louisiana. — *New Orleans v. People's Ins. Co.*, 27 La. Ann. 519; *Louisiana Cotton Mfg. Co. v. New Orleans*, 31 La. Ann. 440; *New Orleans v. Louisiana Sav. Bank, etc., Co.*, 31 La. Ann. 826; *State v. Louisiana Sav. Bank, etc., Co.*, 32 La. Ann. 1136; *New Orleans v. Lafayette Bank*, 27 La. Ann. 376; *Morrison v. Larkin*, 26 La. Ann. 699; *Lefranc v. New Orleans*, 27 La. Ann. 188; *New Orleans v. New Orleans Waterworks Co.*, 36 La. Ann. 432. See also *New Orleans v. Salamander Ins. Co.*, 25 La. Ann. 650.

Nebraska. — *Union Pac. R. Co. v. Saunders County*, 7 Neb. 228.

North Carolina. — *Charlotte Bldg., etc., Assoc. v. Mecklenburg County*, 115 N. Car. 410.

Oregon. — *Crawford v. Linn County*, 11 Oregon 482; *Hogg v. Mackay*, 23 Oregon 339, 37 Am. St. Rep. 682; *Croisan v. Hogg*, 23 Oregon 346.

Pennsylvania. — *Donohugh's Appeal*, 86 Pa. St. 306, *affirming* 35 Leg. Int. (Pa.) 4, 12 Phila. (Pa.) 284; *White v. Smith*, 43 W. N. C. (Pa.) 342. See also *Hunter's Appeal*, 22 W. N. C. (Pa.) 361.

Tennessee. — *Nashville, etc., R. Co. v. Wilson County*, 89 Tenn. 597; *Memphis v. Memphis City Bank*, 91 Tenn. 574.

Utah. — *State v. Armstrong*, (Utah 1898) 53 Pac. Rep. 981.

West Virginia. — *Chesapeake, etc., R. Co. v. Miller*, 19 W. Va. 408.

The provision of art. 10, § 2, of the Constitution of *Arkansas* that "the General Assembly may exempt from taxation personal property to the value of five hundred dollars to each taxpayer" precludes the idea that any other or further exemption may be made. *Fletcher v. Oliver*, 25 Ark. 289.

Act Creating Exemptions Construed with Reference to Constitutional Provision Authorizing Same. — The *Pennsylvania* Act of May 14, 1874 (P. L. 158), exempting from taxation "all hospitals, universities, colleges, seminaries, academies, associations and institutions of learning, benevolence, or charity, with the grounds thereto annexed and necessary for the occupancy and enjoyment of the same, founded, endowed, and maintained by public or private charity," passed in pursuance to a constitutional grant of power to exempt "institutions of purely public charity," while it has never been held to be unconstitutional, has always been construed by the courts with reference to the language of the constitution, so that many institutions have been held to be not exempt notwithstanding they were apparently covered by the general language of the statute. *Mullen v. Juenet*, 6 Pa. Super. Ct. Rep. 1.

Exemptions Held Void. — The *Illinois* statute (Starr & Curt. Annot. Stat. 1896, c. 32, par. 119) which exempts from taxation the shares of stocks and notes of homestead loan associa-

assent to this doctrine.¹

f. LEGISLATURE CANNOT INDIRECTLY EFFECT PROHIBITED EXEMPTIONS.—Exemptions which are forbidden by the constitution cannot be effected by the legislature in an indirect manner, as by providing that certain

things, is unconstitutional. *People's Loan, etc., Assoc. v. Keith*, 153 Ill. 609.

In *Tennessee* the County Court cannot lawfully exempt or release the property of a railroad from taxation for county purposes. Such court cannot exempt from taxation for county purposes any property which the legislature has not exempted from state taxation, and under the constitution the legislature itself could not exempt the property of a railroad. *Nashville, etc., R. Co. v. Wilson County*, 89 Tenn. 597.

In *Chesapeake, etc., R. Co. v. Miller*, 19 W. Va. 408, it was held that a law providing that no taxation should be imposed by the state upon the property of a certain company until its profits amounted to ten per cent upon its capital was unconstitutional.

The provision of the *Nebraska Act of February 12, 1869*, that "there shall be exempt from taxation of the property of each taxpayer who shall, within the state of Nebraska, plant and suitably cultivate one or more acres of forest trees for timber, the sum of one hundred dollars annually for five years for each acre so planted and cultivated," and giving a like exemption of fifty dollars for each acre planted and cultivated with fruit trees, was repugnant to the provision of art. 9, § 1, of the Constitution of 1875, that every person or corporation should pay a tax in proportion to the value of his, her, or its property, but that "the legislature may provide that the increased value of lands by reason of live fences, fruit and forest trees grown and cultivated thereon shall not be taken into account in the assessment thereof," which was carried into effect by legislation. Therefore, the older exemption was ineffective after the adoption of the constitution. *Union Pac. R. Co. v. Saunders County*, 7 Neb. 228.

Exemption from Payment of Municipal License Authorized.—The Constitution of *North Carolina* requires that all property shall be taxed uniformly, and exempts public property from taxation, and also gives to the General Assembly power to exempt cemeteries and property held for educational, scientific, literary, charitable, or religious purposes, and personal property to a value not exceeding three hundred dollars. This is an implied prohibition of the making of other exemptions by the legislature, and therefore any attempt to exempt the capital stock of a corporation from taxation according to the uniform *ad valorem* system established by the constitution would be void. But the General Assembly may require a building and loan association to pay a license tax for the privilege of carrying on its business, and forbid counties and other municipal corporations from exacting from it any other license, for this is not an exemption of the capital stock from taxation. *Charlotte Bldg., etc., Assoc. v. Mecklenburg County*, 115 N. Car. 410.

Effect of Statutory Exemptions.—In *Louisville v. Com.*, 1 Duv. (Ky.) 295, 85 Am. Dec. 624, it

was held that a general statute providing that certain enumerated classes of property "shall be exempt from taxation" did not imply that no other property should be exempt; and that municipal property used for public purposes of local government was not subject to taxation merely because it was not expressly exempted. But in *Grafton County v. Haverhill*, (N. H. 1894) 40 Atl. Rep. 399, it was held that from the fact that the legislature had definitely exempted from taxation "almshouses on county farms," it followed by necessary implication that the county farms themselves were left subject to taxation.

And it would seem to be unquestionable that the fact that a law imposing a specific tax excepts a certain class from its operation effectually excludes all other exceptions. *Bourguignon Bldg. Assoc. v. Com.*, 98 Pa. St. 54; *Miller v. Kirkpatrick*, 29 Pa. St. 226.

Thus the exception of "the occupation of farmers" from the provision of the *Pennsylvania Act of April 29, 1844*, imposing a tax upon "all offices, posts of profit, professions, trades, and occupations," excludes an exemption of clergymen from such a tax. *Miller v. Kirkpatrick*, 29 Pa. St. 226.

Enumeration of Exemptions Does Not Necessarily Subject All Other Property to Taxation.—In *Galveston Wharf Co. v. Galveston*, 63 Tex. 14, *Stayton, A. J.*, delivering the opinion of the court, said: "The enumeration of certain things in the section of the constitution quoted [Const. *Texas*, art. 11, § 9], as exempt from taxation was not intended to operate as a declaration that things not enumerated were subject, but simply to indicate the character of things, and the uses to which they must be appropriated, in order to be entitled to the exemption."

1. Contrary Doctrine in Virginia and Kansas.—In *Williamson v. Massey*, 33 Gratt. (Va.) 237, it was held that the provisions of art. 10, § 3, of the Constitution of Virginia, that "the legislature may exempt all property used exclusively for state, county, municipal, benevolent, and charitable purposes," did not have the effect of forbidding exemptions by the legislature in any other cases. The court, *per Anderson, J.*, said: "If it had intended to forbid its exempting other property it would have been easy to add the words 'but no other,' and we think if its purpose had been to deprive the legislature of a power, the exercise of which in cases that might arise might be so beneficial to the state, and the inhibition of which might be so hurtful, the above words or their equivalent would have been added."

The provision of art. 11, § 1, of the *Kansas Constitution*, that the legislature shall provide for a uniform and equal rate of assessment and taxation, but all property used exclusively for certain enumerated purposes, and personal property to the amount of at least two hundred dollars for each family, shall be exempted from taxation, does not require that all property except such as is therein exempted shall

property shall not be assessed or that portions of some particular property shall be omitted from the assessment,¹ authorizing the remission, rebating, or refunding of taxes,² or renewing or transferring a previously existing valid grant of exemption.³

Legislative Declaration as to Character of Corporation. — Nor can the legislature, by a mere declaration that a corporation belongs to a class which is exempt from a particular tax, effect an exemption, where such corporation is not in fact within the exempt class.⁴

be taxed, nor forbid any other exemption. On the other hand, the language used unavoidably implies that more than two hundred dollars' worth of personal property may be exempted by statute. *Ottawa County v. Nelson*, 19 Kan. 234, 27 Am. Rep. 101; *Francis v. Atchison*, etc., R. Co., 19 Kan. 303. It will be noticed that the actual decision in these cases does not necessarily conflict with the rule laid down in the text, because of the significance which must attach to the use of the words "at least" in the constitutional provision quoted. But that the *Kansas* court dissents from the doctrine stated in the text is apparent from the language of Brewer, J., delivering the opinion of the court in *Francis v. Atchison*, etc., R. Co., 19 Kan. 303. After quoting corresponding provisions from other state constitutions, he continues as follows: "In all these provisions will be noticed either an express direction to tax all property or an express prohibition on exempting any other than certain specified property. Our constitution contains neither. Does it mean the same without as those do with? The positive language of these several sections sustains if it does not compel the positive assertions of the various decisions cited by counsel. Those decisions rest upon the clear commands and prohibitions of the constitution upon which they were based, and are, therefore, only of limited and qualified application here."

1. Legislature Cannot Exclude from Assessment Property of Which the Constitution Prohibits Exemption. — In *Huntington v. Worthen*, 120 U. S. 97, and *Little Rock*, etc., R. Co. v. *Worthen*, 46 Ark. 312, so much of the *Arkansas* Act of March 31, 1883, as directed the board of railroad commissioners not to include in the estimate of railroad tracks for taxation the value of embankments, tunnels, cuts, ties, and bridges, thus lessening the estimate of the value of such property, was held to be unconstitutional.

In *People v. Eddy*, 43 Cal. 331, 13 Am. Rep. 143, it was held that the provision of the *California* Act of April 1, 1870, which was repeated in the Act of April 4, 1870, that "no mortgage or lien given and held upon real estate, or the debts thereby secured, or promissory notes secured by mortgage, shall be assessed upon the books of any assessor, state, county, or otherwise" was unconstitutional because it was an attempt to exempt from taxation all solvent deeds secured by mortgages upon real estate, under the guise of regulating the duties of assessors, and such exemption was prohibited by the constitution.

Legislature May Exercise Power of Exemption by Confirming Assessment Rolls from Which Property Has Been Omitted. — Where the legislature has power originally to exempt certain lands

from taxation it may accomplish this end by the ratification and confirmation of assessment rolls from which such property has been intentionally omitted. *Van Deventer v. Long Island City*, 139 N. Y. 133.

2. Remission, Rebating, or Refunding of Taxes. — *Wilson v. Sutter County*, 47 Cal. 91; *Le Duc v. Hastings*, 39 Minn. 110. See also *State v. Fyler*, 48 Conn. 145, in which case the same rule was applied to a municipal corporation.

Section 2579, Rev. Stat. *Utah*, in so far as it provides that a county board of commissioners "may remit or abate the taxes of any insane, idiotic, infirm, or indigent person to an amount not exceeding ten dollars for the current year," is in conflict with sections 2 and 3 of article 13 of the Constitution, which require that all property in the state not exempt under the laws of the United States or under the state constitution shall be taxed in proportion to its value, and prescribe certain exemptions, not including such property as is here attempted to be exempted. *State v. Armstrong*, (*Utah*, 1898) 53 Pac. Rep. 981.

An act of the legislature in reference to levee taxes provided for the reimbursement to citizens of moneys theretofore contributed by them for levee purposes, by allowing them a credit from their future taxes for sums so contributed. It was held that this was in the nature of an exemption and was unauthorized, as the contributions being voluntarily paid to the advantage of the contributors themselves, the legislature possessed no power to compel the others who might be accidentally benefited by such outlays to refund. *Davis v. Gaines*, 48 Ark. 370.

3. Renewal or Transfer of Previously Existing Valid Grant. — Under a constitutional provision forbidding the exemption of corporate property from taxation, the legislature cannot grant an exemption, in the form of a renewal or transfer of previously existing grants, as, for instance, by authorizing a corporation to acquire by purchase and assignment an exemption from taxation possessed by another corporation chartered before the adoption of the constitution. *Louisville*, etc., R. Co. v. *Palmer*, 109 U. S. 244, affirming *Palmer v. Louisville*, etc., R. Co., 19 Fla. 231, which overruled *Gonzales v. Sullivan*, 16 Fla. 791.

4. Declaration as to Character of Corporation. — It is beyond the power of the legislature merely by declaring to be benevolent a corporation which is not in fact organized for benevolent purposes to exempt it from the corporation tax imposed by art. 10, § 21, of the *Missouri* Constitution of 1875 on all corporations, companies, or associations other than those formed for benevolent, religious, scientific, or educational purposes. *State v. McGrath*, 95 Mo. 193.

g. **POWER TO COMMUTE OR LIMIT TAXATION.** — A grant of the right to commute for taxes, by which is meant to pay a fixed amount in lieu of being assessed according to the general rule,¹ or a provision that certain property shall not be taxed beyond a specified amount or rate, is in effect nothing more nor less than a partial or limited exemption from taxation, for it almost invariably lessens the burden to which the beneficiary would otherwise be subject.² From this it naturally follows that, as a rule, the power to commute or limit taxation is an incident of the power to exempt when it exists,³ and is negatived by a constitutional prohibition of exemptions.⁴

1. **Definition of Commutation.** — Commutation for taxes has been defined to be "a payment of a designated sum for the privilege of exemption, or the selection in advance of a specific sum in lieu of an *ad valorem* tax." White, J., in *Louisiana Cotton Mfg. Co. v. New Orleans*, 31 La. Ann. 447, quoted with approval in *Hogg v. Mackay*, 23 Oregon 346, 37 Am. St. Rep. 682.

Effect of Commutation. — An act providing for the payment by a railroad company of a certain percentage of its gross earnings to the state in lieu of all other taxes upon its property does not exempt the property of the railroad company from taxation, but merely substitutes one method of taxation for another. But it does exempt such property from taxation in any other manner than that provided in the act. *McHenry v. Alford*, 168 U. S. 651.

2. **Commutation Amounts to a Partial or Limited Exemption.** — In *Savannah v. Jesup*, 106 U. S. 563, Mr. Justice Harlan, delivering the opinion of the court, referred to a grant of immunity from all taxation upon payment of a certain percentage of the income of the company to which it was granted, as a "limited exemption from taxation." See also *Dauphin, etc., Streets R. Co. v. Kennerly*, 74 Ala. 583.

Limitation of Taxation a Partial Exemption. — An act of the legislature fixing the amount at which a certain company is to be assessed for taxation is practically an act that all property of the company beyond that amount shall be exempt. *People v. Carter*, 52 Hun (N. Y.) 458, affirmed by 117 N. Y. 625. See also *Augusta v. Georgia R., etc., Co.*, 26 Ga. 651.

Deduction from Valuation for Taxation Amounts to Exemption. — A deduction from the valuation of property for taxation amounts to the same thing as an exemption, for "whatever is deducted under the provisions of the statute is *ipso facto* exempted, or freed from the burden of taxation." *State v. Eureka Consol. Min. Co.*, 8 Nev. 15, *per* Garber, J.

3. **Power to Commute or Limit Taxation Incident to Exempting Power.** — *Mobile v. Stonewall Ins. Co.*, 53 Ala. 570; *State Bank v. New Albany*, 11 Ind. 139; *Dubuque v. Illinois Cent. R. Co.*, 39 Iowa 56; *State v. Butler*, 13 Lea (Tenn.) 400.

Commutations Held Valid. — In *Daughdrill v. Alabama L. Ins., etc., Co.*, 31 Ala. 91, it was held that a law providing for the payment of a specific sum in lieu of all other taxes by a corporation the purposes of which were *prima facie* such as would benefit the public was not in conflict with the provision of the state constitution that "no man or set of men are entitled to exclusive, separate, public emoluments or

privileges, but in consideration of public services."

The territorial act of *Dakota* of March 9, 1883 (Acts 1883, p. 211), providing that in lieu of all taxation upon railroad companies there should thereafter be paid a certain percentage of the gross earnings of such companies, was not in violation of section 6 of the organic act of the territory, providing that there should no "discrimination be made in taxing different kinds of property, but all property subject to taxation shall be in proportion to the value of the property taxed," or of the Fourteenth Amendment of the Federal Constitution. *Northern Pac. R. Co. v. Barnes*, 2 N. Dak. 310; *Northern Pac. R. Co. v. Strong*, 2 N. Dak. 395; *Northern Pac. R. Co. v. Brewer*, 2 N. Dak. 390.

And this was held to be true even where the exemption was applied to lands of the Northern Pacific Railroad Company which, though not used by it for railroad purposes, had yet been granted to it to aid in the construction of its road, and had served to enable the company to raise money to build its road by mortgaging them, for such lands contributed to the earnings of the road by making its construction possible through serving as security for borrowed money, and there was no discrimination in their favor. *McHenry v. Alford*, 168 U. S. 651. This case must necessarily *overrule* *Northern Pac. R. Co. v. Walker*, 47 Fed. Rep. 681, and *Northern Pac. R. Co. v. McGinnis*, 4 N. Dak. 494, in their application to the particular road concerned in all the cases. The opinion of the Supreme Court of the United States, however, gives ground for the presumption that the principle upon which those cases were decided may be right although the application of the principle to the particular company was wrong, for the Supreme Court intimates that it is possible that some companies might not be able to avail themselves of the provisions of the act under discussion. The overruled cases decided that the act referred to and a later act in precisely similar terms, so far as material to the question under discussion, were in conflict with the provisions of the organic act quoted because they exempted property which was not necessary to the discharge of the functions of the railroad concerned as a common carrier.

4. **Prohibition of Exemptions Destroys Power to Commute.** — *Louisiana Cotton Mfg. Co. v. New Orleans*, 31 La. Ann. 447, 440; *New Orleans v. St. Charles St. R. Co.*, 28 La. Ann. 498; *New Orleans v. Lafayette Ins. Co.*, 28 La. Ann. 756, *distinguishing* *Louisiana State Lottery Co. v. New Orleans*, 24 La. Ann. 86; *Life Assoc. of America v. Board of Assessors*,

Doctrine that Commutation Implies Payment of Full Equivalent for Taxes Remitted. — There is, however, a very respectable line of authorities which consider that the idea of commutation implies the payment of a full equivalent for the taxes which are remitted, and have consequently upheld the proposition that the legislature has power to authorize a commutation for taxes in cases where an absolute exemption might be unlawful.¹

3. Power of Municipal Corporations. — A municipal corporation possesses no inherent power to create exemptions from taxation,² nor can such a power

49 Mo. 512; *St. Louis Mut. L. Ins. Co. v. Board of Assessors*, 56 Mo. 503; *Hogg v. Mackay*, 23 Oregon 339, 37 Am. St. Rep. 682; *Croisan v. Hogg*, 23 Oregon 346; *Altgelt v. San Antonio*, 81 Tex. 436; *Austin v. Austin Gas Light, etc., Co.*, 69 Tex. 180.

1. Commutations Upheld on Theory that an Equivalent Is Paid for Taxes Remitted. — *Illinois Cent. R. Co. v. McLean County*, 17 Ill. 291; *People v. Barger*, 62 Ill. 452; *Hunsaker v. Wright*, 30 Ill. 146; *Hunsaker v. Harrell*, 30 Ill. 150; *McDonough County v. Campbell*, 42 Ill. 490; *Neustadt v. Illinois Cent. R. Co.*, 31 Ill. 434; *Illinois Cent. R. Co. v. Irvin*, 72 Ill. 452; *Illinois Cent. R. Co. v. Goodwin*, 94 Ill. 262; *Hennepin County v. St. Paul, etc., R. Co.*, 33 Minn. 534; *Lackawanna County v. Scranton First Nat. Bank*, 94 Pa. St. 221.

In *People v. Barger*, 62 Ill. 452, the court, per Scott, J., said, in reference to the case of *Illinois Cent. R. Co. v. McLean County*, 17 Ill. 291, in which it was held that the provision in the charter of the Illinois Central Railroad Company exempting its property from taxation on payment of a certain proportion of its earnings was constitutional: "The case proceeds on the principle that the proportion of the earnings of the company to be paid to the state is equal to the burden of the state tax imposed on the citizens and other corporations in the state, which is thought to answer the requirements of the constitution that 'every person or corporation shall pay a tax in proportion to his or her property.' The case can be supported on no other principle."

Legislature the Judge of Sufficiency of Equivalent. — In commuting for taxes the legislature is the sole judge of the sufficiency of the equivalent to be received in lieu of the tax. *Hunsaker v. Wright*, 30 Ill. 146; *Hunsaker v. Harrell*, 30 Ill. 150; *Hayward v. People*, 145 Ill. 55.

Attempted Commutation Held Void for Inequality. — The provision of the charter of Alton authorizing the city to call upon male citizens between certain ages to perform three days' labor each on the roads and bridges annually or to pay into the treasury one dollar for each day they shall refuse so to labor, and providing that on payment of the money or performance of the labor "such residents shall be exempt from any other taxation under the power and authority of the county commissioners of Madison county by virtue of the provisions of the general road law of the state of Illinois," was not a commutation of the taxes for road purposes, levied by the county, that all persons living in the county were liable to pay, but amounted to nothing more than an attempt to commute with individuals for exemption from such taxation, and was void

because of its inequality. *Cooper v. Ash*, 76 Ill. 11.

General Laws of Minnesota, 1881, c. 54 (Gen. Stat. 1894, § 1689), providing that corporations organized under the laws of the state for the purpose of mining within the state may pay into the state treasury annually a certain amount for each ton of ore mined, shipped, or disposed of, in lieu of all other taxes or assessments upon the capital stock, personal property, and real estate of such corporation, in or upon which real estate such business of mining may be carried on, or which is connected therewith, and set apart for such business, is in violation with the provisions of art. 9, § 1, of the constitution, that "all taxes to be raised in this state shall be as nearly equal as may be," and all property on which taxes are to be levied shall "have a cash valuation and be equalized and uniform throughout the state." *In re Taxes Delinquent in St. Louis County*, (Minn. 1898) 73 N. W. Rep. 970.

Express Prohibition of Commutation for State Taxes in Illinois. — The Illinois Constitution of 1870, art. 9, § 6, expressly prohibits any commutation for state taxes. *Jack v. Weiennett*, 115 Ill. 105, 56 Am. Rep. 129; *People's Loan, etc., Assoc. v. Keith*, 153 Ill. 609; *Ex p. People's Loan, etc., Assoc.*, 153 Ill. 655.

2. Municipal Corporations Possess No Inherent Power of Exemption — Connecticut. — See *State v. Fyler*, 48 Conn. 145.

Florida. — *Tampa v. Kaunitz*, 39 Fla. 683.

Georgia. — *Cartersville Water-Works Co. v. Cartersville*, 89 Ga. 689.

Iowa. — *Hayzett v. Mt. Vernon*, 33 Iowa 229.

Louisiana. — *New Orleans v. New Orleans Sugar Shed Co.*, 35 La. Ann. 548; *Board of Liquidation v. Thomas*, 42 La. Ann. 605.

Nevada. — *State v. Gracey*, 11 Nev. 223.

New Hampshire. — *Mack v. Jones*, 21 N. H. 393.

Virginia. — *Whiting v. West Point*, 58 Va. 905, 29 Am. St. Rep. 750, overruling *Danville v. Shelton*, 76 Va. 325.

Contrary Doctrine in South Carolina. — That it has been considered in South Carolina that any municipal corporation has the right to create exemptions from municipal taxation is apparent from the following language of Mr. Chief Justice Moses, in *State v. Addison*, 2 S. Car. 499: "In the limit within which municipal bodies are competent to legislate their rights and obligations are identical with those of a state legislature. It will not, however, be assumed that either such a corporation or legislature will deprive itself of its power of taxation, or, in the exercise of it, embarrass itself with stipulations or conditions, unless it is clearly shown that the act having that tendency amounts to a contract."

be implied from a delegation of the power to tax;¹ but it exists only when the legislature has expressly granted it,² and can be exercised only within the limits of such grant.³

Effect on Municipalities of Constitutional Prohibitions of Exemptions. — Any provisions of a constitution which have the effect of restricting or prohibiting the creation of exemptions by the legislature will necessarily have the effect of restraining whatever power in that respect the various municipalities in the state might otherwise possess.⁴

Maine Doctrine as to Delegation to Municipalities of Exempting Power. — In Maine the

Express Prohibition of Exemptions. — A provision in the charter of a town that the board of trustees shall not grant any special privileges to any person, corporation, or company, nor exempt any such person or persons from the payment of an annual tax, prohibits a town from making a contract exempting a corporation from the payment of a franchise tax. *South Covington, etc., R. Co. v. Bellevue*, (Ky. 1899) 49 S. W. Rep. 23.

Contract Held Not to Create Exemption. — A contract by which a city leased for a term of years waterworks owned by it contained a provision that the lessee should bear all expenses of the waterworks except state, city, and county taxes, which was modified by another provision that the lessee should pay all state and county taxes. It was held, the court not giving its reasons, that the contract did not "purport to exempt the property from taxation by and on behalf of the city." *Los Angeles v. Los Angeles City Water Works Co.*, 49 Cal. 638.

Exemption by Municipality Sustained as a Contract where Founded on a Sufficient Consideration. — *Grant v. Davenport*, 36 Iowa 396; *Springfield v. St. Boniface*, 10 Manitoba L. Rep. 615, 15 Can. L. T. 312.

1. Delegation of Power to Tax Gives No Right to Create Exemptions. — *New Orleans v. St. Charles St. R. Co.*, 28 La. Ann. 497; *State v. Hannibal, etc., R. Co.*, 75 Mo. 208; *Whiting v. West Point*, 88 Va. 905, 29 Am. St. Rep. 750. See also *Austin v. Austin Gas Light, etc., Co.*, 69 Tex. 180.

2. Express Legislative Grant Necessary to Confer Power. — *Tampa v. Kaunitz*, 39 Fla. 683; *Atty.-Gen. v. Iberville*, 6 Rev. Lég. 241.

Express Authority to Create Exemptions. — The Act of Assembly 45 Vict., c. 2, authorized the corporation of Milltown to exempt from taxation for a period of no more than ten years the property of companies formed for the purpose of engaging in the manufacture of any goods, wares, and merchandise, articles, or things, in Milltown. *Saint Croix Electric Light, etc., Co. v. Milltown*, 31 New Bruns. 452.

Under Gen. Laws New Hampshire, c. 53, § 10, authority is given to towns to exempt from taxation for a term of not more than ten years establishments and capital used for the manufacture of certain fabrics, etc. *Franklin Falls Pulp Co. v. Franklin*, 66 N. H. 274.

Grant of Power to Exempt Not a Contract. — A grant by the state to a municipal corporation of authority to issue bonds which shall be exempt from taxation does not constitute an irrevocable contract between the state and the municipality, but may be abrogated. *Merchants' Ins. Co. v. Newark*, 54 N. J. L. 138.

3. Extent to Which a Municipality May Grant

Exemption. — A city council can grant an exemption from taxation only to the extent that the legislature could constitutionally authorize it and has in fact authorized it. *Louisville v. Board of Trade*, 90 Ky. 409. See also *Saint Croix Electric Light, etc., Co. v. Milltown*, 31 New Bruns. 452.

In *Bowen v. Newell*, 16 R. I. 238, it was held that where a town was authorized to grant to any person the right of laying water pipes, etc., and to exempt such pipes from taxation, an exemption of pipes already laid was not authorized.

By *Gen. Laws New Hampshire*, c. 53, § 10, providing that "towns may by vote exempt from taxation for a term not exceeding ten years any establishment therein, or proposed to be erected or put in operation therein, and the capital used in operating the same for the manufacture of fabrics of cotton, wool, wood, iron, or any other material, and such vote shall be a contract binding for the term specified therein," the legislature intended the vote of a town to be taken upon a proposition or offer of the owner or operator of existing or proposed establishments, because otherwise the vote could not be a contract at the time of its passing. A vote exempting all manufacturing establishments thereafter erected or put in operation would be, until accepted and acted upon by erecting them or putting them in operation, not a contract, but a proposition on the part of the town which it might withdraw or rescind at any time. Therefore such a general vote of exemption is not authorized by the statute. *Cox Needle Co. v. Gilford*, 52 N. H. 503.

Under the statute quoted above a town has no power to exempt from taxation any property not engaged in manufacture, *Kimball Carriage Co. v. Manchester*, (N. H. 1893) 39 Atl. Rep. 334, nor to grant further immunity from taxation to property which has already received the benefit of ten years' exemption. *Boody v. Watson*, 63 N. H. 320, 64 N. H. 162.

Municipality May Grant Exemption for Shorter Time than Authorized by Statute. — A delegation to a municipal corporation of the power to exempt the property of a private corporation for six years will support an exemption granted by the municipality for five years. In such a case the legislature does not submit an act to be wholly accepted or rejected by the city, but confers a discretion and power upon its council, to be exercised at pleasure. *Portland v. Portland Water Co.*, 67 Me. 136.

4. Constitutional Prohibitions of or Restrictions on Exemptions Apply to Municipalities. — *State v. Hannibal, etc., R. Co.*, 75 Mo. 208; *Austin v. Austin Gas Light, etc., Co.*, 69 Tex. 180. See also *Mack v. Jones*, 21 N. H. 393.

courts admit the right of the legislature to delegate to a municipality the right to exempt from taxation a corporation which renders to the municipality services which may constitute a consideration for the contract of exemption;¹ but a general grant to all municipalities of power to exempt for a certain time manufacturing corporations thereafter established, no consideration passing, has been condemned on the ground that the exercise of such power by the different municipalities would unavoidably result in a state of things such as is designed to be prevented by the constitutional requirement of uniformity in taxation.²

4. Exemptions Can Have No Extraterritorial Effect. — It is axiomatic that a grant of exemption from taxation can have no binding force or effect outside of the territorial limits of the sovereignty by which the grant was made.³

III. WHEN EXEMPTIONS EXIST — **1. Presumption Against Exemptions.** — Taxation of all property being the rule and exemptions the exception,⁴ exemptions will never be presumed or implied in reference to property which would be subject to taxation without some express grant of immunity.⁵ And

1. When Power of Exemption May Be Delegated. — *Portland v. Portland Water Co.*, 67 Me. 136.

2. General Grant of Exempting Power Held Unconstitutional. — The *Maine* Act of March 8, 1864, exempting certain manufacturing establishments from taxation for a term not exceeding ten years, provided the towns or cities in which they were located should in a legal manner give their assent to such exemptions, was in violation of the constitution. *Brewer Brick Co. v. Brewer*, 62 Me. 62; *Farnsworth Co. v. Lisbon*, 62 Me. 451.

3. Exemption from Taxation Has No Extraterritorial Effect. — *Appeal Tax Ct. v. Patterson*, 50 Md. 354; *Catlin v. Trinity College*, 113 N. Y. 133, *affirming* 49 Hun (N. Y.) 278, 22 Abb. N. Cas. (N. Y.) 28; *Catlin v. Domestic, etc., Missionary Soc.*, 113 N. Y. 625, 22 N. Y. St. Rep. 189; *People v. Coleman*, 135 N. Y. 231, *affirming* 18 N. Y. Supp. 675; *Matter of McCoskey*, 6 Dem. (N. Y.) 438. See also *Bonaparte v. Tax Ct.*, 104 U. S. 592; *Appeal Tax Ct. v. Gill*, 50 Md. 377; *Bonaparte v. State*, 63 Md. 465; *Matter of Kimberly*, 27 N. Y. App. Div. 470; *Matter of Prime*, 136 N. Y. 347, *affirming* 64 Hun (N. Y.) 50; *Matter of Balleis*, 144 N. Y. 132, *affirming* 78 Hun (N. Y.) 275.

A state has the power to tax stocks, bonds, and certificates of debt of other states, and of corporations created by them, when held by citizens or residents of the state exercising the taxing power, though such securities are exempted from taxation by the state issuing them or in which they are issued. *Appeal Tax Ct. v. Patterson*, 50 Md. 354, *recognized in Appeal Tax Ct. v. Gill*, 50 Md. 377.

Grant of Exemption Does Not Extend to Foreign Corporations. — The provision of the *Ohio* tax law exempting from taxation any share or shares of stock in any company the capital stock of which is taxed in the name of the company has no reference to shares of stock in foreign companies. It is only where the capital stock of the company is required to be taxed in *Ohio* that the right of exemption obtains. *Bradley v. Bauder*, 36 Ohio St. 28, 38 Am. Rep. 547.

4. Taxation the Rule, Exemptions the Exception — *United States*. — *Walters v. Western, etc., R. Co.*, 68 Fed. Rep. 1002.

Alabama. — *Swann v. State*, 77 Ala. 545.

Arizona. — *Atlantic, etc., R. Co. v. Lesueur*, (Arizona 1888) 37 Am. & Eng. R. Cas. 368.

Georgia. — *Mundy v. Van Hoose*, (Ga. 1898) 30 S. E. Rep. 783.

Iowa. — *Griswold College v. State*, 46 Iowa 275; *Farwell v. Des Moines Brick Mfg. Co.*, 97 Iowa 286.

Maine. — *Auburn v. Young Men's Christian Assoc.*, 86 Me. 241; *Bangor v. Rising Virtue Lodge No. 10*, 73 Me. 428, 40 Am. Rep. 369; *Portland, etc., R. Co. v. Saco*, 60 Me. 196.

Massachusetts. — *Mt. Hermon Boys' School v. Gill*, 145 Mass. 139.

Michigan. — *Water Com'rs v. Auditor-Gen.*, (Mich. 1898) 73 N. W. Rep. 801; *Manistee, etc., R. Co. v. Turner*, (Mich. 1897) 73 N. W. Rep. 240.

Mississippi. — *Frantz v. Dobson*, 64 Miss. 631, 60 Am. Rep. 68.

North Carolina. — *United Brethren of Salem v. Forsyth County*, 115 N. Car. 489.

North Dakota. — *Tyler v. Cass County*, 1 N. Dak. 369.

New York. — *People v. Collison*, 22 Abb. N. Cas. (N. Y. Supreme Ct.) 52; *People v. Sayles*, 23 Misc. Rep. (N. Y. Supreme Ct.) 1; *People v. Commissioners of Taxes, etc.*, 76 N. Y. 64.

Oregon. — *Hibernian Benev. Soc. v. Kelly*, 28 Oregon 173.

Virginia. — *Com. v. Richmond, etc., R. Co.*, 81 Va. 355, 24 Am. & Eng. R. Cas. 482; *Petersburg v. Petersburg Benev. Mechanics' Assoc.*, 78 Va. 431, 8 Am. & Eng. Corp. Cas. 484.

Washington. — *Peirce v. Thurston County*, 14 Wash. 586.

Canada. — *Wylie v. Montreal*, 12 Can. Sup. Ct. Rep. 354.

5. Exemptions Never Implied — *United States*. — *North Missouri R. Co. v. Maguire*, 20 Wall. (U. S.) 46; *Delaware R. Tax*, 18 Wall. (U. S.) 225; *Bailey v. Magwire*, 22 Wall. (U. S.) 226; *Central R., etc., Co. v. Georgia*, 92 U. S. 674; *Wilson v. Gaines*, 103 U. S. 417, *affirming* 9 Baxt. (Tenn.) 546, which *affirmed* 3 Tenn. Ch. 597; *Bank of Commerce v. Tennessee*, 161 U. S. 134; *Southwestern R. Co. v. Wright*, 110 U. S. 231; *Newby v. Brownlee*, 23 Fed. Rep. 320.

Arkansas. — *State v. Certain Lands*, 40 Ark.

even in cases where it is claimed that there has been an express grant of

34; *Files v. State*, 48 Ark. 529; *Biscoe v. Coulter*, 18 Ark. 423.

Illinois. — *People v. Chicago Theological Seminary*, 174 Ill. 177.

Iowa. — *Morseman v. Younkin*, 27 Iowa 350.

Kentucky. — *Kentucky Cent. R. Co. v. Com.*, 87 Ky. 661; *Louisville, etc., R. Co. v. Com.*, 10 Bush (Ky.) 44; *Com. v. Masonic Temple Co.*, 87 Ky. 349.

Louisiana. — *State v. Board of Assessors*, 47 La. Ann. 1498.

Maryland. — *Anne Arundel County v. Annapolis, etc., R. Co.*, 47 Md. 592; *Frederick County v. Sisters of Charity*, 48 Md. 34.

Mississippi. — *Frantz v. Dobson*, 64 Miss. 631, 60 Am. Rep. 68.

Missouri. — *Washington University v. Rowse*, 42 Mo. 308; *State v. Chicago, etc., R. Co.*, 89 Mo. 523; *Pacific R. Co. v. Cass County*, 53 Mo. 17; *North Missouri R. Co. v. Maguire*, 49 Mo. 490; *St. Louis v. Boatmen's Ins., etc., Co.*, 47 Mo. 150; *St. Louis v. Marine Ins. Co.*, 47 Mo. 163; *State v. Lange*, 16 Mo. App. 468.

New Hampshire. — *Phillips Exeter Academy v. Exeter*, 58 N. H. 306, 42 Am. Rep. 589.

New Jersey. — *Cook v. State*, 33 N. J. L. 474; *State Board of Assessors v. Paterson, etc., R. Co.*, 50 N. J. L. 446; *State v. Parker*, 32 N. J. L. 426.

New York. — *People v. Commissioners of Taxes, etc.*, 76 N. Y. 64; *People v. Commissioners of Taxes*, 95 N. Y. 554; *People v. Commissioners of Taxes, etc.*, 82 N. Y. 459, *affirming* 19 Hun (N. Y.) 460; *People v. Collision*, 22 Abb. N. Cas. (N. Y. Supreme Ct.) 52; *People v. Sayles*, 23 Misc. Rep. (N. Y. Supreme Ct.) 1; *People v. Neff*, 34 N. Y. App. Div. 83; *People v. Peck*, 157 N. Y. 51, *affirming* 32 N. Y. App. Div. 624, 52 N. Y. Supp. 259; *People v. Roper*, 35 N. Y. 629.

North Carolina. — *Wilmington, etc., R. Co. v. Alsbrough*, 110 N. Car. 137, 437.

Pennsylvania. — *Jones, etc., Mfg. Co. v. Com.*, 69 Pa. St. 137; *Erie R. Co. v. Com.*, 66 Pa. St. 84, 5 Am. Rep. 351; *Philadelphia v. Pennsylvania Hospital*, 134 Pa. St. 171; *Erie R. Co. v. Com.*, 3 Brews. (Pa.) 368; *New York, etc., R. Co. v. Sabin*, 26 Pa. St. 242.

Tennessee. — *Wilson v. Gaines*, 3 Tenn. Ch. 597, *affirmed* by 9 Baxt. (Tenn.) 546, *affirmed* by 103 U. S. 417.

Washington. — *Puget Sound Agricultural Co. v. Pierce County*, 1 Wash. Ter. 159.

West Virginia. — *Baltimore, etc., R. Co. v. Marshall County*, 3 W. Va. 319.

Wisconsin. — *Weston v. Shawano County*, 44 Wis. 242; *State v. Anderson*, 90 Wis. 550. See also *Yates v. Milwaukee*, 92 Wis. 352.

No Presumption of Exemption Unless for Adequate Consideration. — *Jones, etc., Mfg. Co. v. Com.*, 69 Pa. St. 137.

Lands Unfit for Agricultural Purposes. — The provision of the *Florida Revenue Law* of 1845 that "all the land in this state subject to taxation shall be classed into three classes or grades," etc., while it implies that there are lands in the state not subject to taxation, gives no ground for the inference that the legislature designed to exempt pine and other lands unfit for agricultural purposes. The lands referred to in the statute as being exempt from

taxation are those belonging to the United States, to public schools, and to charitable and religious institutions. *Levy v. Smith*, 4 Fla. 154.

Where Owner of Land Unknown. — Section 232 of the *South Carolina General Statutes* of 1882, in reference to exempted lands, contained a proviso requiring the auditor to enter in the column of names opposite lands where the owner was unknown the word "Unknown," but did not state that such land should be exempt from taxation. It was held that the intent of the legislature was not to exempt such lands, as they did not necessarily fall in the classes which were expressly exempted; and as the proviso had no sensible connection with the rest of the section, the court considered that it was incorporated therein or added thereto by some mistake. *Gilliland v. Citadel Square Baptist Church*, 33 S. Car 164.

Securities Deposited with State Treasurer. — Mortgages held by an insurance company and deposited with the state treasurer in order to enable the company to transact business in other states are not exempt from taxation, as there is no intention to exempt them shown in any of the tax laws, and they are in no sense the property of the state. *State v. Haight*, 35 N. J. L. 279.

Property in Hands of Receiver. — There is no sound principle upon which the property of a person or a corporation which is placed in the hands of a receiver by a court of justice for the purpose of a suit pending in such court can be regarded as being thereby rendered exempt from the operation of the taxing laws of the government within whose jurisdiction such property is situated. *Stevens v. New York, etc., R. Co.*, 13 Blatchf. (U. S.) 104; *Walters v. Western, etc., R. Co.*, 68 Fed. Rep. 1002. See generally the title RECEIVERS.

Property Granted to State by National Government to Aid Railroads. — Lands which have been granted by the national government to a state to aid in the construction of a railroad are subject to taxation after they have been earned by the railroad company and have become its property; an exemption from state taxation cannot be implied from the general principles of law regarding a trustee and his relation to the trust estate. *West Wisconsin R. Co. v. Trempealeau County*, 35 Wis. 258, *affirmed* 93 U. S. 595.

Grant by City of Sole Privilege of Supplying Water Implies No Exemption. — *Stein v. Mobile*, 17 Ala. 234, *reaffirmed* in *Stein v. Mobile*, 24 Ala. 591, again *reaffirmed* in *Mobile v. Stein*, 54 Ala. 23.

Privilege of Furnishing Gas by Means of Public Works Does Not Imply Exemption. — *Memphis Gas Light Co. v. Taxing Dist.*, 109 U. S. 398.

Exemption Not Implied from Grant of Banking Powers. — *Providence Bank v. Billings*, 4 Pet. (U. S.) 514.

Mortgage on Exempt Land Taxable. — *Angle v. Lantz*, 53 N. J. L. 578.

College Professor Not Exempt from Occupation Tax Because State Forbears to Tax Means of Education. — The fact that the state does not tax the means of education, either secular or religious, does not relieve a college professor

exemption, it is an invariable rule that every presumption must be in favor of a continuance of the taxing power and against any surrender thereof.¹

Effect of Payment by Corporation of Bonus for Charter, or License Tax. — Thus, a corporation is not exempted from other taxation by reason of the fact that it is required to pay to the state a bonus for its charter or franchise,² nor does the

from a tax imposed upon all occupations or professions, there being nothing in the law itself showing a legislative intention to exempt such a person from such taxation. *Union County v. James*, 21 Pa. St. 525.

Wife Not Exempt from Bounty Tax on Account of Military Service of Husband. — The real estate of a married woman is not relieved from taxation for bounty purposes by the fact that her husband is exempt on account of his military service. The exemption to the husband is his personal privilege. *Crawford v. Burrell Tp.*, 53 Pa. St. 219.

Agricultural Land Situated in City Not Exempt from Municipal Taxation. — Land situate within the corporate limits of a city is not exempt from municipal taxation because it is used solely for agricultural purposes and is not benefited by being included in the city. *Dixon v. Mayes*, 72 Cal. 166; *Santa Rosa v. Coulter*, 58 Cal. 537.

Mortgage to State. — A mortgage executed to the state cannot exempt the property mortgaged from taxation in the hands of a corporation which is the mortgagor. *Tax Cases*, 12 Gill & J. (Md.) 117.

Although lands belonging to the state are exempt from taxation, lands mortgaged to a corporation cannot be exempted as belonging to the state merely because the state has an ultimate interest in such lands as a mortgagee to indemnify itself against the payment of bonds issued by it to the corporation. *Biscoe v. Coulter*, 18 Ark. 423.

Enlistment in United States Army. — A resident in a city does not become exempt from taxation upon his property therein by reason of enlistment in the United States army. *Webster v. Seymour*, 8 Vt. 135.

1. Presumption Against Exemptions — United States. — *Citizens' Bank v. Board of Assessors*, 54 Fed. Rep. 73; *Annapolis*, etc., R. Co. v. *Anne Arundel County*, 103 U. S. 1; *St. Louis*, etc., R. Co. v. *Loftin*, 98 U. S. 559; *Philadelphia*, etc., R. Co. v. *Maryland*, 10 How. (U. S.) 376; *Ohio L. Ins.*, etc., Co. v. *Debolt*, 16 How. (U. S.) 435; *Phoenix F. & M. Ins. Co. v. Tennessee*, 161 U. S. 174; *Delaware R. Tax*, 18 Wall. (U. S.) 226; *Bailey v. Magwire*, 22 Wall. (U. S.) 226; *Eric R. Co. v. Pennsylvania*, 21 Wall. (U. S.) 408; *New Orleans*, etc., R. Co. v. *New Orleans*, 143 U. S. 102, *affirming* 40 La. Ann. 587. See also *Tucker v. Ferguson*, 22 Wall. (U. S.) 527.

Alabama. — *Stein v. Mobile*, 17 Ala. 234.

Arizona. — *Waller v. Hughes*, (*Arizona* 1886) 11 Pac. Rep. 122.

Illinois. — *North Chicago Hebrew Congregation v. Garibaldi*, 70 Ill. App. 33, *citing* 25 AM. AND ENG. ENCYC. OF LAW (1st ed.) 157.

Kentucky. — *Kentucky Cent. R. Co. v. Bourbon County*, 82 Ky. 497; *Barbour v. Louisville Board of Trade*, 82 Ky. 645; *Louisville*, etc., Canal Co. v. *Com.*, 7 B. Mon. (Ky.) 160; *Clark v. Louisville Water Co.*, 90 Ky. 515.

Maine. — *Bangor v. Rising Virtue Lodge No.*

10, 73 Me. 428, 40 Am. Rep. 369; *Portland*, etc., R. Co. v. *Saco*, 60 Me. 196.

Maryland. — *Baltimore v. Grand Lodge*, etc., 60 Md. 280; *Baltimore v. Baltimore*, etc., R. Co., 6 Gill (Md.) 288, 48 Am. Dec. 531; *Buchanan v. Talbot County*, 47 Md. 286.

Missouri. — *Washington University v. Rowse*, 42 Mo. 308; *Hannibal*, etc., R. Co. v. *Shacklett*, 30 Mo. 550.

New Hampshire. — *Brewster v. Hough*, 10 N. H. 138.

New Jersey. — *State Board of Assessors v. Paterson*, etc., R. Co., 50 N. J. L. 446.

New York. — *People v. Collision*, 22 Abb. N. Cas. (N. Y. Supreme Ct.) 52.

Pennsylvania. — *Kittanning Academy v. Kittanning*, 6 Pa. Dist. Rep. 603, 19 Pa. Co. Ct. Rep. 296, 45 Pittsb. Leg. J. (Pa.) 87.

Tennessee. — *Memphis v. Memphis City Bank*, 91 Tenn. 574; *Memphis v. Home Ins. Co.*, 91 Tenn. 558; *Memphis v. Union*, etc., Bank, 91 Tenn. 546; *M. & C. R. Co. v. Gaines*, MS. Nashville, Tenn., 1878; *Memphis v. Union*, etc., Bank, 91 Tenn. 546, 35 Cent. L. J. 169; *State v. Bank of Commerce*, 95 Tenn. 221.

Texas. — *Morris v. Lone Star Chapter No. 6*, etc., 68 Tex. 698.

Wisconsin. — *West Wisconsin R. Co. v. Trempealeau County*, 35 Wis. 258, *affirmed* by 93 U. S. 595. See also *Yates v. Milwaukee*, 92 Wis. 352.

The provision of the Constitution of *Illinois* that the property of counties may be exempted from taxation, but such exemption shall be only by general law, implies that such property is liable to taxation in the absence of any law exempting it. Therefore, there being no such law of exemption, a city may assess water taxes against the property of the county. *Cook County v. Chicago*, 103 Ill. 646.

2. Payment of Bonus for Franchise. — *Eric R. Co. v. Pennsylvania*, 21 Wall. (U. S.) 492; *Newport v. South Covington*, etc., R. Co., 89 Ky. 29; *Eric R. Co. v. Com.*, 66 Pa. St. 84, 5 Am. Rep. 351; *Baltimore v. Baltimore*, etc., R. Co., 6 Gill (Md.) 288, 48 Am. Dec. 531, *per* *Dorsey*, J., refusing to acquiesce in the construction dictum of *Wayne*, J., in *Gordon v. Appleton Tax Ct.*, 3 How. (U. S.) 133.

The imposition of taxes by the legislature on a corporation at the time when the charter is granted or afterwards will not authorize an assumption that the legislature has contracted that no additional taxes shall be imposed upon property either owned by the corporation at the time of the grant or afterwards acquired. *Louisville*, etc., R. Co. v. *Com.*, 10 Bush (Ky.) 44.

The original act of incorporation of a bank provided as a condition of its passage that the company should pay to the state semi-annually at the rate of one-half per cent. per annum on the stock actually paid in during the continuance of the charter; but before the bank was organized and went into operation, the section containing this provision was repealed by a

fact that it is required to pay a license exempt it from taxes on its property.¹

Failure to Direct Manner of Taxation. — Exemption from taxation as to certain property cannot be presumed from a legislative failure to indicate detailed directions for valuing and taxing the same, where there is an express mandate that such property shall be taxed, and where general means and instrumentalities adequate for that purpose exist.²

Avoidance of Double Taxation. — The rules above stated are subject, however, to the modification that property which is not expressly exempted from certain taxes may be held not liable thereto where the effect of a contrary holding would subject it to double taxation.³

2. Intent to Exempt Must Be Clear — *a. GENERAL RULE.* — An exemption from taxation, whether in the nature of an irrevocable contract or of a mere gratuity which may be withdrawn at the pleasure of the legislature,⁴ can exist only by virtue of some constitutional or legislative provision expressing in clear and unequivocal language an intent to create such an exemption and permitting of no other reasonable construction.⁵ The following language of

supplement which enacted that "in lieu of other taxes" the bank should pay a tax "semi-annually at the rate of one-fourth per centum on the whole capital stock of the said bank actually paid in" during the continuance of the charter. It was held that the words quoted were an insufficient foundation on which to imply a surrender of the taxing power, and they were explained as meaning that the one-fourth per cent. was to be paid instead of one-half per cent. in the original act. Therefore a subsequent act taxing the surplus of the bank was held constitutional. *State v. Smyrna Bank*, 2 Houst. (Del.) 99, 73 Am. Dec. 699.

Provision for Tax on Capital Stock. — By the charter of the Trenton Water Power Company it was enacted that it should be lawful for the council and General Assembly of the state, at any time thereafter, to levy a tax on the company not exceeding the half of one per cent. upon its capital stock subscribed and paid in. It was held that this provision amounted to no more than the reservation to the legislature of a right, in its discretion, to require the company to pay a bonus to the state for its corporate franchises, within the specified limit, and that it did not protect the company from taxation for state, county, and municipal purposes, under the fifteenth section of the tax law of 1866, nor exempt it from taxation beyond the limitation. *State v. Parker*, 32 N. J. L. 426.

1. Payment of License Tax. — *Louisville City R. Co. v. Louisville*, 4 Bush (Ky.) 478; *New Orleans v. People's Ins. Co.*, 27 La. Ann. 519; *State v. Columbia*, 6 S. Car. 1. See also *Newport v. South Covington*, etc., R. Co., 89 Ky. 29.

In *Louisville City R. Co. v. Louisville*, 4 Bush (Ky.) 478, the court, *per* Robertson, J., said: "The price of the license is no more a tax on the company's property than a license to keep a tavern or coffee house is a tax on the house and its appendages; and no such license exempts such property from taxation."

2. Failure to Direct Manner of Taxation. — *State v. Anderson*, 90 Wis. 550.

The legislature granted to a railroad company immunity from all taxation until its road was built and had been in operation two years, but it was declared that after this "the road-bed, buildings, machinery, engines, cars, and

other property of such completed road, at the actual cash value thereof, shall be subject to taxation at the rate assessed by the state on other real and personal property of like value." It was held that a perpetual exemption from county and municipal taxation did not arise by necessary implication. *Bailey v. Magwire*, 22 Wall. (U. S.) 215.

The fact that real estate is assessed for taxation only in alternate years cannot operate to exempt land which by statute became subject to taxation before the time when the assessors were required to return their books, in a year when real estate was not assessed. *Guthrie County v. Carroll County*, 34 Iowa 108.

3. Avoidance of Double Taxation. — *State v. Jones*, 5 Tex. 383; *Fulkerson v. Bristol*, 95 Va. 1. Thus, in the case first cited, it was held that corn and cotton produced in the preceding year were not liable to taxation, for the reason that taxes had already been imposed upon all the agencies, such as slaves, etc., by the use of which the crops had been produced, and to tax the crops would be in effect to levy another tax on such agencies.

In *New Orleans Sugar Shed Co. v. Harris*, 26 La. Ann. 378, the court said that if a corporation has invested its capital stock and become the owner of real estate to the amount thereof, it would be manifestly unjust to assess that property and at the same time to tax the sums so invested as capital stock; but that under the provision of the act of the legislature in question, intended to prevent such double taxation of property, no warrant could be found in support of a pretension of such company that it was entitled to an entire exemption of its property from taxation. See generally as to double taxation the titles TAXATION; TAXATION (CORPORATE).

4. As to when an exemption may be withdrawn and when it constitutes an irrevocable contract see *infra*, this title, *Termination of Exemptions*.

5. Intent to Exempt Must Clearly Appear — *United States*. — *Wilson v. Gaines*, 103 U. S. 417, *affirming* 9 Baxt. (Tenn.) 546, which *affirmed* 3 Tenn. Ch. 597; *Delaware R. Tax*, 18 Wall. (U. S.) 206; *Trask v. Maguire*, 18 Wall. (U. S.) 391; *North Missouri R. Co. v. Maguire*, 20 Wall. (U. S.) 46; *Davenport Nat. Bank v.*

the Supreme Court of *New Jersey* well illustrates the extent to which this rule is carried: "In view of the extraordinary character of this power [of granting

Mittelbuscher, 15 Fed. Rep. 225; *Central R., etc., Co. v. Georgia*, 92 U. S. 665; *Southwestern R. Co. v. Georgia*, 92 U. S. 676, note; *Bailey v. Magwire*, 22 Wall. (U. S.) 215; *Hoge v. Richmond, etc., R. Co.*, 99 U. S. 348; *Chicago, etc., R. Co. v. Guffey*, 120 U. S. 569; *Providence Bank v. Billings*, 4 Pet. (U. S.) 514; *Philadelphia, etc., R. Co. v. Maryland*, 10 How. (U. S.) 376; *Southwestern R. Co. v. Wright*, 116 U. S. 231; *Memphis, etc., R. Co. v. Railroad Com'rs*, 112 U. S. 609; *Vicksburg, etc., R. Co. v. Dennis*, 116 U. S. 665; *Phoenix F. & M. Ins. Co. v. Tennessee*, 161 U. S. 174; *People v. Cook*, 148 U. S. 397, *affirming* *People v. Cook*, 110 N. Y. 443, which *affirmed* 47 Hun (N. Y.) 467; *Provident Inst. v. Massachusetts*, 6 Wall. (U. S.) 611; *Wilmington, etc., R. Co. v. Alsbrook*, 146 U. S. 279, 53 Am. & Eng. R. Cas. 687, *affirming* 110 N. Car. 137; *Jefferson Branch Bank v. Skelly*, 1 Black (U. S.) 436; *Annapolis, etc., R. Co. v. Anne Arundel County*, 103 U. S. 1; *Pacific R. Co. v. McGuire*, 20 Wall. (U. S.) 36; *Sturges v. Carter*, 114 U. S. 511; *Gilfillan v. Union Canal Co.*, 109 U. S. 401; *Tennessee v. Whitworth*, 117 U. S. 139, *affirming* 22 Fed. Rep. 81; *Bank of Commerce v. Tennessee*, 161 U. S. 134, 163 U. S. 416; *Picard v. East Tennessee, etc., R. Co.*, 130 U. S. 637; *Tomlinson v. Branch*, 15 Wall. (U. S.) 460; *Bank of Commerce v. Tennessee*, 104 U. S. 493; *Raleigh, etc., R. Co. v. Reid*, 13 Wall. (U. S.) 269; *Savings Soc. v. Coite*, 6 Wall. (U. S.) 594, *affirming* *Coite v. Savings Soc.*, 32 Conn. 173; *Ohio L. Ins., etc., Co. v. Debolt*, 16 How. (U. S.) 416; *Piqua Branch of State Bank v. Knoop*, 16 How. (U. S.) 369; *Walters v. Western, etc., R. Co.*, 68 Fed. Rep. 1002; *Santa Clara County v. Southern Pac. R. Co.*, 18 Fed. Rep. 385, 9 Sawy. (U. S.) 165; *Louisville, etc., R. Co. v. Gaines*, 3 Fed. Rep. 266, 2 Flipp. (U. S.) 621; *Winona, etc., Land Co. v. Minnesota*, 159 U. S. 526, *affirming* *Redwood County v. Winona, etc., Land Co.*, 40 Minn. 512; *Gold Hill v. Caledonia Silver Min. Co.*, 5 Sawy. (U. S.) 575; *Tennessee v. Bank of Commerce*, 53 Fed. Rep. 735; *North Wisconsin R. Co. v. Barron County*, 8 Biss. (U. S.) 414; *Erie R. Co. v. Pennsylvania*, 21 Wall. (U. S.) 408; *New Orleans, etc., R. Co. v. New Orleans*, 143 U. S. 192, *affirming* 40 La. Ann. 587. See also *Bank of Redemption v. Boston*, 125 U. S. 60.

Alabama. — *Mobile, etc., R. Co. v. Kennerly*, 74 Ala. 566; *Stein v. Mobile*, 17 Ala. 234; *Mobile v. Stein*, 54 Ala. 23; *Dauphin, etc., Streets R. Co. v. Kennerly*, 74 Ala. 583; *Montgomery v. Shoemaker*, 51 Ala. 114.

Arizona. — *Atlantic, etc., R. Co. v. Lesueur*, (Arizona 1888) 37 Am. & Eng. R. Cas. 368; *Waller v. Hughes*, (Arizona 1886) 11 Pac. Rep. 122.

Arkansas. — *Brodie v. Fitzgerald*, 57 Ark. 445; *St. Louis, etc., R. Co. v. Loftin*, 30 Ark. 693; *Memphis, etc., R. Co. v. Berry*, 41 Ark. 436; *Briscoe v. Coulter*, 18 Ark. 423.

California. — *Hart v. Plum*, 14 Cal. 148; *People v. Whyler*, 41 Cal. 351.

Colorado. — *County Com'rs v. Colorado Seminary*, 12 Colo. 497. See also *People v.*

Hall, 8 Colo. 485; *Dyke v. Whyte*, 17 Colo. 296.

Connecticut. — *Seymour v. Hartford*, 21 Conn. 481; *Bridgeport v. New York, etc., R. Co.*, 36 Conn. 255, 4 Am. Rep. 63.

Delaware. — *State v. Smyrna Bank*, 2 Houst. (Del.) 99, 73 Am. Dec. 699.

District of Columbia. — *Baltimore, etc., R. Co. v. District of Columbia*, 3 MacArthur (D. C.) 122; *Alexandria Canal R., etc., Co. v. District of Columbia*, 1 Mackey (D. C.) 217, 7 Am. & Eng. R. Cas. 325.

Georgia. — *Mundy v. Van Hoose*, (Ga. 1898) 30 S. E. Rep. 783; *Macon v. Central R., etc., Co.*, 50 Ga. 620. See also *Athens City Waterworks Co. v. Athens*, 74 Ga. 413.

Illinois. — *People v. Chicago*, 124 Ill. 636; *Matter of Swigert*, 119 Ill. 83, 59 Am. Rep. 789; *North Chicago Hebrew Congregation v. Garibaldi*, 70 Ill. App. 33, *citing* 25 AM. AND ENG. ENCYC. OF LAW (1st ed.) 157; *Sanitary Dist. v. Martin*, 173 Ill. 243; *Bloomington Cemetery Assoc. v. People*, 170 Ill. 377; *People v. Watseka Camp Meeting Assoc.*, 160 Ill. 576; *People v. Ryan*, 138 Ill. 263; *Adams County v. Quincy*, 130 Ill. 566; *Montgomery v. Wyman*, 130 Ill. 17; *Matter of Swigert*, 123 Ill. 267; *State Bank v. People*, 5 Ill. 303; *People v. Chicago Theological Seminary*, 174 Ill. 177; *Illinois, etc., Canal v. Chicago, etc., R. Co.*, 14 Ill. 321; *Bank of Republic v. Hamilton County*, 21 Ill. 53. See also *McLean County v. Bloomington*, 106 Ill. 209.

Indiana. — *Methodist Episcopal Church v. Ellis*, 38 Ind. 3; *Hanna v. Allen County*, 8 Blackf. (Ind.) 352; *Madison v. Fitch*, 18 Ind. 33; *Deniston v. Terry*, 141 Ind. 677. See also *Horn v. Woodard*, (Ind. 1898) 50 N. E. Rep. 33.

Iowa. — *Iowa Homestead Co. v. Webster County*, 21 Iowa 221. See also *Ft. Des Moines Lodge No. 25 v. Polk County*, 56 Iowa 34; *Mitchellville v. Board of Supervisors*, 64 Iowa 554; *McGregor v. Vapel*, 24 Iowa 436.

Kansas. — *Miami County v. Brackenridge*, 12 Kan. 114.

Kentucky. — *Kilgus v. Orphanage of Good Shepherd*, 94 Ky. 439, 15 Ky. L. Rep. 318; *Clark v. Louisville Water Co.*, 90 Ky. 515; *Louisville, etc., Canal Co. v. Com.*, 7 B. Mon. (Ky.) 160; *Deposit Bank v. Daviess County*, (Ky. 1897) 39 S. W. Rep. 1030; *Nashville, etc., R. Co. v. Com.*, 97 Ky. 162; *Louisville v. Board of Trade*, 90 Ky. 409, 12 Ky. L. Rep. 397; *Evansville, etc., R. Co. v. Com.*, 9 Bush (Ky.) 438; *Bradley v. McAtee*, 7 Bush (Ky.) 667, 3 Am. Rep. 309; *Louisville Water Co. v. Hamilton*, 81 Ky. 517; *Wendover v. Lexington*, 15 B. Mon. (Ky.) 262; *Kentucky Cent. R. Co. v. Com.*, 87 Ky. 661; *Louisville, etc., R. Co. v. Com.*, 10 Bush (Ky.) 44.

Louisiana. — *Benedict v. New Orleans*, 44 La. Ann. 793; *Jones v. Raines*, 35 La. Ann. 996; *State v. Board of Assessors*, 34 La. Ann. 574; *State v. Morgan*, 28 La. Ann. 482; *Gast v. Board of Assessors*, 43 La. Ann. 1104; *New Orleans v. New Orleans City, etc., R. Co.*, 40 La. Ann. 587, *affirmed* by 143 U. S. 192. See also *New Orleans v. Union Ins. Co.*, 18 La. Ann. 416; *New Orleans v. Star Mut. Ins. Co.*,

irrepealable exemptions], of the great inconvenience consequent upon even its occasional use, of the utter destruction of government that would follow its

18 La. Ann. 519; *New Orleans v. New Orleans Mechanics' Soc.*, 27 La. Ann. 436.

Maine. — *Portland, etc.*, R. Co. v. Saco, 60 Me. 196.

Maryland. — *Baltimore v. State*, 15 Md. 376, 74 Am. Dec. 572; *Baltimore v. Baltimore, etc.*, R. Co., 6 Gill (Md.) 288, 48 Am. Dec. 531; *Baltimore v. Grand Lodge, etc.*, 60 Md. 280; *Anne Arundel County v. Annapolis, etc.*, R. Co., 47 Md. 592; *State v. Wilson*, 52 Md. 638; *Buchanan v. Talbot County*, 47 Md. 286; *Gordon v. Baltimore*, 5 Gill (Md.) 231; *Howell v. State*, 3 Gill (Md.) 14.

Massachusetts. — *Harvard College v. Boston*, 104 Mass. 470. See also *Third Cong. Soc. v. Springfield*, 147 Mass. 396.

Michigan. — *People v. Detroit, etc.*, R. Co., 1 Mich. 458; *Lefevre v. Detroit*, 2 Mich. 586; *Manistee, etc.*, R. Co. v. *Turner*, (Mich. 1897) 73 N. W. Rep. 240; *East Saginaw Mfg. Co. v. East Saginaw*, 19 Mich. 259, 2 Am. Rep. 82.

Minnesota. — *St. Peter's Church v. Scott County*, 12 Minn. 395; *Hennepin County v. Bell*, 43 Minn. 344; *Chicago, etc.*, R. Co. v. *Pfaender*, 23 Minn. 217; *Redwood County v. Winona, etc.*, Land Co., 40 Minn. 512, *affirmed* by *Winona, etc.*, Land Co. v. *Minnesota*, 159 U. S. 526. See also *Morrison County v. St. Paul, etc.*, R. Co., 42 Minn. 451.

Mississippi. — *Frantz v. Dobson*, 64 Miss. 631, 60 Am. Rep. 68; *State v. Simmons*, 70 Miss. 485; *Adams v. Yazoo, etc.*, R. Co., (Miss. 1898) 24 So. Rep. 200; *State v. Simmons*, 70 Miss. 485; *Anderson v. State*, 23 Miss. 459. See also *Morris Ice Co. v. Adams*, 75 Miss. 410.

Missouri. — *Scotland County v. Missouri, etc.*, R. Co., 65 Mo. 123; *Pacific R. Co. v. Cass County*, 53 Mo. 17; *State v. Lange*, 16 Mo. App. 468; *Hannibal, etc.*, R. Co. v. *Shacklett*, 30 Mo. 550; *Washington University v. Rowse*, 42 Mo. 308.

Nebraska. — See *Republican Valley, etc.*, R. Co. v. *Chase County*, 33 Neb. 759, 48 Am. & Eng. R. Cas. 641.

New Hampshire. — *Brewster v. Hough*, 10 N. H. 138; *Franklin St. Soc. v. Manchester*, 60 N. H. 342.

New Jersey. — *State v. Woodruff*, 37 N. J. L. 139; *State v. Collectors*, 26 N. J. L. 519, *affirming* 25 N. J. L. 315; *Cook v. State*, 33 N. J. L. 474; *State v. Parker*, 32 N. J. L. 426. See also *Williams v. Bettle*, 50 N. J. L. 132, *affirmed* by 51 N. J. L. 512.

New York. — *People v. Roper*, 35 N. Y. 629; *People v. New York*, 32 Barb. (N. Y.) 113; *People v. Campbell*, 93 N. Y. 196; *People v. Peck*, 157 N. Y. 51, *affirming* 32 N. Y. App. Div. 624, 52 N. Y. Supp. 259; *People v. Coleman*, 135 N. Y. 231, *affirming* 18 N. Y. Supp. 675; *People v. Davenport*, 91 N. Y. 574, 1 Am. & Eng. Corp. Cas. 475; *People v. Collision*, 22 Abb. N. Cas. (N. Y. Supreme Ct.) 52; *People v. Williams*, 6 Misc. Rep. (N. Y. Supreme Ct.) 185; *People v. Commissioners of Taxes*, 95 N. Y. 554. See also *People v. Commissioners of Taxes, etc.*, 82 N. Y. 459, *affirming* 19 Hun (N. Y.) 460; *Black v. Brooklyn*, (Supreme Ct.) 6 N. Y. Supp. 958; *People v. Knickerbocker Ice Co.*, 99 N. Y. 181, *affirming* 32 Hun (N. Y.) 475.

North Carolina. — *State v. Petway*, 2 Jones Eq. (55 N. Car.) 396; *Wilmington, etc.*, R. Co. v. *Alsbrook*, 110 N. Car. 137, 437.

Ohio. — *Cincinnati College v. State*, 19 Ohio 110.

Oregon. — *Hibernian Benev. Soc. v. Kelly*, 28 Oregon 173.

Pennsylvania. — *Platt v. Rice*, 10 Watts (Pa.) 352; *Crawford v. Burrell Tp.*, 53 Pa. St. 219; *Jones, etc.*, Mfg. Co. v. *Com.*, 69 Pa. St. 137; *New York, etc.*, R. Co. v. *Sabin*, 26 Pa. St. 242; *Erie R. Co. v. Com.*, 66 Pa. St. 84, 5 Am. Rep. 351; *Miller v. Kirkpatrick*, 29 Pa. St. 226; *Pennsylvania Bank v. Com.*, 19 Pa. St. 144; *Philadelphia v. Pennsylvania Hospital*, 134 Pa. St. 171; *Com. v. Easton Bank*, 10 Pa. St. 442. See also *Farmers', etc.*, Bank v. *Greene County*, 3 Leg. Chron. (Pa.) 91, 7 Leg. Gaz. (Pa.) 147; *Chadwick v. Maginnes*, 94 Pa. St. 117; *Union Pass. R. Co. v. Philadelphia*, 83 Pa. St. 429; *Appeals from Taxation*, 10 Leg. Int. (Pa.) 6, 1 Phila. (Pa.) 418.

Rhode Island. — *Second Universalist Soc. v. Providence*, 6 R. I. 235.

South Carolina. — *State v. Newberry*, 12 Rich. L. (S. Car.) 339; *State v. Addison*, 2 S. Car. 499; *State v. Hood*, 15 Rich. L. (S. Car.) 177.

Tennessee. — *Wilson v. Gaines*, 3 Tenn. Ch. 597, *affirmed* by 9 Baxt. (Tenn.) 546, *affirmed* by 103 U. S. 417; *Louisville, etc.*, R. Co. v. *State*, 8 Heisk. (Tenn.) 663; *Turnpike Cases*, 92 Tenn. 369; *State v. Whitworth*, 8 Lea (Tenn.) 594; *Nashville, etc.*, R. Co. v. *Hodges*, 7 Lea (Tenn.) 663; *McCallie v. Chattanooga*, 3 Head. (Tenn.) 317; *Memphis v. Union, etc.*, Bank, 91 Tenn. 546, 35 Cent. L. J. 169; *State v. Bank of Commerce*, 95 Tenn. 221; *Memphis v. Memphis City Bank*, 91 Tenn. 574; *Memphis v. Home Ins. Co.*, 91 Tenn. 558; *Memphis v. Union, etc.*, Bank, 91 Tenn. 546; *M. & C. R. Co. v. Gaines*, MS. Nashville, Tenn., 1878.

Texas. — *Morris v. Lone Star Chapter No. 6*, etc., 68 Tex. 698.

Utah. — *Judge v. Spencer*, 15 Utah 242.

Vermont. — See *Webster v. Seymour*, 8 Vt. 135; *Thorpe v. Rutland, etc.*, R. Co., 27 Vt. 140, 62 Am. Dec. 625; *Herrick v. Randolph*, 13 Vt. 525.

Virginia. — *Com. v. Richmond, etc.*, R. Co., 81 Va. 355, 24 Am. & Eng. R. Cas. 482; *Petersburg v. Petersburg Benev. Mechanics' Assoc.*, 78 Va. 431, 8 Am. & Eng. Corp. Cas. 484; *Orange, etc.*, R. Co. v. *Alexandria*, 17 Gratt. (Va.) 176; *Com. v. Chesapeake, etc.*, R. Co., 27 Gratt. (Va.) 344. See also *Eyre v. Jacob*, 14 Gratt. (Va.) 422, 73 Am. Dec. 367.

Washington. — *Percival v. Thurston County*, 14 Wash. 586; *Washington Iron Works Co. v. King County*, (Wash. 1898) 54 Pac. Rep. 1004; *Thurston County v. Sisters of Charity*, 14 Wash. 264.

West Virginia. — *Baltimore, etc.*, R. Co. v. *Marshall County*, 3 W. Va. 319; *Probasco v. Moundsville*, 11 W. Va. 501.

Wisconsin. — *Hale v. Kenosha*, 29 Wis. 599; *Weston v. Shawano County*, 44 Wis. 242; *State v. Anderson*, 90 Wis. 550.

Canada. — *Wylie v. Montreal*, 12 Can. Supp.

frequent and impartial exercise, courts must feel constrained to decide that it has been put in force only when the opposite judgment cannot be formed by

Ct. Rep. 384. See also Canadian Pac. R. Co. v. Burnett, 5 Manitoba L. Rep. 395.

Church Property. — The constitution of *New Hampshire* does not exempt church property from taxation. *Franklin St. Soc. v. Manchester*, 60 N. H. 342.

Public Lands Granted to the Union Pacific Railroad Company are not exempted from taxation by the provision of the act making the grant that all such lands which shall not be sold or disposed of by the company within three years after the entire road shall have been completed shall be subject to settlement and pre-emption like other public lands at a certain price to be paid to the company. For if such a construction were given the company could obtain title, sell the lands when a good offer was made, and exercise all other acts of full ownership over them without the liability to pay taxes. *Union Pac. R. Co. v. McShane*, 22 Wall. (U. S.) 444, *overruling* *Kansas Pac. R. Co. v. Prescott*, 16 Wall. (U. S.) 603, so far as it asserts a different doctrine.

Authorizing Return or Remission of Taxes. — The fact that a statute permits a return of the greater part of the taxes levied and collected upon property of a certain corporation does not operate as an exemption of the property from taxation. *Darlington v. Atlantic Trust Co.*, 68 Fed. Rep. 849, *affirming* 63 Fed. Rep. 76.

A city ordinance providing that "the commissioner of public works be and he is hereby authorized and empowered to remit and rebate the water tax or rates assessed against property used and occupied wholly for charitable and educational purposes" does not exempt such property from the payment of water taxes, but merely authorizes the rebate or remission, if the commissioner in his discretion decides to make it. *Cook County v. Chicago*, 103 Ill. 646. Compare with subsection *Legislature Cannot Indirectly Effect Prohibitive Exemptions*, *supra*.

The Commerce Clause of the Federal Constitution "neither confers, regulates, nor prohibits taxation." From this it follows as a necessary consequence that the fact that a ship or vessel is enrolled and licensed for the coasting trade does not exempt the owner thereof from taxation for his interest therein as property, upon a valuation as in the case of other property. *Wheeling, etc., Transp. Co. v. Wheeling*, 99 U. S. 273.

The provision of the Federal Constitution which gives to Congress power to regulate commerce with foreign nations does not exempt from state taxation all property engaged in foreign commerce; and a steamship company incorporated under the laws of a state, and whose capital is invested in vessels employed for the purpose of its incorporation, that is, the transportation of passengers and freight between the state and a foreign nation, and in carrying mail under a contract with the United States, is not exempt from state taxation on its capital. *People v. Commissioners of Taxes*, 48 Barb. (N. Y.) 157.

Provision for the Freedom of the Press. — The provision of the Constitution of *Louisiana* that "the press shall be free" did not exempt

from taxation capital invested in a newspaper. *New Orleans v. Crescent Newspaper*, 14 La. Ann. 816.

Freedom from Incumbrances "Except for the Necessary and Ordinary Expenses of Government." — The fact that an owner of property derives his title from the state through a patent issued under an act providing that the transferee should hold the property free and clear of all incumbrances "except for the necessary and ordinary expenses of government" does not relieve him from the payment of a tax for the purpose of raising "additional revenue, to be applied towards the payment of interest and the extinguishment of the debts of the commonwealth" created by her system of internal improvements. *Shitz v. Berks County*, 6 Pa. St. 80.

Public Schools to Be Open to Children of Soldiers Without Cost. — Gen. Stat. *Rhode Island*, c. 58, § 13, providing that "all the public schools in the state * * * shall be open to the children of officers and soldiers belonging to the state * * * without any cost or expense or taxes, or other charges imposed for purposes of public education," does not exempt the estate of such an officer or soldier from taxes levied for school purposes, for the original act, of which the act quoted is a substantial reenactment, provided that the education should be "without any cost or expense for taxes, rates, or other charges," which shows that the intention of the General Assembly was to relieve the children of persons of the classes named and their parents and guardians from the payment of rate bills which under the provisions of the law then existing were liable to be, and were in fact, assessed upon scholars attending public schools, and from the payment of all other taxes and charges which might thereafter be imposed by law upon scholars personally as a condition of attending public schools. Had the General Assembly intended to exempt the property of the classes of persons named from taxation for the purpose of education it would have chosen words more apt. *Carpenter v. School Trustees*, 12 R. I. 574.

Provision that Compensation of Judges Shall Not Be Diminished. — The provision of the Constitution of *Pennsylvania* that the compensation of judges of the Supreme Court and of the presidents of the Court of Common Pleas shall not be diminished during their continuance in office does not exempt them from taxation under a law taxing "all offices and posts of profit." *Northumberland County v. Chapman*, 2 Rawle (Pa.) 73. *Contra*, *New Orleans v. Lea*, 14 La. Ann. 194.

Provision for Collection of State Taxes Does Not Exempt from County Taxes. — The object of the *Georgia* Act of 1874 in reference to the collection of state taxes on railroad property, and having such property returned with the view of the laying of the tax by the comptroller-general, was to make more searching and sweeping provisions in respect to the taxation of railroads by the state, and to compel more full and specific returns; it was not the intention of the act to exempt from county taxation such property of railroad companies as was

a rational mind. If to doubt whether the state has parted with any public right is to be resolved that it has not, certainly language can scarcely express the reluctance of courts to infer that this most important of all public rights has been surrendered."¹

Necessary Implication. — It has been said that an exemption may exist also by virtue of a necessary implication from the language of a statute. But this can be sustained only by giving the strictest construction to the word "necessary," as, if any construction excluding the exemption is possible, it will be given.²

Doubt Must Be Solved in Favor of Power to Tax. — For it is established beyond question that if there is any doubt as to whether or not there was an intention to create an exemption, such doubt must be resolved in favor of the power to tax and against the claim of exemption.³

Exemptions Clearly Granted. — When, however, the language of a constitution

previously subject thereto; nor did such exemption result from the fact that the act made no provision for county taxation. *Savannah, etc., R. Co. v. Morton*, 71 Ga. 24.

Rule Applies to Exemptions from Municipal Taxation. — The principle that a relinquishment of the power of taxation is never presumed and that a deliberate purpose to abandon it must be apparent applies to municipal taxation as well as to taxation by the state. "The express power of the city to impose a specific tax on the employment or business of express companies cannot be presumed to be withdrawn or revoked by a general statute prohibiting all municipal corporations from imposing a percentage tax on the receipts of a particular company." *Montgomery v. Shoemaker*, 51 Ala. 114.

1. Extent to Which the Rule Is Carried. — Dixon, J., delivering the opinion of the court in *Little v. Bowers*, 46 N. J. L. 300.

2. Exemption May Result from Necessary Implication. — See *Tennessee v. Bank of Commerce*, 53 Fed. Rep. 735; *Appeal Tax Ct. v. Rice*, 50 Md. 302; *Frederick County v. Sisters of Charity*, 48 Md. 34; *Anne Arundel County v. Annapolis, etc., R. Co.*, 47 Md. 592; *Buchanan v. Talbot County*, 47 Md. 286; *Brown University v. Granger*, 19 R. I. 704.

Implied Exemption of Political Agencies of State. — Cities or municipalities are, in one sense, political agencies of the state, and although their property or franchises may not be expressly exempted from taxation in their charters, or in the organic law of the sovereignty creating them, there is an implied exemption, and in order to subject them to taxation the legislative intent to do so must be clear and certain. *Eastman v. Nashville*, 13 Lea (Tenn.) 717.

The Bank of Tennessee is a public corporation chartered for the benefit of the state, and though in the act of incorporation there is no express provision exempting the property of the bank from taxation, such exemption is necessarily implied. *Nashville v. State Bank*, 1 Swan (Tenn.) 269.

See generally *infra*, this title, *Particular Subjects of Exemption — Public Property and the Instrumentalities of Government*.

3. Doubts Must Be Solved in Favor of Taxing Power — *United States*. — *Tucker v. Ferguson*, 22 Wall. (U. S.) 527; *Citizens' Bank v. Board*

of Assessors, 54 Fed. Rep. 73; *Central R., etc., Co. v. Georgia*, 92 U. S. 665; *Southwestern R. Co. v. Georgia*, 92 U. S. 676, note; *Bailey v. Magwire*, 22 Wall. (U. S.) 215; *Delaware R. Tax*, 18 Wall. (U. S.) 206; *Hoge v. Richmond, etc., R. Co.*, 99 U. S. 348; *Memphis, etc., R. Co. v. Loftin*, 105 U. S. 258; *Wilmington, etc., R. Co. v. Alsbrook*, 146 U. S. 279, 53 Am. & Eng. R. Cas. 687, *affirming* 110 N. Car. 137; *Bank of Commerce v. Tennessee*, 161 U. S. 134; *North Missouri R. Co. v. Maguire*, 20 Wall. (U. S.) 61; *Wilson v. Gaines*, 103 U. S. 417, *affirming* 9 Baxt. (Tenn.) 546, which *affirmed* 3 Tenn. Ch. 597.

Alabama. — *Mobile, etc., R. Co. v. Kennerly*, 74 Ala. 566.

District of Columbia. — *Baltimore, etc., R. Co. v. District of Columbia*, 3 MacArthur (D. C.) 122.

Illinois. — *People v. Chicago Theological Seminary*, 174 Ill. 177.

Kentucky. — *Barbour v. Louisville Board of Trade*, 82 Ky. 645.

Louisiana. — *Gast v. Board of Assessors*, 43 La. Ann. 1104; *Ivens, etc., Mach. Co. v. Parker*, 42 La. Ann. 1103; *Carre v. New Orleans*, 41 La. Ann. 996.

Maryland. — *Anne Arundel County v. Annapolis, etc., R. Co.*, 47 Md. 592; *Appeal Tax Ct. v. Rice*, 50 Md. 302; *Baltimore v. Grand Lodge, etc.*, 60 Md. 280.

Massachusetts. — *Mt. Hermon Boys' School v. Gill*, 145 Mass. 139.

Mississippi. — *Greenville Ice, etc., Co. v. Greenville*, 69 Miss. 86; *Adams v. Yazoo, etc., R. Co.*, (Miss. 1898) 24 So. Rep. 200.

New Jersey. — *State Board of Assessors v. Paterson, etc., R. Co.*, 50 N. J. L. 446.

New York. — *People v. Commissioners of Taxes, etc.*, 76 N. Y. 64; *People v. Collision*, 22 Abb. N. Cas. (N. Y. Supreme Ct.) 52.

North Carolina. — *United Brethren of Salem v. Forsyth County*, 115 N. Car. 489; *Wilmington, etc., R. Co. v. Alsbrook*, 110 N. Car. 137, 437.

Pennsylvania. — *Com. v. Easton Bank*, 10 Pa. St. 451.

Tennessee. — *Wilson v. Gaines*, 3 Tenn. Ch. 597, *affirmed* by 9 Baxt. (Tenn.) 546, *affirmed* 103 U. S. 417; *Memphis v. Union, etc., Bank*, 91 Tenn. 546, 35 Cent. L. J. 169; *Nashville, etc., R. Co. v. Hodges*, 7 Lea (Tenn.) 663; *State v. Bank of Commerce*, 95 Tenn. 221.

or statute clearly shows an intent to grant an exemption, the courts will not hesitate to give it force and effect.¹

b. RULE APPLIES TO COMMUTATION OR LIMITATION OF TAXATION. — The general rule that the intention to exempt must be clearly expressed is not restricted in its application to absolute exemptions, but applies also to cases of commutation or limitation of taxation.²

c. RULE APPLIES TO EXTENSION OF EXEMPTIONS. — Where an exemption has been clearly granted, the principles set out above apply with full force to an alleged extension of the exemption so as to cover additional property,³ to extend the time during which the exemption is to remain in

Texas. — *Morris v. Lone Star Chapter No. 6*, etc., 68 Tex. 698.

Utah. — *Judge v. Spencer*, 15 Utah 242.

1. Courts Will Enforce Exemption Clearly Granted. — *Bradley, J.*, in *St. Anna's Asylum v. New Orleans*, 105 U. S. 362; *Detroit Home, etc., v. School v. Detroit*, 76 Mich. 521; *Howard Association's Appeal*, 70 Pa. St. 344. See also *State v. Bank of Commerce*, 95 Tenn. 221.

Illustrations of Language Creating Exemptions. — Chapter 23 of the *Maryland Act of 1841* enacted that all property should be taxed, "provided that nothing herein contained shall be construed to authorize the assessment of any tax upon property belonging to * * * any incorporated literary or charitable institution." This amounted to an exemption of the property of such institutions. *Tax Cases*, 12 Gill & J. (Md.) 117.

Provision that Salary Shall Not Be Diminished. — The article of the *Louisiana Constitution* which declares that the judges of both the supreme and inferior courts shall at stated times receive a salary which shall not be diminished during their continuance in office exempts the salary of a judge from taxation. *New Orleans v. Lea*, 14 La. Ann. 194. *Contra*, *Northumberland County v. Chapman*, 2 Rawle (Pa.) 73.

Variance in Name of Corporation in Grant of Exemption. — A grant of exemption from taxation to a corporation is not ineffective because the name of the corporation as stated in the exempting act is slightly different from the name by which it is incorporated, where the two names are substantially the same and it is clear that the corporation claiming the exemption is the one referred to in the grant. *St. Vincent's College v. Schaefer*, 104 Mo. 261.

2. Rule Applies to Commutation or Limitation of Taxation. — *Dauphin, etc., Streets R. Co. v. Kennerly*, 74 Ala. 583; *State v. Parker*, 32 N. J. L. 426. In the case first cited, *Brickell, C. J.*, delivering the opinion of the court, after stating the general rule which has been set out in the text, continued: "It cannot be of importance in the application of this principle that the exemption claimed is not total and absolute — that it is partial and qualified, assuming the form of a commutation, or the substitution of a burden less onerous than that which is imposed on the property of others of like kind. An absolute, unqualified exemption and a partial exemption, a commutation, differ in degree, not in character."

Provision for Payment of Certain Sum in Lieu of All Other Taxes Is a Grant of Commutation. — A provision that a corporation shall pay at stated intervals a certain amount, which shall be "in lieu of all other taxes," or words to

that effect, undoubtedly creates an exemption or commutation. *Mobile, etc., R. Co. v. Kennerly*, 74 Ala. 566; *Neary v. Philadelphia, etc., R. Co.*, 7 Houst. (Del.) 419, *affirming Philadelphia, etc., R. Co. v. Neary*, 5 Del. Ch. 600; *State Bank v. People*, 5 Ill. 303; *Le Roy v. East Saginaw City R. Co.*, 18 Mich. 233, 100 Am. Dec. 162.

An act incorporating a company enacted that as soon as its net proceeds amounted to a certain per cent. upon the cost of its railroad the company should pay to the state a certain annual tax, "provided that no other tax or impost shall be levied or assessed upon the said company." It was held that these words amounted to an absolute exemption of all the company's property from other taxation, and could not be construed to mean merely that the company should be relieved from the obligation to pay the percentage on the cost of its road in case any other tax or impost should be assessed or levied upon it. *State v. Minton*, 23 N. J. L. 529.

3. Rule Applies to Alleged Extension of Exemption to Cover Additional Property. — *Philadelphia, etc., R. Co. v. Maryland*, 10 How. (U. S.) 376. See also *Wilmington, etc., R. Co. v. Alsbroom*, 146 U. S. 279, 53 Am. & Eng. R. Cas. 687, *affirming* 110 N. Car. 137.

Where an act incorporating a company has authorized it to construct certain works and forever exempted its property from taxation, and a subsequent act (unaccompanied by any act of exemption) authorizes the company to construct other works which are in no sense an appropriate part of the first, or within the purposes or contemplation of those who granted the original franchise, the new property thus created cannot fairly be included as coming under the grant of exemption from taxation in the original act. *Alexandria Canal R., etc., Co. v. District of Columbia*, 1 Mackey (D. C.) 217, 7 Am. & Eng. R. Cas. 325.

The *New Jersey Act of April 2, 1873*, providing that railroad companies shall pay county and municipal taxes upon all their property by them occupied, excepting their main stem or roadbed, and track, not exceeding one hundred feet in width, does not extend the exemption to a railroad corporation which has by charter the right to hold exempt from taxation a roadbed of the width of sixty-six feet so as to allow it to hold exempt a road of one hundred feet in width. *State v. Wetherill*, 41 N. J. L. 147.

Statutes Held to Extend Exemption. — The statute 4 Wm. & Marv. c. 1, exempted from the land tax any college or hall in either of the universities or certain colleges. This

force,¹ or to allow a person other than the original grantee to enjoy the immunity granted.²

d. WHETHER EXEMPTION IS INCLUDED IN THE TERM "PRIVILEGES." — It is by no means unusual for a corporation to be given "the rights, powers, and privileges" of another corporation named, instead of having its rights, powers, and privileges enumerated in its charter, or to be authorized to extend its works or lines with "the same rights, powers, and privileges" as it possesses in regard to its original works or lines; and it has been held that an exemption from taxation possessed by the corporation so referred to is a "privilege" in the popular sense of the word, and will be vested in the latter corporation by such a grant, unless an intention to exclude such exemption is clear.³ But the later and better opinion, and the one most in accord with the well-established rule requiring that the legislative intent to grant an exemption shall clearly appear, is that in the absence of other provisions removing all doubt of the intention of the legislature to include exemption from taxation in the term "privileges" it will not be so construed, as it can be given its full force by confining it to other grants to the corporation which

statute was followed until the statute of 11 & 12 Wm. & Mary, which extended the exemption to the buildings within the walls or limits of colleges, halls, and hospitals. The statute of 2 Anne, c. 1, further extended the exemption of all lands which, on the 25th of March, 1693, did belong to the sites of any colleges, etc., and this statute was followed down to the time when the land tax became perpetual. It was held that under these statutes all buildings which formed a part of and were used for the purpose of a college were within the exemption, although they had not been originally exempted, but had been included by the enlargement of the limits of the college. All Souls' College *v.* Costar, 3 B. & P. 635.

1. **Claim of Extension of Time.** — Section 3 of article 10 of the *Colorado* Constitution, adopted in 1876, provided "that mines and mining claims * * * shall be exempt from taxation for the period of ten years from the date of the adoption of this constitution." In 1880 this section was amended by the addition of an exemption of personal property. In the enrolled bill the exemption of mines and mining claims is set out exactly as above quoted, and the state board of canvassers, in declaring the amendment adopted, set it out in the same language. The amendment, as printed in *Laws Colo.*, 1879, p. 31, reads that mines and mining claims shall be exempted "for the period of ten years from the date of the adoption of this [amendment to the] constitution." A question submitted to the Supreme Court as to whether the adoption of the amendment extended the period of exemption beyond the ten years provided in the original section was answered in the negative. *Taxation of Patented Min. Lands*, 9 Colo. 623. The account of the adoption of this amendment is condensed from 1 Mills's Annot. Stat. Colo., 1891, 295, the report of the case being incomplete.

2. **Claim of Extension to Persons Other than Original Grantee.** — The exemption from taxation of lands granted to officers and soldiers of the state as a reward for their services, "for and during the life of such officer and soldier,"

granted by the *Pennsylvania* Act of March 16, 1785, is not extended to donation lands granted by patent to the widows or children of such soldiers by the Act of March 24, 1785, giving the widow and children of a deceased soldier the right to his donation land. *Platt v. Rice*, 10 Watts (Pa.) 352.

3. **View that the Term "Privileges" Includes Exemption.** — *Humphrey v. Pegues*, 16 Wall. (U. S.) 244; *Tennessee v. Whitworth*, 117 U. S. 139, affirming 22 Fed. Rep. 81; *Louisville, etc., R. Co. v. Gaines*, 2 Flipp. (U. S.) 621, 3 Fed. Rep. 266; *State v. Betts*, 24 N. J. L. 555. See also *State v. Receiver of Taxes*, 38 N. J. L. 299; *Lehigh Valley R. Co. v. Newark*, 44 N. J. L. 323; *Atlantic, etc., R. Co. v. Mecklenburg*, 87 N. Car. 129; *Com. v. Chesapeake, etc., R. Co.*, 27 Gratt. (Va.) 344.

In *Tennessee v. Whitworth*, 117 U. S. 139, affirming 22 Fed. Rep. 81, the court considered that there was nothing in the provision of the Constitution of *Tennessee* that the legislature should have no power to pass any law granting to any individual "rights, privileges, immunities, or exemptions" other than such as might be by the same law extended to every member of the community (saving to the legislature the right to grant such charters as it deemed expedient) which so limited the popular meaning of the word "privileges" as to require it to be applied in that state in a more restricted sense than is indicated in the text. *Disapproving* in respect to this point *Wilson v. Gaines*, 9 Baxt. (Tenn.) 546.

Exemption Held to Be Included Within the Term "Rights." — In *Atlantic, etc., R. Co. v. Allen*, 15 Fla. 637, Westcott, J., delivering the opinion of the court, said: "A right of exemption from taxation can be passed under the general language of 'all the rights' as well as any other right. We can see no difference. In all cases the language must be clear to create such an exemption as is here claimed, but it is going too far to hold that each right must be enumerated in order to pass it. The term 'all rights' embraces each right, and there is no room for the least doubt on the subject."

are necessary to the carrying out of its functions.¹

Grant of "Immunities." — A grant, however, of "all the powers, privileges, and immunities" of an earlier corporation clearly confers an exemption from taxa-

1. **Exemption Not Included in Term "Privileges" Unless Such Meaning Clearly Intended** — *United States*. — Picard v. East Tennessee, etc., R. Co., 130 U. S. 637, reversing 24 Fed. Rep. 614; Wilmington, etc., R. Co. v. Alsbrook, 146 U. S. 279, 53 Am. & Eng. R. Cas. 687, affirming 110 N. Car. 137; Phoenix F. & M. Ins. Co. v. Tennessee, 161 U. S. 174, affirming Memphis v. Phoenix, etc., Ins. Co., 91 Tenn. 566; Annapolis, etc., R. Co. v. Anne Arundel County, 103 U. S. 1; Norfolk, etc., R. Co. v. Pendleton, 156 U. S. 667; Southwestern R. Co. v. Wright, 116 U. S. 231; Chesapeake, etc., R. Co. v. Miller, 114 U. S. 176.

Delaware. — See State v. Smyrna Bank, 2 Houst. (Del.) 99, 73 Am. Dec. 699.

District of Columbia. — Alexandria Canal R., etc., Co. v. District of Columbia, 1 Mackey (D. C.) 217, 7 Am. & Eng. R. Cas. 325.

Georgia. — Atlanta, etc., Air-Line R. Co. v. State, 63 Ga. 483.

Kentucky. — Nashville, etc., R. Co. v. Com., 97 Ky. 162.

Maryland. — Anne Arundel County v. Annapolis, etc., R. Co., 47 Md. 592.

Mississippi. — Adams v. Yazoo, etc., R. Co., (Miss. 1898) 24 So. Rep. 200.

New York. — See People v. Knickerbocker Ice Co., 99 N. Y. 181, affirming 32 Hun (N. Y.) 475.

North Carolina. — Wilmington, etc., R. Co. v. Alsbrook, 110 N. Car. 137, 437.

Tennessee. — Memphis v. Phoenix, etc., Ins. Co., 91 Tenn. 566, affirmed by Phoenix F. & M. Ins. Co. v. Tennessee, 161 U. S. 174; Wilson v. Gaines, 3 Tenn. Ch. 597, affirmed 9 Baxt. (Tenn.) 546; Nashville, etc., R. Co. v. Hodges, 7 Lea (Tenn.) 663; Turnpike Cases. 92 Tenn. 369; State v. Mercantile Bank, 95 Tenn. 212; Wilson v. Gaines, Nashville, Tenn., 1877; East Tennessee, etc., R. Co. v. Hamblen County, MS. Knoxville, Tenn., 1877; Railroad v. Hicks, Knoxville, Tenn. 1877; Railroad v. State, Jackson, Tenn., 1877.

Texas. — See International, etc., R. Co. v. State, 75 Tex. 360.

See also *infra*, this title, *Particular Subjects of Exemption* — *Corporations and Corporate Stock Generally* — *Effect of Consolidation of Corporations*.

Grant of "Franchises and Rights." — The charter of the Henderson and Nashville Railroad Company granted to it an exemption from taxation. After the company had made considerable progress towards the construction of its road, it abandoned the work. Subsequently the Evansville, Henderson, and Nashville Railroad Company was incorporated and purchased the roadbed for the bed of its own road, together with the right of way and other property of the old company. The General Assembly then passed an act granting to the latter company all the "franchises and rights" which had been possessed by the old company. It was held that the Evansville, Henderson, and Nashville Railroad Company did not, by this purchase of the right to the franchises and property of the old company and

by its acceptance of the act conferring upon it the franchises and rights of the old company, become entitled to the immunity from taxation granted to such old company. *Evansville, etc., R. Co. v. Com.*, 9 Bush (Ky.) 438. See also the next case, *infra*.

"Interest." — The words "rights, franchise, and interest" do not include exemption from taxation. Therefore, a corporation to which are granted the rights, franchises, and interest in and to a specific property of a pre-existing corporation does not take an exemption from taxation possessed by it. *State v. Maine Cent. R. Co.*, 66 Me. 488.

"Benefits." — Similarly a grant of "benefits" does not include exemption from taxation. *Nashville, etc., R. Co. v. Hodges*, 7 Lea (Tenn.) 663.

"Rights and Relief." — The provision in the charter of the Buffalo Bayou, Brazos, and Colorado Railway Company that "said new company shall be entitled to the same or similar rights and relief, except state aid in bonds or indorsement or guaranty of interest on bonds granted to or provided for any other railroad company by the legislature, and upon the same or similar terms and conditions so far as such rights or relief are in their character applicable to said new company or its line or lines of railroad," could not bind the state to confer upon the company any and every charter right or privilege which future legislatures might see proper to confer upon other railroad corporations. Therefore, this company did not become exempt from taxation for a period of five years on account of the provision to that effect in the charter granted to the International Railroad Company. *Galveston, etc., R. Co. v. State*, 38 Tex. 224.

"Restrictions, Limitations, and Conditions." — The *Alabama* Act of February 4, 1860 (Sess. Acts 1859-60, pp. 261-3), empowering the city of Mobile to grant the privilege of constructing railroads within its corporate limits, provided that the city might collect "from each person, company, or association erecting any railway under the authority of this act" a certain tax, to be in lieu of all other taxation by the city. A subsequent act gave to a certain corporation the right, upon obtaining the assent of the corporate authorities, to construct a railway through the streets of Mobile, subject to "all the restrictions, limitations, and conditions" prescribed in the Act of February 4, 1860. It was held that by the terms of the Act of 1860 the exemption was limited to persons or companies constructing railways under the authority of that act, and that the provision in the later act that the company to which it had reference should be subject to "all the restrictions, limitations, and conditions" prescribed in the Act of 1860 referred to the limitation of power prescribed and the liabilities imposed by that act, and did not include the exemption from taxation. *Dauphin, etc., Streets R. Co. v. Kennerly*, 74 Ala. 583. Compare *State v. Woodruff*, 36 N. J. L. 91.

"Reservations," etc. — An act of the legisla-

tion possessed by it, as such exemption is necessarily included within the scope of the term "immunities."¹

3. Burden of Proof.—The one who claims an exemption from taxation assumes the burden of proof and must clearly and satisfactorily establish that an exemption exists and that the property for which it is claimed is within its scope.² But it is not to be inferred from this that whenever it is attempted

ture authorizing a corporation to "organize with all the forms, officers, terms, powers, rights, reservations, restrictions, and liabilities given to and imposed upon" another corporation is not sufficient to give the new corporation an exemption from taxation possessed by the corporation referred to. *Home Ins., etc., Co. v. Tennessee*, 161 U. S. 108, 200.

"Rules and Restrictions."—The charter of a railroad company contained a provision that "the said railway and its appurtenances and all property therewith connected shall not be subject to be taxed higher" than a specified rate. An amendment to the charter gave to the company authority to build a branch road "under the rules and restrictions" to which it was subjected in building the original road; but such amendment contained no reference to taxation. It was held that the limited exemption granted by the charter was not extended to the branch road authorized by the amendment. *Southwestern R. Co. v. Wright*, 116 U. S. 231, affirming 68 Ga. 311.

Exemption May Be Included in Term "Privilege" Where Legislative Intent to That Effect Is Clear.—In *Wilmington, etc., R. Co. v. Alsbrough*, 146 U. S. 279, 53 Am. & Eng. R. Cas. 687, affirming 110 N. Car. 137, Fuller, C. J., delivering the opinion of the court, said: "We do not deny that exemption from taxation may be construed as included in the word 'privileges,' if there are other provisions removing all doubt of the intention of the legislature in that respect, * * * but we have none such here."

1. Grant of "Privileges and Immunities" Includes Exemption—*United States*.—*Atlantic, etc., R. Co. v. Georgia*, 98 U. S. 359; *Hoge v. Richmond, etc., R. Co.*, 99 U. S. 348; *Phoenix F. & M. Ins. Co. v. Tennessee*, 161 U. S. 174, affirming *Memphis v. Phoenix, etc., Ins. Co.*, 91 Tenn. 566. See also *Trask v. Maguire*, 18 Wall. (U. S.) 392; *Burlington, etc., R. Co. v. Putnam County*, 5 Dill. (U. S.) 289.

Connecticut.—*Nichols v. New Haven, etc., Co.*, 42 Conn. 103.

Dakota.—See *Winona, etc., R. Co. v. Deuel County*, 3 Dakota 1.

Georgia.—See *Atlanta, etc., Air Line R. Co. v. State*, 63 Ga. 483.

Maryland.—See *Washington County v. Franklin R. Co.*, 34 Md. 159.

Minnesota.—*State v. Northern Pac. R. Co.*, 36 Minn. 207.

Mississippi.—See *Adams v. Yazoo, etc., R. Co.*, (Miss. 1898) 24 So. Rep. 200. See also *Natchez, etc., R. Co. v. Lambert*, 70 Miss. 779.

New Jersey.—*State Board of Assessors v. Morris, etc., R. Co.*, 49 N. J. L. 193.

Tennessee.—*Memphis v. Phoenix, etc., Ins. Co.*, 91 Tenn. 566, affirmed by *Phoenix F. & M. Ins. Co. v. Tennessee*, 161 U. S. 174. See also *State v. Nashville, etc., R. Co.*, 12 Lea (Tenn.) 583; *Knoxville, etc., R. Co. v. Hicks*, 9 Baxt. (Tenn.) 442.

Contrary Doctrine in Kentucky.—The Kentucky Act of February 22, 1871, incorporating the Kentucky Central Railroad Company, created certain persons a body corporate for the purpose of operating the Covington and Lexington Railroad, of which they were the owners by purchase, under judgment and order of sale of the Fayette Circuit Court, and provided that they "shall have and are hereby invested with all the powers, privileges, rights, immunities, and franchises, subject to the restrictions and limitations contained in the original charter of incorporation authorizing the construction of said railroad and the various acts amendatory thereof." It was held that this grant did not pass to the new corporation an exemption from the general law prescribing the mode of assessing and taxing of railroad property in the state, which was possessed by the original corporation, and which amounted to a limited exemption from taxation. *Kentucky Cent. R. Co. v. Com.*, 87 Ky. 661.

2. Claimant of Exemption Must Establish the Same by Clear Proof—*England*.—*Inland Revenue Com'rs v. Forrest*, L. R. 15 App. 334, 60 L. J. Q. B. 281, 63 L. T. N. S. 36, 39 W. R. 33, 54 J. P. 772.

Canada.—*Montreal v. Montreal Auxiliary Bible Soc.*, Quebec L. R. 6 Q. B. 251.

United States.—*Myers v. Northern Pac. R. Co.*, 83 Fed. Rep. 358, 48 U. S. App. 620; *Ohio L. Ins., etc., Co. v. Debolt*, 16 How. (U. S.) 416; *Tucker v. Ferguson*, 22 Wall. (U. S.) 527; *Sturges v. Carter*, 114 U. S. 511; *Picard v. East Tennessee, etc., R. Co.*, 130 U. S. 637; *Mercantile Bank v. Tennessee*, 161 U. S. 161; *Citizens' Bank v. Board of Assessors*, 54 Fed. Rep. 73; *McHenry v. Alford*, 168 U. S. 651. See also *Raleigh, etc., R. Co. v. Reid*, 13 Wall. (U. S.) 269; *Hoge v. Richmond, etc., R. Co.*, 99 U. S. 348.

Alabama.—*Swann v. State*, 77 Ala. 545.

Arkansas.—*Cairo, etc., R. Co. v. Parks*, 32 Ark. 131; *State v. Certain Lands*, 40 Ark. 34.

Connecticut.—*Copp v. Norwich*, 24 Conn. 28.

Illinois.—*People v. Graceland Cemetery Co.*, 86 Ill. 336; *People v. Wabash R. Co.*, 138 Ill. 85; *North Chicago Hebrew Congregation v. Garibaldi*, 70 Ill. App. 33; *Matter of Swigert*, 119 Ill. 83, 59 Am. Rep. 789, 24 Am. & Eng. R. Cas. 494; *Illinois Cent. R. Co. v. People*, 119 Ill. 137; *People v. Watseka Camp Meeting Assoc.*, 160 Ill. 576; *Sanitary Dist. v. Martin*, 173 Ill. 243. See also *Monticello Female Seminary v. People*, 106 Ill. 398, 46 Am. Rep. 702; *People v. Ryan*, 138 Ill. 263.

Indiana.—*Conklin v. Cambridge City*, 58 Ind. 130; *State v. Miami County*, 63 Ind. 497.

Iowa.—*Nugent v. Dilworth*, 95 Iowa 49.

Kansas.—*Washburn College v. Shawnee County*, 8 Kan. 344. See also *Ottawa University v. Franklin County*, 48 Kan. 460; *Stahl v. Kansas Educational Assoc.*, 54 Kan. 542.

Kentucky.—*Elizabethtown Dist. Public*

to tax property the owner, in order to escape, must in the first instance prove an exemption. On the other hand, it is first incumbent upon the taxing power to show that the property is subject to the tax, and it is only after this has been shown that the owner must prove an express exemption.¹

School v. Louisville, etc., R. Co., (Ky. 1895) 30 S. W. Rep. 620.

Louisiana. — *New Orleans v. New Orleans Canal, etc., Co., 29 La. Ann. 851; First Presb. Church v. New Orleans, 30 La. Ann. 259, 31 Am. Rep. 224; New Orleans v. Fourchy, 30 La. Ann. 910; Jones v. Raines, 35 La. Ann. 996; Carre v. New Orleans, 41 La. Ann. 996, 42 La. Ann. 1119; Ivens, etc., Mach. Co. v. Parker, 42 La. Ann. 1103; Benedict v. New Orleans, 44 La. Ann. 793. See also Union Stave Co. v. Langridge, (La. 1898) 24 So. Rep. 304.*

Maine. — *Bangor v. Rising Virtue Lodge No. 10, 73 Me. 428, 40 Am. Rep. 369; Dover v. Maine Water Co., 90 Me. 180.*

Maryland. — *Anne Arundel County v. Annapolis, etc., R. Co., 47 Md. 592; Appeal Tax Ct. v. Rice, 50 Md. 302; Baltimore v. Grand Lodge, etc., 60 Md. 280; Appeal Tax Ct. v. Gill, 50 Md. 377; Appeal Tax Ct. v. Baltimore Academy, 50 Md. 437.*

Massachusetts. — *Mt. Hermon Boys' School v. Gill, 145 Mass. 139; Third Cong. Soc. v. Springfield, 147 Mass. 396.*

Mississippi. — *Greenville Ice, etc., Co. v. Greenville, 69 Miss. 86; Morris Ice Co. v. Adams, 75 Miss. 410; Adams v. Yazoo, etc., R. Co., (Miss. 1898) 24 So. Rep. 200.*

Missouri. — *See State v. Central St. Louis Masonic Hall Assoc., 14 Mo. App. 596.*

Nebraska. — *Welton v. Merrick County, 16 Neb. 83.*

New Hampshire. — *Phillips Exeter Academy v. Exeter, 58 N. H. 306, 42 Am. Rep. 589.*

New Jersey. — *United New Jersey R., etc., Co. v. Jersey City, 57 N. J. L. 563; Electric Storage Battery Co. v. State Board of Assessors, 60 N. J. L. 66; Passaic, etc., Bridge v. State, 21 N. J. L. 384, affirmed by 22 N. J. L. 593. See also Williams v. Bettie, 50 N. J. L. 132, affirmed by 51 N. J. L. 512.*

New York. — *People v. Neff, 34 N. Y. App. Div. 83; Catlin v. Trinity College, 113 N. Y. 133, affirming 49 Hun (N. Y.) 278; Catlin v. Domestic, etc., Missionary Soc., 113 N. Y. 625, 22 N. Y. St. Rep. 189; People v. Coleman, 135 N. Y. 231, affirming 18 N. Y. Supp. 675; Prosser v. Secor, 5 Barb. (N. Y.) 607. See also People v. Coleman, 61 Hun (N. Y.) 626, 16 N. Y. Supp. 330, affirmed by 133 N. Y. 625; People v. Board of Education, 46 Barb. (N. Y.) 598; People v. Board of Education, 46 Barb. (N. Y.) 588; Park Bank v. Wood, 24 N. Y. 93.*

Oregon. — *Hibernian Benev. Soc. v. Kelly, 28 Oregon 173.*

Pennsylvania. — *Thiel College v. Mercer County, 101 Pa. St. 530; Philadelphia v. Barb, 160 Pa. St. 123; Kittanning Academy v. Kittanning, 6 Pa. Dist. Rep. 603, 19 Pa. Co. Ct. Rep. 296, 45 Pittsb. Leg. J. (Pa.) 87; Hunter's Appeal, 22 W. N. C. (Pa.) 361. See also Erie City v. Young Men's Christian Assoc., 151 Pa. St. 168.*

Tennessee. — *State v. Bank of Commerce, 95 Tenn. 221; Memphis v. Union, etc., Bank, 91 Tenn. 546, 35 Cent. L. J. 169. See also South Nashville St. R. Co. v. Morrow, 87 Tenn. 406.*

Texas. — *Morris v. Lone Star Chapter No. 6, etc., 68 Tex. 698. See also Campbell v. Riviere, (Tex. Civ. App. 1893) 22 S. W. Rep. 993.*

Wisconsin. — *Weston v. Shawano County, 44 Wis. 242. See also Yates v. Milwaukee, 92 Wis. 352; Quinney v. Stockbridge, 33 Wis. 505.*

Illustrations of What Must Be Shown in Order to Support a Claim of Exemption. — Property owned and used exclusively for church purposes is not shown to be exempt from taxation under the provision of section 2 of the *Illinois* revenue law, exempting "all church property actually and exclusively used for public worship where the land (to be of reasonable size for the location of the church building) is owned by the congregation," unless it be affirmatively shown that the premises are of reasonable size for the location of the church building. *North Chicago Hebrew Congregation v. Garibaldi, 70 Ill. App. 33, citing 25 AM. AND ENG. ENCYC. OF LAW (1st ed.) 157, as to strict construction of exempting statutes.*

Where there is a statutory provision which protects from taxation the roadbed and appurtenances of a railroad company, no exemption can be claimed until it is shown that there is a roadbed, something to which a fixture can be attached. *Cairo, etc., R. Co. v. Parks, 32 Ark 131.*

Under chapter 347 of the *New York* Laws of 1897, property purchased with the proceeds of a pension can be assessed in the ordinary way, and the pensioner claiming an exemption must state in writing the facts, including the amount of pension money used in the purchase. *People v. Reilley, 21 Misc. Rep. (N. Y. Supreme Ct.) 363.*

Competency of Evidence. — An indorsement on the assessment-roll book of a town that certain property is "exempt from taxation" is not competent evidence to prove that such property is in fact exempt, where it is not included within any of the exemptions authorized by the state constitution. *Darlington v. Atlantic Trust Co., 68 Fed. Rep. 849, affirming 63 Fed. Rep. 76.*

When Presumption that Property Is Within Exemption May Arise. — Buildings suitable and proper for a railroad company's legitimate business are presumed to be so used, and thus within an exemption from taxation of its property, until the contrary is shown. *State v. Wetherill, 41 N. J. L. 147.*

1. Property Must Be First Shown to Be Subject to Tax. — In *Presbyterian Church v. Gratz, 8 Pa. Co. Ct. Rep. 47, Thayer, P. J.,* delivering the opinion of the court, which was adopted by the Supreme Court, *affirming* the judgment below, in *Christy v. Sill, 131 Pa. St. 497; Presbyterian Church v. Gratz, 27 W. N. C. (Pa.) 207, said: "In determining, however, the question at issue, we must remember that it is not incumbent upon the plaintiffs to show any exemption until it is first clearly demonstrated that they are subject to the tax; that they are clearly embraced within the words and the meaning of the act imposing the tax." It was*

IV. PERSONAL NATURE OF THE PRIVILEGE — 1. General Rule — Privilege Not Transferable. — A grant of exemption from taxation, even though made in respect to some particular property, is considered to be a personal privilege of the grantee,¹ and the exemption does not pass to a purchaser of the property, in the absence of a clear indication of an intention on the part of the legislature that it shall so pass.² Nor, when the grantee is a corporation, does it

held in this case that the plaintiffs were not within the meaning of the act imposing the tax.

Rule as to Crown Property. — When an attempt is made to tax property of the crown it is for the taxing power to show a right to tax the property, not for the crown to show an exemption. *Atty.-Gen. v. Montreal*, 13 Can. Sup. Ct. Rep. 352.

1. A Personal Privilege — United States. — *Picard v. East Tennessee, etc.*, R. Co., 130 U. S. 637, *reversing* *East Tennessee, etc.*, R. Co. v. Pickerd, 24 Fed. Rep. 614; *Memphis, etc.*, R. Co. v. Railroad Com'rs, 112 U. S. 609; *Mercantile Bank v. Tennessee*, 161 U. S. 161, 173; *Wilson v. Gaines*, 103 U. S. 417; *Tennessee v. Bank of Commerce*, 53 Fed. Rep. 735.

Arkansas. — *Memphis, etc.*, R. Co. v. Berry, 41 Ark. 436; *Arkansas Midland R. Co. v. Berry*, 44 Ark. 17.

Connecticut. — See *Bridgeport v. Bishop*, 33 Conn. 187.

District of Columbia. — *Alexandria Canal R., etc.*, Co. v. District of Columbia, 1 Mackey (D. C.) 217, 7 Am. & Eng. R. Cas. 325.

Florida. — *Bloxham v. Florida Cent., etc.*, R. Co., 35 Fla. 625.

Indiana. — *Revoir v. State*, 137 Ind. 332.

Kansas. — *Miami County v. Brackenridge*, 12 Kan. 114.

Kentucky. — *Com. v. Masonic Temple Co.*, 87 Ky. 349; *Com. v. Owensboro, etc.*, R. Co., 81 Ky. 572; *Com. v. Nashville, etc.*, R. Co., 93 Ky. 430.

Maryland. — See *Tax Cases*, 12 Gill & J. (Md.) 117.

Michigan. — *Lake Shore, etc.*, R. Co. v. Grand Rapids, 102 Mich. 374.

Minnesota. — See *Hennepin County v. Bell*, 43 Minn. 344.

Missouri. — *State v. Chicago, etc.*, R. Co., 89 Mo. 523.

New Jersey. — See *State v. Hoboken*, 43 N. J. L. 96.

New York. — *People v. Feitner*, 157 N. Y. 363, *affirming* 32 N. Y. App. Div. 23. See also *People v. Williams*, 6 Misc. Rep. (N. Y. Sup. Ct.) 185.

Pennsylvania. — *Crawford v. Burrell Tp.*, 53 Pa. St. 219; *Platt v. Rice*, 10 Watts (Pa.) 352.

Tennessee. — *East Tennessee, etc.*, R. Co. v. Hamblen County, MS. Knoxville, Tenn. 1877; *Railroad v. Hicks*, Knoxville, Tenn. 1877; *Railroad v. State*, Jackson, Tenn. 1877; *Memphis, etc.*, R. Co. v. Gaines, 3 Tenn. Ch. 604; *Wilson v. Gaines*, 3 Tenn. Ch. 597, *affirmed* 9 Baxt. (Tenn.) 546, *affirmed* 103 U. S. 417.

2. Exemption Does Not Pass to Purchaser of Property — United States. — *Louisville, etc.*, R. Co. v. Palmes, 109 U. S. 244; *Armstrong v. Athens County*, 16 Pet. (U. S.) 281, *affirming* 10 Ohio 235.

Arkansas. — *Memphis, etc.*, R. Co. v. Berry, 41 Ark. 436; *Arkansas Midland R. Co. v. Berry*, 44 Ark. 17.

Connecticut. — *New Haven v. Sheffield*, 30 Conn. 160. See also *Yale University v. New Haven*, 71 Conn. 316.

Florida. — *Bloxham v. Florida Cent., etc.*, R. Co., 35 Fla. 625.

Iowa. — *Sands v. Adams County*, 11 Iowa 577. See also *American Emigrant Co. v. Iowa R. Land Co.*, 52 Iowa 323.

Indiana. — *Revoir v. State*, 137 Ind. 332.

Kansas. — *Miami County v. Brackenridge*, 12 Kan. 114.

Louisiana. — *State v. Morgan*, 28 La. Ann. 482.

New Jersey. — *State v. Wilson*, 2 N. J. L. 282.

New York. — See *People v. Williams*, 6 Misc. Rep. (N. Y. Sup. Ct.) 185.

Ohio. — *Armstrong v. Treasurer*, 10 Ohio 235.

Pennsylvania. — *Sandford v. Decamp*, 8 Watts (Pa.) 542.

Tennessee. — *Memphis, etc.*, R. Co. v. Gaines, 3 Tenn. Ch. 604; *State v. Whitworth*, 8 Lea (Tenn.) 594.

Immunity from taxation is "a personal privilege, not extending beyond the immediate grantee unless otherwise so declared in express terms. The same considerations which call for clear and unambiguous language to justify the conclusion that immunity from taxation has been granted in any instance must require similar distinctness of expression before the immunity will be extended to others than the original grantee." *Field, J.*, in *Picard v. East Tennessee, etc.*, R. Co., 130 U. S. 637, *reversing* *East Tennessee, etc.*, R. Co. v. Pickerd, 24 Fed. Rep. 614.

Virtual Conveyance Though Title Retained. — An exemption from taxation granted by statute to the property of a college cannot be extended to property sold by parol to one of the professors and occupied by him, although he has paid nothing of the purchase price; for though the title remains in the college, the property is substantially owned and enjoyed by a private person. *Yale University v. New Haven*, 71 Conn. 316.

Trust Deed Held Not a Conveyance. — In *Sioux City, etc.*, R. Co. v. Robinson, 41 Minn. 452, 39 Am. & Eng. R. Cas. 510, the complainant conveyed a part of its land grant to trustees, that the land might be sold and the proceeds devoted to the satisfaction of certain bonds issued at the same time and sold in open market to obtain funds with which to build a portion of its railway. The lands as originally held were wholly exempt from taxation, and the court, considering the trust deed in connection with the circumstances, as appeared from the testimony, held that the transaction did not amount to a conveyance of the lands and that they continued exempt after the execution of the deed. See also *Sioux City, etc.*, R. Co. v. King, 41 Minn. 461, note.

Exemption in Favor of Soldier Does Not Pass to Heir at Law or Devisee. — *Donation land granted*

pass to a purchaser of all its franchises and property.¹

2. Modification as to Exemptions Granted to Induce Public Improvements. — In *Minnesota* the rule above set out has been denied so far as to hold that a grant to a railroad company of exemption from taxation upon its stock, franchises, and property, in consideration of an annual payment into the state treasury of a sum or percentage of its earnings, was not simply a personal privilege conferred upon such company, but a right appurtenant to its lines of road, it being considered that the object of such exemption was to facilitate the early construction of the lines of road contemplated rather than to grant a personal

by the state of *Pennsylvania* to soldiers who served in the Revolutionary war was exempt from taxation, but the exemption extended only during the life of the soldier who was the original grantee, and did not extend to the heir at law or devisee. *Kelsey v. Badger*, 7 Watts (Pa.) 516.

Exemption Not Lost by Lease of Lands. — The Act of Congress of July 2, 1862, donating public lands to the several states and territories for agricultural and mechanical colleges, required in effect that such lands, when situated in the state to which they were granted, should not be taxed. The lands so granted to the state of Iowa were by it granted to the state agricultural college, which possessed, by general law, an exemption from taxation of all lands belonging to it. The lands, under authority of the state act making the grant, were leased out by the college at a certain rent, and the lease contained conditions providing for a forfeiture in case of nonpayment of rent, and gave to the lessee the privilege of purchasing at the expiration of the lease at the appraised value of the lands. The lease was strictly according to the statute under which it was made. It was held that during the term of the lease the agricultural college was the owner of the land, and it was therefore exempt from taxation, as the condition of the lease as to a purchase was merely a provision for sale, and not a contract for sale. *Agricultural College v. Webster County*, 34 Iowa 141. Compare *Com. v. Nashville*, etc., R. Co., 93 Ky. 430, *infra*, next note.

1. Does Not Pass to Purchaser of Franchises and Property — United States. — *Picard v. East Tennessee*, etc., R. Co., 130 U. S. 637, reversing *East Tennessee*, etc., R. Co. v. Pickerd, 24 Fed. Rep. 614; *East Tennessee*, etc., R. Co. v. Hamblen County, 102 U. S. 273; *Wilson v. Gaines*, 103 U. S. 417, affirming 9 Baxt. (Tenn.) 546, which affirmed 3 Tenn. Ch. 597; *Trask v. Maguire*, 18 Wall. (U. S.) 392; *Chesapeake*, etc., R. Co. v. Miller, 114 U. S. 176; *Morgan v. Louisiana*, 93 U. S. 217; *Norfolk*, etc., R. Co. v. Pendleton, 156 U. S. 667; *Louisville*, etc., R. Co. v. Palmes, 109 U. S. 244, distinguished *Gonzales v. Sullivan*, 16 Fla. 791, *infra*, this section; *Mercantile Bank v. Tennessee*, 161 U. S. 173; *Memphis*, etc., R. Co. v. Railroad Com'rs, 112 U. S. 609; *St. Louis*, etc., R. Co. v. Gill, 156 U. S. 649.

District of Columbia. — *Alexandria Canal R., etc., Co. v. District of Columbia*, 1 Mackey (D. C.) 217, 7 Am. & Eng. R. Cas. 325.

Kentucky. — *Com. v. Masonic Temple Co.*, 87 Ky. 349; *Kentucky Cent. R. Co. v. Com.*, 87 Ky. 661. See also *Evansville*, etc., R. Co. v. *Com.*, 9 Bush (Ky.) 438.

Massachusetts. — *Worcester Agricultural Soc. v. Worcester*, 116 Mass. 189.

Michigan. — *Lake Shore*, etc., R. Co. v. *Grand Rapids*, 102 Mich. 374.

Mississippi. — *Adams v. Yazoo*, etc., R. Co., (Miss. 1898) 24 So. Rep. 200.

Missouri. — *State v. Chicago*, etc., R. Co., 89 Mo. 523.

New Jersey. — *State Board of Assessors v. Morris*, etc., R. Co., 49 N. J. L. 193.

Tennessee. — *State v. Butler*, 15 Lea (Tenn.) 104; *State v. Mercantile Bank*, 95 Tenn. 212.

Texas. — See *International*, etc., R. Co. v. *Smith County*, 65 Tex. 21.

Exemption from Taxation Not Included Within Term "Franchise." — In *Chesapeake*, etc., R. Co. v. *Miller*, 114 U. S. 176, the court, per Matthews, J., said: "The franchises of a railroad corporation are rights or privileges which are essential to the operations of the corporation, and without which its road and works would be of little value; such as the franchise to run cars, to take tolls, to appropriate earth and gravel for the bed of its road, or water for its engines, and the like. They are positive rights or privileges, without the possession of which the road of the company could not be successfully worked. Immunity from taxation is not one of them. The former may be conveyed to a purchaser of the road as part of the property of the company; the latter is personal and incapable of transfer without express statutory direction."

Effect of Long Lease of Property. — A lease of all the property of a railroad company for one thousand years in consideration of the lessee building the road within a certain time, and containing no provision for the reversion of the property, is equivalent to a sale, or is at least such a transfer of the property as would defeat an exemption from taxation possessed by the lessor, for it is well settled that where the lease is equivalent to a sale of the property the right of exemption from taxation possessed by the lessor is extinguished. *Com. v. Nashville*, etc. R. Co., 93 Ky. 430.

South Carolina Doctrine. — In *Hand v. Savannah*, etc., R. Co., 17 S. Car. 219, 12 Am. & Eng. R. Cas. 495, McGowan, J., delivering the opinion of the court, said: "We do not think that a statutory exemption from taxation under which, as a contract, rights have vested [as, in the case at bar, the issuing of bonds by a railroad company, which were a first lien upon its property] is a mere personal privilege which ends with the ownership of the first taker, if the property, although in other hands, is continued in the same use on account of which the exemption was granted." The state

favor to the original company undertaking such enterprise.¹ And the court of *Florida* has recognized a similar doctrine.²

3. Assignment of Exemption under Express Authority. — The legislature may authorize an assignment of an exemption from taxation;³ and when an assignment is made under such authority, the assignee takes the exemption precisely as the assignor held it, as a personal privilege. The assignment in the particular case does not impart to the exemption the quality of general assignability to other successors in title to the property and franchises, claiming only under a conveyance between the parties.⁴

4. Exemption Expressly Attached to Property. — It is, of course, within the power of the legislature to attach an exemption from taxation expressly to specific property in such terms that the exemption will remain, no matter into whose hands the property may come.⁵

5. Rights of Lessee of Exempt Property. — While the leasing of property which is exempt from taxation generally operates to put an end to the exemption,⁶

of facts which gave rise to this language was that it was claimed that the original corporation to which the exemption had been given having passed away and its property having gone into other hands, and the purchasers having formed themselves into a new company, this was practically a forfeiture of the charter and ended the exemption.

1. Minnesota Rule. — First Div. St. Paul, etc., R. Co. v. Parcher, 14 Minn. 297; State v. Winona, etc., R. Co., 21 Minn. 315; State v. Southern Minnesota R. Co., 21 Minn. 344; Stevens County v. St. Paul, etc., R. Co., 36 Min. 467; Minnesota Cent. R. Co. v. Melvin, 21 Minn. 339; Chicago, etc., R. Co. v. Pfander, 23 Minn. 217; St. Paul v. St. Paul, etc., R. Co., 23 Minn. 469; Nobles County v. Sioux City, etc., R. Co., 26 Minn. 294; State v. Northern Pac. R. Co., 32 Minn. 294, 17 Am. & Eng. R. Cas. 475; Traverse County v. St. Paul, etc., R. Co., (Minn. 1898) 76 N. W. Rep. 217; Ramsey County v. Chicago, etc., R. Co., 33 Minn. 537; Hennepin County v. St. Paul, etc., R. Co., 33 Minn. 534; State v. St. Paul, etc., R. Co., 30 Minn. 311.

2. Rule Recognized in Florida. — Gonzales v. Sullivan, 16 Fla. 791. See also *infra*, this section, *Exemption Expressly Attached to Property*.

3. Legislature May Authorize Assignment of Exemption. — Louisville, etc., R. Co. v. Palmes, 109 U. S. 244, *affirming* Palmes v. Louisville, etc., R. Co., 19 Fla. 231; Nichols v. New Haven, etc., Co., 42 Conn. 103; State Board of Assessors v. Morris, etc., R. Co., 49 N. J. L. 193. See also Knoxville, etc., R. Co. v. Hicks, 9 Baxt. (Tenn.) 442.

Language Showing Intention that Exemption Shall Pass. — The provision in the charter of the Pensacola Railroad Company which authorized it to acquire by purchase and assignment "all the property, rights, franchises, privileges, and immunities" of the Pensacola and Louisville Railroad Company, and upon the completion of such purchase and assignment declared that it should be deemed in law and in equity to be as fully invested with and entitled to "all the said property, rights, franchises, privileges, and immunities" as though they were originally granted to or acquired by it, was broad enough to cover an assignment and transfer of all the immunity from taxation

granted to the Pensacola and Louisville Railroad Company by its charter. Louisville, etc., R. Co. v. Palmes, 109 U. S. 244, *affirming* Palmes v. Louisville, etc., R. Co., 19 Fla. 231. See also Natchez, etc., R. Co. v. Lambert, 70 Miss. 779.

A purchaser at a judicial sale of a railroad, its appurtenances, rights, and privileges, became vested with an exemption from taxation in respect to the road which was granted to the original owners, where the act of the legislature under which the sale was made provided that the purchaser should "be vested with all the rights, privileges, franchises, and immunities" of the original owner, and the sale was made without any restrictions in the deed. Com. v. Owensboro, etc., R. Co., 81 Ky. 572. See also Winona, etc., R. Co. v. Deuel County, 3 Dakota 1.

4. Express Authority to Make One Assignment Does Not Authorize Others. — Louisville, etc., R. Co. v. Palmes, 109 U. S. 244, *affirming* Palmes v. Louisville, etc., R. Co., 19 Fla. 231. See also Wilson v. Gaines, 3 Tenn. Ch. 597, *affirmed* 9 Baxt. (Tenn.) 546, *affirmed* 103 U. S. 417.

5. Exemptions Expressly Attached to Property. — New Jersey v. Wilson, 7 Cranch (U. S.) 164; State v. Hicks, 9 Yerg. (Tenn.) 486, 30 Am. Dec. 423; International, etc., R. Co. v. Smith County, 65 Tex. 21; International, etc., R. Co. v. State, 75 Tex. 356. See also Anderson County v. Kennedy, 58 Tex. 616; Colchester v. Kewney, L. R. 1 Exch. 368, 35 L. J. Exch. 204, 12 Jur. N. S. 743, 14 L. T. N. S. 888, 14 W. R. 994, 4 H. & C. 445.

"All Places of Burial." — Under a provision of the Constitution of *Louisiana* exempting "all places of burial" it has been held that "the law concerns itself exclusively with the quality and use of the property, and not at all with its ownership or disposition;" and that so long as the property retains the character of a place of burial, it continues to be exempt, and "it matters not who owns it, how often it may change hands, nor at what prices." Metairie Cemetery Assoc. v. Board of Assessors, 37 La. Ann. 32, *per* Fenner, J.

6. General Rule as to Effect of Leasing Exempt Property. — See *infra*, this title, *General Rules of Construction*, subdiv. 4. b. *Exemptions Dependent upon Use of Property*.

this rule is not invariable,¹ and in cases where the lessor retains the right of exemption the question arises as to how far the lessee may be taxed for such property. Owing to the different statutes prevailing in the various jurisdictions, it is impossible to lay down a rule which will govern all cases, but the principles best supported by reason and authority are that the lessee cannot be directly taxed for such exempt land,² but may be assessed for the value of his leasehold estate therein,³ and for any improvements erected thereon by him which remain his individual property.⁴

1. Exemption May Continue Though Property Be Leased. — In *Texas* county school lands are exempt from all taxation as against the county, even though they be leased and in the possession of the lessee. *Daugherty v. Thompson*, 71 Tex. 192; *Trammell v. Fought*, 74 Tex. 557; *Davis v. Burnett*, 77 Tex. 3; *Continental Land, etc., Co. v. Board*, 80 Tex. 489.

2. Exempt Property Cannot Be Taxed Against Lessee. — *State v. Campbell*, 23 La. Ann. 445. See also *Philadelphia, etc., R. Co. v. Appeal Tax Ct.*, 50 Md. 397; *Zumstein v. Consolidated Coal, etc., Co.*, 54 Ohio St. 264, *infra*, next note.

Obvious Legislative Intention to Subject Leased Property to Taxation. — It is not a necessary inference from the fact that land of the state is leased or put for a term of years in the hands of a citizen, that with respect to such property the state agrees to give up its right to taxation, but the effect of the transaction is purely a question of legislative intention. Therefore, where the state granted certain property to a corporation during the continuance of its charter upon the payment of a certain sum annually, and provided for the reversion of such property to the state, and that "the exemption of said company, in its original charter, from taxation, assessments, or other legal impositions, shall not extend to the property or privileges hereby granted," the property so granted was not exempt from taxation. *State v. Haight*, 36 N. J. L. 471, *affirming* 35 N. J. L. 178.

3. Lessee May Be Assessed for Value of Leasehold Estate. — *Ex p. Gaines*, 56 Ark. 227; *State v. Tucker*, 38 Neb. 56.

Texas Rule. — In *Texas* it has been held that the leasehold estate of the lessee of county school lands, which are exempt from all taxation, could not be taxed as his property. *Daugherty v. Thompson*, 71 Tex. 192; *Davis v. Burnett*, 77 Tex. 3. But in *Trammell v. Fought*, 74 Tex. 557, the court said that if the lessee held the lands under an absolute lease for a term of three years or more, his leasehold estate would be subject to taxation upon such value as it would bring at a fair voluntary sale for cash.

Rule under Statute Making Lessee Liable for Taxes. — By a statute of *Maryland* it was made the duty of a tenant holding any leasehold estate to pay the taxes levied on the demised premises. Under this statute, however, a lessee of premises which belong to a city and are exempt from all taxation can be assessed only with the value of the leasehold estate subject to the rent reserved. *Philadelphia, etc., R. Co. v. Appeal Tax Ct.*, 50 Md. 397.

Section 2732 of the Revised Statutes of *Ohio* exempts from taxation the property of municipi-

pal corporations used exclusively for public purposes. Section 2733 provides that "all lands held under lease for any term exceeding fourteen years, and not subject to revaluation, belonging to the state or any municipal corporation, * * * shall be considered for all purposes of taxation as the property of the person or persons holding the same, and shall be assessed in their name." Under this statute lands so leased are taxable only to the extent of the lessee's interest therein, the purpose of the section not being to impose a tax upon the fee. *Zumstein v. Consolidated Coal, etc., Co.*, 54 Ohio St. 264. But *compare Bentley v. Barton*, 41 Ohio St. 410, in which case it was held that under section 2733, above quoted, lands granted to the inhabitants of a township for the use of schools but leased for a term exceeding fourteen years were taxable to the lessee, for the statute so provided, and as to such lands the trust upon which they were accepted by the township was fully executed when the lands were leased and the proceeds applied to the use upon which they were held.

4. Liability to Taxation for Improvements. — *San Francisco v. McGinn*, 67 Cal. 110; *Parker v. Redfield*, 10 Conn. 490; *Lee v. New Orleans*, 28 La. Ann. 426.

Where land belonging to a corporation possessing an exemption from taxation in reference to it is leased to persons under contracts by which the lessees erect buildings upon such land and under which the lessees are to have perpetual possession of the property unless the corporation at certain fixed periods shall elect to re-enter thereupon and pay the lessees the appraised value of their erection, and under which the lessors have a right of re-entry upon the nonperformance of the lessees of their covenants, the exemption does not extend to such buildings, but they may be taxed as real estate to the lessees. *People v. Board of Assessors*, 93 N. Y. 308, *affirming* 27 Hun (N. Y.) 559.

Where land exempt from taxation under the Connecticut Act of 1702, providing that lands, etc., granted for the maintenance of the ministry of the gospel, etc., shall be exempted out of the general lists of estates and free from the payment of rates, is leased for a ground rent, and the lessees erect a building thereon, under a stipulation that at the expiration of the term the lessors shall pay for such building a price to be fixed by appraisers, the building does not become part of the land so as to partake of the exemption. *Russell v. New Haven*, 51 Conn. 259. In this case the court said that the case of *Osborne v. Humphrey*, 7 Conn. 335, which decided that a building erected on land exempt from taxation under the Act of 1702 and leased for nine hundred and ninety-nine years was not taxable, although the person

V. GENERAL RULES OF CONSTRUCTION — 1. Exempting Statutes Strictly Construed — *a. RULE STATED.* — A grant of exemption from taxation, being in the nature of a renunciation of sovereignty, must invariably be construed most strictly against the grantee, and can never be permitted to extend either in scope or duration beyond what the terms of the concession clearly require.¹

holding it at the time held under a warranty deed, was practically overruled by a statute passed in 1859, providing that when any ecclesiastical, etc., institution should lease or convey any real estate from which it did not receive an annual income or rent, such real estate should not be exempt from taxation; which act was held constitutional in *Brainard v. Colchester*, 31 Conn. 407; *Lord v. Litchfield*, 36 Conn. 116.

See also *infra*, this title, *Particular Subjects of Exemption*, subdiv. 24. *h. Rule as to Possessory Rights to and Improvements upon Public Lands.*

Superstructure on Exempt Piers. — Where piers which are exempt from taxation on account of being the property of a county are leased to a person who is to erect a bridge thereon, of which he is entitled to retain possession so long as he keeps the bridge safe, sound, and in good repair, the county, however, being no partner in the transaction, the bridge is not exempt from taxation. *Luttrell v. Knox County*, 89 Tenn. 253.

Structures Which Become the Property of the Lessor Exempt. — The city of New York leased to a corporation certain piers, the lease providing that the lessee should construct a shed on the piers, which shed was to become the property of the city upon the expiration or termination of the lease. It was held that the shed, when erected, became the property of the city and as such was exempt from taxation, the court applying the rule that when structures are erected by persons not owners of the land they become a part of the realty, and as such property of the landowner. *People v. Barker*, 153 N. Y. 98, *affirming* 15 N. Y. App. Div. 628.

Cattle Grazing on Exempt Indian Reservation under Lease from Indians May Be Taxed. — The provision of the *Montana* Constitution disclaiming all right to lands lying within the limits of the state owned or held by Indians or Indian tribes, and providing that until the Indian title thereto shall have been extinguished by the United States such lands shall be and remain under the absolute jurisdiction and control of Congress, does not have the effect of exempting from taxation cattle belonging to a corporation and grazing upon Indian lands under a lease from the Indians, sanctioned by the United States. *Truscott v. Hurlbut Land, etc., Co.*, 73 Fed. Rep. 60.

1. Exemptions Strictly Construed — England. — *Stourbridge Canal v. Wheeley*, 2 B. & Ad. 792, 22 E. C. L. 185; *Inland Revenue Com'rs v. Scott*, (1892) 2 Q. B. 152, 61 L. J. Q. B. 432, 67 L. T. N. S. 173, 40 W. R. 632, 56 J. P. 580; *Matter of Duty on Estate of New University Club*, 18 Q. B. Div. 720, 56 L. J. Q. B. 462, 56 L. T. N. S. 909, 35 W. R. 774.

Canada. — *Wylie v. Montreal*, 12 Can. Sup. Ct. Rep. 384; *Montreal v. Montreal Auxiliary Bible Soc.*, *Quebec L. R.* 6 Q. B. 251; *Les Commissaires d'Écoles, etc., v. Les Sœurs, etc.*, 12 Can. Sup. Ct. Rep. 45. See also

Canadian Pac. R. Co. v. Burnett, 5 Manitoba L. Rep. 395; *Reg. v. Victoria Lumber, etc., Co.*, 5 British Columbia 280, 17 Can. L. T. 443; *Montreal v. Christ Church Cathedral*, *Montreal L. R.* 4 Super. Ct. 13, 33 L. C. Jur. 89.

United States. — *Bank of Commerce v. Tennessee*, 104 U. S. 493; *Winona, etc., Land Co. v. Minnesota*, 159 U. S. 526, *affirming* *Redwood County v. Winona, etc., Land Co.*, 40 Minn. 512; *Ford v. Delta, etc., Land Co.*, 164 U. S. 662, *affirming* 43 Fed. Rep. 181; *Vicksburg, etc., R. Co. v. Dennis*, 116 U. S. 665; *Gold Hill v. Caledonia Silver Min. Co.*, 5 Sawy. (U. S.) 575; *Yazoo, etc., R. Co. v. Thomas*, 132 U. S. 174; *Bank of Commerce v. Tennessee*, 104 U. S. 493; *People v. Cook*, 148 U. S. 397; *Memphis, etc., R. Co. v. Loftin*, 105 U. S. 258; *Vicksburg, etc., R. Co. v. Dennis*, 116 U. S. 665, *affirming* 34 La. Ann. 954; *Tucker v. Ferguson*, 22 Wall. (U. S.) 575; *Yazoo, etc., R. Co. v. Thomas*, 132 U. S. 174, *affirming* 65 Miss. 553; *Memphis, etc., R. Co. v. Railroad Com'rs.*, 112 U. S. 609; *Walters v. Western, etc., R. Co.*, 68 Fed. Rep. 1002; *Christ Church v. Philadelphia County*, 24 How. (U. S.) 302; *Beaty v. Knowler*, 4 Pet. (U. S.) 168. See also *Thomson v. Union Pac. R. Co.*, 9 Wall. (U. S.) 579.

Alabama. — *Swann v. State*, 77 Ala. 545; *Baugh v. Ryan*, 51 Ala. 212; *Tallassee Mfg. Co. v. Spigener*, 49 Ala. 262.

Arkansas. — *State v. County Ct.*, 19 Ark. 360; *Brodie v. Fitzgerald*, 57 Ark. 445; *Memphis, etc., R. Co. v. Berry*, 41 Ark. 436; *St. Louis, etc., R. Co. v. Loftin*, 30 Ark. 693; *Fletcher v. Oliver*, 25 Ark. 289; *Files v. State*, 48 Ark. 529.

California. — *Hart v. Plum*, 14 Cal. 148; *People v. Shearer*, 30 Cal. 645; *San Francisco v. Fry*, 63 Cal. 470; *San Francisco v. Flood*, 64 Cal. 504.

Colorado. — *County Com'rs v. Colorado Seminary*, 12 Colo. 497. See also *People v. Hall*, 8 Colo. 485.

Connecticut. — *Nichols v. New Haven, etc., Co.*, 42 Conn. 103; *Hartford v. Hartford Theological Seminary*, 66 Conn. 475; *Copp v. Norwich*, 24 Conn. 28; *New Haven v. Sheffield*, 30 Conn. 160; *Yale University v. New Haven*, 71 Conn. 316; *First Unitarian Soc. v. Hartford*, 66 Conn. 368. See also *Osborn v. New York, etc., R. Co.*, 40 Conn. 491.

District of Columbia. — *Baltimore, etc., R. Co. v. District of Columbia*, 3 MacArthur (D. C.) 122.

Georgia. — *Mundy v. Van Hoose*, (Ga. 1898) 30 S. E. Rep. 783; *Macon v. Central R.*, etc., Co., 50 Ga. 620; *Atlanta St. R. Co. v. Atlanta*, 66 Ga. 104.

Illinois. — *Sanitary Dist. v. Martin*, 173 Ill. 243; *People v. Chicago*, 124 Ill. 636; *Matter of Swigert*, 119 Ill. 83, 59 Am. Rep. 789; *North Chicago Hebrew Congregation v. Garibaldi*, 70 Ill. App. 33, *citing* 25 AM. AND ENG. ENCYC. OF LAW (1st ed.) 157; *Bloomington Cemetery Assoc. v. People*, 170 Ill. 377; *People v. Wat-*

Illustrations. — The application of this rule will be abundantly illustrated in

seka Camp Meeting Assoc., 160 Ill. 576; *People v. Young Men's Christian Assoc.*, 157 Ill. 403; *People v. Peoria Mercantile Library Assoc.*, 157 Ill. 369; *People v. Ryan*, 138 Ill. 263; *People v. Wabash R. Co.*, 138 Ill. 85; *Adams County v. Quincy*, 130 Ill. 566; *Montgomery v. Wyman*, 130 Ill. 17; *Matter of Swigert*, 123 Ill. 267; *People v. Western Seaman's Friend Soc.*, 87 Ill. 246; *Northwestern University v. People*, 80 Ill. 333; *People v. Chicago Theological Seminary*, 174 Ill. 177; *Presbyterian Theological Seminary v. People*, 101 Ill. 578.

Indiana. — *Root v. Erdelmeyer*, 37 Ind. 225; 1 *Thomp. Nat. Bank Cas.* 432; *Indianapolis v. Grand Master*, 25 Ind. 518; *Madison v. Fitch*, 18 Ind. 33; *Fitch v. Madison*, 24 Ind. 425; *Indianapolis v. McLean*, 8 Ind. 328; *Orr v. Baker*, 4 Ind. 86; *Conklin v. Cambridge City*, 58 Ind. 130; *Methodist Episcopal Church v. Ellis*, 38 Ind. 3; *Frederickson v. Fowler*, 5 Blackf. (Ind.) 409.

Iowa. — *Sioux City v. Independent School Dist.*, 55 Iowa 150; *Foy v. Coe College*, 95 Iowa 689; *Barrett v. Kevane*, 100 Iowa 653; *Griswold College v. State*, 46 Iowa 275; *Cassady v. Hammer*, 62 Iowa 359; *Farwell v. Des Moines Brick Mfg. Co.*, 97 Iowa 286. See also *Matter of McGhee*, 105 Iowa 9.

Kansas. — *Ottawa University v. Franklin County*, 48 Kan. 460; *Stahl v. Kansas Educational Assoc.*, 54 Kan. 542; *Miami County v. Brackenridge*, 12 Kan. 114.

Kentucky. — *Deposit Bank v. Daviess County*, (Ky. 1897) 39 S. W. Rep. 1030; *Kilgus v. Orphanage of Good Shepherd*, 94 Ky. 439, 15 Ky. L. Rep. 318; *Zable v. Louisville Baptist Orphans' Home*, 92 Ky. 89; *Louisville v. Board of Trade*, 90 Ky. 409, 12 Ky. L. Rep. 397; *Louisville, etc., R. Co. v. Com.*, 10 Bush (Ky.) 44; *Bowling Green v. Barclay*, 91 Ky. 66.

Louisiana. — *Robertson v. New Orleans*, 45 La. Ann. 617; *Shreveport Gas, etc., Co. v. Assessor*, 47 La. Ann. 65; *State v. Board of Assessors*, 47 La. Ann. 1498; *St. Landry Cotton Oil Co. v. McGee*, 49 La. Ann. 750; *Brooklyn Cooperage Co. v. New Orleans*, 47 La. Ann. 1314; *Electric Traction Co. v. New Orleans*, 45 La. Ann. 1475; *Benedict v. New Orleans*, 44 La. Ann. 703; *Gast v. Board of Assessors*, 43 La. Ann. 1104; *Ricks v. Board of Assessors*, 43 La. Ann. 1075; *Carre v. New Orleans*, 41 La. Ann. 996, 42 La. Ann. 1119; *Ivens, etc., Mach. Co. v. Parker*, 42 La. Ann. 1103; *Blackman v. Houston*, 39 La. Ann. 502; *New Orleans v. New Orleans Canal, etc., Co.*, 32 La. Ann. 104; *Jones v. Raines*, 35 La. Ann. 996; *State v. Board of Assessors*, 34 La. Ann. 576; *Baton Rouge, etc., R. Co. v. Kirkland*, 33 La. Ann. 622; *First Presb. Church v. New Orleans*, 30 La. Ann. 259, 31 Am. Rep. 224; *State v. Board of Assessors*, 35 La. Ann. 668; *Bishop v. Marks*, 15 La. Ann. 147; *State v. Morgan*, 28 La. Ann. 482; *Lafayette v. Male Orphan Asylum*, 4 La. Ann. 1. See also *Moore v. New Orleans*, 48 La. Ann. 1452; *Metairie Cemetery Assoc. v. Board of Assessors*, 37 La. Ann. 32; *New Orleans v. New Orleans Mechanics' Soc.*, 27 La. Ann. 436.

Maine. — *Bangor v. Rising Virtue Lodge No. 10*, 73 Me. 428, 40 Am. Rep. 369; *Portland,*

etc., R. Co. v. Saco, 60 Me. 196; *Plaisted v. Lincoln*, 62 Me. 91.

Maryland. — *Bonaparte v. State*, 63 Md. 465; *Appeal Tax Ct. v. Gill*, 50 Md. 377; *Appeal Tax Ct. v. St. Peter's Academy*, 50 Md. 321; *State v. Wilson*, 52 Md. 638; *Frederick County v. Sisters of Charity*, 48 Md. 34; *Emory v. State*, 41 Md. 38; *Salisbury Permanent Bldg., etc., Assoc. v. Wicomico County*, 86 Md. 615.

Massachusetts. — *Mt. Hermon Boys' School v. Gill*, 145 Mass. 139. See also *Minot v. Winthrop*, 162 Mass. 113; *Redemptorist Fathers v. Boston*, 129 Mass. 178.

Michigan. — *Lefevre v. Detroit*, 2 Mich. 586; *East Saginaw Mfg. Co. v. East Saginaw*, 19 Mich. 259, 2 Am. Rep. 82; *Manistee, etc., R. Co. v. Turner*, (Mich. 1897) 73 N. W. Rep. 240; *Water Com'rs v. Auditor-Gen.*, (Mich. 1898) 73 N. W. Rep. 801.

Minnesota. — *Hennepin County v. Bell*, 43 Minn. 344; *St. Paul v. St. Paul, etc., R. Co.*, 23 Minn. 469; *Washburn Memorial Orphan Asylum v. State*, (Minn. 1898) 76 N. W. Rep. 204, citing 25 AM. AND ENG. ENCYC. OF LAW (1st ed.) 157-165; *State v. Northern Pac. R. Co.*, 32 Minn. 294, 17 Am. & Eng. R. Cas. 475.

Mississippi. — *State v. Simmons*, 70 Miss. 485; *Greenville Ice, etc., Co. v. Greenville*, 69 Miss. 86. See also *Yocona Cotton Mills v. Duke*, 71 Miss. 790.

Missouri. — *State v. Chicago, etc., R. Co.*, 89 Mo. 523; *State v. Lange*, 16 Mo. App. 468; *State v. Central St. Louis Masonic Hall Assoc.*, 14 Mo. App. 596.

Nebraska. — *Bellinger v. White*, 5 Neb. 399.

Nevada. — *State v. Eureka Consol. Min. Co.*, 8 Nev. 15; *State v. Northern Belle Mill, etc., Co.*, 13 Nev. 250.

New Hampshire. — *Phillips Exeter Academy v. Exeter*, 58 N. H. 306, 42 Am. Rep. 589; *Boody v. Watson*, 63 N. H. 320; *Kimball Carriage Co. v. Manchester*, (N. H. 1893) 39 Atl. Rep. 334.

New Jersey. — *State Board of Assessors v. Paterson, etc., R. Co.*, 50 N. J. L. 446; *State v. Krollman*, 38 N. J. L. 574; *State v. Hoboken*, 43 N. J. L. 96; *State v. Axtell*, 41 N. J. L. 117; *State v. Mills*, 34 N. J. L. 177. See also *State Board of Assessors v. Morris, etc., R. Co.*, 49 N. J. L. 193; *State v. Receiver of Taxes*, 38 N. J. L. 299; *State v. Metz*, 32 N. J. L. 199.

New Mexico. — *U. S. Trust Co. v. Atlantic, etc., R. Co.*, 8 N. Mex. 673.

New York. — *People v. Davenport*, 91 N. Y. 574, 1 Am. & Eng. Corp. Cas. 475; *People v. Commissioners of Taxes, etc.*, 76 N. Y. 64; *Buffalo City Cemetery v. Buffalo*, 46 N. Y. 506; *Matter of McCoskey*, 6 Dem. (N. Y.) 438; *Matter of Miller*, 5 Dem. (N. Y.) 132; *People v. Collison*, 22 Abb. N. Cas. (N. Y. Supreme Ct.) 52; *People v. Commissioners of Taxes*, 11 Hun (N. Y.) 505; *People v. Peck*, 157 N. Y. 51, affirming 32 N. Y. App. Div. 624, 52 N. Y. Supp. 259; *People v. Board of Assessors*, 93 N. Y. 308; *People v. Commissioners of Taxes, etc.*, 41 How. Pr. (N. Y. Supreme Ct.) 459; *Worden v. Oneida County*, 35 N. Y. App. Div. 206, citing 25 AM. AND ENG. ENCYC. OF LAW (1st ed.) 157. See also *Park Bank v. Wood*, 24 N. Y. 93.

North Carolina. — *United Brethren of Salem*

other parts of this article,¹ and in addition there are given in the note hereto a number of illustrations which are believed to be of peculiar value.²

v. Forsyth County, 115 N. Car. 489; *Atlantic, etc., R. Co. v. Mecklenburg*, 87 N. Car. 129; *State v. Petway*, 2 Jones Eq. (55 N. Car.) 396.

Ohio. — *Cincinnati College v. State*, 19 Ohio 110; *Matlack v. Jones*, 2 Disney (Ohio) 2; *State v. Cappeller*, 6 Cinc. Wkly. L. Bul. 339, 8 Ohio Dec. (Reprint) 219.

Oklahoma. — *Territory v. Clark*, 2 Okla. 82.

Oregon. — *Hibernian Benev. Soc. v. Kelly*, 28 Oregon 173.

Pennsylvania. — *Pennsylvania Bank v. Com.*, 19 Pa. St. 144; *Union Canal Co. v. Dauphin County*, 3 Brews. (Pa.) 124; *Serrill v. Philadelphia*, 38 Pa. St. 355; *Jones, etc., Mfg. Co. v. Com.*, 69 Pa. St. 137; *Crawford v. Burrell Tp.*, 53 Pa. St. 219. See also *Chadwick v. Maginnes*, 94 Pa. St. 117.

Rhode Island. — *Brown University v. Granger*, 19 R. I. 704.

South Carolina. — *State v. Hood*, 15 Rich. L. (S. Car.) 177.

South Dakota. — *Grigsby v. Minnehaha County*, 6 S. Dak. 492.

Tennessee. — *State v. Fisk University*, 87 Tenn. 233. See also *Louisville, etc., R. Co. v. Bate*, 12 Lea (Tenn.) 573; *Memphis v. Union, etc., Bank*, 91 Tenn. 546, 35 Cent. L. J. 169; *Woolman v. State*, 2 Swan (Tenn.) 353.

Texas. — *Campbell v. Wiggins*, 85 Tex. 424, *affirming* 2 Tex. Civ. App. 1; *Campbell v. Riviere*, (Tex. Civ. App. 1893) 22 S. W. Rep. 993; *Edmonds v. San Antonio*, 14 Tex. Civ. App. 155; *Moody v. Cox*, 54 Tex. 492.

Utah. — *Bear Lake, etc., Waterworks, etc., Co. v. Ogden City*, 8 Utah 494.

Vermont. — *Willard v. Pike*, 59 Vt. 202. See also *Bullock v. Guilford*, 59 Vt. 516.

Virginia. — *Orange, etc., R. Co. v. Alexandria*, 17 Gratt. (Va.) 176; *Petersburg v. Petersburg Benev. Mechanics' Assoc.*, 78 Va. 431, 8 Am. & Eng. Corp. Cas. 484; *Com. v. Chesapeake, etc., R. Co.*, 27 Gratt. (Va.) 344. See also *Miller v. Com.*, 27 Gratt. (Va.) 110.

Washington. — *Thurston County v. Sisters of Charity*, 14 Wash. 264.

West Virginia. — *Baltimore, etc., R. Co. v. Marshall County*, 3 W. Va. 319.

Wisconsin. — *Milwaukee Electric R., etc., Co. v. Milwaukee*, 95 Wis. 42; *Yates v. Milwaukee*, 92 Wis. 352; *State v. Harshaw*, 76 Wis. 230; *Weston v. Shawano County*, 44 Wis. 242.

Rule Applies to Exemptions of Property of Municipal Corporations. — "The rule requiring a strict construction of statutes exempting property from taxation belonging to private persons or corporations has been applied to municipal corporations also." *Sanitary Dist. v. Martin*, 173 Ill. 243, *per Carter, J., citing as instances of such application Matter of Swigert*, 123 Ill. 267; *People v. Chicago*, 124 Ill. 636; *Chicago v. People*, 80 Ill. 384.

1. See the remainder of this section, and the section *Particular Subjects of Exemption, infra*.

2. **Illustrations.** — The provision of Comp. Laws *South Dakota*, § 1542, subdiv. 14, that "any one-fourth part of any quarter section, * * * together with all improvements thereon, not to exceed in value one thousand dollars," shall be exempt from taxation, ex-

empts the land together with such improvements as added to the value of the land amount to one thousand dollars in value, and does not exempt the land absolutely and in addition thereto improvements to the value of one thousand dollars. *Grigsby v. Minnehaha County*, 6 S. Dak. 492.

The exemption granted by Rev. Stat. *Maine*, c. 6, § 6, cl. 10, to the aqueducts, pipes, and conduits of water companies, when the town takes water therefrom for the extinguishment of fires without charge, does not extend to the property of a water company which furnishes water to a village for such purpose, but is paid for all the water it furnishes. *Dover v. Maine Water Co.*, 90 Me. 180.

Chapter 394 of the *Maryland Acts of 1870*, which provides that no tax of any kind shall "be assessed, levied, or collected on any mortgages of any kind, or on any mortgage (or) bill of sale upon any property in this state," was designed to exempt from assessment and taxation only mortgage debts as such, and did not exempt from taxation the capital stock of all corporations to the extent that their loans might be secured by mortgage. *Emory v. State*, 41 Md. 38, *approved in* *Salisbury Permanent Bldg., etc., Assoc. v. Wicomico County Comrs.*, 86 Md. 615.

The provision of article 10, § 6, of the Constitution of *Missouri*, authorizing the legislature to pass a general law exempting from taxation lots of a certain area, "with the buildings thereon," when used for schools, and Rev. Stat. 1889, § 7504, making such exemption as broadly as the constitution has empowered it to do, cannot be construed to exempt personal property such as the furniture and appliances used in an educational institution. *Kansas City v. Kansas City Medical College*, 111 Mo. 141, *distinguishing* *Omaha Medical College v. Rush*, 22 Neb. 449.

The exemption ordinance adopted by the *Mississippi* constitutional convention, and which went into effect November 1, 1890, provided that "all permanent factories hereafter established in this state while this section is in force, for working cotton, wool, silk, furs, or metals, and all other manufacturing implements or articles of use in a finished state, shall be exempt from taxation for a period of ten years. Any factory which has been abandoned for not less than three years and commencing operations within two years from the date of the adoption of this constitution shall be entitled to such exemption." This exemption did not extend to a factory established before the ordinance went into effect and in operation at that time. *Yocona Cotton Mills v. Duke*, 71 Miss. 790.

Under a statute allowing railroad companies an exemption from taxation on property to the value of one thousand dollars, the amount of one thousand dollars should be deducted from the total assessment against each company, and not from the value of each road operated or leased by such company or each branch road thereof. *Louisville, etc., R. Co. v. Bate*, 12 Lea (Tenn.) 573.

To bring a corporation within the provision

Reason for the Rule. — The reason for the rule above set out is very apparent, for beyond the fact that exemptions are the exceptions to the rule of taxation, and are in the nature of a renunciation of sovereignty, the relieving from the burden of taxation of one class of persons or property, however meritorious and deserving of assistance that class may be, throws a correspondingly heavier burden upon all other classes, thus creating an inequality which is repugnant to common right and to the established principles of republican government. Hence the courts have uniformly refused to favor exemptions.¹

Rule Especially Applicable in the Absence of a Constitutional Grant of Power to Exempt. — It has been said that the rule requiring a strict construction of statutes creating exemptions is especially applicable in a state where there is an absence of any express constitutional grant to the legislature of power to create exemptions.²

b. LIMITATIONS OF THE RULE. — The rule stated is, of course, subject to the limitation that statutes creating exemptions should not be so strictly construed as to defeat the obvious intention of the legislature in enacting them.³

of section 15 of the *New Jersey* tax law of 1866 (Acts 1866, p. 1084), exempting from its operation all corporations which "by virtue of any contract in their charters or other contracts with this state are expressly exempted from taxation," it must have a contract of entire exemption from all such taxation for state, county, township, or municipal purposes as is imposed by the general system of taxation in force in the state. *State v. Parker*, 32 N. J. L. 426.

Context of Statute Considered as Limiting Exemption. — Only public school houses are exempt from taxation under the provisions of the *Indiana* statute (Rev. Stat., p. 106) exempting "every schoolhouse, court house, market house, poorhouse, and jail, and the land whereon such buildings are situate, and all county lands and buildings set apart for county purposes," for the connection in which the term "schoolhouse" is used shows that it was intended to apply only to public property. *Indianapolis v. McLean*, 8 Ind. 328.

Exemption of Municipal Bonds Applies Only to Bonds Authorized by Act Granting Exemption. — *State v. Woodruff*, 37 N. J. L. 139.

Property Must Be Lawfully Acquired. — *Mayer v. Peebles*, 58 Miss. 628.

Exemption of Insurance Companies Does Not Apply to Surety Company. — *People v. Wemple*, 58 Hun (N. Y.) 248, *affirmed* without opinion, 126 N. Y. 623.

Railroad Company Taxable under a Law Which Exempts Only Persons of Color. — A state law provided for the taking of the sense of the white people of a district as to whether a certain tax should be levied in support of a school, and expressly enacted that no property belonging to any negro should be subject to such tax. The vote was in favor of the tax, and it was accordingly laid. A railroad company claimed to be exempt therefrom, on the ground that it was an artificial person and could not be identified by a color. It was held that the company was not exempt, as under the statute all property was taxed except that belonging to colored people, and the company could not show itself to be within the exemption. *Elizabethtown Dist. Public School v. Louisville, etc., R. Co.*, (Ky. 1895) 30 S. W. Rep. 620.

Corporations Held Not Entitled to Exemption Granted to "Residents" of the State or Citizens. —

State v. Metz, 32 N. J. L. 199; *State v. Haight*, 35 N. J. L. 279.

Property Employed in "Boat Building." — The provision of article 207 of the *Louisiana* Constitution of 1879 exempting from taxation capital, property, etc., employed in "boat building" cannot be extended to exempt property used in boat repairing. *Robertson v. New Orleans*, 45 La. Ann. 617.

"Gifts, Bequests, or Endowments." — Real estate conveyed gratuitously to a corporation chartered to give free instruction in the natural sciences, which real estate is held and rented by it as a source of income to carry out its purposes, is neither a gift, a bequest, nor an endowment, within the meaning of a statute exempting from taxation all "gifts, bequests, or endowments" belonging to the corporation. *Wagner Free Institute's Appeal*, 116 Pa. St. 555, 18 Am. & Eng. Corp. Cas. 193.

Exemptions Held to Apply Only to Works to Be Erected in Future, Not to Those in Existence at Time of Grant. — The provision of Act 174, Pub. Laws *Michigan*, 1891, that "the rate of taxation fixed by this act or any other law of this state shall not apply to any railway or railroad company hereafter building and operating a line of railroad within this state north of parallel forty-four of latitude, until the same has been operated for the full period of ten years," does not apply to a railroad company which had entered upon the construction of its line of road nearly two years before the act took effect and when the act did take effect had nearly two-thirds of its line in such condition that it was running trains over it and earning freight. *Manistee, etc., R. Co. v. Turner*, (Mich. 1897) 73 N. W. Rep. 240.

1. Reasons for the Rule of Strict Construction. — *Fletcher v. Oliver*, 25 Ark. 289; *Orr v. Baker*, 4 Ind. 86. See also *People v. Neff*, 34 N. Y. App. Div. 83.

2. Rule Especially Applicable in Absence of Express Constitutional Grant of Power to Exempt. — *Auburn v. Young Men's Christian Assoc.*, 86 Me. 244.

3. Limitation of Rule — United States. — *Ensinger v. Powers*, 108 U. S. 202; *Tennessee v. Bank of Commerce*, 52 Fed. Rep. 735.

Connecticut. — *New Haven v. Sheffield Scientific School*, 59 Conn. 163; *Gillette v. Hartford*, 21 Conn. 351; *Nichols v. New Haven, etc.*,

Relaxation of Rule in Reference to Certain Classes of Exemptions. — There are several classes of exemptions in reference to which it has been suggested that the rule of strict construction should be relaxed.

Religious, Charitable, and Educational Institutions. — This has been suggested in relation to exemptions of religious, charitable, and educational institutions, on account of their meritorious nature and the fact that they relieve the government of burdens which it would otherwise have to bear.¹

Works of Public Improvement. — The same suggestion has been made in relation to an exemption of initial works of great public improvement, on account of the resulting benefit to the state at large, the pecuniary hazard appertaining to the enterprise, and the readiness of the legislature, in consideration of these facts, to grant all reasonable privileges and immunities in aid of the enterprise.²

Co., 42 Conn. 103; *Yale University v. New Haven*, 71 Conn. 316.

Georgia. — *Augusta v. Georgia R., etc., Co.*, 26 Ga. 651.

Maine. — *Portland v. Portland Water Co.*, 67 Me. 135.

Maryland. — *Chauvenet v. Anne Arundel County*, 3 Md. 259.

Massachusetts. — *Coburn v. Richardson*, 16 Mass. 213.

Nebraska. — *Omaha Medical College v. Rush*, 22 Neb. 449.

New Jersey. — *Home for Education, etc., v. Landis Tp.*, 59 N. J. L. 343. See also *State v. Receiver of Taxes*, 38 N. J. L. 299.

Tennessee. — *Morristown First Nat. Bank v. Morristown*, 93 Tenn. 208.

Virginia. — *Richmond v. Richmond, etc., R. Co.*, 21 Gratt. (Va.) 604; *Com. v. Richmond, etc., R. Co.*, 81 Va. 355, 24 Am. & Eng. R. Cas. 482.

Construction According to True Legislative Intent. — A special grant of exemption from taxation contained in the charter of a corporation will, if such construction be possible, be held to confer an immunity beyond that to which the corporation, by reason of its character, would be entitled under the general law in force at the time when the charter is granted, as any other construction would leave the exempting provision in the charter destitute of meaning. *New Haven v. Sheffield Scientific School*, 59 Conn. 163.

The supplement of March 28, 1862, to the *New Jersey Tax Law* excepted from its operation those corporations which "by virtue of an irrevocable contract in their charters or other contracts with this state are expressly exempted from taxation." This exemption did not include any corporations which had repealable charters containing exemptions. *State v. Miller*, 31 N. J. L. 521, affirming 30 N. J. L. 368, 86 Am. Dec. 188; *State v. Jersey City*, 31 N. J. L. 575, 86 Am. Dec. 240; *State v. Person*, 32 N. J. L. 566, affirming 32 N. J. L. 134. But the General Tax Law of 1866, repealing the pre-existing statute, re-enacted the clause quoted save that the word "irrevocable" was omitted therefrom. It was held that by this the legislature intended to exempt from the taxation imposed by the act every corporation which was expressly exempted from taxation in its charter, whether such charter was irrevocable or repealable in its discretion. *Douglass v. State*, 34 N. J. L. 485, affirming *State v. Douglass*, 34 N. J. L. 82.

A part of a contract made with a railway company provided that the lands of the company "in the Northwest Territory" should be exempt from taxation for a certain time. Some of such lands which were in the Northwest Territory at the time of the contract became a part of the province of Manitoba before they were acquired by the railway company. Nevertheless, it was held that such lands were within the terms of the contract and exempt from taxation. *Canadian Pac. R. Co. v. Cornwallis*, 10 Can. L. T. 236.

A provision in the charter of a railroad company exempting all its "works" will include real as well as personal property. *Richmond v. Richmond, etc., R. Co.*, 21 Gratt. (Va.) 604. See also *Petersburg R. Co. v. Northampton County*, 81 N. Car. 487.

"Produce for Export." — An exemption from municipal taxation of "produce for export" includes a quantity of pork in which the capital of a firm is invested, and all of which is for export, and is in process of being exported to a foreign market, as pork is included within the meaning of the term "produce." *Fitch v. Madison*, 24 Ind. 425, overruling *Madison v. Fitch*, 18 Ind. 33, and *Powell v. Madison*, 21 Ind. 335, and by implication overruling *Madison v. Martin*, 18 Ind. 35, in which the principle decided in *Madison v. Fitch*, 18 Ind. 33, was applied to flour which was to be exported.

Lands "Sequestered" for Certain Uses. — In *Vermont* it has been held that where a statute laying a tax excepted therefrom lands "sequestered" to public, pious, and charitable purposes, the exception could not be confined to lands which had been so sequestered by charter, but included all methods of sequestering which were authorized by law. *Middlebury College v. Cheney*, 1 Vt. 336.

1. Relaxation of Rule in Case of Exemptions of Religious, Charitable, or Educational Institutions. — *Indianapolis v. Grand Master*, 25 Ind. 518; *Sisters of Charity v. Chatham Tp.*, 52 N. J. L. 373; *Colored Orphans' Assoc. v. New York*, 104 N. Y. 581, 18 Am. & Eng. Corp. Cas. 186, affirming 38 Hun (N. Y.) 593; *People v. Commissioners of Taxes*, 11 Hun (N. Y.) 505; *People v. Sayles*, 23 Misc. Rep. (N. Y. Supreme Ct.) 1; *State v. Fisk University*, 87 Tenn. 233; *Ex p. Saint John Law Soc.*, 30 New Bruns. 501. See also *People v. Commissioners of Taxes*, 36 Hun (N. Y.) 311.

2. Initial Works of Great Public Improvement. — *State v. Baltimore, etc., R. Co.*, 48 Md. 49.

Public Property. — In relation to public property a similar relaxation is suggested because of the presumption against a legislative intent to tax it.¹

Property Which Has Never Been Taxed. — A similar consideration suggests a relaxation of the rule in favor of an express exemption of property which has never been taxed,² or which it has always been the policy of the state to leave untaxed.³

Where Exemption More Equitable than Taxation. — The plain principles of justice suggest that an exemption should be construed with some liberality where it applies to property which it is more equitable to exempt than to subject to the tax from which the exemption is granted.⁴

Commutation. — It has also been considered that the rule should be relaxed where the grantee pays in the form of a commutation an equivalent for the taxes from which exemption is claimed.⁵

c. EFFECT OF PROVISION IN EXEMPTING STATUTE FOR LIBERAL CONSTRUCTION. — In *Rhode Island* it has been held that a provision in a corporate charter, which granted an exemption from taxation, that the act should "be construed, reputed, and adjudged in all cases most favorable on the behalf and for the best benefit" of the corporation compelled a liberal construction of the exemption.⁶ In *Illinois*, however, this doctrine is somewhat modified, for the court of that state has held that a similar provision does not supersede the general rule of strict construction of grants of exemption, but means simply that when the purpose of the grant is ascertained according to such general

1. **Public Property.** — *Yale University v. New Haven*, 71 Conn. 316; *Newark v. Belleville Tp.*, 61 N. J. L. 455.

2. **Property Which Has Never Been Taxed.** — In a case where public lands have been granted to a railroad company, and an exemption from taxation has been given in reference to such lands, which exemption is to terminate upon the happening of certain specified contingencies, and it is attempted to subject such land to taxation, the question is "Has it [the land] ever become so [taxable]?" not "Has it, at one time liable to taxation, been exempted therefrom?" and there is no question arising of exemption, at least in the ordinary sense of the withdrawing of particular property from taxation to which other property remains subject. Therefore in such a case the rule of strict construction of exemptions does not apply with such force as it would in the other case indicated. *Canadian Pac. R. Co. v. Burnett*, 5 Manitoba L. Rep. 395, quoted in *Reg. v. Victoria Lumber, etc., Co.*, 5 British Columbia 288, 17 Can. L. T. 443.

3. **Property Which It Is the Policy of the State to Leave Untaxed.** — The rule that laws exempting property from taxation should be strictly construed is limited to the reasons which brought it about. These are two: "Exceptions to a general rule should be distinctly stated; private privileges are obnoxious to the law and must be clearly expressed." These reasons do not fully apply to a law expressly exempting property such as public property, or, in the case at bar, the property of colleges which it has always been the policy of the state to leave untaxed. *Yale University v. New Haven*, 71 Conn. 316.

4. **Where Exemption More Equitable than Taxation.** — An exception to the rule of strict construction of exemptions arises in a case such as the exemption of vacant farm lands, which have been included within the limits of

a city, from city taxation beyond a certain amount; for this is an equitable provision inserted for the protection of those who might otherwise be injuriously and unjustly affected by the act extending the city limits, and it is not the case of a mere gratuity. *Gillette v. Hartford*, 31 Conn. 351.

5. **Commutation.** — In *Traverse County v. St. Paul, etc., R. Co.*, (Minn. 1898) 76 N. W. Rep. 217, Mitchell, J., delivering the opinion of the court, said: "It has also been repeatedly held by this court, as well as by the Supreme Court of the United States, that the substitution of an assessment upon gross earnings in lieu of all other taxes on the road and the granted lands does not exempt the lands from taxation, but merely substitutes one method of taxation for another, upon the terms and conditions specified; and for that reason the latter court, which is very tenacious of the doctrine that an exemption from taxation must be clearly shown and strictly construed, has held that this doctrine does not apply, at least to its full extent, to such a case. *Northern Pac. R. Co. v. Clark*, 153 U. S. 252; *McHenry v. Alford*, 168 U. S. 651. And this court held to the same effect in *St. Paul v. St. Paul, etc., R. Co.*, 23 Minn. 469."

In *Wisconsin* it has been held that the law exempting certain railroad property from taxation should receive a fair and liberal construction in favor of the railroad companies, for the reason that such exemption is not a bonus or donation to the corporation as in some of the states, but, on the contrary, they pay into the state treasury an equivalent for taxes in the form of license money. *Milwaukee, etc., R. Co. v. Crawford County*, 20 Wis. 116; *Milwaukee, etc., R. Co. v. Milwaukee*, 34 Wis. 271.

6. **Effect of Provision for Liberal Construction.** — *Brown University v. Granger*, 10 R. I. 704.

rule, a liberal construction, if necessary, is to be resorted to in order to give effect to such purpose.¹

2. When Exemption Takes Effect — *a. LEGISLATIVE GRANT.* — In the absence of some words showing a contrary intent on the part of the legislature a legislative grant of exemption from taxation takes effect as soon as the act making the grant becomes a law and is accepted by the beneficiary, if express acceptance be required,² and relieves from all taxes the assessment of which has not been completed, and so placed beyond the power of the taxing officers to change, before such time.³

Cannot Relieve from Taxes Previously Assessed. — But a grant of exemption, whether made by constitution or by statute, cannot have the effect of releasing the beneficiary from the payment of taxes which have been finally assessed and have become due and payable before the grant takes effect.⁴

1. Provision for Liberal Construction Does Not Supersede General Rule of Strict Construction. — *People v. Chicago Theological Seminary*, 174 Ill. 177. The provision in this act was that the charter containing the grant of exemption should "be construed liberally in all courts for the purposes therein expressed."

2. Exemption Takes Effect as Soon as the Act Granting It Becomes a Law. — *McGavisk v. State*, 34 N. J. L. 509; *State v. Minton*, 23 N. J. L. 529; *State v. Harshaw*, 76 Wis. 230. See also *Hardy v. Waltham*, 7 Pick. (Mass.) 108.

Condition of Grant Not to Be Performed until Future Time. — In *McGavisk v. State*, 34 N. J. L. 509, it was further held that the operation of the exemption could not be delayed by the fact that the conditions imposed upon the grantee as a consideration therefor were not to be performed until some future time. The act under consideration in this case provided that a certain tax should be paid by a railroad company at the expiration of one year from the time when its road should be opened and in use, and annually thereafter, which tax should be in lieu and satisfaction of all other taxation, and it was held that the exemption took effect immediately upon the act being accepted by the company, and it was not subject to taxation thereafter, even though the annual tax provided for had not become due, the time when the payment thereof should commence not having arrived.

To the same effect is *State v. Minton*, 23 N. J. L. 529, in which case the payment of the tax, which was to be in lieu of all other taxes, was not to commence until the net proceeds of the railroad of the company to which the exemption was granted should amount to seven per cent. on its cost.

When Statute Extending Existing Exemption Takes Effect. — In *Wisconsin Cent. R. Co. v. Comstock*, 71 Wis. 88, it was held that where an act of the legislature (Laws Wis., 1877, c. 21, § 1) provided that the time during which certain lands should be exempt from taxation "is hereby extended three years," the three years commenced to run from the termination of the original exemption, and not from the time when the act granting the extension went into effect.

3. Exemption Relieves from All Taxes Not Finally Assessed. — *People v. Commissioners of Taxes, etc.*, 142 N. Y. 348, *affirming* 76 Hun (N. Y.) 491.

4. Grant of Exemption Cannot Release from Payment of Taxes Which Have Previously Become Due — *United States.* — See *Prevost v. Gren-eaux*, 19 How. (U. S.) 1, *affirming* *Prevost's Succession*, 12 La. Ann. 577.

Iowa. — *First Cong. Church v. Linn County*, 70 Iowa 396.

Kentucky. — *Louisville Water Co. v. Hamilton*, 81 Ky. 517.

Louisiana. — *State v. New Orleans*, 40 La. Ann. 697; *Louisiana, etc., Ice Co. v. Parker*, 42 La. Ann. 669; *New Orleans v. L'Hote*, 35 La. Ann. 1177.

Maine. — *Donnell v. Webster*, 63 Me. 15.

Maryland. — *Appeal Tax Ct. v. Baltimore Academy*, 50 Md. 437.

Mississippi. — *McCulloch v. Stone*, 64 Miss. 378.

New York. — *People v. Commissioners of Taxes, etc.*, 91 N. Y. 593; *Matter of Van Kleeck*, 121 N. Y. 701, 31 N. Y. St. Rep. 896, *reversing* 55 Hun (N. Y.) 472; *People v. Commissioners of Taxes, etc.*, 142 N. Y. 348, *affirming* 76 Hun (N. Y.) 491; *Matter of American Fine Arts Soc.*, 6 N. Y. App. Div. 496; *People v. Feitner*, 157 N. Y. 363, *affirming* 32 N. Y. App. Div. 23; *Etna Ins. Co. v. New York*, 14 Misc. Rep. (N. Y. Supreme Ct.) 145; *Etna Ins. Co. v. New York*, 153 N. Y. 331, *affirming* 7 N. Y. App. Div. 145, which *affirmed* 14 Misc. Rep. (N. Y.) 145. See also *Matter of American Fine Arts Soc.*, 151 N. Y. 621, *affirming* 6 N. Y. App. Div. 496; *People v. New York*, 16 N. Y. 424, *affirming* 20 Barb. (N. Y.) 81.

Tennessee. — *Turley, etc., Institute Co. v. Memphis*, 8 Heisk. (Tenn.) 845.

Wisconsin. — See *Yates v. Milwaukee*, 92 Wis. 352.

Canada. — *Henderson v. Stisted Tp.*, 17 Ont. Rep. 673, 9 Can. L. T. 406.

Express Provision Against Application to Taxes Previously Assessed. — The *Wisconsin* Act of 1877, c. 21, extending for three years an exemption theretofore granted to certain lands, which had, however, expired before the passage of such act, expressly provided that "the provisions of this act shall not apply to nor in any manner exempt said lands from the taxes which have been heretofore assessed against them." This limitation applied to the lands which were included within the extended exemption, and not merely to certain lands which had been expressly excepted from the exemption by other portions of the act. *Wisconsin Cent. R. Co. v. Lincoln County*, 57 Wis. 137.

Grant to Take Effect in Future. — Where, by the terms of a grant of exemption, it is to take effect, not immediately, but at some time in the future, as upon the completion of certain works or the happening of a certain event, the property referred to is taxable until the time specified arrives.¹

Failure of Grantee to Perform Condition Precedent to Exemption. — In some cases a positive act of the beneficiary is required as a condition precedent to the taking effect of a grant of exemption from taxation in his favor. In such case he cannot successfully claim the exemption until the act has been performed, and the exemption is totally lost if the act be not performed within the time allowed.²

b. ACQUISITION OF PROPERTY BY CORPORATION POSSESSING GENERAL EXEMPTION. — The rules above set out apply also to the case of the acquisition of property by a corporation which possesses a general exemption in regard to all its property. In such case the property is released from taxes

Effect of Irregular Assessment and Illegal Levy.

— Under the act above referred to and quoted, the exemption could not apply to taxes which had been assessed before the passage of the act, although the document purporting to be the assessment roll was not signed nor verified by the assessor and did not appear to have been made by him, nor because of the illegal levying of school taxes together with the county, state, and general town taxes, as such illegality did not render the whole tax levied a nullity. *Wisconsin Cent. R. Co. v. Lincoln County*, 67 Wis. 478.

Contrary Doctrine in Missouri. — A contrary doctrine appears in the *Missouri* case of *State v. Academy of Science*, 13 Mo. App. 213, in which it was held that as a tax is not a debt, it was perfectly competent for the General Assembly, under the *Missouri* Constitution of 1875, to arrest proceedings to collect taxes imposed after that constitution went into effect, upon property which it authorized the legislature to exempt from taxation; and that "where the legislature exempts from taxation a certain class of property which had been subject to taxation, and makes no provision as to the collection of taxes already assessed against such property, its intention must be that proceedings should not afterwards be inaugurated to subject the exempted property to the tax which has been removed, although the assessment was made before the repeal of the tax."

1. Exemption to Take Effect Upon Completion of Railroad. — A grant to a railroad company of exemption from taxation on its railroad and appurtenances for a certain length of time "after the completion of said road" does not take effect until the road is completed, and it is not exempt from taxation while being built. *Vicksburg, etc., R. Co. v. Dennis*, 116 U. S. 665, affirming 34 La. Ann. 954; *Yazoo, etc., R. Co. v. Thomas*, 132 U. S. 174; *Yazoo, etc., R. Co. v. Levee Com'rs*, 132 U. S. 190, affirming 37 Fed. Rep. 24; *Baton Rouge, etc., R. Co. v. Kirkland*, 33 La. Ann. 622.

Exemption of Manufacturing Establishments from the Time When They are "Put in Operation."

— The exemption granted by the *Vermont* statute of 1870 to "all manufacturing establishments hereafter erected, and all the machinery and capital used in operating the same," * * * for the term of five years from the time such establishment shall be put in opera-

tion" does not take effect as to any particular property claimed to belong to a manufacturing establishment until such establishment has been actually "put in operation." *Westmore Lumber Co. v. Orne*, 48 Vt. 90.

Exemption of Manufacturing Company "Carrying on Business." — A manufacturing corporation cannot be exempt from taxation under the *New Jersey* Act of April 18, 1884, exempting "manufacturing companies or mining companies carrying on business in this state" until it has actually located its business and begun its work within the state, and owns and controls a plant for the purpose of manufacturing. *Norton Naval Constr., etc., Co. v. State Board of Assessors*, 53 N. J. L. 564. See also *Edison Phonograph Co. v. State Board of Assessors*, 55 N. J. L. 55.

Exemption of Military Bounty Lands "From and After the Date of the Patents." — The provision of the Act of Congress of March 3, 1845, that bounty lands in *Iowa* granted for military service shall, while they continue to be held by the patentees and their heirs, remain exempt from any tax made by or under the authority of the state, whether for state, county, township, or other purposes, "for the term of three years from and after the date of the patents respectively," means that the three years' exemption is to begin from the actual date of the patent issued for the lands, and the term patent unquestionably refers to instruments executed by the proper officers of the government, as evidence of the title transferred to the patentee. It cannot be held that the exemption starts to run from the location of the land warrant and the issuing of the proper receipt or certificate by the officers of the land office where the warrant is located. *Fisher v. Wisner*, 34 Iowa 447; *Churchill v. Sowards*, 78 Iowa 472. To the same effect, under a statute containing an exactly similar grant, is *People v. Auditor-Gen.*, 9 Mich. 134.

Exemption of Property Devoted to Certain Objects. — Under a statute exempting from taxation the property of certain institutions "devoted solely to the appropriate objects" of these institutions, property belonging to such an institution is taxable until it is so devoted. *Kirk v. St. Thomas' Church*, 70 Iowa 287; *Mulroy v. Churchman*, 60 Iowa 717.

2. Failure to Perform Condition Precedent to Exemption. — *Farnham v. Sherry*, 71 Wis. 568.

which have not been finally assessed before such acquisition,¹ but not from taxes which have been finally assessed and become due, and the lien of which has attached.²

c. ACT OF PERSON BRINGING HIM WITHIN EXEMPTION. — Similarly, an act of a person which entitles him to an exemption provided by general law cannot relieve him from taxes previously levied.³

3. To What Taxes Exemption Applies — a. EXEMPTION FROM SPECIFIED TAXES. — It is within the power of the legislature to exempt property from taxation of certain kinds or for certain purposes without extending the exemption so as to relieve from all taxes;⁴ and where there is no apparent intention to relieve from all taxation the rule of strict construction of exemptions, as

1. Property Released from Taxes Not Finally Assessed. — *Hennepin County v. St. Paul, etc.*, R. Co., 33 Min. 534; *Washington Heights M. E. Church v. New York*, 20 Hun (N. Y.) 297; *St. James Church v. New York*, 41 Hun (N. Y.) 309.

When Title Is Acquired — Pendency of Condemnation Proceedings. — Although by the provisions of the Act of Congress and the *Massachusetts* statutes the title of land taken by the United States for a post office does not vest in the government until the assessment and payment of damages thereby occasioned to the owners of the land, in theory of law the compensation paid and the title acquired have relation back to the inception of the proceedings for the condemnation of the land for public use. Therefore the owners of such land are not chargeable with taxes imposed thereon during the pendency of such proceedings. *Sherwin v. Wigglesworth*, 129 Mass. 64.

2. Property Not Released from Taxes Which Have Been Finally Assessed and Have Become a Lien. — *Manly v. Gibson*, 14 Ill. 136; *Sisters of the Poor v. New York*, 51 Hun (N. Y.) 355, affirmed on opinion below in 112 N. Y. 677; *Colored Orphans' Assoc. v. New York*, 104 N. Y. 581, 18 Am. & Eng. Corp. Cas. 186, affirming 38 Hun (N. Y.) 593; *State v. Ewing*, 11 Lea (Tenn.) 172. See also *Independent School Dist. v. Hewitt*, 105 Iowa 663.

Land purchased, after the taxes for the year have been assessed, but before they are levied, for the purpose of erecting thereon a house of worship is not released from liability for that year's taxes by the provision of the *Iowa Code*, § 797 (Code 1897, § 1304), exempting from taxation land "devoted solely to the appropriate objects" of a religious institution. The land, having been liable to taxes when assessed, ought to pay for the time during which it was so liable, and there is no provision of the law under which the tax may be apportioned; therefore the whole tax must be paid. *First Cong. Church v. Linn County*, 70 Iowa 396.

In *Philadelphia v. Barber*, 160 Pa. St. 123, a church acquired certain property for its purposes after the taxes for the year had been assessed. It was held that the church could not be entitled to exemption as to such property for more than the portion of the year during which it held the title thereto, but the court did not decide that it would be exempt for such portion of the year.

Acquisition Before Final Assessment but No Occupation until Afterwards. — Chapter 498 of the *New York Laws of 1893* exempted from

taxation the real property of missionary and other corporations used exclusively for carrying out their purposes, but provided that the exemption should not extend to property of such corporations which was leased. A missionary corporation purchased property which was under lease which did not expire until noon of May 1, whereas the tax books for that year closed, at the latest, on April 30. Prior to the closing of the tax books, however, the corporation was preparing in good faith to occupy the premises for its purposes as soon as the lease expired. Nevertheless it was held that the property was subject to taxation for the current year, as the exemption in regard thereto did not take effect until after the tax assessment was completed. *Board of Home Missions v. New York*, 91 Hun (N. Y.) 642, 37 N. Y. Supp. 96.

Provision that Property Be "Exonerated" from Taxes. — The Act of Congress admitting the state of Missouri into the Union provided that "no tax shall be imposed on lands or property of the United States." An act of the legislature of *Missouri* gave the consent of the state to the acquisition by the United States of a piece of land in Kansas City for the accommodation of the United States courts, post offices, and other government offices, and provided that when the title was acquired by the United States the property should be "exonerated" from all taxes, assessments, and other charges levied or imposed under the authority of the state. The federal government acquired a piece of property after the lien of the city government for taxes for a certain fiscal year had attached, but before any levy of the tax had been made. It was held that the land was not subject to the tax. *Bannon v. Burnes*, 39 Fed. Rep. 892.

3. No Relief from Taxes Levied Before Right of Exemption Acquired. — The *Pennsylvania* Act of March 25, 1864, exempting the property of soldiers from bounty taxes, does not relieve a person from a tax which had been levied before his enlistment. *Tobin v. Morgan*, 70 Pa. St. 229.

4. Property May Be Exempted from Some Taxes and Left Liable to Others. — "The state may exempt property from taxation for state purposes when the exemption would not apply to taxation for municipal purposes." *Covington Gaslight Co. v. Covington*, 92 Ky. 312.

The exemptions granted by the *Pennsylvania* Act of May 14, 1874 (which is the statute now in force in that state in reference to exemptions), relieve only from taxes for county, city, borough, bounty, road, school, and poor pur-

set out in a previous part of this section, will be applied in order to determine from what taxes the beneficiary is protected.¹ An exemption, however, from taxes for certain purposes, as, for instance, for "county purposes," will pro-

poses. The act contains no exemption from taxation for state purposes. *Presbyterian Church v. Gratz*, 8 Pa. Co. Ct. Rep. 47.

1. Construction of Exemption from "Public Taxes."—In *Morgan v. Cree*, 46 Vt. 773, 14 Am. Rep. 640, it was held that an exemption from "public taxes" relieved only from state taxes pertaining to the public revenue as contradistinguished from local municipal taxes, such as town, parish, district, and village taxes, assessed upon and to be expended for the use and immediate benefit of the particular municipality. The court based this construction on the meaning attached to the term "public taxes" in the legislature at the time when the exemption in question was granted.

"State Taxes."—An exemption from state taxes does not relieve the beneficiary from taxation for county purposes. *Pacific R. Co. v. Cass County*, 53 Mo. 22.

Property does not become exempt from city taxation merely because the state forbears to tax it for state purposes, or, in enumerating the objects of taxation in the annual tax act, expressly excepts it. *Martin v. Charleston*, 13 Rich. Eq. (S. Car.) 50.

What Is a State Tax.—The specific levy made by the General Assembly of *Ohio* in 1862, 1863, and 1864, upon all taxable property of the state, for the relief of the necessities of soldiers and marines in the state and United States service was a state tax within the meaning of a law exempting certain property from all "state taxes." *State v. Auditor*, 15 Ohio St. 482.

"State and County Taxes."—A grant of exemption from taxation for state and county purposes does not include an exemption from municipal taxation for local purposes. *St. Joseph v. Hannibal, etc.*, R. Co., 39 Mo. 476; *Livingston County v. Hannibal, etc.*, R. Co., 60 Mo. 516; *St. Joseph v. Hannibal, etc.*, R. Co., 39 Mo. 476.

Nor from a township tax to pay bonds issued in aid of a railroad. *State v. Hannibal, etc.*, R. Co., 101 Mo. 136, 41 Am. & Eng. R. Cas. 581, affirming on rehearing *State v. Hannibal, etc.*, R. Co., 101 Mo. 136, 39 Am. & Eng. R. Cas. 547; *State v. Hannibal, etc.*, R. Co., 113 Mo. 297.

Nor does it include an exemption from school taxes. *Livingston County v. Hannibal, etc.*, R. Co., 60 Mo. 516; *Caldwell County v. Hannibal, etc.*, R. Co., 60 Mo. 521.

What Are County Taxes Within Exemption.—A tax levied to pay the bonds of a county given in payment of a subscription to railroad stock is a county tax, although the bonds can be paid only out of a tax levied for that special purpose, and provided for by a provision in the charter of the railroad company whose stock was subscribed for. Therefore a corporation which is by charter exempt from payment of county taxes is not liable to such taxation. *State v. Hannibal, etc.*, R. Co., 101 Mo. 136, 41 Am. & Eng. R. Cas. 581, affirming on rehearing *State v. Hannibal, etc.*, R. Co., 101 Mo. 136, 39 Am. & Eng. R. Cas. 547.

"State, County, and Municipal Taxes."—The *South Carolina* Act of 1873, which in effect exempts manufacturing companies from "state," "county," and "municipal" taxes, by providing that the state, county, and municipal treasurers shall refund to such companies the amount of such taxes paid in, does not entitle such a company to have refunded the proportion paid by it of a tax levied by a township upon property in a township to pay subscription to the capital stock of a railroad. *Carolina, etc.*, R. Co. v. *Tribble*, 25 S. Car. 260.

Municipal Taxes.—An exemption from taxation for municipal purposes does not exempt from a township tax or a tax levied by the assessors of the county in aid of a railroad. *Root v. Erdelmeyer*, 37 Ind. 225, 1 Thomp. Nat. Bank Cas. 432.

Nor does such an exemption relieve the beneficiary from the payment of school taxes. *South Bend v. Notre Dame Du Lac University*, 69 Ind. 344; *Daniels v. Strader*, 39 Ind. 63; *Root v. Erdelmeyer*, 37 Ind. 225, 1 Thomp. Nat. Bank Cas. 432; *Bamberger v. Louisville*, 82 Ky. 337; *Henderson v. Lambert*, 8 Bush (Ky.) 607.

But it does exempt from a tax for the reconstruction of streets and ways, as this is purely a municipal purpose. *Bamberger v. Louisville*, 82 Ky. 337.

"Local Taxation."—In *New York* it is considered that an exemption from "local taxation" does not exempt from state taxes, *Matter of Vanderbilt*, 2 Connolly (N. Y.) 319; *People v. Board of Assessors*, 141 N. Y. 476, reversing 74 Hun (N. Y.) 18, but that it does exempt from all other taxation, because as to the state all taxation is local which is not for the common benefit of all the citizens, but only for those residing in one of the local subdivisions of the state, *People v. Board of Assessors*, 141 N. Y. 476, reversing 74 Hun (N. Y.) 18.

In *Pennsylvania* such an exemption has been held to exempt from a license imposed for general revenue purposes, but not to relieve from payment of a license tax imposed by a city in the exercise of its police power. *Oil City v. Oil City Trust Co.*, 151 Pa. St. 454, 31 Am. St. Rep. 770, 31 W. N. C. (Pa.) 129.

In *Michigan* it has been held that an exemption from ordinary local taxation did not include an exemption from liability to pay a tax laid on dogs, as this was to be regarded as a license rather than as a tax on property. *Hendrie v. Kalthoff*, 48 Mich. 306.

Parish Taxes.—Section 1 of the *Louisiana* Act 172 of 1852, which provided that "the town of Jackson, in the parish of East Feliciana, be and the same is hereby exempt from the payment of parish taxes," included the inhabitants of the town as well as the property of the corporation, and exempted an inhabitant of the town from the payment of a license on his occupation levied by the parish. The court considered that the word "taxes" was employed in its broadest sense and included license taxes as well as property taxes. *East Feliciana v. Levy*, 40 La. Ann. 332. But com-

fect from a subsequent tax for any such purpose, even though the tax be of a character which was not anticipated by the legislature at the time when the exemption was granted.¹

Commutation for Taxes. — Where an act of the legislature providing apparently for state taxation merely authorizes certain corporations to pay to the state a sum of money which shall be in lieu of all other taxes, and there is no provision in the law by virtue of which the various counties and municipalities may receive a share of the amount so paid, it must be considered that the commutation refers only to taxes for state purposes, and that the corporations referred to are not exempt from county, municipal, and other local taxes.²

pare New Orleans *v.* New Orleans Canal, etc., Co., 32 La. Ann. 104.

Poll Tax. — The *New Jersey* Act of March 9, 1869, exempting all members of the National Guard of the state from "poll and military tax," applied only to the general poll tax, and did not exempt such persons from a special poll tax assessed for the payment of war bonds. *State v. Mills*, 34 N. J. L. 177.

Exemption from "Tax or License." — In *Bowling Green v. Kentucky Masonic, etc., Ins. Co.*, 5 Ky. L. Rep. 697, it was held that a charter provision that a corporation should be exempt from "any state, county, or municipal tax or license for transacting business" did not exempt it from a license tax only, but extended to all taxes, as the words "tax" and "license" in the exempting statute were not synonymous.

"Car License," etc. — A city ordinance providing that in consideration of certain matters a street-railway company "is released from the payment of car license, except as hereinafter provided, and from the payment of tax of any and every kind except an *ad valorem* tax upon its real estate and personal property," only exempts such company from the payment of a license tax or fee proper, and does not release it from an *ad valorem* tax on the value of its franchise. If it had been attempted to release it from such tax, the ordinance would have been unconstitutional. *South Covington, etc., R. Co. v. Bellevue*, (Ky. 1899) 49 S. W. Rep. 23.

Tax on Dividends. — A charter exemption of a corporation from a tax on dividends does not include an immunity from taxation upon its capital stock although the consideration paid for such exemption is a certain bonus upon the capital stock. *Com. v. Jacobus, etc., Mfg. Co.*, (C. Pl.) 1 Dauph. Co. Rep. 82.

Limitation of Insurance Tax. — The provision of the *Louisiana* Act of 1871 that "there shall be levied and collected an annual amount as a license or tax * * * from each insurance company with a capital of one hundred thousand dollars or more, incorporated by or under the laws of this state, and transacting an insurance business therein, one thousand dollars, * * * provided that no insurance company whose license tax shall be one thousand dollars shall be liable to any assessment throughout the state other than that imposed by this article and by section six of this act," which section provides for a tax upon the gross amount of premiums, exempts such companies simply from the payment of any further license tax, and does not exempt them from other taxation on property and capital, etc.

New Orleans v. Salamander Ins. Co., 25 La. Ann. 650.

Exemption from Taxation to Pay Interest on Debt Previously Incurred by City. — The provision of the *New Jersey* Act of March 21, 1874 (P. L. 402), that certain territory annexed by that act to the city of Hoboken should, in consideration of the payment by the property owners therein of a certain sum, be exempt from all taxes thereafter assessed to pay the principal and interest of any indebtedness theretofore incurred by the city, with certain exceptions, included an exemption from taxation to pay improvement certificates issued under the charter for work done in the streets before annexation, and also an exemption from taxation for the payment of bonds issued after the annexation by authority of an act prior thereto to pay judgments reserved on such certificates. *State v. Hoboken*, 43 N. J. L. 96.

Exemption from Taxes for Fire-department Purposes. — A provision in the charter of a city exempting from taxation for fire-department purposes all parcels of land of ten acres or more used exclusively for farm purposes and not laid out into city lots does not exempt such property from taxation to pay the interest on bonds issued by the city to erect waterworks and maintain a supply of water, merely because the water is furnished for fire purposes also. *Baldwin v. Hastings*, 83 Mich. 639. In this case, however, the court further said that it would be unreasonable and unjust for the city to supply water to the fire department without charge, and if it continued to do so the persons who claimed the exemption would not be without remedy, but there was no basis on which such a person could recover the whole tax paid, nor could the court say from the record in the case at bar what part of it he was entitled to recover.

1. Taxes of a Character Not Anticipated When Exemption Was Granted. — A provision in the charter of a city exempting property therein "from all taxes for county purposes" applies to a tax afterwards levied for the payment of bounties for volunteers for the army; for while a tax of this specific character was undoubtedly not anticipated, at the time when the charter was granted, still if the legislature had intended to confine the exemption to such county taxes as were then levied it would have been easy to do so, and it must be presumed that it would have been done. *McDonough County v. Campbell*, 42 Ill. 490.

2. Commutation for State Taxes — *United States*. — *Insurance Co. v. New Orleans*, 1 Woods. (U. S.) 85.

A similar rule applies to a commutation for state and county taxes,¹ or for city taxes.²

Intention to Exempt from All Taxes. — Where, however, there is a plain legislative intent to exempt from all taxes, it will be enforced even though the consideration therefor be paid entirely to the state.³

b. GENERAL EXEMPTION — (1) *Includes All Taxes.* — A general exemption "from taxation" or "from all taxes," or in similar words, extends to and relieves from all taxes, whether state, municipal, or of any other kind.⁴

Iowa. — See *Dunlieth, etc., Bridge Co. v. Dubuque*, 32 Iowa 427, *infra*, next note.

Kentucky. — *Kentucky Cent. R. Co. v. Bourbon County*, 82 Ky. 497; *Kentucky Cent. R. Co. v. Pendleton Co.*, 8 Ky. L. Rep. 517.

Maryland. — *Gordon v. Baltimore*, 5 Gill (Md.) 231.

Missouri. — *Lexington v. Aull*, 30 Mo. 480; *Pacific R. Co. v. Cass County*, 53 Mo. 22.

New York. — *People v. Davenport*, 91 N. Y. 574, 1 Am. & Eng. Corp. Cas. 475, *affirming* 25 Hun (N. Y.) 630; *People v. Commissioners of Taxes*, 26 Hun (N. Y.) 446.

Virginia. — *Orange, etc., R. Co. v. Alexandria*, 17 Gratt. (Va.) 176.

1. Commutation for State and County Taxes. — *Troy v. Mutual Bank*, 20 N. Y. 387; *Manufacturers' Bank v. Troy*, 24 How. Pr. (N. Y. Supreme Ct.) 250; *Dunlieth, etc., Bridge Co. v. Dubuque*, 32 Iowa 427.

2. Commutation for City Taxes. — *Saint Croix Electric Light, etc., Co. v. Milltown*, 31 New Bruns. 452.

3. Intention to Exempt from All Taxes. — *Cape Fear Bank v. Edwards*, 5 Ired. L. (27 N. Car.) 516; *Cape Fear Bank v. Deming*, 7 Ired. L. (29 N. Car.) 55; *People v. Coleman*, 121 N. Y. 542; *distinguishing People v. Davenport*, 91 N. Y. 574, 1 Am. & Eng. Corp. Cas. 475; *State Bank v. Charleston*, 3 Rich. L. (S. Car.) 342. See also *State v. Knox, etc., R. Co.*, 78 Me. 92; *State v. Dexter, etc., R. Co.*, 69 Me. 44.

4. General Exemption Extends to All Taxes. — *Kentucky.* — *Elizabethtown, etc., R. Co. v. Elizabethtown*, 12 Bush (Ky.) 233.

Louisiana. — *Lefranc v. New Orleans*, 27 La. Ann. 188; *New Orleans v. Carondelet Canal, etc., Co.*, 36 La. Ann. 396.

Maryland. — *Baltimore v. Baltimore, etc., R. Co.*, 6 Gill (Md.) 288, 48 Am. Dec. 531; *Tax Cases*, 12 Gill & J. (Md.) 117.

New Jersey. — *State v. Jersey City*, 41 N. J. L. 471; *State v. Mansfield*, 23 N. J. L. 510; *State v. Minton*, 23 N. J. L. 529; *State v. Bentley*, 23 N. J. L. 532; *State v. Hancock*, 35 N. J. L. 537; *Gardner v. State*, 21 N. J. L. 557; *State v. Berry*, 17 N. J. L. 80; *Camden, etc., R. Co. v. Hillegas*, 18 N. J. L. 11; *Camden, etc., R. Co. v. Appeal Com'rs*, 18 N. J. L. 71.

New York. — *Johnson Home v. Seneca Falls*, 37 N. Y. App. Div. 147.

North Carolina. — *Cape Fear Bank v. Edwards*, 5 Ired. L. (27 N. Car.) 516.

Pennsylvania. — *Finney v. Mercer County*, 1 S. & R. (Pa.) 62; *Coney v. Owen*, 6 Watts (Pa.) 435.

South Carolina. — *St. Philip's Church v. Charleston*, McMull. Eq. (S. Car.) 139; *State Bank v. Charleston*, 3 Rich. L. (S. Car.) 342.

Virginia. — *Richmond v. Richmond, etc., R. Co.*, 21 Gratt. (Va.) 604.

West Virginia. — *Baltimore, etc., R. Co. v. Wheeling*, 3 W. Va. 372; *Baltimore, etc., R. Co. v. Marshall County*, 3 W. Va. 319.

General Exemption of Railroad Precludes Taxation by Counties or Municipalities Which Aided in Construction. — The *Texas* Act of March 10, 1875, granting certain lands to the International and Great Northern railroad, and providing that such lands should be exempted "from taxation, state, county, city, municipal, and other taxes," for a specified time, exempted such property from taxation even by counties, cities, or towns which had aided, by the donation of lands, the construction of the railroad of one of the companies which was consolidated into that to which the lands and exemption were granted. *Anderson County v. Kennedy*, 58 Tex. 616.

Exemption "from Taxation by Federal, State, or Municipal Authority." — The provision of the Act of Congress of June 20, 1874 (18 U. S. Stat. at L. 120), that certain bonds authorized to be issued by the District of Columbia "shall be exempt from taxation by federal, state, or municipal authority," does not apply only to taxation within the District of Columbia, either by the government of the United States or the government of the District as a state, but exempts the bonds from taxation everywhere within the limits of the United States. *Grether v. Wright*, 75 Fed. Rep. 743.

English Rule. — The Act of 7 Geo. III., c. 37, exempting the owners of certain lands on the bank of the river Thames from all taxes and assessments whatsoever, did not exempt the occupier of a house built on such lands from a payment of the house and window duties imposed by 38 Geo. III., c. 40. *Perchard v. Heywood*, 8 T. R. 468. But it did relieve such lands from the general land tax imposed by 27 Geo. III., though such act was conceived in general terms, and was subsequent in point of time to the act creating the exemption. *Williams v. Prichard*, 4 T. R. 2.

Franchise Tax. — An exemption from "any tax or impost whatsoever" includes every enforced contribution from the grantee of such exemption to the public treasury. Therefore a franchise tax is within the exemption. *Hancock v. Singer Mfg. Co.*, (N. J. 1898) 41 Atl. Rep. 846. See also *Singer Mfg. Co. v. Heppenheimer*, 58 N. J. L. 633, *reversing* 54 N. J. L. 439. See generally the title TAXATION (CORPORATE).

License Tax. — In *Louisiana* it has been held that a provision in the charter of a corporation exempting its stock and real estate from taxation did not exempt it from license taxes. *New Orleans v. State Nat. Bank*, 34 La. Ann. 892; *New Orleans v. New Orleans Canal, etc., Co.*, 32 La. Ann. 104. See generally the title OCCUPATION, BUSINESS, AND PRIVILEGE TAXES.

(2) *Rule as to Local Assessments*—(a) *Rule Stated*.—The terms “assessment” and “tax” or “taxation,” as used in constitutions and statutes, are not synonymous, but have entirely distinct meanings,¹ and consequently, by an application of the rule of strict construction heretofore set forth, a constitutional or statutory exemption from taxation is almost invariably held to apply only to taxation for the general purposes of the government, state, county, or municipal, and not to relieve from liability for special and local assessments for municipal and other like improvements.²

1. “Assessment” and “Tax” Not Synonymous Terms—*United States*.—Illinois Cent. R. Co. v. Decatur, 147 U. S. 190.

California.—Emery v. San Francisco Gas Co., 28 Cal. 345.

Indiana.—Palmer v. Stumph, 29 Ind. 329.

Kansas.—Hines v. Leavenworth, 3 Kan. 186.

Missouri.—Sheehan v. Good Samaritan Hospital, 50 Mo. 155, 11 Am. Rep. 412.

New Jersey.—State v. Newark, 36 N. J. L. 478, 13 Am. Rep. 464.

New York.—Van Deventer v. Long Island City, 139 N. Y. 133; Matter of New York, 11 Johns. (N. Y.) 77.

Ohio.—Lima v. Lima Cemetery Assoc., 42 Ohio St. 128, 51 Am. Rep. 809, 5 Am. & Eng. Corp. Cas. 547; Ridenour v. Saffin, 1 Handy (Ohio) 464.

Pennsylvania.—Chester City v. Chester, etc., R. Co., 5 Pa. Co. Ct. Rep. 387; Merrifield v. Scranton City, 5 Pa. Co. Ct. Rep. 388.

Wisconsin.—Hale v. Kenosha, 29 Wis. 599; Johnson v. Milwaukee, 40 Wis. 315.

See generally the title SPECIAL ASSESSMENTS.

2. *Exemption from Taxation Does Not Relieve from Liability for Local Assessments*—*United States*.—Ford v. Delta, etc., Land Co., 164 U. S. 662; Illinois Cent. R. Co. v. Decatur, 147 U. S. 190, explaining McGee v. Mathis, 4 Wall. (U. S.) 143.

Arkansas.—Board of Improvement v. School Dist., 56 Ark. 354, 35 Am. St. Rep. 108, 37 Am. & Eng. Corp. Cas. 302; Davis v. Gaines, 48 Ark. 370. Compare Peay v. Little Rock, 32 Ark. 31.

California.—Emery v. San Francisco Gas Co., 28 Cal. 346.

Connecticut.—Bridgeport v. New York, etc., R. Co., 36 Conn. 255, 4 Am. Rep. 63.

Georgia.—Atlanta v. First Presb. Church, 86 Ga. 730, overruling First M. E. Church v. Atlanta, 76 Ga. 181.

Illinois.—Illinois Cent. R. Co. v. Decatur, 126 Ill. 92, 37 Am. & Eng. R. Cas. 395, affirmed 147 U. S. 190; Illinois Cent. R. Co. v. Decatur, 154 Ill. 173; Illinois Cent. R. Co. v. Mattoon, 141 Ill. 32; Illinois, etc., Canal v. Chicago, 142 Ill. 403; Higgins v. Chicago, 18 Ill. 276; Chicago v. Colby, 20 Ill. 614; Peoria v. Kidder, 26 Ill. 352; Wright v. Chicago, 46 Ill. 44; Mix v. Ross, 57 Ill. 121; Adams County v. Quincy, 130 Ill. 566; Ottawa v. Free Church, 20 Ill. 423; Bloomington Cemetery Assoc. v. People, 139 Ill. 16.

Indiana.—Kalbrier v. Leonard, 34 Ind. 497; First Presb. Church v. Ft. Wayne, 36 Ind. 338, 10 Am. Rep. 35.

Iowa.—Farwell v. Des Moines Brick Mfg. Co., 97 Iowa 286, citing 25 AM. AND ENG. ENCY. OF LAW (1st ed.) 160, 495; Sioux City v. Independent School Dist., 55 Iowa 150; Cas-

sady v. Hammer, 62 Iowa 359. See also Polk County Sav. Bank v. State, 60 Iowa 24.

Kentucky.—Louisville v. McNaughten, (Ky. 1898) 44 S. W. Rep. 380; Zable v. Louisville Baptist Orphans' Home, 92 Ky. 89. See also Bamberger v. Louisville, 82 Ky. 337.

Louisiana.—Lafayette v. Male Orphan Asylum, 4 La. Ann. 1; Crowley v. Copley, 2 La. Ann. 329.

Maryland.—Dolan v. Baltimore, 4 Gill (Md.) 394; Baltimore v. Green Mount Cemetery, 7 Md. 517. See also Alexander v. Baltimore, 5 Gill (Md.) 383; Baltimore County v. Maryland Hospital, 62 Md. 127.

Massachusetts.—Boston Seamen's Friend Soc. v. Boston, 116 Mass. 181, 17 Am. Rep. 153; Worcester Agricultural Soc. v. Worcester, 116 Mass. 189.

Michigan.—Lefevre v. Detroit, 2 Mich. 586; Lake Shore, etc., R. Co. v. Grand Rapids, 102 Mich. 374.

Minnesota.—Washburn Memorial Orphan Asylum v. State, (Minn. 1898) 76 N. W. Rep. 204, citing 25 AM. AND ENG. ENCY. OF LAW (1st ed.) 157-165.

Mississippi.—Daily v. Swope, 47 Miss. 367; Vasser v. George, 47 Miss. 713; Macon v. Patty, 57 Miss. 378, 34 Am. Rep. 451.

Missouri.—Sheehan v. Good Samaritan Hospital, 50 Mo. 155, 11 Am. Rep. 412; St. Louis Public Schools v. St. Louis, 26 Mo. 468; Lockwood v. St. Louis, 24 Mo. 20. See also Egyptian Levee Co. v. Hardin, 27 Mo. 495, 72 Am. Dec. 276.

Nebraska.—Beatrice v. Brethren Church, 41 Neb. 358.

New Jersey.—Paterson v. Society, etc., 24 N. J. L. 385; State v. Elizabeth, 37 N. J. L. 330; State v. Newark, 35 N. J. L. 157; State v. Jersey City, 36 N. J. L. 56; State v. Robertson, 24 N. J. L. 504; State v. Jersey City, 42 N. J. L. 97. Compare State v. Newark, 27 N. J. L. 185.

New York.—Matter of St. Joseph's Asylum, 69 N. Y. 353; Hassan v. Rochester, 67 N. Y. 528; Tucker v. Utica, 35 N. Y. App. Div. 173; Harlem Presb. Church v. New York, 5 Hun (N. Y.) 442; Roosevelt Hospital v. New York, 84 N. Y. 108; Buffalo City Cemetery v. Buffalo, 46 N. Y. 506. See also People v. Board of Assessors, 93 N. Y. 308. Compare Matter of Van Antwerp, 56 N. Y. 261.

Ohio.—Lima v. Lima Cemetery Assoc., 42 Ohio St. 128, 51 Am. Rep. 809, 5 Am. & Eng. Corp. Cas. 547; Gilmour v. Pelton, 2 Cinc. Wkly. L. Bul. 158, 7 Ohio Dec. (Reprint) 359, 6 Am. L. Rec. 26, 5 Ohio Dec. (Reprint) 447. See also Northern Indiana R. Co. v. Connelly, 10 Ohio St. 160.

Pennsylvania.—Philadelphia v. Franklin Cemetery Co., 2 Pa. Super. Ct. Rep. 569; Northern Liberties v. St. John's Church, 13 Pa.

Contrary Doctrine. — In *Canada* the prevailing doctrine is that every contribution to a public purpose imposed by statutory authority is a tax, and that, therefore, an exemption from taxation includes an exemption from a special assessment for a local improvement.¹ And a similar doctrine seems to be recognized in *Texas*.²

St. 104; *Philadelphia v. Union Burial Ground Soc.*, 178 Pa. St. 533; *New Castle City v. Stone Church Graveyard*, 172 Pa. St. 86, 37 W. N. C. (Pa.) 283; *Broad St.*, 165 Pa. St. 475, *overruling* *Olive Cemetery Co. v. Philadelphia*, 93 Pa. St. 129, 39 Am. Rep. 732; *Erie v. First Universalist Church*, 105 Pa. St. 278; *Erie City v. Young Men's Christian Assoc.*, 151 Pa. St. 168; *City v. Church*, 5 L. T. N. S. (Pa.) 207; *In re Fifty-first St.*, 3 Pa. Co. Ct. Rep. 422; *Jenkintown v. Jenkintown Baptist Church*, 5 Pa. Co. Ct. Rep. 385; *Chester City v. Chester, etc.*, R. Co., 5 Pa. Co. Ct. Rep. 387; *Harrisburg v. St. Paul's Church*, 5 Pa. Dist. Rep. 351; *Philadelphia v. Pennsylvania Hospital*, 143 Pa. St. 367, 28 W. N. C. (Pa.) 434; *Wilksburg v. Home for Aged Women*, 131 Pa. St. 109, *affirming* 7 Pa. Co. Ct. Rep. 75; *Philadelphia v. St. James Church*, 134 Pa. St. 207; *Philadelphia v. Pennsylvania Hospital*, 154 Pa. St. 9; *Ladies' United Aid Soc. v. Philadelphia*, 14 Pa. Co. Ct. Rep. 215, 34 W. N. C. (Pa.) 260.

Rhode Island. — *Second Universalist Soc. v. Providence*, 6 R. I. 235; *Matter of College St.*, 8 R. I. 474. See also *Beals v. Providence Rubber Co.*, 11 R. I. 381, 23 Am. Rep. 472.

South Dakota. — *Winona, etc.*, R. Co. v. *Watertown*, 1 S. Dak. 46.

Wisconsin. — *Brightman v. Kirner*, 22 Wis. 54; *Yates v. Milwaukee*, 92 Wis. 352. See also *Milwaukee, etc.*, R. Co. v. *Milwaukee*, 34 Wis. 271.

Illustrations of Language Held Not to Exempt from Local Assessments. — In the following cases the language quoted has been held not to include any exemption from local assessments for municipal and other like improvements.

An exemption from "all taxation." *Winona, etc.*, R. Co. v. *Watertown*, 1 S. Dak. 46.

A provision that a certain payment provided should be "in lieu of all other taxes." *Bridgeport v. New York, etc.*, R. Co., 36 Conn. 255, 4 Am. Rep. 63.

An exemption from "all taxation of every kind except as herein provided for." *Illinois Cent. R. Co. v. Decatur*, 126 Ill. 92.

An exemption from "taxation of every kind." *Sheehan v. Good Samaritan Hospital*, 50 Mo. 155, 11 Am. Rep. 412.

"Exempted from taxation." *Boston Seamen's Friend Soc. v. Boston*, 116 Mass. 181, 17 Am. Rep. 153.

"Exempt from taxation." *Roosevelt Hospital v. New York*, 84 N. Y. 108.

A provision that certain property should be "exempt from taxation of every description." *Illinois, etc.*, *Canal v. Chicago*, 12 Ill. 403.

An exemption from "any tax or public imposition whatever." *Baltimore v. Green Mount Cemetery*, 7 Md. 517.

An exemption from "taxes, charges, and impositions." *Paterson v. Society, etc.*, 24 N. J. L. 385.

A provision that certain property should not

be "taxed by any law of this state." *Matter of New York*, 11 Johns. (N. Y.) 77.

An exemption from "all taxation, either by the state, parish, or city." *Lafayette v. Male Orphan Asylum*, 4 La. Ann. 1.

An exemption from "all and every county, road, city, and school tax." *Northern Liberties v. St. John's Church*, 13 Pa. St. 104.

A provision that certain property should be "exempt from all taxation by state or local laws, for any purpose whatever." *Zable v. Louisville Baptist Orphans' Home*, 92 Ky. 89.

An exemption from taxation "for any city purpose." *Farwell v. Des Moines Brick Mfg. Co.*, 97 Iowa 286.

A provision in the charter of a corporation for the payment by it of a state tax, and that "no other tax or impost shall be levied or assessed upon said company," does not exempt it from assessments for local improvements, for the word "assess" is used merely to describe the act of levying the tax or impost, and not to describe special levies for public improvements. *State v. Jersey City*, 42 N. J. L. 97.

For further illustrations the reader is referred to the cases cited above.

Express Provision Against Relief from Local Assessments. — Chapter 173 of *Wisconsin Laws 1860*, exempting from taxation property necessarily used in operating any railroad within the state, contained an express proviso that such property should be subject to special assessments for local improvements within cities and incorporated villages. *Milwaukee, etc.*, R. Co. v. *Milwaukee*, 34 Wis. 271.

When Existence of Exemption May Influence Mode of Assessment. — In assessing for local improvements the depot of a railroad company which possesses an exemption from taxation, supposed benefits arising from the probable increase in business which will result from the increased facilities of access to the depot cannot be made the basis of the assessment, for an assessment on that principle would be simply a tax on the business of the company, in violation of its privilege of exemption from taxation. *State v. Jersey City*, 36 N. J. L. 56.

1. Canada Doctrine. — *Les Ecclésiastiques, etc.*, v. *Montreal*, 16 Can. Sup. Ct. Rep. 399, 9 Can. L. T. 291, *reversing* *Montreal L. R.* 4 Q. B. 1, and consequently *affirming* *Montreal L. R.* 2 Super. Ct. 265, which the latter case *reversed*; *Montreal v. Christ Church Cathedral*, *Montreal L. R.* 4 Super. Ct. 13, 33 L. C. Jur. 89. See also *Haynes v. Copeland*, 18 U. C. C. P. 150.

2. Texas Doctrine. — In *Texas* it is considered that the exemptions from taxation granted by the constitution include all taxation, special as well as general, and that, therefore, property within the exemptions is not subject to assessments for city improvements, the court considering that the purposes of the exemption obtain against assessments as clearly as against general taxation. *Harris County v.*

Whether the Rule Applies to Exemptions of Public Property. — The general rule above set out has been applied in cases where the exemption granted was to public property, and such property has been subjected to local assessments, notwithstanding such grant of exemption;¹ but there are other cases in which it has been considered that as the immunity of public property from taxation does not depend upon any statutory grant, and the reason for such immunity applies as well to such local assessments as to general taxation, public property cannot be subjected to such assessments in the absence of some express provision of law making it liable thereto.²

(b) **Express Exemption from Assessments** — *aa. POWER TO GRANT.* — It is not to be implied from the rule laid down above that the legislature has not power to exempt from local assessment as well as from general taxation, for in the absence of any constitutional restrictions such a power doubtless exists.³ It has been held, however, that a constitutional provision that certain property may be exempted "from taxation" by the General Assembly impliedly forbids any exemption from special assessments.⁴

bb. WHAT AMOUNTS TO. — Grants of exemption from "taxation and assessment" or in similar terms have been frequently held to include immunity from local assessments, so that all the words of the grants might be given effect.⁵ But the court of *Kentucky* has held otherwise,⁶ and in *New York* an exemption from "public taxes, rates, and assessments" has been held not to extend to assessments of a local nature.⁷

Boyd, 70 Tex. 237. In this case the court does not appear to have attached any particular importance to the fact that the property sought to be assessed consisted of lots belonging to the county, and on which the county court house was situated. Compare *Allen v. Galveston*, 51 Tex. 302, in which case the court recognized the distinction between taxation and assessments for local improvements.

1. **Rule Applies to Exemptions of Public Property.** — *Adams County v. Quincy*, 130 Ill. 566; *McLean County v. Bloomington*, 106 Ill. 209; *Sioux City v. Independent School Dist.*, 55 Iowa 150; *Clinton v. Henry County*, 115 Mo. 557; *Hassan v. Rochester*, 67 N. Y. 528; *Smith v. Buffalo*, 90 Hun (N. Y.) 118. See also *St. Louis Public Schools v. St. Louis*, 26 Mo. 468.

2. **Doctrine that Public Property Is Exempt from Local Assessments.** — *Board of Improvement v. School Dist.*, 56 Ark. 354, 35 Am. St. Rep. 108, 37 Am. & Eng. Corp. Cas. 392; *Fagan v. Chicago*, 84 Ill. 227; *Baltimore County v. Maryland Hospital*, 62 Md. 127; *Worcester County v. Worcester*, 116 Mass. 193, 17 Am. Rep. 159; *State v. Levee Com'rs*, 75 Miss. 132.

3. **Legislature May Exempt from Local Assessments.** — *Doyle v. Austin*, 47 Cal. 353; *Edgerton v. Huntington School Tp.*, 126 Ind. 261, 33 Am. & Eng. Corp. Cas. 163; *Milwaukee Electric R., etc., Co. v. Milwaukee*, 95 Wis. 42.

4. **Implied Prohibition.** — *Chicago v. Baptist Theological Union*, 115 Ill. 245; *Chicago University v. People*, 118 Ill. 565.

5. **Effect of Exemption from "Taxation and Assessment," etc.** — *First Div. St. Paul, etc., R. Co. v. St. Paul*, 21 Minn. 526; *St. Paul v. St. Paul, etc., R. Co.*, 23 Minn. 469; *State v. St. Paul*, 36 Minn. 529; *Barry v. Wesleyan Cemetery Assoc.*, 10 Mo. App. 587; *State v. Newark*, 36 N. J. L. 478, 13 Am. Rep. 464, *reversing* 35 N. J. L. 157; *Mt. Pleasant Cemetery Co. v. Newark*, 50 N. J. L. 66; *Hudson County Catholic Protectory v. Kearney Tp.*, 56 N. J.

L. 385; *Swan Point Cemetery v. Tripp*, 14 R. I. 199.

Exemption Extends to Assessments Not in Existence When Grant Was Made. — A provision in the charter of a corporation exempting its property "from all taxes and assessments" will relieve it from street assessments or sewer assessments, even though sewer assessments were not in existence when the charter was granted, for they are similar to street assessments, which did exist and were within the exemption. *Swan Point Cemetery v. Tripp*, 14 R. I. 199.

Exemption from "Civil Impositions." — The provision in the charter of Harvard College exempting its property up to a certain amount from "all civil impositions, taxes, and rates" exempts it from an assessment for a portion of the cost of a public improvement, such as widening a street. *Harvard College v. Boston*, 104 Mass. 470.

6. **Contrary Doctrine in Kentucky.** — An exemption of certain property "from assessment and taxation under the revenue laws of the commonwealth," and also under ordinances of the city of Louisville, does not exempt such property from local assessment for the improvement of a street. *Kilgus v. Orphanage of Good Shepherd*, 94 Ky. 439, 15 Ky. L. Rep. 318. In support of this position, the court cited *State v. Newark*, 35 N. J. L. 157, which case was reversed by *State v. Newark*, 36 N. J. L. 478, 13 Am. Rep. 464, cited *supra*.

7. **Exemption from "Public Taxes, Rates, and Assessments."** — A provision exempting the property of certain corporations from "all public taxes, rates, and assessments" does not exempt one of such corporations from an assessment upon its lands levied by the city to pay the expenses of constructing a sidewalk, for such an assessment is private and local in its nature. *Buffalo City Cemetery v. Buffalo*, 46 N. Y. 506. But compare *State v. St. Paul*,

4. What Property Is Within Exemption — *a.* **GENERAL RULE.** — A grant of exemption is, as a rule, made in reference to some particular property or class of property belonging to the grantee, rather than to all property which the grantee may own or acquire. In such case the exemption will be strictly confined to property coming within the terms of the grant.¹ Where, however, there is a manifest legislative intention that the exemption shall extend to all

36 Minn. 529, *supra*, in which an exemption from "all public taxes and assessments" was construed to relieve from local assessments.

1. Exemption of Certain Kinds of Property Only Strictly Limited by Terms of Grant. — A law that declares that the stock of a company shall be exempt from taxation implies that nothing but the stock shall be exempt. *New Orleans v. New Orleans Canal, etc., Co.*, 32 La. Ann. 104.

The exemption of "houses for public worship or burying grounds" in the *Maryland Act of 1841*, c. 23, does not exempt from taxation bank stock and other property held by or in trust for religious institutions, whether incorporated or otherwise. *Tax Cases*, 12 Gill & J. (Md.) 117.

Stocks and personal property belonging to a seminary and used to produce income for its support are not exempt from taxation under chapter 260 of the *Maryland Act of 1876* which exempts "hospitals or asylums, charitable or benevolent institutions, so far as used for the benefit of the indigent and afflicted, and the ground which the buildings used as such hospitals, asylums, charitable or benevolent institutions shall actually cover." And this is true although the seminary itself is within the exemption as a benevolent or charitable institution. *Appeal Tax Ct. v. St. Peter's Academy*, 50 Md. 321.

An endowment of a religious society, college, academy, seminary of learning, or public library, consisting of land, is not exempt from taxation under the fifth section of the supplement of April 11, 1866, to the *New Jersey Tax Act*, which exempts "the endowment or fund" of such societies. The connection in which the terms "endowment" and "fund" are used shows that they are used as words *ejusdem generis* and that they are employed to signify property other than land. That this is true is clearly shown by the context, which exempts the buildings of such associations and the land whereon they are situated so far as may be necessary for the uses of the institutions, with a further limitation that that exemption shall not extend beyond five acres of land for such building. *State v. Krollman*, 38 N. J. L. 574, *affirming* 38 N. J. L. 323; *State v. Lyon*, 32 N. J. L. 360.

A provision in a city charter that merchants and others paying a license or specific tax on their business shall be exempt from *ad valorem* taxation thereon does not exempt from *ad valorem* taxation the property of a gas company used in the manufacture and distribution of gas, although such company has paid a license, for the business of manufacturing and selling gas is entirely distinct from property owned and used for that purpose. *Newport Light Co. v. Newport*, (Ky. 1892) 20 S. W. Rep. 434.

The charter of Harvard College granted to

it an exemption from taxation as to its lands, etc., not exceeding the value of five hundred pounds per annum. This grant began to operate on the property then belonging to the college and applied to such as should afterwards be acquired until its real estate should exceed in value five hundred pounds per year, after which all real estate acquired by the college would be liable to taxation unless exempted therefrom by subsequent legislative acts. *Hardy v. Waltham*, 7 Pick. (Mass.) 108.

Exemption of Land Does Not Include Timber Severed Therefrom. — Logs cut for the purpose of sale by a railroad company upon lands belonging to it which are exempt from taxation may be taxed. *State v. Northern Pac. R. Co.*, 39 Minn. 25.

Exemptions Not Applicable to Property Acquired After Grant. — A statutory provision exempting from taxation "the capital stock and assets" of a certain corporation "which now are * * * liable to taxation" cannot be extended to assets which are afterwards acquired by the corporation, but covers only those which it holds at the time when the exemption is granted. *Union Canal Co. v. Dauphin County*, 3 Brews. (Pa.) 124.

The exemptions from taxation under the *English Land Tax Act* applied only to institutions which were in existence at the time when the tax was made perpetual. *Colchester v. Kewney*, L. R. 1 Exch. 368, 35 L. J. Exch. 204, 12 Jur. N. S. 743, 14 L. T. N. S. 888, 14 W. R. 994, 4 H. & C. 445.

Exemption of Personal Property, etc., Includes Bank Stock. — The exemption of "the personal property, franchise, and business" of insurance companies, granted by *New York Laws 1886*, c. 679, § 4, exempts such corporations from taxation on shares of bank stock held by them. *Etna Ins. Co. v. New York*, 153 N. Y. 331, *affirming* 7 N. Y. App. Div. 145, which *affirmed* 14 Misc. Rep. (N. Y. Supreme Ct.) 145.

Exemption of "Personal Property" Includes Trust Fund Held for Grantee. — An accumulating fund held in trust for the future benefit of an incorporated educational institution is, for the purpose of taxation, deemed to be the property of the institution, and therefore is exempt from taxation under *Pub. Stat. Massachusetts*, c. 11, § 5, cl. 3, which exempts "the personal property of literary, benevolent, charitable, and scientific institutions incorporated within this commonwealth." *Williston Seminary v. Hampshire County*, 147 Mass. 427. In this case it was further considered that the provision of *Pub. Stat.*, c. 11, § 20, cl. 6, that such an accumulating fund shall be assessed to the person for whose benefit it is held, does not mean that it shall be assessed at all events to such person irrespective of exemptions, but merely that such shall be the method of taxation when such a fund is taxed.

property which the grantee may hold or own, full effect will be given to it.¹

b. EXEMPTIONS DEPENDENT UPON USE OF PROPERTY — (1) *General Principles*. — A very large proportion of the exemptions customarily granted are dependent for their existence upon the use of the property exempted; that is to say, the exemption does not attach absolutely to the property of the beneficiary, but arises from the fact that it is used for some purpose which the legislature has seen fit to foster by relieving it from the burden of taxation.² As these exemptions will be specifically treated in another part of this article,³ this section will be confined to a statement of the general principles which apply to all such exemptions. These may be epitomized as follows: When the legislature exempts from taxation property used for a specified purpose, the exemption includes such property only as is directly and immediately used therefor,⁴

1. *Legislative Intent to Exempt All Property*. — *McHenry v. Alford*, 168 U. S. 651; *St. Anna's Asylum v. New Orleans*, 105 U. S. 362; *Osborn v. New York, etc., R. Co.*, 40 Conn. 491; *Savannah v. Solomon's Lodge*, 53 Ga. 93; *Kentucky Female Orphan School v. Louisville*, 100 Ky. 470; *New Orleans v. Poydras Asylum*, 9 La. Ann. 584; *Harvard College v. Kettell*, 16 Mass. 204, *approved in Hardy v. Waltham*, 7 Pick. (Mass.) 108; *Utica Cotton Mfg. Co. v. Oneida County*, 1 Barb. Ch. (N. Y.) 432; *Milwaukee Electric R., etc., Co. v. Milwaukee*, 95 Wis. 42.

2. *Exemption Dependent upon Use of Property*. — The exemption provided by the *Maryland* statutes, of the buildings of charitable and benevolent institutions and the grounds appurtenant thereto, contemplates only such buildings as are actually used by such institutions for their corporate purposes, and does not include buildings used to produce revenue. The exemption extends only to such buildings as are reasonably required for the uses of the institution. *Baltimore v. Grand Lodge, etc.*, 60 Md. 280.

It is the use, not the ownership, of property which determines whether or not it is exempt from taxation, under article II, § 1, of the *Kansas* Constitution, which exempts property "used exclusively for" certain enumerated purposes. *Washburn College v. Shawnee County*, 8 Kan. 344; *Vail v. Beach*, 10 Kan. 214.

A statute granting to an educational institution an exemption from taxation as to all lands, tenements, and personal estate given for its use makes the use and not the ownership the test of exemption. *Phillips Exeter Academy v. Exeter*, 58 N. H. 306, 42 Am. Rep. 589.

Under the *Maine* statutes (Rev. Stat. 1883, tit. I, c. 6, § 6) the property of religious, benevolent, and charitable institutions, used for "their own purposes," is exempt from taxation, but the property of all such institutions not directly so used, and from which revenue is derived, is expressly made taxable. *Foxcroft v. Piscataquis Valley Camp Meeting Assoc.*, 86 Me. 78; *Auburn v. Young Men's Christian Assoc.*, 86 Me. 244.

An exemption of all the real estate held by a railroad company "for right of way, for station places of whatever kind, and for workshop location" covers only such real estate as is actually held and used for the purposes expressed. *Richmond, etc., R. Co. v. Alamance County*, 76 N. Car. 212.

Exemption Held Not Dependent upon Use. — An act of the legislature creating a religious corporation authorized it to acquire a tract of land not exceeding a certain amount, and declared that the said land "shall be used solely and exclusively for such religious, benevolent, or charitable purposes * * * as the said corporation, with the written consent of the ecclesiastical authority of the said diocese, may from time to time determine, and the same shall be exempt from taxes and assessments." The corporation acquired property which was never used for the purposes of any church, hospital, or benevolent or charitable institution, but was rented and all income and revenue received therefrom devoted to the purposes of the corporation, such use being approved by the ecclesiastical authority of the diocese as required by law. It was held that the exemption from taxation extended to this property, the court saying: "The only restriction as to the use of the land was such uses and purposes as should be approved or determined by the ecclesiastical authority of the diocese of Long Island; but it must be noted that that provision is independent and disconnected from the exemption. * * * The use is not made the test of exemption, but it is exempted at once, before it can be put to any use, and without regard to use. The statute does not say the property shall be exempt only so long as or provided it is used for a church or hospital building, but the exemption is immediate and absolute." *People v. Dohling*, 6 N. Y. App. Div. 86.

3. *Specific Treatment of Exemptions*. — See *infra*, this title, *Particular Subjects of Exemption*, for a treatment of the specific application of the general rules set out in this section.

4. *Property Must Be Used for Designated Purposes* — *United States*. — *Home of Friendless v. Rouse*, 8 Wall. (U. S.) 430; *Bank of Commerce v. Tennessee*, 104 U. S. 493.

Arkansas. — *School Dist. v. Howe*, 62 Ark. 481; *Brodie v. Fitzgerald*, 57 Ark. 445.

Georgia. — *Massenburg v. Grand Lodge, etc.*, 81 Ga. 212.

Illinois. — *First M. E. Church v. Chicago*, 26 Ill. 482; *Presbyterian Theological Seminary v. People*, 101 Ill. 578. See also *People v. Young Men's Christian Assoc.*, 157 Ill. 403; *Matter of Swigert*, 123 Ill. 267; *Monticello Female Seminary v. People*, 106 Ill. 398, 46 Am. Rep. 702.

Indiana. — *Indianapolis v. Grand Master*, 25 Ind. 518.

and cannot be extended to other property, even though the income derived

Iowa. — *Mulroy v. Churchman*, 52 Iowa 238; *Ft. Des Moines Lodge No. 25 v. Polk County*, 56 Iowa 34; *Mitchellville v. Board of Supervisors*, 64 Iowa 554; *Foy v. Coe College*, 95 Iowa 689. See also *Kirk v. St. Thomas' Church*, 70 Iowa 287.

Kansas. — *Stahl v. Kansas Educational Assoc.*, 54 Kan. 542. See also *Ottawa University v. Franklin County*, 48 Kan. 460.

Louisiana. — *New Orleans v. Congregation, etc.*, 15 La. Ann. 389; *New Orleans v. St. Patrick's Hall Assoc.*, 28 La. Ann. 512. See also *New Orleans v. Poydras Orphan Asylum*, 33 La. Ann. 850; *Grand Lodge, etc. v. New Orleans*, 46 La. Ann. 717; *New Orleans Female Orphan Asylum v. Houston*, 37 La. Ann. 68; *First Presb. Church v. New Orleans*, 30 La. Ann. 259, 31 Am. Rep. 224.

Maine. — *Foxcroft v. Straw*, 86 Me. 76; *Foxcroft v. Piscataquis Valley Campmeeting Assoc.*, 86 Me. 78; *Auburn v. Young Men's Christian Assoc.*, 86 Me. 244.

Maryland. — *Appeal Tax Ct. v. Baltimore Academy*, 50 Md. 437; *Baltimore v. Grand Lodge, etc.*, 60 Md. 280; *Redemptorists v. Howard County*, 50 Md. 449; *Appeal Tax Ct. v. St. Peter's Academy*, 50 Md. 321; *Frederick County v. Sisters of Charity*, 48 Md. 34.

Massachusetts. — *South Cong. Meeting House v. Lowell*, 1 Met. (Mass.) 538; *Lynn Workingmen's Aid Assoc. v. Lynn*, 136 Mass. 283; *Chapel of Good Shepherd v. Boston*, 120 Mass. 212; *Salem Lyceum v. Salem*, 154 Mass. 15; *Williams College v. Assessors*, 167 Mass. 505; *St. James Educational Institute v. Salem*, 153 Mass. 185; *Mt. Hermon Boys' School v. Gill*, 145 Mass. 139. See also *Harvard College v. Kettell*, 16 Mass. 204; *Wesleyan Academy v. Wilbraham*, 99 Mass. 599.

Michigan. — *Detroit Young Men's Soc. v. Detroit*, 3 Mich. 172.

Minnesota. — *Hennepin County v. St. Paul, etc.*, R. Co., 42 Minn. 238.

Missouri. — *State v. Lange*, 16 Mo. App. 468.

Montana. — *Montana Catholic Missions v. Lewis, etc., County*, 13 Mont. 559.

Nebraska. — *First Christian Church v. Beatrice*, 39 Neb. 432.

New Jersey. — See *Englewood School v. Chamberlain*, 55 N. J. L. 292.

New York. — *People v. Collison*, 22 Abb. N. Cas. (N. Y. Supreme Ct.) 52. See also *People v. Commissioners of Taxes*, 6 Hun (N. Y.) 109, affirmed by 64 N. Y. 656; *People v. Barber*, 42 Hun (N. Y.) 27, affirmed by 106 N. Y. 669; *People v. Commissioners of Taxes*, 10 Hun (N. Y.) 246.

North Carolina. — *Stewart v. Davis*, 3 Murph. (7 N. Car.) 244; *United Brethren of Salem v. Forsyth County*, 115 N. Car. 489.

Ohio. — *Cincinnati College v. State*, 19 Ohio 110.

Oregon. — *Hibernian Benev. Soc. v. Kelly*, 28 Oregon 173.

Pennsylvania. — *Pennsylvania Hospital v. Delaware County*, 169 Pa. St. 305, 36 W. N. C. (Pa.) 547; *Philadelphia v. Jewish Hospital Assoc.*, 148 Pa. St. 454; *Philadelphia v. Ladies' United Aid Soc.*, 154 Pa. St. 12, affirming 12 Pa. Co. Ct. Rep. 346, 1 Pa. Dist. Rep. 249; *Thiel College v. Mercer County*, 101 Pa. St.

530; *Christian Assoc. v. McDonough*, 7 W. N. C. (Pa.) 208; *Society v. City*, 4 W. N. C. (Pa.) 213; *Township v. Cemetery Co.*, 1 Woodw. (Pa.) 323; *Re Historical Soc.*, 13 Montg. Co. Rep. (Pa.) 205; *Christian Assoc. v. City*, 1 Lack. Jur. (Pa.) 43; *Pennsylvania Hospital v. Delaware County*, 15 Pa. Co. Ct. Rep. 548; *Pittsburgh v. Home of Friendless*, 3 Pa. Co. Ct. Rep. 390; *Pittsburgh v. Mercantile Library Hall Co.*, 3 Pa. Co. Ct. Rep. 519. See also *Philadelphia v. State University*, 44 Pa. St. 360.

Texas. — *Morris v. Lone Star Chapter No. 6, etc.*, 68 Tex. 698; *Red v. Morris*, 72 Tex. 554. See also *St. Edwards College v. Morris*, 82 Tex. 1; *Cassiana v. Ursuline Academy*, 64 Tex. 673.

Wisconsin. — *Green Bay, etc., Canal Co. v. Outagamie County*, 76 Wis. 587.

Canada. — *Les Commissaires d'Ecoles, etc. v. Les Sœurs, etc.*, 12 Can. Sup. Ct. Rep. 45.

Property exempted from taxation in the hands of its owner, while used for the purpose on account of which exemption was given, will doubtless become subject to taxation if leased for any period and to be used for any purpose which does not of itself give the exemption, unless in cases in which the exemption is given by the constitution or under a contract which would be impaired by taxation. *Daugherty v. Thompson*, 71 Tex. 192.

Occasional Use for Favored Purpose Cannot Give Exemption. — Capital invested to be habitually used and primarily intended to be used for a particular purpose not giving exemption from taxation cannot become exempt by reason of its being occasionally, exceptionally, and accidentally used for another purpose which does give an exemption. *Robertson v. New Orleans*, 45 La. Ann. 617.

Trust Fund Held for Purposes Not Giving Exemptions. — The exemption from taxation given by Pub. Stat. *Massachusetts*, c. 11, § 5, cl. 3, to "the personal property of literary, benevolent, charitable, and scientific institutions incorporated within this commonwealth and the real estate belonging to such institutions, occupied by them or their officers for the purposes for which they were incorporated," does not extend to property held by such an institution as a trustee for purposes which do not of themselves exempt the property from taxation, as such property does not fall within either of the classes described in the statute. *Salem Marine Soc. v. Salem*, 155 Mass. 329.

Illustrations of Uses Held to Deprive Property of Exemption. — Lots owned by a camp-meeting association and let to members for the purpose of building cottages are not exempt from taxation under the *Maine* statute (Rev. Stat. 1883, tit. 1, c. 6, § 6) exempting the property of religious, charitable, or benevolent societies or institutions when used for "their own purposes," but are expressly subjected to taxation by the further provision of the statute that all other property of such institutions shall be liable thereto. *Foxcroft v. Straw*, 86 Me. 76; *Foxcroft v. Piscataquis Valley Campmeeting Assoc.*, 86 Me. 78.

And the same is true of real estate belonging to such an association, of which a part is

therefrom is entirely devoted to furthering such purposes.¹

used for a stable and yard where horses are stabled for hire, and another part let for an eatinghouse or for "victualing purposes." *Foxcroft v. Piscataquis Valley Campmeeting Assoc.*, 86 Me. 78.

How a Fund May Be "Exclusively Used" for Purposes Giving Exemption.—An exemption of the property belonging to religious, charitable, or educational institutions "set apart and exclusively used" for religious and charitable or educational purposes includes a fund belonging to such an institution, the interest of which is applied to the purposes enumerated, for in no other way can the fund be applied to such uses. But any part of such fund of which the interest was not so applied, but was allowed to accumulate, would not be exempt. *United Brethren of Salem v. Forsyth County*, 115 N. Car. 489.

Officers of Institution Holding Property the Judges of Manner of Using, etc.—*Gen. Stat. Massachusetts*, c. 11, § 5, cl. 3, exempted from taxation "the real estate belonging to such [benevolent] institutions, occupied by them or their officers for the purposes for which they were incorporated." No consideration of public policy required that the court should confine this exemption to narrower limits than the terms of the statute fairly implied, and what lands were reasonably required for, and what use of lands would promote, the purposes for which such an institution was incorporated were questions to be determined by its own officers. In the absence of anything to show abuse, or otherwise to impeach their determination, it was sufficient to entitle land to the exemption that it was intended for and appropriated to those purposes. *Massachusetts General Hospital v. Somerville*, 101 Mass. 319.

Record Title to Property Need Not Show Devotion to Uses Giving Exemption.—Under the *Vermont* statute exempting property "used for public, pious, or charitable uses," such property is exempt although the deed or record title may not show that it is devoted to such uses. *Willard v. Pike*, 59 Vt. 202.

Exemption Held to Extend to Uncompleted Building Abandoned and Held for Sale.—The exemption granted by the *Pennsylvania* Constitution and laws to institutions of purely public charity extends to a lot purchased by such an institution for its intended purpose and upon which it has commenced to erect an appropriate building, though such building is abandoned before completion, and held for sale in order that the proceeds may be used for the erection of a new building in another location, where there is nothing to show that the lot is held for investment purposes or for any purpose of profit. Such a case is within the provision of the Act of June 4, 1879 (P. L. 90), that "nothing in the act to which this is a supplement [Tax Act of 1874] shall be taken as implying that any building, though incomplete or in course of construction, shall be subject to taxation, where said building was intended under provision of said act to be exempt from taxation when completed." *Philadelphia v. Keystone Battery A.*, 169 Pa. St. 526, 36 W. N. C. (Pa.) 482.

Purchase of Property with Exempt Funds.—Where the charter of a university exempted from taxation money and lands which had been donated to it "so long as the same are held or used for the purposes of the institution," and with a portion of the money donated the institution has bought other land which is held and used exclusively for its purposes, such land is not taxable. *Northampton County v. Lehigh University*, 13 Pa. Co. Ct. Rep. 659.

But real property which is not used for the purposes of the institution to which it belongs, but is leased, and therefore within an express exception to the statutory exemption granted to the property of such institution, is not exempt merely because the money with which it was purchased was exempt before being invested in real estate. *Ft. Des Moines Lodge No. 25 v. Polk County*, 56 Iowa 34.

Effect of Constitutional Grant of Power to Exempt Property Necessary for Certain Purposes.—Under the provision of the *Illinois* Constitution of 1848, art. 9, § 2, that such property "as the General Assembly may deem necessary for schools, religious and charitable purposes, may be exempted from taxation," it was not competent for the General Assembly to exempt from taxation any property owned by educational, religious, or charitable corporations which was not in itself used directly in aid of the purposes for which the corporations were created, but which was held for profit merely, although the profits were to be devoted to the purposes of the corporations. *Northwestern University v. People*, 80 Ill. 333, 22 Am. Rep. 187.

1. Use of Income for Proper Purposes Does Not Exempt Property Producing It—*Arkansas*.—*Brodie v. Fitzgerald*, 57 Ark. 445.

Georgia.—*Richmond County Academy v. Bohler*, 80 Ga. 159.

Illinois.—*First M. E. Church v. Chicago*, 26 Ill. 482. See also *Northwestern University v. People*, 80 Ill. 333, 22 Am. Rep. 187, *supra*.

Indiana.—*Indianapolis v. Grand Master*, 25 Ind. 518.

Iowa.—*Ft. Des Moines Lodge No. 25 v. Polk County*, 56 Iowa 34; *Mitchellville v. Board of Supervisors*, 64 Iowa 554.

Kansas.—*St. Mary's College v. Crowl*, 10 Kan. 442; *Stahl v. Kansas Educational Assoc.*, 54 Kan. 542.

Louisiana.—*State v. Board of Assessors*, 34 La. Ann. 574; *New Orleans v. Congregation, etc.*, 15 La. Ann. 389; *State v. Board of Assessors*, 35 La. Ann. 668; *New Orleans v. New Orleans Mechanics' Soc.*, 27 La. Ann. 436; *New Orleans v. St. Patrick's Hall Assoc.*, 28 La. Ann. 512. See also *New Orleans v. Poydras Orphan Asylum*, 33 La. Ann. 850; *New Orleans Female Orphan Asylum v. Houston*, 37 La. Ann. 68.

Maryland.—*Redemptorists v. Howard County*, 50 Md. 449; *Frederick County v. Sisters of Charity*, 48 Md. 34; *Appeal Tax Ct. v. St. Peter's Academy*, 50 Md. 321.

Massachusetts.—*South Cong. Meeting-house v. Lowell*, 1 Met. (Mass.) 538; *Salem Lyceum v. Salem*, 154 Mass. 15; *Williams College v. Assessors*, 167 Mass. 505; *St. James Educa-*

(2) *Requirement that Use Be Exclusive.* — Exemptions are frequently lim-

tional Institute *v.* Salem, 153 Mass. 185; Mt. Hermon Boys' School *v.* Gill, 145 Mass. 139; Chapel of Good Shepherd *v.* Boston, 120 Mass. 212.

Nebraska. — See First Christian Church *v.* Beatrice, 39 Neb. 432.

New York. — People *v.* Sayles, 32 N. Y. App. Div. 197, reversing 23 Misc. Rep. (N. Y.) 1; People *v.* Sayles, 32 N. Y. App. Div. 203.

North Carolina. — United Brethren of Salem *v.* Forsyth County, 115 N. Car. 489.

Ohio. — Cleveland Library Assoc. *v.* Pelton, 36 Ohio St. 253; Cincinnati College *v.* State, 19 Ohio 110.

Oregon. — Hibernian Benev. Soc. *v.* Kelly, 28 Oregon 173.

Pennsylvania. — Young Men's Christian Assoc. *v.* Donohugh, 13 Phila. (Pa.) 12, 36 Leg. Int. (Pa.) 284; Appeals from Taxation, 1 Phila. (Pa.) 418, 10 Leg. Int. (Pa.) 6; Pennsylvania Hospital *v.* Delaware County, 169 Pa. St. 305, 36 W. N. C. (Pa.) 547; American Sunday School Union *v.* Philadelphia, 161 Pa. St. 307, affirming 14 Pa. Co. Ct. Rep. 213; Philadelphia *v.* Barber, 160 Pa. St. 123, 34 W. N. C. (Pa.) 155; Mercantile Library Co. *v.* Philadelphia, 161 Pa. St. 155, affirming 14 Pa. Co. Ct. Rep. 204, 3 Pa. Dist. Rep. 139; Christian Assoc. *v.* McDonough, 7 W. N. C. (Pa.) 208. See also Township *v.* Cemetery Co., 1 Woodw. (Pa.) 323; Presbyterian Church *v.* Montgomery County, 3 Grant's Cas. (Pa.) 245.

Texas. — Red *v.* Morris, 72 Tex. 554; Morris *v.* Lone Star Chapter No. 6, etc., 68 Tex. 698.

Virginia. — See Petersburg *v.* Petersburg Benev. Mechanics' Assoc., 78 Va. 431, 8 Am. & Eng. Corp. Cas. 484.

Canada. — Les Commissaires d'Ecoles, etc., *v.* Les Sœurs, etc., 12 Can. Sup. Ct. Rep. 45.

Rents Exempt. — Although an exemption of property set apart and exclusively used for charitable, religious, and educational purposes does not extend to property which is rented and the rents applied to such purposes, the rents themselves are exempt. United Brethren of Salem *v.* Forsyth County, 115 N. Car. 489.

Express Grant of Exemption Based on Use of Income. — Under a former statutory provision of *Rhode Island* exempting from taxation "houses for religious worship" "and the land used in connection therewith so far as the same is held, occupied, and used for, and the rents and profits thereof are applied to," religious purposes, it was held that the interest of a religious society in lands leased by it and upon which it had erected a building partly occupied by it for religious worship and partly rented for stores and other purposes — the rents and profits being appropriated exclusively for religious uses — was exempt. Second Universalist Soc. *v.* Providence, 6 R. I. 235.

The *Virginia* Act of March 16, 1874, exempted from taxation the real estate owned by Masonic, Odd Fellows, and other like beneficial associations, where the proceeds arising from the property were devoted exclusively to charity or school purposes, provided that no lot or building which was used wholly or partially for any private purpose, or for profit, should be exempt. A later act (Acts 1876,

1877, pp. 302 303), added to this proviso the following words: "But where a part of such proceeds are used for charitable or school purposes, then to that extent the said property shall be exempt from taxation." It was held that in adding these words the legislature intended to include within the exemption property of such association used for "any private purpose or for profit," and to exempt it to the extent that the proceeds were applied to the purposes mentioned. Petersburg *v.* Petersburg Benev. Mechanics' Assoc., 78 Va. 431, 8 Am. & Eng. Corp. Cas. 484.

Effect of Provision for Favorable Construction of Exemption. — The charter of a university provided that "the college estate * * * shall be freed and exempted from all taxes" and that the charter should in every respect be construed most favorably to the corporation. It was held that in view of this provision the exemption applied to real estate owned by the corporation as a part of its endowment but rented for general business uses. Brown University *v.* Granger, 10 R. I. 704.

Contrary Doctrine in Kentucky. — That the rule stated in the text does not always prevail is apparent from the case of Henderson *v.* Strangers' Rest Lodge No. 13, (Ky. 1891) 17 S. W. Rep. 215. In that case the charter of a charitable institution had exempted its property from taxation and authorized the erection of a building and the application of rents derived therefrom to the payment of the cost of construction. Such building was erected, and the parts not occupied by the organization were rented out, the rents being applied to no other purpose except that of charity and paying the cost of erecting the structure. It was held that the building was exempt from taxation.

Exemption of Property "Occupied" by Grantee. — But even in *Kentucky* the court has not departed far from the rule laid down in the text, for in the case of Louisville *v.* Board of Trade, 90 Ky. 409, it was held that the provision of the Act of 1873, exempting from state taxes real estate held by the Louisville board of trade in the city of Louisville, not exceeding a certain amount, and any improvements thereon "so long as such property shall be occupied by said board of trade for the purposes contemplated in its organization," and authorizing the general council of the city of Louisville to exempt such property "so held and occupied" from municipal taxation, did not exempt or authorize an exemption of a large building erected on such property, of which only two small rooms were in actual use by the board of trade for the purposes of its organization, and all of the balance was rented out, although the rents were applied to the purposes of the organization.

Missouri Doctrine. — In *North St. Louis Gymnastic Soc. v. Hudson*, 12 Mo. App. 342, affirmed 85 Mo. 32, it was held that school property which was, by the charter of the corporation owning and using it, exempt from taxation "as long as said property is used only for the purposes of education" did not lose its exemption because two rooms on the first floor of the building were rented out, the rent

ited to property "exclusively" used for certain enumerated purposes,¹ and in such cases the general rule is that the exemption will be lost by a use of the property for other purposes in connection with those enumerated.²

(3) *Occasional Use of Property for Purposes Not Giving Exemption.* — In some cases it has been held that where an exemption of property is dependent upon its being used for certain specified purposes it is sufficient that it is mainly and primarily used therefor and that it will not become taxable on account of being occasionally and incidentally used for purposes which are subsidiary thereto.³ And the rule has been applied even in cases where the use was required to be exclusive.⁴ But the *Kansas* court holds the contrary opinion.⁵

being used for defraying the legitimate expenses of conducting the school, paying the salaries of teachers, keeping the building in repair, and discharging an indebtedness incurred by the corporation in erecting the building. The court considered that the corporation used the building only for the purpose of education, for by its charter the corporation was purely a benevolent one, and could pay neither interest or dividends. The court distinguished the case of *Chapel of Good Shepherd v. Boston*, 120 Mass. 212, on the ground that the grant of exemption in that case was only to the real estate of literary and charitable institutions to "be occupied by them or their officers for the purposes for which they were incorporated;" and *Cincinnati College v. State*, 19 Ohio 110, on the ground that the statute considered in that case provided that the buildings exempted "shall not be leased or otherwise used with a view to profit."

1. Requirement of Exclusive Use. — An exemption of property set apart and appropriated to certain purposes refers only to property which is specially and exclusively set apart and appropriated to such purposes and directly employed therefor. *Stewart v. Davis*, 3 Murph. (7 N. Car.) 244.

Object of Requirement. — The *New York* General Tax Law (Laws 1896, c. 908, as amended by Laws 1897, c. 371), limiting the exemption of the real estate of charitable, etc., corporations to such as is exclusively used for carrying out their purposes, was intended "to establish a system which should place exemptions of the real property of charitable corporations upon a basis of clearly defined equity, free from the unsystematic partialities of special favoritism, and free from the danger of hazarding their usefulness by embarking in outside enterprises." *People v. Sayles*, 32 N. Y. App. Div. 203.

The accumulation of large amounts of untaxed property by educational, charitable, religious, and other institutions is contrary to the fundamental rule requiring an equal rate of assessment and taxation; hence the constitution makes exclusive use and for a designated purpose the test of exemption, not mere ownership of the property. *Washburn College v. Shawnee County*, 8 Kan. 344.

2. Partial Use for Other than Enumerated Purposes Forfeits Exemption — *Colorado*. — See *County Com'rs v. Colorado Seminary*, 12 Colo. 497.

Illinois. — See *People v. Young Men's Christian Assoc.*, 157 Ill. 403; *Chicago v. People*, 80 Ill. 384; *Presbyterian Theological Seminary v. People*, 101 Ill. 578.

Indiana. — *Conklin v. Cambridge City*, 58 Ind. 130.

Kansas. — *St. Mary's College v. Crowl*, 10 Kan. 442; *Stahl v. Kansas Educational Assoc.*, 54 Kan. 542.

Louisiana. — See *State v. Board of Assessors*, 35 La. Ann. 668.

Michigan. — *Detroit Young Men's Soc. v. Detroit*, 3 Mich. 172.

Montana. — *Montana Catholic Missions v. Lewis, etc., County*, 13 Mont. 559.

Nebraska. — *Academy of Sacred Heart v. Irely*, 51 Neb. 755.

New Hampshire. — *Phillips Exeter Academy v. Exeter*, 58 N. H. 306, 42 Am. Rep. 589.

New Jersey. — See *State v. Paterson*, (N. J. 1898) 39 Atl. Rep. 655.

New York. — *Young Men's Christian Assoc. v. New York*, 113 N. Y. 187, reversing 44 Hun (N. Y.) 102.

North Carolina. — *Stewart v. Davis*, 3 Murph. (7 N. Car.) 244.

Pennsylvania. — *Philadelphia v. Barber*, 160 Pa. St. 123. Compare *Scranton Guard Assoc. v. Scranton*, 1 Pa. Co. Ct. Rep. 550.

South Carolina. — *State v. Newberry*, 12 Rich. L. (S. Car.) 339.

Texas. — See *Red v. Johnson*, 53 Tex. 284; *Red v. Morris*, 72 Tex. 554; *Edmonds v. San Antonio*, 14 Tex. Civ. App. 155; *Carter v. Patterson*, (Tex. Civ. App. 1897) 39 S. W. Rep. 1110.

3. Occasional Use for Other Purposes. — *Camden v. Camden Village Corp.*, 77 Me. 530; *Richmond, etc., R. Co. v. Alamance*, 84 N. Car. 504, 7 Am. & Eng. R. Cas. 339.

Temporary Leasing of Property. — *Northampton County v. Lafayette College*, 5 Pa. Co. Ct. Rep. 407, 45 Leg. Int. (Pa.) 246; *Willard v. Pike*, 59 Vt. 202.

Renting when Premises Must Otherwise Be Vacant. — In *New York* it has been held that an incorporated seminary did not waive or forfeit an exemption given by statute to its buildings and premises by leasing them during the usual vacation period in the summer for a boarding-house. *Temple Grove Seminary v. Cramer*, 98 N. Y. 121, affirming 26 Hun (N. Y.) 309.

Main Use Must Be For Purposes Giving Exemption. — *Salem Lyceum v. Salem*, 154 Mass. 15.

4. Rule Applies Though Use Required to Be Exclusive. — *Ramsey County v. Church of Good Shepherd*, 45 Minn. 229; *Scranton Guard Assoc. v. Scranton*, 1 Pa. Co. Ct. Rep. 550, 2 C. Pl. Rep. (Pa.) 217; *St. Mary's Church v. Tripp*, 14 R. I. 307. See also *People v. Dohling*, 6 N. Y. App. Div. 86.

5. Under the Kansas Constitution no property is exempt from taxation because it is used for

(4) *Property Held for Future Use.* — The preponderance of authority supports the view that where property is not used for purposes which would entitle it to exemption, the fact that it is owned by a corporation or association which aims to carry out such purposes and intends to use the property directly therefor at some future time will not relieve it from liability to taxation.¹

(5) *Use of Part of Property Only for Purposes Giving Exemption.* — It has frequently occurred that of a building or other property owned by an institution whose purposes were such as entitled it to exemption from taxation on property used therefor, a part only was used for such purposes, while other distinct portions were otherwise used, and the courts have allowed an exemption from taxation as to such part as was used for the favored purposes, or as to the proportion of the entire value of the property which such portion represented, but held the rest of the property taxable.²

educational purposes unless it is exclusively so used. Property used partly for educational purposes and partially for some other purpose is not exempt, even though it may be used mainly for educational purposes. *St. Mary's College v. Crowl*, 10 Kan. 442.

1. *Intention to Use at Future Time Does Not Give Exemption* — *Georgia.* — Ordinary *v. Central R., etc., Co.*, 40 Ga. 646.

Kansas. — *Washburn College v. Shawnee County*, 8 Kan. 344.

Louisiana. — *Enaut v. McGuire*, 36 La. Ann. 804, 51 Am. Rep. 14.

Massachusetts. — *Redemptorist Fathers v. Boston*, 129 Mass. 178.

Minnesota. — *Ramsey County v. Macalester College*, 51 Minn. 437; *Todd County v. St. Paul, etc., R. Co.*, 38 Minn. 163; *St. Paul v. St. Paul, etc., R. Co.*, 39 Minn. 112; *Ramsey County v. Chicago, etc., R. Co.*, 33 Minn. 537.

Montana. — *Montana Catholic Missions v. Lewis, etc., County*, 13 Mont. 559.

Nebraska. — *Academy of Sacred Heart v. Irely*, 51 Neb. 755; *First Christian Church v. Beatrice*, 39 Neb. 432.

New York. — *Trinity Church v. New York*, 10 How. Pr. (N. Y. Supreme Ct.) 138.

Ohio. — *Matlack v. Jones*, 2 Disney (Ohio) 2.

Pennsylvania. — *Grubb v. Weaver*, 19 Pa. Co. Ct. Rep. 609; *Thiel College v. Mercer County*, 101 Pa. St. 530.

Wisconsin. — See *Green Bay, etc., Canal Co. v. Outagamie County*, 76 Wis. 587.

Doctrine as to Intention Immediately to Devote Property to Use Giving Exemption. — In some jurisdictions it is considered that an exemption dependent upon the use of property for the purposes of a corporation will extend to property purchased by it in good faith with the present intention to apply it to such uses as soon as it may be made fit and suitable therefor, or held in good faith and reasonably necessary for the growth of the business, such property not being held for speculation or to meet a remote contingency or expectation of necessary use, or for mere incidental convenience. *Ramsey County v. Chicago, etc., R. Co.*, 33 Minn. 537; *Todd County v. St. Paul, etc., R. Co.*, 38 Minn. 163; *St. Paul v. St. Paul, etc., R. Co.*, 39 Minn. 112; *Ramsey County v. Macalester College*, 51 Minn. 437; *State v. Gaffney*, 34 N. J. L. 131, 133; *State v. Haight*, 35 N. J. L. 40; *State v. Binninger*, 42 N. J. L. 528. See also *Enaut v. McGuire*, 36 La. Ann. 804, 51 Am. Rep. 14.

Preparation for Use. — Land which has been purchased for the purpose of establishing and maintaining a hospital thereon by a benevolent and charitable institution or corporation, which is diligently proceeding with the preliminary measures necessary to the erection of the hospital, must be deemed to be then occupied by the corporation for the charitable purposes for which it was incorporated, and as such exempt from taxation under Gen. Stat. *Massachusetts*, c. 11, § 5, cl. 3. *New England Hospital v. Boston*, 113 Mass. 518.

The question which has arisen as to whether property on which a church is being erected is exempt as being used for public worship, or whether such unfinished building is a house of religious worship within an exemption of such houses, will be discussed in another part of this article. See *infra*, *Particular Subjects of Exemption* — *Religious Institutions*.

2. *Effect of Use of Part of Property Only for Purposes Giving Exemption* — *United States.* — *Bank of Commerce v. Tennessee*, 104 U. S. 493.

Georgia. — See *Massenburg v. Grand Lodge*, etc., 81 Ga. 212.

Illinois. — *First M. E. Church v. Chicago*, 26 Ill. 482.

Iowa. — *Mulroy v. Churchman*, 52 Iowa 238, 60 Iowa 717.

Louisiana. — *State v. Board of Assessors*, 34 La. Ann. 574.

Maine. — *Foxcroft v. Piscataquis Valley Campmeeting Assoc.*, 86 Me. 78; *Auburn v. Young Men's Christian Assoc.*, 86 Me. 244.

Maryland. — *Frederick County v. Sisters of Charity*, 48 Md. 34; *Appeal Tax Ct. v. St. Peter's Academy*, 50 Md. 321; *Baltimore v. Grand Lodge*, etc., 60 Md. 280.

Massachusetts. — *South Cong. Meetinghouse v. Lowell*, 1 Met. (Mass.) 538; *Cambridge v. Middlesex County*, 114 Mass. 337.

Michigan. — *Detroit Young Men's Soc. v. Detroit*, 3 Mich. 172.

New Jersey. — *State v. Leester*, 28 N. J. L. 103; *State v. Woodruff*, 36 N. J. L. 94.

New York. — *People v. Sayles*, 32 N. Y. App. Div. 197, 203.

Ohio. — *Cleveland Library Assoc. v. Pelton*, 36 Ohio St. 253; *Scott v. Athens*, 1 Ohio N. P. 94, 1 Ohio Dec. 84.

Oregon. — *Hibernian Benev. Soc. v. Kelly*, 28 Oregon 173.

Pennsylvania. — *Re Historical Soc.*, 13 Montg. Co. Rep. (Pa.) 205; *County v. Camp-*

(6) *When Use and Ownership Must Be Combined.* — Frequently statutes granting exemptions to property used for certain purposes are so worded as to require further that the property shall be owned by the person or corporation that devotes it to such purposes.¹ In such cases the ownership and use must combine in order to give the exemption,² and the fact that it is

Meeting Assoc., 3 Kulp (Pa.) 175; American Sunday School Union v. Philadelphia, 161 Pa. St. 307, affirming 14 Pa. Co. Ct. Rep. 213; Young Men's Christian Assoc. v. Donohugh, 13 Phila. (Pa.) 12, 36 Leg. Int. (Pa.) 284; Philadelphia v. Barber, 160 Pa. St. 123, 34 W. N. C. (Pa.) 155; Mercantile Library Co. v. Philadelphia, 161 Pa. St. 155, affirming 3 Pa. Dist. Rep. 139, 14 Pa. Co. Ct. Rep. 204. See also Howard Association's Appeal, 70 Pa. St. 344.

South Carolina. — See *Columbia v. Tindal*, 43 S. Car. 547.

Texas. — *Morris v. Lone Star Chapter No. 6*, etc., 68 Tex. 698.

Virginia. — *Petersburg v. Petersburg Benev. Mechanics' Assoc.*, 78 Va. 431, 8 Am. & Eng. Corp. Cas. 484.

See also *infra*, this title, *Particular Subjects of Exemption*, subdiv. 6. d. (4) *Apportionment of Exemption*.

Parts Need Not Be Separable by Definite Lines.

— The fact that a building belonging to a corporation which is entitled to an exemption as to all buildings belonging to it, actually occupied by such institution and not leased or otherwise used with a view of profit, is so constructed that the parts leased or otherwise used with a view of profit cannot be separated from the residue by definite lines is no obstacle to the valuation of such parts for the purposes of taxation, having reference to the taxable value of the entire property. *Cleveland Library Assoc. v. Pelton*, 36 Ohio St. 253.

Taxation on the Value of Rental Received. — Under the *Maryland* Act of 1876, c. 260, exempting the property belonging to benevolent and charitable institutions so far as used for the benefit of the indigent and afflicted, a building which is used partly for such purposes, and of which the other part is rented for various purposes, thus yielding a profit, is subject to taxation to the extent of the value of the rental thus received. *Appeal Tax Ct. v. Grand Lodge, etc.*, 50 Md. 421.

Manner of Assessing. — In *Auburn v. Young Men's Christian Assoc.*, 86 Me. 244, the court, per Peters, C. J., said: "The defendant's entire real estate, a portion of which was let for a boarding house and another portion for stores, was valued at the sum of twenty thousand dollars, and an assessment was made upon one-half of that sum as the value of the nonexempted portion of the property. This may not have been the most regular mode of assessment, but was regular enough to sustain an action for collecting the taxes, and there is no injustice in it."

Contrary Doctrine in Missouri. — In *Wyman v. St. Louis*, 17 Mo. 335, it was claimed that a four-story building, of which the third and fourth stories were used for school purposes, the second floor occasionally used for purposes connected with the school and at times rented out, and the first floor rented for a store, was exempt from taxation under the section of the revenue act exempting schoolhouses and other

buildings for the purpose of education so long as used for such purpose. It was held that the house was not exempt from taxation, but was taxable according to its true value, there being no mode appointed by which part of a house could be assessed and not the remainder. In this case the court pointed out the difficulties which would arise in the collection of taxes where a part only was held to be taxable.

1. Construction of Statutes. — The provision of Gen. Stat. *Minnesota*, 1878, c. 11, § 5, exempting from taxation "all public-school houses, academies, colleges, universities, and seminaries of learning, with the books and furniture therein, and the grounds attached to such buildings necessary for their proper occupancy, use, and enjoyment," does not extend the privilege of exemption to property leased for its use and used by an educational institution. "If it had been the intention of the legislature to exempt all property exclusively used for educational purposes it would have been very easy to have said so, as it is clearly expressed in the statutes of some of the states." *Hennepin County v. Bell*, 43 Minn. 344.

The *Pennsylvania* Act of May 14, 1874, exempting from taxation real estate devoted to public, charitable, or other enumerated uses, contemplates either ownership of the buildings and the adjacent real estate by the institutions to which the exemption is granted or a definite and stable dedication to charitable or public use. *Kittanning Academy v. Kittanning*, 8 Pa. Super. Ct. Rep. 27.

2. Ownership and Use Must Combine. — *People v. Anderson*, 117 Ill. 50; *People v. Ryan*, 138 Ill. 263; *Matter of Swigert*, 123 Ill. 267; *Laurant v. Muscatine*, 59 Iowa 404; *State v. Duryea*, 40 N. J. L. 266; *Humphries v. Little Sisters of Poor*, 29 Ohio St. 201.

Under the provision of Rev. Stat. *Illinois*, c. 120, § 2, exempting from taxation "all church property actually and exclusively used for public worship, when the land (to be of reasonable size for the location of the church building) is owned by the congregation," it is necessary in order to bring lands within the exemption that it should be so owned by a religious congregation. Therefore, camp-meeting grounds owned by camp-meeting associations, not organized as religious corporations, are not exempt. *People v. Waseka Camp Meeting Assoc.*, 160 Ill. 576, following *People v. Anderson*, 117 Ill. 50.

Use of Property of One Corporation by Another Whose Objects Are Similar — Property Not Exempt. — *St. James Educational Institute v. Salem*, 153 Mass. 185.

Cases Explained and Reconciled. — The position taken in *Washburn College v. Shawnee County*, 8 Kan. 344; *Vail v. Beach*, 10 Kan. 214, and other similar cases, which have received notice in a preceding section of this article, that it is the use, not the ownership, of

exclusively devoted to such purposes cannot exempt property which is held merely under lease,¹ even though the terms of the lease require that the taxes on the property be paid by the lessee.²

c. **EXEMPTION DEPENDENT UPON OWNERSHIP OF PROPERTY, REGARDLESS OF USE.** — It sometimes happens that exemption is granted to all property belonging to the beneficiary of the grant, in which case it is considered that ownership is the sole test of exemption.³ But in *Vermont* it has been

property which determines whether or not it is exempt from taxation under a constitutional provision exempting property "used exclusively" for certain enumerated purposes, is not in conflict with the statement in the text, for the claim of exemption in those cases was based on ownership apart from use, and the question here under consideration, of use apart from ownership, was not before the court in any way.

1. **Leased Property Not Exempt.** — *Travelers' Ins. Co. v. Kent*, (Ind. 1898) 50 N. E. Rep. 562, citing 25 AM. AND ENG. ENCYC. OF LAW (1st ed.) 165; *Hennepin County v. Bell*, 43 Minn. 344; *Englewood School v. Chamberlain*, 55 N. J. L. 292; *People v. Board of Assessors*, 32 Hun (N. Y.) 457, affirmed 97 N. Y. 648; *Hebrew Free School Assoc. v. New York*, 99 N. Y. 488; *Humphries v. Little Sisters of Poor*, 29 Ohio St. 201; *Kittanning Academy v. Kittanning*, 8 Pa. Super. Ct. Rep. 27. See also *Pace v. Jefferson County*, 20 Ill. 644.

The owner of property which is rented out for the use of a public school is not exempt from taxation thereon. *Armand v. Dumas*, 28 La. Ann. 403, distinguishing *Le France Case* (not reported, Opinion Book 44, p. 170), on the ground that in that case the house was not only used for the purposes of education, but the owner thereof kept the school.

Buildings "Used and Set Apart." — Property rented out for use as a school is not exempt from taxation under Rev. Stat. *Indiana*, 1881, § 6276, cl. 5, exempting "every building used and set apart for educational * * * purposes." *Travelers' Ins. Co. v. Kent*, (Ind. 1898) 50 N. E. Rep. 562.

Interest of Lessee Exempt. — The exemption granted by the *Rhode Island* statutes to houses for religious worship and the lands used in connection therewith extends to the interest of a religious society in lands leased by it and upon which it has erected a building for religious worship. *Second Universalist Soc. v. Providence*, 6 R. I. 235.

Statute Containing No Restriction as to Ownership. — In *Howell v. Philadelphia*, 8 Phila. (Pa.) 280, Leg. Int. (Pa. 1871) 268, it was held that property leased by a religious congregation for use as a church was exempt from taxation under the *Pennsylvania* Act of April 16, 1838, section 29, exempting "all churches, meeting houses, or other regular places of stated religious worship." The court considered that the plain, obvious, and natural reading of the act was to include within the exemption all places consecrated to regular stated religious worship, without exception, whether or not the congregation owned the building.

Case Holding Leased Property Exempt. — The case of *Sisters of Charity v. Detroit*, 9 Mich.

94, while the decision therein is directly opposed to the rule set out in the text, is not a strong authority against it. In this case the complainants, who were incorporated as a charitable society, procured a lease for thirty years of certain premises, "for the purpose of keeping and maintaining thereon, during said term, an orphan asylum and gratuitous school or schools for poor and destitute children." It was held by the trial court that this property was exempt from taxation under 1 Comp. Laws *Michigan*, § 786, which exempted "such real estate belonging to such [benevolent and charitable] institutions as shall actually be occupied by them for the purposes for which they were incorporated." On appeal to the Supreme Court, Martin, C. J., and Manning, J., were of the opinion that the decree should be affirmed, while Campbell and Christianity, JJ., were of the opinion that as the land did not belong to the complainants it was not within the meaning of the exemption, although they paid a merely nominal rent. The Supreme Court being thus equally divided, the decree of the court below was affirmed.

2. **Rule Applies Though Lease Provides that Lessee Shall Pay Taxes.** — *Hebrew Free School Assoc. v. New York*, 99 N. Y. 488, overruling *Hebrew Free School Assoc. v. New York*, 4 Hun (N. Y.) 446; *Washington Heights M. E. Church v. New York*, 20 Hun (N. Y.) 297; *Humphries v. Little Sisters of Poor*, 29 Ohio St. 201; *Kittanning Academy v. Kittanning*, 8 Pa. Super. Ct. Rep. 27.

Where a corporation which has leased certain land for a term of years with the agreement to pay the taxes thereon is granted an exemption from taxation for the term of five years, it is still liable for the taxes upon such leased land, for to allow it to escape the payment of such taxes for five years would be to allow it to violate one of the terms of its lease, and put the burden of taxation for that period upon the lessor without remedy. *Com. v. Chesapeake, etc., R. Co.*, 94 Ky. 16.

3. **Ownership the Sole Test of Exemption.** — The exemption granted by statute in *Utah* to property owned by the state is absolute, and depends upon no condition but ownership by the state. *Springville v. Johnson*, 10 Utah 351.

The exemption granted by statute in *Virginia* (Acts 1881-82, p. 382) to "all real estate belonging to any county, city, or town" is dependent merely upon ownership by such county, city, or town, and is not subject to the subsequent modification in the same statute to the effect that "nothing herein contained shall be construed to exempt from taxation any part of a lot or building used for any private purpose or for profit." *Black v. Sherwood*, 84 Va. 906.

In a case where a statute provided that cer-

said that even where ownership is all that is expressly required by the statute, such ownership must be for the appropriate purposes of the grantee, and not merely speculative.¹

d. PROPERTY PARTLY OWNED BY A CORPORATION ENTITLED TO EXEMPTION. — In *Texas* it has been held that a public wharf of which one-third was owned by a city and the other two-thirds by a private corporation was exempt from taxation as to the interest of the city therein, though the interest of the private corporation could be taxed.²

5. Exemption in Favor of Certain Classes of "Institutions" Held Restricted to Corporations. — There have been several cases in which it has been held that grants of exemption in favor of "institutions" of a certain character, or in similar terms, operate only in favor of incorporated institutions.³

6. Exemption Dependent upon Corporate Objects of Beneficiary. — The benefit of a grant of exemption from taxation in favor of corporations or associations organized for certain designated objects cannot be successfully claimed by any such body unless the accomplishment or furthering of one or more of such objects is the exclusive or at least the main purpose of its existence.⁴

tain land belonging to a university "shall be exempt from taxation so long as said land belongs to said university," it was held that the exemption continued in force so long as the title to the land remained in the university, and was not affected by the fact that the land was rented to various persons upon leases extending from one to thirty-three years, with renewal options given to some of the tenants, the profits and emoluments arising from the leases being used by the corporation for the purposes of the university, and not otherwise. *University of South v. Skidmore*, 87 Tenn. 155.

1. View that Ownership Must Be for Appropriate Purposes of Grantee. — In *Willard v. Pike*, 59 Vt. 202, Veazey, J., delivering the opinion of the court, and referring to Rev. Laws *Vermont*, § 270, which exempted from taxation "lands owned or leased by colleges, academies, or other public schools," said: "Although, under our statute, ownership is all that is expressly required, it is probable that the legislature did not intend to exempt property simply because owned by an academy. In construing statutes of exemption from taxation, regard must be had to the settled rule that they are to be construed most strongly against those who claim their benefit. The ownership must undoubtedly be, not for speculative purposes, but for the appropriate use and benefit of the institution as an academy or a college in carrying out the purposes of its incorporation." See also *University of South v. Skidmore*, 87 Tenn. 155.

2. Partial Exemption of Property Partly Owned by Exempt Corporation. — *Galveston Wharf Co. v. Galveston*, 63 Tex. 14.

3. Institutions Must Be Incorporated to Claim Exemption. — *People v. Western Seaman's Friend Soc.*, 87 Ill. 246; *St. Monica Church v. New York*, 119 N. Y. 91; *Chegaray v. New York*, 13 N. Y. 220, reversing 2 Duer (N. Y.) 521, and overruling the contrary dictum of *Ruggles, C. J.*, in *Chegaray v. Jenkins*, 5 N. Y. 376, which affirmed 3 Sandf. (N. Y.) 409; *Nashville v. Ward*, 16 Lea (Tenn.) 27. See also *Kentucky Female Orphan School v. Louisville*, 100 Ky. 470; *Indianapolis v. Sturdevant*, 24 Ind. 391; *State v. Ross*, 24 N. J. L. 497. *Contra*, *Indianapolis v. McLean*, 8 Ind. 328.

In *St. Monica Church v. New York*, 119 N. Y. 91, the court, *per* Earl, J., said: "The words 'religious society,' when used in the laws of this state, as they frequently are, generally have reference to an incorporated religious society. It cannot be supposed that it was the legislative intention that any number of persons could come together for some religious purpose and set up a school and then claim the exemption. In using the words 'religious society' it is most probable that the lawmakers had in mind some legal entity capable as such of taking and holding property, and popularly known as a religious society."

4. Body Claiming Exemption Must Be Organized for Purposes Designed to Be Aided by Grant. — In order for a society to be entitled to an exemption from taxation under Pub. Stat. *Massachusetts*, c. II, § 5, cl. 3, as amended by Statutes of 1889, c. 465, exempting the property of benevolent and charitable institutions and temperance societies when used for their purposes, the society must act exclusively as a temperance society or a benevolent or charitable institution or some two or all of these combined. The exemption does not extend to an organization which is in part a temperance society and in part a mutual aid and relief society, affording relief and assistance to its members only, as the latter object is not charitable or benevolent within the meaning of the statute. *Young Men's Protestant Temperance, etc., Soc. v. Fall River*, 160 Mass. 409.

Under *New York* Laws 1893, c. 498, § 1, exempting from taxation "the real property of a corporation or association organized exclusively for" charitable, educational, and other enumerated purposes, and used exclusively for carrying out one or more of such purposes, a corporation is not entitled to exemption because it does in effect use its property for educational and charitable purposes, where there is nothing in the statute under which the corporation is organized which compels it to make such use of its property; for such a corporation is not organized "exclusively" for any of the purposes for which the exemption is granted. *People v. Neff*, 34 N. Y. App. Div. 83.

7. Duration of Exemptions. — It is quite usual for a statute granting an exemption from taxation to limit the time during which it shall remain in force,¹ and in such case the rules of strict construction which have been already set forth are applied in order to determine the duration of the immunity.²

Continuance of Exemption While Property Is Used for Purposes Designated. — Where land

It is not enough, in order to exempt an association from taxation under Pub. Acts *Michigan*, 1893, act 206, § 7, subdiv. 4, exempting the property of "library, benevolent, charitable, educational, and scientific institutions," that one of its direct or indirect purposes or results is benevolence, charity, education, or the promotion of science. It must be organized chiefly, if not solely, for one or more of these objects. *Atty.-Gen. v. Detroit*, 113 Mich. 388.

Sufficient that Main Object Be One Which Gives Exemption. — A corporation whose purposes are, first, the encouragement of debating, reading, and literature; second, the enjoyment of rational useful amusements; and third, the playing of tenpins, checkers, and other lawful games of the kind, is a corporation for educational purposes, and therefore exempt from the corporation tax imposed by the *Missouri* Constitution of 1875, art. 10, § 21, on all corporations, companies, or associations other than those formed for benevolent, religious, scientific, or educational purposes. The first of the declared purposes of such a corporation is clearly educational, and the others seem to be added as matters of amusement and incidental to the first. *State v. Lesueur*, 99 Mo. 552.

1. Exemptions Granted for Limited Time Only — United States. — *Yazoo, etc.*, R. Co. *v. Thomas*, 132 U. S. 174; *Yazoo, etc.*, R. Co. *v. Levee Com'rs*, 132 U. S. 190, *affirming* 37 Fed. Rep. 24; *Vicksburg, etc.*, R. Co. *v. Dennis*, 116 U. S. 665, *affirming* 34 La. Ann. 954.

Iowa. — *Barrett v. Kevane*, 100 Iowa 653; *Churchill v. Sowards*, 78 Iowa 472; *Fisher v. Wisner*, 34 Iowa 447.

Louisiana. — *Baton Rouge, etc.*, R. Co. *v. Kirkland*, 33 La. Ann. 622.

Michigan. — *People v. Auditor-Gen.*, 9 Mich. 134.

Vermont. — *Westmore Lumber Co. v. Orne*, 48 Vt. 90.

Wisconsin. — *Wisconsin Cent. R. Co. v. Lincoln County*, 57 Wis. 137, 67 Wis. 478; *Wisconsin Cent. R. Co. v. Comstock*, 71 Wis. 88; *State v. Harshaw*, 76 Wis. 230.

2. Construction of Statutes as to Duration of Exemption. — The charter of a railroad company granted to it an exemption from taxation "for a term of twenty years from the completion of said railroad to the Mississippi river, but not to extend beyond twenty-five years from the date of the approval of this act." It was held that the true construction of this grant was that the exemption took effect upon the completion of the road to the Mississippi river and continued for twenty years thereafter, if the road was completed in five years or less; but that if more than five years from the granting of the charter were consumed in completing the road to the point designated, the term of exemption would be decreased to such an ex-

tent that the property would become taxable at the end of twenty-five years from the time when the charter was granted. *Yazoo, etc.*, R. Co. *v. Thomas*, 132 U. S. 174; *Yazoo, etc.*, R. Co. *v. Levee Com'rs*, 132 U. S. 190, *affirming* 37 Fed. Rep. 24. See also *Memphis, etc.*, R. Co. *v. Loftin*, 105 U. S. 258; *McGee v. Mathis*, 4 Wall. (U. S.) 143, 21 Ark. 40; *State v. County Ct.*, 19 Ark. 360.

The *Iowa* statute (Revision 1860, § 711, subdiv. 7) providing that "government lands entered or located * * * shall not be taxed for the year in which the entry, location, or purchase was made" exempts such property from taxation only for the year in which the entry was made, and not for a subsequent year, though no patent has been issued, as the liability of land for taxation does not depend upon the issuing of patents. *Barrett v. Kevane*, 100 Iowa 653.

Obvious Legislative Intention Given Effect. — A provision that military bounty lands shall be exempt from taxation while they continue to be held by the patentees and their heirs "for the term of three years from and after the date of the patents" cannot be construed to confine the exemption to three years from the location of the lands. *People v. Auditor-Gen.*, 9 Mich. 134. To the same effect under a substantially similar statute is *Churchill v. Sowards*, 78 Iowa 472.

Liberal Construction When the State Is the Real Beneficiary. — The act incorporating a bank in Louisiana contemplated that the capital of the bank would be obtained by the issuance by the bank of its own bonds. The subscribers to the stock were to pay nothing on their subscriptions, but were to furnish mortgages upon their land and slaves to secure the payment of their subscriptions, which mortgages were to be held as security for the payment of the bonds above referred to. The bank being unable to negotiate its own bonds, the state loaned to it state bonds to the amount of twelve million dollars, it being provided that the state was to have a graduated interest in the profits of the bank according to the amount of bonds actually used, and the amendment to the charter, making such provisions granted to the bank an exemption from taxation on its capital stock "during the continuance of its charter." It was held that this exemption continued so long as the existing relations of the state to the bank should require that the charter should continue, and did not terminate at the expiration of the time originally limited in the first charter for the existence of such charter; and this even though previous to the granting of an extension of the charter a constitutional provision had been adopted which would have forbidden the creation of such an exemption. *Citizens' Bank v. Board of Assessors*, 54 Fed. Rep. 73.

has been granted to a railroad and canal company for the express purpose of enabling it to increase its terminal facilities, and such land has been exempted from taxation, the exemption remains in force so long as the land continues incident to or necessary or convenient for such purposes and is not actually used for other purposes.¹

VI. PARTICULAR SUBJECTS OF EXEMPTION — 1. Religious Institutions — a. CUSTOMARY EXEMPTION. — It is a very usual custom for the states to relieve religious institutions or societies² of the burden of taxation,³ by grants of exemption, which, though they vary much in their terms, have all the same object in view.⁴

b. WHAT IS WITHIN EXEMPTION OF HOUSES OF RELIGIOUS WORSHIP. — Such a grant is frequently in the form of an exemption of "houses of religious worship" or "buildings for public worship,"⁵ which is usually considered to include not merely the building, but also the land on which it stands and which is necessary for its use;⁶ but the immunity does not extend

1. **Continuance of Exemption While Property Is Used for Purposes Designated.** — United New Jersey R., etc., *Co. v. Jersey City*, 57 N. J. L. 563. See also *infra*, this title, *Termination of Exemptions*.

2. **What Is a Religious Society.** — Rather a broad meaning was attached to the term "religious society" in the case of Hebrew Free School Assoc. *v. New York*, 4 Hun (N. Y.) 446, in which the court considered that chapter 282 of the *New York Laws* of 1852, providing that certain exemptions granted by general law should not apply to any buildings or premises in the city of New York unless they were exclusively the property of a "religious society," did not necessarily mean a society organized as an incorporated church, but referred to a society whose organization and object were of a benevolent, charitable, or missionary character, falling within the general sense of the term "religious" as contradistinguished from private and secular institutions.

The "Book Agents of the Methodist Episcopal Church, South," a corporation created as an arm or agency of the Methodist church, a religious organization, and charged with the trust of manufacturing and distributing books, periodicals, etc., in the interest and under the auspices of that church, and thereby raising a fund with which to support its worn-out preachers and their families, is clearly a religious and charitable institution and as such exempt from taxation under the *Tennessee Constitution* and statutes. *Methodist Episcopal Church v. Hinton*, 92 Tenn. 188.

As to exemption of missionary societies, see *infra*, this section, *Charitable Institutions*.

3. **Custom Not to Tax Church Property.** — In *State v. Platt*, 24 N. J. L. 109, the court said that meeting houses and schoolhouses, although not formally exempted by the tax laws in force prior to 1851, were seldom if ever assessed in any part of the state, and that this omission was so obviously proper and so entirely in accordance with the public sentiment that it universally prevailed, and was in effect a contemporaneous construction of the laws which the court would probably have sanctioned had the question been formally raised.

4. **Exemptions in Favor of Religious Institutions.** — Under the *Indiana Constitution* a church and the lot on which it is situated are

exempt from taxation. *First Presb. Church v. Ft. Wayne*, 36 Ind. 338, 10 Am. Rep. 35.

Property belonging to a church is exempt from taxation under the *Iowa Code* of 1851, c. 39, § 455, cl. 4, where it does not exceed three acres in extent, is devoted solely to the appropriate objects of the church, and is not leased or otherwise used with a view to pecuniary profit. *Byington v. Wood*, 12 Iowa 479.

5. **What Is a House of Religious Worship.** — Rev. Stat. *Massachusetts*, c. 7, § 5, exempting from taxation houses of religious worship, refers only to such distinct tenements as are used for religious worship and purposes connected therewith. *South Cong. Meeting-house v. Lowell*, 1 Met. (Mass.) 538.

Buildings Held to Be Not for Public Worship — *Chapel in Cemetery.* — *Trinity Church v. New York*, 10 How. Pr. (N. Y. Supreme Ct.) 138.

Orphanage where Religious Services Are Held for Inmates. — *Colored Orphans' Assoc. v. New York*, 104 N. Y. 581, 18 Am. & Eng. Corp. Cas. 186, *overruling* as to this point 38 Hun (N. Y.) 593, though *affirming* the judgment of the court below in that case.

Building Used Partly as a Synagogue. — *Kol Israel Anschi Poland Congregation v. New York*, 52 Hun (N. Y.) 507, *affirming* 1 N. Y. Supp. 35.

Abandoned Church Owned by Private Individual. — *Black v. Brooklyn*, 51 Hun (N. Y.) 581. Reargument denied, 6 N. Y. Supp. 958.

Camp-meeting Grounds. — In *Pennsylvania* it has been held that an exemption of "actual places of religious worship" did not include camp-meeting grounds which were a source of profit to the association owning them. *Camp-Meeting Assoc. v. School Dist.*, 12 W. N. C. (Pa.) 103. But *compare County v. Camp-Meeting Assoc.*, 1 Kulp (Pa.) 49.

6. **Exemption Includes Necessary Land.** — *Gerke v. Purcell*, 25 Ohio St. 229; *Matlack v. Jones*, 2 Disney (Ohio) 2; *Trinity Church v. Boston*, 118 Mass. 164; *Redemptorist Fathers v. Boston*, 129 Mass. 178; *Third Cong. Soc. v. Springfield*, 147 Mass. 396.

An exemption from taxation of houses of religious worship includes not merely the building itself but a reasonable sufficient territory around it for convenient ingress and egress, light, air, or appropriate and decent ornament. *Third Cong. Soc. v. Springfield*, 147 Mass. 396.

to any other land.¹

Church Building in Process of Erection. — In some of the states it is considered that an exemption in the terms above quoted will extend to property purchased by a religious society for the purpose of constructing a church thereon, where the work of construction is being prosecuted in good faith and with no unreasonable delay.² But in *Pennsylvania* it has been held that a statutory exemption of "regular places of stated worship" under a constitutional grant of power to exempt "actual places of religious worship" does not extend to an unfinished building.³

Leased Property. — In *Ohio* and *Pennsylvania* it has been considered that a building actually used exclusively for public worship is within such an exemption, though the congregation which worships therein does not own the building but holds it merely under lease.⁴

c. EXEMPTION OF PROPERTY USED FOR RELIGIOUS PURPOSES. — When a grant of exemption is in terms to property used for religious purposes, it cannot extend to any property save that which is primarily so used.⁵ And the exemption is frequently still further restricted to property which is exclusively used for such purposes, in which case such exclusive use must be shown in order to escape taxation.⁶

Exemption Held Not to Extend to Land. — Rev. Stat. *Michigan*, c. 20, § 2, provides that "real estate shall, for the purpose of taxation, be construed to include all lands within the state and all buildings and fixtures thereon, except in cases otherwise expressly provided by law." Section 5 of the same chapter provides that "all houses of public worship, with the pews or slips and furniture therein, and rights of burial and tombs, while in use as repositories of the dead," shall be exempt from taxation. It was held that the exemption of houses of public worship did not embrace the land upon which such houses were erected, as the language of the fifth section, above set out, did not in express terms embrace land, and an implication that it was intended to embrace it was precluded by section 2, even if it could be fairly drawn from section 5. *Lefevre v. Detroit*, 2 Mich. 586.

1. Does Not Extend to Land Not Necessary for Use. — *Redemptorist Fathers v. Boston*, 129 Mass. 178; *Matlack v. Jones*, 2 Disney (Ohio) 2; *Gerke v. Purcell*, 25 Ohio St. 229; *Hamilton County v. Mannix*, 11 Cinc. Wkly. L. Bul. 184, 9 Ohio Dec. (Reprint) 189, reversing 10 Cinc. Wkly. L. Bul. 53, 9 Ohio Dec. (Reprint) 18.

Vacant Lots Not Within Exemption. — Vacant lots, however appropriately dedicated to be used for the erection of a building for public worship, are not exempt from taxation under a statute exempting every building for public worship and the several lots whereon the several buildings are erected. *Trinity Church v. New York*, 10 How. Pr. (N. Y. Supreme Ct.) 138.

Land Set Off for Secular Purposes Not Exempt. — A statute exempting from taxation "every building erected for religious worship, * * * and the lands whereon such building is situate, not exceeding ten acres" does not exempt a part of a church lot which is set off for secular purposes, and business houses erected thereon and rented. *Orr v. Baker*, 4 Ind. 86.

2. Exemption Extends to Property on Which Church Is Being Erected. — *Trinity Church v. Boston*, 118 Mass. 164; *Old South Soc. v. Boston*, 127 Mass. 378; *St. James Church v. New*

York, 41 Hun (N. Y.) 309; *Washington Heights M. E. Church v. New York*, 20 Hun (N. Y.) 297. See also *Green Bay, etc., Canal Co. v. Outagamie County*, 76 Wis. 587; *Matlack v. Jones*, 2 Disney (Ohio) 2.

3. Pennsylvania Doctrine that Unfinished Building Is Not Exempt. — *Moore v. Taylor*, 147 Pa. St. 481; *Mullen v. Erie County*, 85 Pa. St. 288; *Erie County v. Bishop*, 13 Phila. (Pa.) 509, 34 Leg. Int. (Pa.) 356.

4. Exemption Extends to Property Leased for Use as a Church. — *Church of Epiphany v. Raine*, 21 Cinc. Wkly. L. Bul. 180; *Howell v. Philadelphia*, 8 Phila. (Pa.) 280, Leg. Int. (Pa. 1871) 268.

5. Property Must Be Primarily Used for Religious Purposes. — *Ramsey County v. Church of Good Shepherd*, 45 Minn. 229.

Use Must Be Direct and by Occupancy. — *Nugent v. Dilworth*, 95 Iowa 49.

Endowment of Religious Societies. — A mortgage held by a church as security for a sum of money bequeathed to it with the direction that the interest therefrom is to be used toward the minister's salary is exempt from taxation under the *New Jersey* statute exempting endowments or funds of religious societies. *Trustees v. Silverthorn*, 52 N. J. L. 73.

6. Requirement that Use Be Exclusive. — *Manresa Institute v. Norwalk*, 61 Conn. 228; *Connecticut Spiritualist Camp-meeting Assoc. v. East Lyme*, 54 Conn. 152; *People v. Watseka Camp Meeting Assoc.*, 160 Ill. 576.

Such a grant of exemption cannot be held to apply to vacant lots owned and held by a religious association. *Kirk v. St. Thomas' Church*, 70 Iowa 287; *Green Bay, etc., Canal Co. v. Outagamie County*, 76 Wis. 587. In the case last cited the court said that the fact that a church building was placed on the lot nearly or quite two years after the assessment in dispute was quite foreign to the case, for such a building could not have a retroactive effect to exempt the lot, vacant two years before.

When a Building Is "Exclusively Occupied as a Church." — Gen. Stat. *Connecticut*, 1888, § 3820, exempts from taxation buildings "ex-

d. WHETHER PARSONAGES ARE EXEMPT. — In some jurisdictions there are statutes in force expressly exempting parsonages,¹ but it is well settled that a parsonage is not included within an exemption such as of buildings for religious stated or public worship,² or for religious purposes.³ Nor is a par-

clusively occupied as "churches. A certain religious society owned a church in which the services were free, no charge being made for seats, and derived a revenue by renting the church building for "lectures, concerts, readings, and any other thing not inappropriate to be had in a church." The revenue so derived was used exclusively for the maintenance of religious services in the church. It was held that the church building was exempt from taxation. *First Unitarian Soc. v. Hartford*, 66 Conn. 368.

Occupation by Janitor. — In *Shaarai Berocho v. New York*, 60 N. Y. Super. Ct. 479, it was held that a building owned by a religious corporation and used as a church was not taken out of the exemption granted by the New York statute (Consolidation Act, 1882, § 827) exempting from taxation property "exclusively used" for purposes of public worship merely because part of the top floor was occupied by the janitor of the church for residential purposes, the janitor paying nothing for the use thereof, and having no proprietary interest or estate in any part of the premises, but being removable at will and residing on the premises simply because his presence, by night as well as by day, was required as caretaker of the property. The court considered that the position of janitor was incidental to the purpose of the corporation, and his presence on or absence from the premises in no manner affected the right to exemption which the corporation possessed.

1. Construction of Statutes Expressly Exempting Parsonages. — Rev. Stat. *Wisconsin*, § 1038, subdiv. 3, exempts from taxation "parsonages, whether of local churches or districts, and whether occupied by the pastor permanently or rented for his benefit." It was held that the exemption here granted applied to a building rented by a religious association from a third person for the use and occupation of its pastor as a parsonage. *Gray v. LaFayette County* 65 Wis. 567.

The exemption from taxation of parsonages granted by "the Assessment Amendment Act of 1885" (48 Vict., c. 42), does not extend to a dwelling owned and occupied by a superannuated minister of the Methodist church who has no charge of any congregation or circuit, but is expected to do such occasional preaching and ministerial work as may be required of him from time to time, and who does not receive any ministerial stipend or salary from any congregation, but is paid a small allowance annually from the superannuated ministers' fund of the Methodist church. *In re Pearson*, 7 Can. L. T. 48.

2. Parsonage Not Within Exemption of Buildings for Religious Worship, etc. — *Georgia*. — *St. Mark's Church v. Brunswick*, 78 Ga. 541.

Indiana. — *Methodist Episcopal Church v. Ellis*, 38 Ind. 3.

Louisiana. — *First Presb. Church v. New Orleans*, 30 La. Ann. 259, 31 Am. Rep. 224.

Massachusetts. — *Third Cong. Soc. v. Springfield*, 147 Mass. 396.

Minnesota. — *Ramsey County v. Church of Good Shepherd*, 45 Minn. 229.

New York. — *People v. Collison*, 22 Abb. N. Cas. (N. Y. Supreme Ct.) 52; *People v. O'Brien*, 53 Hun (N. Y.) 580.

Ohio. — *Gerke v. Purcell*, 25 Ohio St. 229.

Pennsylvania. — *Church v. County*, 10 W. N. C. (Pa.) 170; *Wood v. Moore*, 1 Chest. Co. Rep. (Pa.) 265. See also *Thiel College v. Mercer County*, 101 Pa. St. 530.

Rhode Island. — *St. Joseph's Church v. Assessors of Taxes*, 12 R. I. 19, 34 Am. Rep. 597.

Use of Part of Parsonage for Certain Services, etc. — A residence of a priest or clergyman is not exempt from taxation as a building "for religious worship" under the *Rhode Island* statutes because it contains a room which is used as a chapel in the celebration of certain services and sacraments of the church. *St. Joseph's Church v. Assessors of Taxes*, 12 R. I. 19, 34 Am. Rep. 597. The theory of this case is that the use of one room for religious purposes does not bring the building within the exemption, nor is it brought within the exemption because occupied by a priest or ecclesiastic who is peculiarly consecrated by his own vows and by the discipline and canons of his church to religious offices. The court aptly remarks that "even such a person has secular necessities to which his dwelling house is subservient."

Exemption of Churches, etc., "with the Grounds Thereto Annexed, for the Occupancy and Better Enjoyment of the Same." — The exemption granted by the *Pennsylvania* Act of April 16, 1838, to "all churches, meeting houses, or other regular places of stated religious worship, with the grounds thereto annexed, for the occupancy and better enjoyment of the same," does not extend to a parsonage erected on a lot entirely separate from the lot upon which the church is erected, and at some distance therefrom, with other lots and a street intervening. Had the parsonage been erected on part of the curtilage for the better and more comfortable enjoyment of the church, "it would have stood on ground exempted from taxation while so held, and being used by the rector, a portion of the corporation, for the benefit of the church, it might possibly have claimed a part of the immunity conferred upon the soil." *Treasurer v. St. Stephen's Church*, 3 Phila. (Pa.) 189, 15 Leg. Int. (Pa.) 253. See also *Cumberland County v. Big Spring Church*, 17 Leg. Int. (Pa.) 300.

Occupation of Part of Church as a Parsonage. — In *Northampton County v. St. Peter's Church*, 5 Pa. Co. Ct. Rep. 416, it was attempted to impose a tax upon the part of a church building which was "in use as a parsonage," it not being disputed that the building itself was "an actual place of religious worship" and "a regular place of stated worship" within the constitutional and statutory exemptions of such places. It was held that the tax could not be imposed.

3. Parsonage Not Exempt as a Building Used for Religious Purposes. — *Vail v. Beach*, 10 Kan.

sonage within an exemption of the "endowment" of a religious society.¹ In *Iowa*, however, a statutory exemption of "all grounds and buildings used for religious institutions" has been held to include a building owned by a church and used as a residence for its rector.²

c. EXEMPTIONS IN FAVOR OF MINISTERS OF THE GOSPEL. — In several of the states there have been statutes exempting from taxation the salaries and property of ministers of the gospel, but at the present time most if not all of these statutes have been repealed.³

2. Literary and Scientific Institutions — *a. CUSTOMARY EXEMPTION.* — Another class of property which is very usually exempted from taxation is that owned by and used for the appropriate purposes of literary and scientific institutions.⁴

b. WHAT EXEMPTION OF LITERARY INSTITUTIONS INCLUDES. — The word "literary" has no technical legal meaning, and there is some difference of opinion as to what is meant by statutes exempting literary institutions or societies from taxation.⁵ In the note are given abstracts of the various decisions as to what institutions are or are not "literary."⁶

214; *St. Peter's Church v. Scott County*, 12 Minn. 395; *Hennepin County v. Grace*, 27 Minn. 503; *State v. Axtell*, 41 N. J. L. 117.

1. Parsonage Not Exempt as "Endowment" of Religious Society. — *State v. Lyon*, 32 N. J. L. 360.

2. Parsonage Held Exempt under Iowa Statute. — *Griswold College v. State*, 46 Iowa 275; *Cook v. Hutchins*, 46 Iowa 706. The statute considered in these cases appears in slightly altered language as section 1304 of the Iowa Code of 1897, from which the quotation in the text is taken.

3. Exemptions in Favor of Ministers of the Gospel. — The statutes referred to in the text have been construed in the following cases: *Gridley v. Clark*, 2 Pick. (Mass.) 403; *Ruggles v. Kimball*, 12 Mass. 337; *Moore v. Poole*, cited in *Smith (N. H.)* 166; *Kidder v. French*, *Smith (N. H.)* 155; *Prosser v. Secor*, 5 Barb. (N. Y.) 607; *People v. Peterson*, 31 Hun (N. Y.) 421; *Com. v. Cuyler*, 5 W. & S. (Pa.) 275; *Miller v. Kirkpatrick*, 29 Pa. St. 226; *Plumer v. Com.*, 3 Gratt. (Va.) 615.

4. Institution Must Be a Permanent One. — The *Indiana* statute (Acts 1861, p. 170), exempting from taxation buildings erected for the use of any literary or scientific "institution" implies more than the application of the property for the time being merely to educational uses. By the term "institution" is understood a permanent establishment as contradistinguished from an enterprise of a temporary character. The statute could not be held to comprehend the latter, for it would be in no just sense an institution. *Indianapolis v. Sturdevant*, 24 Ind. 391.

Scope of Section. — In this subsection it is proposed to treat merely of exemptions granted to literary, scientific, and similar institutions on account of their character as such. The exemption of such institutions on account of their benevolent or charitable character will be treated in the subdivision *Charitable Institutions*, *infra*. And exemptions which result from the public nature of the institutions will be treated in the subdivision *Public Property and the Instrumentalities of Government*, *infra*. Some cases in which an exemption of literary and scientific institutions has been considered

as equivalent to an exemption of educational institutions will be treated in the subdivision *Educational Institutions*, *infra*.

5. No Technical Legal Meaning Attached to Word "Literary." — *New England Theosophical Corp. v. Boston*, (Mass. 1898) 51 N. E. Rep. 450.

6. Institutions Held to Be "Literary" Within Exemption. — An institution in which a corps of teachers are engaged in teaching large numbers of pupils "in ancient and modern languages, in the various sciences, and in all the branches of education usually taught in colleges," is a literary or scientific institution within the meaning of the *Indiana* Act of 1861 (Acts 1861, p. 170) exempting such institutions from taxation. *Indianapolis v. Sturdevant*, 24 Ind. 391, *distinguishing* *Indianapolis v. McLean*, 8 Ind. 328.

The exemption from income tax granted to "any building the property of any literary or scientific institution used solely for the purposes of such institution, and in which no payment is made or demanded for any instruction there afforded by lectures or otherwise," by the Income Tax Act of 1842 (5 & 6 Vict., c. 35), extends to buildings used for free public libraries which are owned by municipal corporations and supported by rates or taxes, as the leading object of the exemption was to encourage the formation of literary and scientific institutions because they were regarded as of public utility; and it should therefore include such institutions as that in question. *Manchester v. McAdam*, (1896) App. 500, 65 L. J. Q. B. 672, 75 L. T. N. S. 229, 61 J. P. 100, *reversed* (1895) 1 Q. B. 673, 64 L. J. Q. B. 401, 72 L. T. N. S. 349, 43 W. R. 438, 59 J. P. 261, 14 Reports 313. But compare *Andrews v. Bristol*, 61 L. J. Q. B. 715, 5 Reports 7, 67 L. T. N. S. 618, 56 J. P. 615.

Institutions Held Not Literary. — A corporation whose paramount object is the dissemination of theosophical ideas and the procuring of converts thereto cannot claim exemption from taxation as a "literary" institution because in furtherance of its object books are collected and instruction given, and literary work done. *New England Theosophical Corp. v. Boston*, (Mass. 1898) 51 N. E. Rep. 450.

c. EXEMPTION OF SCIENTIFIC INSTITUTIONS. — A scientific institution, within the meaning of an exempting statute, is an institution for the advancement and promotion of knowledge.¹ In order, however, that an institution may come within such exemption it must be devoted either to the sciences generally or to some particular department of science as a principal object,² and not merely as an unimportant incident to some other object.³

d. EXEMPTION OF PUBLIC LIBRARIES. — In order for a library to be within an exemption of "public libraries" the general public must have a right to the free use thereof.⁴

3. Educational Institutions — *a.* CUSTOMARY EXEMPTION. — Another exemption which is granted in almost all jurisdictions is in favor of educational institutions.⁵

b. WHAT INSTITUTIONS ARE WITHIN EXEMPTION. — In some jurisdictions this exemption is limited to public schools⁶ forming a part of a system of

The property of a law society whose object is the "procuring and maintaining a law library * * * with suitable rooms in connection therewith, and the institution and carrying out of such matters and things as may by the by-laws of the society be declared necessary for the governing of the society and the advancement of the profession, and of the study of the laws," is not exempt from taxation under the Act 52 Vict., c. 27, § 122, which exempts the property of any "literary institution," as the primary and direct object for which such an institution exists is not the promotion of learning, but the advancement of the interests of the profession of the law and the study of the laws. *Ex p.* St. John Law Soc., 30 New Bruns. 501.

In *England* it is held that a school for educating teachers is not a literary society. *Reg. v. Pocock*, 8 Q. B. 739, 55 E. C. L. 739.

1. Institution for Promotion of Education Scientific. — A corporation organized under How. Annot. Stat. Mich., c. 138, "to establish, maintain, and conduct a seminary of learning," and whose actual business is the maintenance of such a seminary, with the usual studies pursued in such institutions, is a "scientific institution" within the meaning of *Michigan Laws 1887*, c. 415, § 3, subdiv. 2, exempting the real estate of such institutions which is occupied by them for the purpose for which they were incorporated. *Detroit Home, etc., School v. Detroit*, 76 Mich. 521. See also, to the same effect, *Indianapolis v. Sturdevant*, 24 Ind. 391, *supra*, preceding note.

2. Devotion to Science Must Be the Principal Object. — *Inland Revenue Com'rs v. Forrest*, L. R. 15 App. 334, 60 L. J. Q. B. 281, 63 L. T. N. S. 36, 39 W. R. 33, 54 J. P. 772, *affirming* *Matter of Duty on Civil Engineer's Estate*, 20 Q. B. Div. 621, 57 L. J. Q. B. 353, 59 L. T. N. S. 282, 36 W. R. 598, 52 J. P. 549; *New England Theosophical Corp. v. Boston*, (Mass. 1898) 51 N. E. Rep. 456.

3. Incidental Devotion to Science Does Not Give Exemption. — *New England Theosophical Corp. v. Boston*, (Mass. 1898) 51 N. E. Rep. 456.

4. What Is a Public Library. — *People v. Commissioners of Taxes*, 11 Hun (N. Y.) 505.

Library Held Not Public. — An exemption of "public libraries and the land and buildings used in connection therewith" does not extend to a library the ownership of which is in a corporation and the privilege of using which

is confined to the stockholders in such corporation, their immediate families, and their licensees, although the constitution of the corporation provides that any one can become a stockholder and thereby acquire the right to use the library by paying fifteen dollars. The public as such have no right in such library. *Providence Athenæum v. Tripp*, 9 R. I. 559.

5. Exemption of Institutions of Learning. — *Omaha Medical College v. Rush*, 22 Neb. 449; *Haverford College v. Rhodes*, 6 Del. Co. Rep. (Pa.) 541.

Immunity Founded on Public Policy. — *Yale University v. New Haven*, 71 Conn. 316.

What Term "School" Includes. — In *Omaha Medical College v. Rush*, 22 Neb. 449, it was held that the exemption of property used for school purposes granted by Comp. Stat. *Nebraska*, c. 77, art. 1, § 2, meant property used by any institution of learning, as the term "school" could not be restricted to the lower grades of such institutions; and that, therefore, property used for a college was exempt under that statute.

The court of *Louisiana*, however, seems to have taken a rather different view of this question, for in *Lichtentag v. Tax Collector*, 46 La. Ann. 572, the court considered that the word "school," as used in the provision of article 207 of the state constitution, exempting from taxation property used exclusively for colleges or for school purposes, meant educational establishments below the grade of colleges, in which elementary knowledge was imparted, such institutions being for the purpose of instructing young children, and for acquiring knowledge and mental training. Therefore it was held that a school at which stenography and typewriting was taught was not exempt.

Bible Society Not an Educational Establishment. — *Montreal v. Montreal Auxiliary Bible Sec.*, *Quebec L. R.* 6 Q. B. 251.

Scope of Section. — In this subsection will be treated only those exemptions which are granted in consideration of the educational character of the institutions favored. Those which, though benefiting educational institutions, result from their charitable or public nature will be treated in the subdivisions *Charitable Institutions*, and *Public Property and the Instrumentalities of Government*, *infra*.

6. What Is a Public School. — A school founded under a private act of Parliament with the object of furnishing "a liberal and

education maintained and conducted by the state; ¹ while in others it extends also to private schools. ²

Exemption of Seminaries of Learning. — An exemption in favor of every "seminary of learning" can extend only to those institutions whose exclusive or at least primary object is the dissemination of knowledge. ³

Exclusion of Schools Conducted for Profit. — Frequently the exempting statutes exclude from their operation schools which are conducted for profit. ⁴

useful education for the sons of respectable persons engaged in professional, commercial, or trading pursuits," which school is under the management of the common council, which has the power to make regulations for it, and out of which no profit has been made or sought by the corporation, but on the contrary in which there is a deficit each year, is a public school within the exemption from taxation in favor of such institutions. *Blake v. London*, 19 Q. B. Div. 79, 56 L. J. Q. B. 424, 36 W. R. 791, *affirming* 51 J. P. 71.

1. Exemption Limited to Public Schools. — *Mackay v. San Francisco*, 113 Cal. 392; *Colored Orphans' Assoc. v. New York*, 104 N. Y. 581, 18 Am. & Eng. Corp. Cas. 186, *overruling* as to this point 38 Hun (N. Y.) 593, though *affirming* the judgment of the court below in the case; *Gerke v. Purcell*, 25 Ohio St. 229; *People v. Ryan*, 138 Ill. 263; *Chegaray v. New York*, 13 N. Y. 220, *reversing* 2 Duer (N. Y.) 521, and *overruling* the contrary dictum of *Ruggles, C. J.*, in *Chegaray v. Jenkins*, 5 N. Y. 376, which *affirmed* 3 Sandf. (N. Y.) 409; *St. Joseph's Church v. Assessors of Taxes*, 12 R. I. 19, 34 Am. Rep. 597.

Public School Managed by Corporation. — Property which forms part of the school fund of the state is exempt from taxation, the constitution having authorized such exemption and the General Assembly having granted it. This is true although in regard to the particular property in question the General Assembly has created a body corporate as the most convenient mode of controlling the institution, its property and affairs, where the state retains the power of appointing its trustees and has power to sell and dispose of the property of the institution through agents other than its trustees, and may amend or even repeal the charter as public policy or the interests of the university may require. *Illinois Industrial University v. Champaign County*, 76 Ill. 187.

2. Exemption Extending to Private Schools. — *Phillips County v. Sister Estelle*, 42 Ark. 536; *Ramsey County v. Stryker*, 52 Minn. 144; *Wylie v. Montreal*, 12 Can. Sup. Ct. Rep. 384.

In *Chicago v. People*, 80 Ill. 384, the court, *per Walker, J.*, said that the provision of article 9, § 3, of the Constitution of 1870, that "the property of the state and such other property as may be used exclusively for school purposes may be exempted from taxation," would "hardly bear the construction that the public school property alone is embraced in its provisions, but it was intended to embrace private schools, or schools under private charters, as well as the public school fund."

Tuition Need Not Be Free. — The laws of *Michigan* exempting from taxation educational institutions have not required that the tuition shall be free even in the public institutions. *Detroit Home, etc., School v. Detroit*,

76 Mich. 521. See also *Ramsey County v. Stryker*, 52 Minn. 144.

3. Institutions Held Not to Be Seminaries of Learning. — A building occupied and used as a medical college, hospital, and free dispensary for women is not exempt from taxation under the *New York* statute exempting property exclusively used as a seminary of learning. *People v. Campbell*, 93 N. Y. 196.

A Young Men's Christian Association whose object is the improvement of the spiritual, mental, and social condition of young men is not a "seminary of learning" within the meaning of the statute exempting buildings erected for the use of such institutions. *Young Men's Christian Assoc. v. New York*, 113 N. Y. 187.

A society whose object is to "provide and maintain a place of refuge for colored orphans, where they shall be boarded and suitably educated until of an age to be bound or apprenticed," is not exempt from taxation under the *New York* statute exempting the property of every "incorporated academy or other seminary of learning." *Colored Orphans' Assoc. v. New York*, 104 N. Y. 581, 18 Am. & Eng. Corp. Cas. 186.

Sectarian Academy. — Gen. Stat. *New Hampshire*, c. 49, § 2, exempts from taxation all schoolhouses and seminaries of learning, without distinction of sect, denomination, or party. Therefore, the exemption extends to property which is devoted exclusively to the purposes of a seminary of learning, the educational course being that usually included in the academic course of higher seminaries for young ladies, in addition to which the pupils are instructed in moral and religious principles as understood by adherents of the Roman Catholic Church. *Warde v. Manchester*, 56 N. H. 508, 22 Am. Rep. 504.

Historical Society Exempt. — In *Pennsylvania* an exemption of institutions of learning has been held to extend to a society whose object was the study and preservation of history, and whose facilities were open to the public. *Re Historical Soc.*, 13 Montg. Co. Rep. (Pa.) 205.

4. Exclusion of Schools Conducted for Profit. — *Mundy v. Van Hoose*, 104 Ga. 292; *People v. Ryan*, 138 Ill. 263; *Montgomery v. Wyman*, 130 Ill. 17; *Kentucky Female Orphan School v. Louisville*, 100 Ky. 470; *Henderson v. McCullagh*, 89 Ky. 448; *Lichtentag v. Tax Collector*, 46 La. Ann. 572.

Burden of Proof. — In order to gain exemption it must be affirmatively shown that the school property is not being used with a view to the making of a profit. *People v. Ryan*, 138 Ill. 263. See also *Montgomery v. Wyman*, 130 Ill. 17.

Institution Conducted for Profit Exempt under Indiana Statute. — Under the *Indiana* statute (Acts 1861, p. 170) exempting from taxation

c. WHAT PROPERTY IS WITHIN EXEMPTION — (1) Exemption of All Property. — In *Kentucky* the exemption in favor of educational institutions extends to all their property which, or the income from which, is devoted to education.¹

(2) Exemption Restricted to Property Directly Used for Educational Purposes. — But as a general rule such an exemption is confined to property which is directly used for the purposes of the institutions designed to be benefited by the grant.²

buildings erected for the use of any literary or scientific, etc., association, "by any individual or individuals, association, or corporation," the buildings of an educational institution are exempt from taxation although the institution is conducted on private account and the earnings of it are applied to the personal benefit of the individual proprietor. *Indianapolis v. Sturdevant*, 24 Ind. 391.

1. All Property Devoted to Education Exempt in Kentucky. — The provision of section 170 of the Kentucky Constitution of 1891, exempting from taxation "institutions of education not used or employed for gain by any person or corporation, and the income of which is devoted solely to the cause of education," exempts the entire property of such institution, wherever situated and in whatever form its investment may be found. *Kentucky Female Orphan School v. Louisville*, 100 Ky. 470. In this case the court, *per* Hazelrigg, J., reviewed the legislation of the state upon this subject, in order to show that the construction of the language of the constitution here given was in accord with the long-settled policy of the state.

Construction of Statutes. — In *Nazareth Literary, etc., Inst. v. Com.*, 14 B. Mon. (Ky.) 214, it was held that the provision of Rev. Stat. Ky., c. 58, art. 1, § 1, that "lands held by a school or seminary shall not be subject to taxation," and that of chapter 83, art. 5, § 3, that "the land upon which any seminary of learning is erected, to the extent of five acres, held fiducially or individually, shall be exempt from taxation," were not necessarily in conflict with each other, since, while the first exempted all lands held by a school or seminary, as well those on which no seminary was erected as those on which there was a seminary, the other exempted land on which a seminary was erected, to the extent of five acres, though such land was not held by any school or seminary.

2. See *supra*, this title, General Rules of Construction, subdv. 4. b. (1) General Principles.

Use Sufficient Without Dedication to Use. — Under the *Texas* statute exempting from taxation "all buildings used exclusively and owned by persons or associations of persons for school purposes" it is not necessary, in order to entitle the property to the exemption, that it should be dedicated to the use of the school, but it is sufficient that it is so used. *Red v. Morris*, 72 Tex. 554.

What Is a Use for the Purposes of a University. — An exemption from taxation of a university extends to the property of a given department which department is required to pay into the university a certain amount annually, the balance of the receipts being reserved for the fees of the members of the faculty of such depart-

ment; for such an arrangement, though apparently giving an income from the property, is merely an internal arrangement by which the income from the different departments of the university is distributed for the benefit of the whole without injustice to any. Such income is derived from the exercise of university functions, and not from the use of its property for other purposes. *Philadelphia v. State University*, 44 Pa. St. 360, *overruling* 1 Phila. (Pa.) 421, 10 Leg. Int. (Pa.) 7.

The Fact that a College Lot Is Intersected by a Highway and a railroad constructed through it does not affect its exemption from taxation under the *New York* statute exempting every building erected for the use of a college, etc., and the several lots whereon such buildings so used are situated, where all such land is necessary for the use of the college. *People v. Barber*, 42 Hun (N. Y.) 27, *affirmed* 106 N. Y. 669.

Lots for Ingress and Egress. — Lots adjacent to a schoolhouse used for the purpose of ingress and egress therefrom are exempt as being used with the schoolhouse, under the Louisiana statutes. *First Presb. Church v. New Orleans*, 30 La. Ann. 259, 31 Am. Rep. 224.

Grounds Necessary for Recreation are exempt as being used for the purposes of an educational institution. *Hennepin County v. Grace*, 27 Minn. 503; *People v. Commissioners of Taxes*, 6 Hun (N. Y.) 109, *affirmed* 64 N. Y. 656; *People v. Commissioners of Taxes*, 10 Hun (N. Y.) 246; *People v. Barber*, 42 Hun (N. Y.) 27; *Dickinson College v. Cumberland County*, 12 Pa. Co. Ct. Rep. 582, 2 Pa. Dist. Rep. 378; *St. Edward's College v. Morris*, 82 Tex. 1; *Cassiano v. Ursuline Academy*, 64 Tex. 673.

Farm Used to Supply Food for Scholars. — An exemption of property used for the purpose of an educational institution will include a farm which is used for the purpose of raising provisions to be consumed by the instructors and pupils in the institution by which it is owned. *Monticello Female Seminary v. People*, 106 Ill. 398, 46 Am. Rep. 702; *Wesleyan Academy v. Wilbraham*, 99 Mass. 599; *Academy of Sacred Heart v. Irey*, 51 Neb. 755; *People v. Commissioners of Taxes*, 6 Hun (N. Y.) 109, *affirmed* 64 N. Y. 656; *People v. Commissioners of Taxes*, 10 Hun (N. Y.) 246; *People v. Barber*, 42 Hun (N. Y.) 27, *affirmed* 106 N. Y. 669; *State v. Fisk University*, 87 Tenn. 233; *Cassiano v. Ursuline Academy*, 64 Tex. 673. But *compare* *St. Edward's College v. Morris*, 82 Tex. 1.

If, However, the Products of Such Farm Are Sold, it will be taxable though the proceeds arising therefrom are used for the support of the institution. *Les Commissaires d'Ecoles, etc.*,

(3) *Requirement of Exclusive Use.* — And in a great many jurisdictions the statutes go still further and restrict the exemption to such property only as is exclusively used for educational purposes.¹

(4) *Requirement that Title to Property Be in Educational Institution.* — It is sometimes required, in addition to property being used for educational purposes, that the title thereto shall be in the institution so using it,² and in such case property leased for such use is not exempt.³

v. Les Sœurs, etc., 12 Can. Sup. Ct. Rep. 45. See also *Mt. Hermon Boys' School v. Gill*, 145 Mass. 139, in which case the court recognized that the sale of farm products would in most cases deprive it of exemption, though because of the peculiar facts of the case it did not apply that rule to the farm there under consideration.

1. *Use Must Be Exclusive.* — An exemption granted to an educational institution of "all lands, tenements, and personal estate that shall be given to the trustees for the use of the academy" does not include a building about two-thirds of which is used by the students as a boarding house and dormitory, while the remainder is used as a public house, regular and transient boarders being taken therein. *Phillips Exeter Academy v. Exeter*, 58 N. H. 306, 42 Am. Rep. 589. And see generally *supra*, this title, *General Rules of Construction*, subdv. 4. b. (2) *Requirement that Use Be Exclusive.*

Statute Construed in Conformity with Constitutional Requirement of Exclusive Use. — The *Illinois* statute which exempts from taxation "all property of institutions of learning, including the real estate on which the institutions are located, not leased by such institutions or otherwise used with a view to profit," must be read in connection with the provision of the constitution authorizing the legislature to exempt certain kinds of property used "exclusively" for certain charitable purposes enumerated, and must therefore be understood to exempt only such property as may be used exclusively for the objects and purposes of such institutions. Therefore it does not exempt a tract of land belonging to a seminary but separated from it by a street of the usual width, and which tract is not used for any purpose. *Presbyterian Theological Seminary v. People*, 101 Ill. 578.

Dormitories, etc., Exempt. — The dormitories and dining halls occupied by students of Yale University, and also observatory buildings and houses furnished by the college for officers of the observatory, and adjoining lands found to be reasonably necessary for the purposes of the observatory, are exempt from taxation under section 3820 of the General Statutes of *Connecticut*, which exempts "buildings or portions of buildings exclusively occupied as colleges," etc. *Yale University v. New Haven*, 71 Conn. 310.

Leasing of School Property During Vacation Does Not Forfeit Exemption. — *Temple Grove Seminary v. Cramer*, 98 N. Y. 121, 26 Hun (N. Y.) 309.

Effect of Residence of Teachers in School Building. — A building which is used primarily as a school does not lose its character as property used exclusively for educational purposes by reason of the fact that the principal of the

school and some of the teachers, officers, or servants therein occupy rooms in the building for dwelling purposes, where their presence on the premises is necessary for the proper conduct of the school business. *Blackman v. Houston*, 39 La. Ann. 592; *Red v. Morris*, 72 Tex. 554; *Carter v. Patterson*, (Tex. Civ. App. 1897) 39 S. W. Rep. 1110. But compare *Red v. Johnson*, 53 Tex. 284, in which case it was held that a building used as a family residence and also as a schoolhouse was not exempt as a building used exclusively for school purposes although the main use thereof was as a school, and the owner and his family were all engaged in the school as teachers or pupils.

Where the primary use of a building is for a dwelling house, it is, of course, not exempt because a school is also conducted therein by the wife of the owner. *Edmonds v. San Antonio*, 14 Tex. Civ. App. 155.

2. *Property Must Be Owned by an Educational Institution.* — The provision in the Revenue Law of *Illinois* exempting from taxation "all property of institutions of learning, including the real estate on which the institutions are located," requires that the institution with which the property is connected must hold the legal or equitable title thereto. Therefore, it cannot apply to exempt property used as a school by two persons, in one of whom the title to the property is vested, he having a right at any time to stop the school and exclude the institution from the premises and from all use of the property, and close the institution itself. *Montgomery v. Wyman*, 130 Ill. 17.

Exemptions Dependent upon Use Regardless of Ownership. — Under the *Kansas* Constitution property used exclusively for educational purposes is exempt from taxation, whoever may own it or whoever may use it, while property not so exclusively used, if otherwise taxable, is not exempt, no matter who owns or uses it. *St. Mary's College v. Crowl*, 10 Kan. 442.

Chapter 83, art. 5, § 3, of the Revised Statutes of *Kentucky* in force in 1853 exempted from taxation the land on which any seminary was erected, to the extent of five acres, though such lands were not held by the seminary. *Nazareth Literary, etc., Inst. v. Com.*, 14 B. Mon. (Ky.) 214.

3. *Property Leased for Educational Uses Not Exempt.* — See *supra*, this title, *General Rules of Construction*, subdv. 4. b. (6) *When Use and Ownership Must Be Combined.*

Distinction Between Renting and Donation to Educational Purposes. — Property belonging to an educational corporation and which it has put into the possession of a teacher for a term of years under an agreement that he will establish and carry on therein a high school

(5) *Whether Residences of College Officials Are Exempt.* — As a general rule, houses owned by colleges, situated on or near the college grounds, and occupied as dwellings by the officials or professors of the colleges, are within the exemption from taxation possessed by the colleges.¹ But in *Massachusetts* such dwellings are held to be not exempt where the occupants are required to pay rent therefor.²

4. **Charitable Institutions** — *a.* CUSTOMARY EXEMPTION. — Still another exemption which almost universally prevails is in favor of charitable institutions.³

for boys, and will from the income of such school devote a specified sum to paying the interest on a small mortgage on the premises, insurance, and certain other designated expenses, the rest of such income being applied to the payment of his own salary and that of his assistants, is exempt from taxation under the *New Jersey* statute exempting "all colleges, academies, or seminaries of learning * * * and the land whereon the same are situate, necessary for the use and enjoyment thereof, * * * provided that no building so used which may be rented for such purposes and rent received by the owner thereof shall be exempted," for in the transaction above stated what the corporation does in substance is to donate the property in question to educational uses for a certain period of time. *Englewood School v. Chamberlain*, 55 N. J. L. 292, reversing 54 N. J. L. 549, and overruling in effect, though not expressly, *Society, etc., v. New Brunswick*, 55 N. J. L. 65. In this case the court distinguished the case of *State v. Ross*, 24 N. J. L. 497, in which it was held that under the former *New Jersey* statute (Act March 14, 1851, § 5, par. 2) a grammar school occupied by a tenant on his own account and at his own risk on lands belonging to the trustees of the College of New Jersey was not exempt from taxation, on the ground that in the earlier case the land was taxed as having been rented by the owner, while in the case at bar the land was not rented.

1. **Residences of Officials and Professors Exempt** — *Connecticut.* — *Yale University v. New Haven*, 71 Conn. 316.

Iowa. — *Griswold College v. State*, 46 Iowa 275.

Massachusetts. — *Williams College v. Assessors*, 167 Mass. 505. See also *Pierce v. Cambridge*, 2 Cush. (Mass.) 611.

Minnesota. — *Ramsey County v. Macalester College*, 51 Minn. 437.

New Jersey. — *State v. Ross*, 24 N. J. L. 497.

Pennsylvania. — *Dickinson College v. Cumberland County*, 12 Pa. Co. Ct. Rep. 582, 2 Pa. Dist. Rep. 378; *Northampton County v. Lafayette College*, 128 Pa. St. 132, affirming 5 Pa. Co. Ct. Rep. 407, 45 Leg. Int. (Pa.) 246; *Metzger Institute v. Cumberland County*, 2 Pa. Dist. Rep. 381.

Dwelling of College Professor Not Exempt as "Occupied for Literary Purposes." — A house on college lands occupied as a dwelling by a professor at a college and in which none of the exercises or recitations of the college is had is not a building "occupied for literary purposes" within the meaning of a statute exempting from taxation all buildings and lots of ground set apart for colleges, but declaring that the buildings on any of them not occu-

pied for literary purposes may be taxed. *Kendrick v. Farquhar*, 8 Ohio 189.

2. **No Exemption Where Rent Is Charged.** — *Williams College v. Assessors*, 167 Mass. 505; *Pierce v. Cambridge*, 2 Cush. (Mass.) 611.

3. **Charitable Institutions Not a Proper Subject of Taxation.** — In *Louisville v. Com.*, 1 Duv. (Ky.) 295, 85 Am. Dec. 624, Robertson, J., delivering the opinion of the court, said: "The true principle of taxation is equality of contribution according to means. A charity is no part of the means of the donor or the mere custodian of the barren title. It is of no pecuniary profit or appreciable value to the nominal owner. It is not, therefore, a fit subject for taxation. And, consequently, although the legislature has the power to tax it, yet no general statute for taxing the property of all persons will be interpreted as embracing property dedicated to public use or mere benevolence. In this category are included hospitals, almshouses, and schoolhouses."

Charitable Object Must Be Shown. — In order for an institution to be exempt as a charitable one under the *Canadian* statutes, it must be shown that its object is in fact charitable, and that no profit, reward, or remuneration can be derived from it by its members or directors. *Montreal v. Montreal Auxiliary Bible Soc.*, *Quebec L. R.* 6 Q. B. 251.

Manner in Which Title to Property Is Held Immaterial. — The constitution, in authorizing the exemption from taxation, among other things, of institutions of purely public charity, has reference to property and to the uses to which it is applied; and where property is applied to the support of a charity which is purely public, the legislature may exempt it from taxation without reference to the manner in which the title is held or recorded or the form or character of the organization adopted to administer the charity. *Gerke v. Purcell*, 25 Ohio St. 229.

Exemption of "Equipments" of Charitable Institution. — The exemption in chapter 260 of the *Maryland* Act of 1876 of the equipments owned by charitable or benevolent institutions plainly means the visible tangible furniture, fixtures, and apparatus on the premises which are usual and necessary for the operations there conducted. *Appeal Tax Ct. v. St. Peter's Academy*, 50 Md. 321.

Mortgage Securities Constituting a Part of the Endowment of a college which is a charitable institution are exempt from taxation for state purposes in *Pennsylvania*. In *re Washington*, etc., *College Mortg. Endowment Fund*, 10 Pa. Co. Ct. Rep. 478.

"Benevolent" Synonymous with "Charitable." — In *Saltonstall v. Sanders*, 11 Allen (Mass.) 446, the court said that the word "benevo-

b. WHAT IS A CHARITABLE INSTITUTION. — In a previous part of this work will be found a complete definition of what is meant by the term "charity,"¹ and also an exhaustive treatment of what purposes are or are not charitable.² In addition it is deemed proper to give in this connection the rules and illustrations which are to be deduced from the cases in which the question as to what is or is not a charitable institution has arisen directly under a claim of exemption from taxation.

General Rules. — The term "charity," in its more restricted sense of the relief of the wants of the poor, is not confined to their mere physical wants, but includes their intellectual and moral culture.³ In its wider sense, however, the term is not restricted to the relief of the poor as a class, but includes whatever is gratuitously done or given in relief of the public burden or for the advancement of the public good.⁴

lent," when used in connection with the word "charitable" — as in a grant of exemption to benevolent and charitable institutions — was synonymous with it, whatever might be its meaning when used alone. And in *Maine Baptist Missionary Convention v. Portland*, 65 Me. 92, the court said that it might be difficult to say what a benevolent institution was if it differed from one which was merely charitable.

1. Definition of Charity. — See the title **CHARITIES AND TRUSTS FOR CHARITABLE USES**, vol. 5, p. 893.

2. What Purposes Are or Are Not Charitable. — See the title **CHARITIES AND TRUSTS FOR CHARITABLE USES**, vol. 5, p. 925 *et seq.*

3. Physical Help and Intellectual and Moral Culture of the Poor. — *Income Tax Com'rs v. Pemsel*, (1891) App. 531, 61 L. J. Q. B. 265, 65 L. T. N. S. 621, 55 J. P. 805, *affirming* 22 Q. B. Div. 296.

In *New England Theosophical Corp. v. Boston*, (Mass. 1898) 51 N. E. Rep. 456, the court, *per* Lathrop, J., said: "The word 'charitable' refers to hospitals and other charitable institutions for the relief of the poor or the sick. The reason of this exemption is that they render a service to the public, and so relieve the state or municipality from expense."

The exemption under the *Pennsylvania* Constitution and laws of "institutions of purely public charity" extends to premises of a missionary society whose objects are the relief of the suffering poor from destitution and their education in temporal and religious matters, the premises being used as a place of residence for the deaconesses, who are the agents of the charity, who perform their duty without any compensation or pension other than their residence therein; as a place where gifts consisting of food, clothing, and money to aid the charitable labors of the corporation are received and stored, and from which they are distributed; as a place of free instruction for certain classes of children of both sexes; as a place where books are kept for the use of those for whom the charitable offices are conducted; as a lunch restaurant where light meals are sold to poor working girls at a rate less than the cost of furnishing, and as a place of daily public worship which is thoroughly nonsectarian in its character, though the institution is on a Methodist foundation; no objects of private or corporate gain being contemplated or attained by the work. *Woman's Home Missionary Soc. v. Taylor*, 173 Pa. St. 456.

4. Relief of Public Burdens or Advancement of Public Good. — *Kentucky Female Orphan School v. Louisville*, 100 Ky. 470; *Episcopal Academy v. Philadelphia*, 150 Pa. St. 565, 30 W. N. C. (Pa.) 528. See also *Income Tax Com'rs v. Pemsel*, (1891) App. 531, 61 L. J. Q. B. 265, 65 L. T. N. S. 621, 55 J. P. 805, *affirming* 22 Q. B. Div. 296.

A gift designed to promote the public good by the encouragement of learning, science, and the useful arts, without any particular reference to the poor, or any gift for a beneficial public purpose not contrary to any declared policy of the law, is a charity. And if such gift is administered according to the intention of the donor, and is used for charitable purposes, it is exempt from taxation under the *Missouri* Constitution of 1875, art. 10, § 6, and the Act of April 28, 1877, passed to give effect to that provision, and exempting from taxation property used for purely charitable purposes. *State v. Academy of Science*, 13 Mo. App. 213.

Institution Held Charitable. — The "Book Agents of the Methodist Episcopal Church, South," a corporation created as an arm or agency of the Methodist church, a religious organization, and charged with the trust of manufacturing and distributing books, periodicals, etc., in the interest and under the auspices of that church, and thereby raising a fund with which to support its worn-out preachers and their families, is clearly a religious and charitable institution and as such exempt from taxation under the *Tennessee* Constitution and statutes, and this exemption is not defeated by the fact that the outfit of the publishing house maintained by that corporation is in part used for the publishing of secular works, while the proceeds therefrom are wholly devoted to the charitable purposes contemplated in the creation of the institution. *Methodist Episcopal Church v. Hinton*, 92 Tenn. 188.

Charity Need Not Be Perpetual. — Property which is maintained by a Catholic church as a school of such a nature as to be a purely public charity within the meaning of the *Pennsylvania* Constitution and statutes is exempt from taxation although the legal title to the property is in an individual, the bishop, with no declared trust in him for a charitable use, and in consequence the charity may be terminated at any time by a sale of the property. *White v. Smith*, 43 W. N. C. (Pa.) 342, in

Institutions Held Exempt as Charities. — The following institutions have been held to be charitable or benevolent in their nature, and as such entitled to exemption from taxation in regard to the property owned and used by them for their appropriate purposes: A hospital into which all are received without distinction, and those who are unable to pay are treated free;¹ a poorhouse or almshouse;² a home or asylum for orphans;³ a school which is free to all without distinction;⁴ a missionary society whose purpose is the diffusion of Christian

effect, though not expressly, *overruling* *Mullen v. Juenet*, 6 Pa. Super. Ct. Rep. 1.

Institutions Held Not Charitable. — A trading corporation does not become an institution of learning, benevolence, or charity because its sole business is the publication and circulation of moral and religious works, nor because it sometimes sells its books at less than cost, as many business houses sometimes do that. *American Sunday School Union v. Philadelphia*, 3 Pa. Dist. Rep. 139.

The provision of the charter of Shawneetown that "the inhabitants of said city are hereby exempt from state tax for twenty years" is an obvious attempt on the part of the General Assembly to create an exemption, and is a violation of the constitution; and the fact that the city council is authorized to levy a tax equal in amount to a state tax during such period, for the purpose of local improvements, does not change the effect of the words used. Nor can the fact that such an amount is to be levied for the purpose of building levees make the exemption for a charitable purpose within the meaning of article 9, § 3, of the Constitution of 1848, authorizing exemptions of property necessary for charitable purposes. *People v. Barger*, 62 Ill. 452.

The eighth clause of section seven of the *Indiana Act of December 21, 1872* (Acts 1872, p. 57), which exempts from taxation "property to the amount of five hundred dollars of a widow or unmarried female, or of any female minor whose father is deceased," if her whole estate, real and personal, not otherwise exempted from taxation, does not exceed in value the sum of one thousand dollars, is unconstitutional, because not within the meaning of any of the exemptions authorized by the constitution. *State v. Indianapolis*, 69 Ind. 375, 35 Am. Rep. 223; *Warner v. Curran*, 75 Ind. 309.

In the case first cited, the court, *per* Biddle, J., said: "If the exemption from taxation claimed in this case can be upheld, it must be under the head of 'charitable purposes,' and proceeded to demonstrate that it could not be upheld at all.

1. Hospital. — *Massachusetts General Hospital v. Somerville*, 101 Mass. 319; *Sisters of Charity v. Collector*, 52 N. J. L. 373; *Pennsylvania Hospital v. Delaware County*, 169 Pa. St. 305; *Philadelphia v. Pennsylvania Hospital*, 8 Pa. Co. Ct. Rep. 72; *St. Joseph's Hospital Assoc. v. Ashland County*, 96 Wis. 636.

2. Poorhouse or Almshouse. — *Humphries v. Little Sisters of Poor*, 29 Ohio St. 201; *Cumru v. Directors of Poor*, 112 Pa. St. 264; *House of Refuge v. Smith*, 140 Pa. St. 387; *Armstrong County v. Overseers of Poor*, (Pa. 1888) 15 Atl. Rep. 892.

Poorhouse Farm, etc. — This exemption extends to a farm connected with the poorhouse

and used for the employment and maintenance of the inmates. *Cumru v. Directors of Poor*, 112 Pa. St. 264; *House of Refuge v. Smith*, 140 Pa. St. 387, *reversing* 8 Pa. Co. Ct. Rep. 552.

3. Orphan Asylum. — *Zable v. Louisville Baptist Orphans' Home*, 92 Ky. 89; *Kentucky Female Orphan School v. Louisville*, 100 Ky. 470.

4. Free Schools. — *Louisville v. Nazareth Literary, etc., Inst.*, (Ky. 1896) 36 S. W. Rep. 994; *Kentucky Female Orphan School v. Louisville*, 100 Ky. 470; *Appeal Tax Ct. v. St. Peter's Academy*, 50 Md. 321; *Hennepin County v. Grace*, 27 Minn. 503; *Sisters of Charity v. Collector*, 52 N. J. L. 373; *Northampton County v. Lafayette College*, 128 Pa. St. 132, *affirming* 5 Pa. Co. Ct. Rep. 407, 45 Leg. Int. (Pa.) 246; *White v. Smith*, 27 Pittsb. Leg. J. N. S. (Pa.) 330; *Haverford College v. Rhoades*, 6 Pa. Super. Ct. Rep. 71; *Dickinson College v. Cumberland County*, 2 Pa. Dist. Rep. 378; *Beaver County v. Geneva College*, 2 Pa. Dist. Rep. 70. See also *Meyers v. Akins*, 8 Ohio Cir. Ct. Rep. 228, 4 Ohio Cir. Dec. 425; *Gerke v. Purcell*, 25 Ohio St. 229.

Free Education for Ministry of a Certain Denomination. — In *Maryland* institutions having for their object the gratuitous instruction and preparation of poor young men for the ministry of a certain religious denomination have been held exempt as benevolent or charitable. *Appeal Tax Ct. v. Grand Lodge, etc.*, 50 Md. 431; *Redemptorists v. Howard County*, 50 Md. 449.

School Maintained by Tuition Fees Not Exempt. — A school which is supported mainly by tuition fees cannot be exempt as a charity, though it is partly maintained by an endowment fund. *Southwell v. Royal Holloway College*, (1895) 2 Q. B. 487, 64 L. J. Q. B. 791, 15 Reports 533, 73 L. T. N. S. 183, 44 W. R. 315, 59 J. P. 503; *Kittanning Academy v. Kittanning*, 19 Pa. Co. Ct. Rep. 296, 6 Pa. Dist. Rep. 603, 45 Pittsb. Leg. J. (Pa.) 87. See also *Hunter's Appeal*, 22 W. N. C. (Pa.) 361, *reversing* 20 W. N. C. (Pa.) 100, in which case a similar decision was rendered under a statute exempting institutions "founded, endowed, and maintained" by charity.

Nor is such a school exempt because its revenues are expended for religious and charitable purposes. *Seminary v. County Com'rs*, 2 Lanc. L. Rev. (Pa.) 281.

Institution Aiming to Furnish Education as Reasonably as Possible. — A college which requires all students admitted therein to pay for their tuition, and which admits only those whom the trustees see fit to admit, is not exempt, though its object is to furnish education at as reasonable a rate as possible and indigent pupils are allowed to work for their tuition. *Thiel College v. Mercer County*, 101 Pa. St. 530.

knowledge; ¹ a free library; ² a voluntary military organization constituting a part of the state militia; ³ a society for the prevention of cruelty to animals; ⁴ and a camp-meeting association. ⁵ And on the same principle a parsonage has been held exempt. ⁶

Institutions Held Not Exempt as Charities. — The following institutions have been held not to be of such a charitable nature as to entitle them to exemption from taxation: A society for the dissemination of theosophical ideas; ⁷ a law society; ⁸ a building association; ⁹ and, in *England*, a hospital which is entirely self-supporting. ¹⁰

c. LIMITATION OF EXEMPTION TO INSTITUTIONS OF "PURELY PUBLIC CHARITY." — In some jurisdictions the exemption is limited to institutions of

School Conducted for Profit. — The exemption granted by the Constitution and laws of *Pennsylvania* to institutions of purely public charity does not extend to the property of a corporation organized for the establishment and maintenance of a school wherein the children of the rich may be educated at reasonable rates, and the poor gratuitously, where such property has been placed in the charge of a head master under an agreement that the corporation is to receive one-eighth of the gross receipts of the school conducted by him, out of which it is to pay him for all scholars educated free of charge, and where out of three hundred and fifty-nine pupils only sixteen are educated without paying the cost of their own education. *Philadelphia v. Overseers of Public Schools*, 170 Pa. St. 257, 37 W. N. C. (Pa.) 65.

1. Domestic Missionary Society. — *Maine Baptist Missionary Convention v. Portland*, 65 Me. 92.

Heathen Missions. — Lands which are vested in trustees for the purpose of maintaining and advancing missions among the heathen are vested in them for charitable purposes, within the meaning of the *English Income Tax Law*, and the rents and profits thereof are exempt. *Income Tax Comr's v. Pemsel*, (1891) App. 531, 61 L. J. Q. B. 365, 65 L. T. N. S. 621, 55 J. P. 805, *affirming* 22 Q. B. Div. 206.

2. Free Library. — *Essex v. Brooks*, 164 Mass. 79; *Cleveland Library Assoc. v. Pelton*, 36 Ohio St. 253; *Donohugh's Appeal*, 86 Pa. St. 306, *affirming* 12 Phila. (Pa.) 284, 35 Leg. Int. (Pa.) 4; *Mercantile Library Co. v. Philadelphia*, 14 Pa. Co. Ct. Rep. 204, 3 Pa. Dist. Rep. 139; *Re Historical Soc.*, 13 Montg. Co. Rep. (Pa.) 205.

3. Militia Organization. — *Philadelphia v. Keystone Battery A*, 169 Pa. St. 526, 36 W. N. C. (Pa.) 482; *Scranton Guard Assoc. v. Scranton*, 1 Pa. Co. Ct. Rep. 550, 2 C. Pl. Rep. (Pa.) 217.

4. Society for the Prevention of Cruelty to Animals. — *Massachusetts Soc., etc., v. Boston*, 142 Mass. 24.

5. Camp-meeting Association. — Where an association organized and conducted for the purpose of a purely public charity, as a camp meeting, under the supervision and control of a church, owns real estate devoted exclusively to such use, and thereon provides facilities for the comfort and convenience of those who may attend the meeting, the fact that it makes charges for the use of such facilities does not take the property nor the facilities so provided from within the exemption granted by the *Ohio* statute to "all buildings belonging to in-

stitutions of purely public charity, together with the lands actually occupied by such institutions, not leased or otherwise used with a view to profit," where the accommodations provided are solely for the convenience and comfort of those who attend the meeting, and the charges therefor are not sufficient to meet the expenses of the association, but such expenses have to be met in part by donations from those interested. *Davis v. Cincinnati Camp Meeting Assoc.*, 57 Ohio St. 257.

6. Parsonage. — A lot of land and parsonage thereon for the use and occupancy free of rent, of such bishops of the Methodist Episcopal church as might from time to time be designated to reside in the city, the bishops being ministers of the gospel and general superintendents of the various churches, and devoting their entire lives and labor to building up the societies of the church, preaching the gospel, and administering the sacraments, and the lot having been purchased and the parsonage erected by the church raising a fund for such purpose, is exempt from taxation under *Rev. Stat. Missouri*, § 6659, exempting from taxation all property used for purely charitable purposes. *Bishop's Residence Co. v. Hudson*, 91 Mo. 671.

7. Theosophical Society. — *New England Theosophical Corp. v. Boston*, (Mass. 1898) 51 N. E. Rep. 456.

8. Law Society. — The property of a law society whose object is the "procuring and maintaining a law library, * * * with suitable rooms in connection therewith, and the institution and carrying out of such matters and things as may by the by-laws of the society be declared necessary for the governing of the society and the advancement of the profession, and of the study of the laws," is not exempt from taxation as a charitable institution under the Act 52 Vict., c. 27, § 122. *Ex p. St. John Law Soc.*, 30 New Bruns. 501.

9. Building Association. — *State v. McGrath*, 95 Mo. 103.

10. Self-supporting Hospital. — The exemption from income tax granted to hospitals by 5 & 6 Vict., c. 35, § 61, must be restricted to hospitals maintained wholly or in part by charity, and does not extend to an institution which is entirely self-supporting, although the hospital buildings and premises were originally purchased out of money subscribed by benevolent persons for that purpose, as this is not sufficient to constitute it an institution partly maintained by charity. *Needham v. Bowers*, 21 Q. B. Div. 436, 59 L. T. N. S. 404, 37 W. R. 125.

"purely public charity."¹ Such a provision excludes from the exemption charities which confine their benefits to certain privileged individuals,² but includes those which benefit only a certain class or give the preference to one class among several which may be benefited, where the beneficiaries are indefinite within that class.³

Charity Need Not Be Controlled by State. — Whether or not a charitable institution can be exempt as a "purely public charity" depends upon the nature of the charity, and not upon whether the corporation or institution which administers it is a public or private organization; and therefore such an exemption cannot be interpreted as confined to those institutions which are controlled and administered by the state itself, but extends to private institutions whose objects are within the exemption.⁴

d. WHAT AN EXEMPTION OF HOSPITALS OR ALMSHOUSES INCLUDES. — A hospital, so far as the present inquiry is concerned, is a place where the

1. Exemption Limited to Institutions of "Purely Public Charity." — An institution "maintained as a charity" is not entitled to exemption under the Constitution and laws of *Pennsylvania*, as the exemption authorized by article 9, § 1, of the constitution includes only "institutions of purely public charity." *Philadelphia v. Ladies' United Aid Soc.*, 154 Pa. St. 12, *affirming* 12 Pa. Co. Ct. Rep. 346, 1 Pa. Dist. Rep. 249.

Effect of Limitation. — The provision of the Constitution of *Pennsylvania* authorizing the exemption from taxation of institutions of purely public charity "is intended to exclude those charities which are private or only *quasi* public, such as many religious aid societies, and also those which, though public to some extent or for some purposes, have, like Masonic lodges and similar charities, some mixture of private with their public character." It was sufficient, however, to support the exemption granted by the Act of May 14, 1874 (P. L. 158), to "all hospitals, universities, colleges, seminaries, academies, associations, and institutions of learning, benevolence, or charity, with the grounds thereto annexed, and necessary for the occupancy and enjoyment of the same, founded, endowed, and maintained by public or private charity." *Donohugh's Appeal*, 86 Pa. St. 306, *affirming* 12 Phila. (Pa.) 284, 35 Leg. Int. (Pa.) 4.

But such act has always been construed by the courts with reference to the language of the constitution, so that many institutions have been held to be not exempt, notwithstanding the fact that they were apparently exempted by the general language of the statute. *Mullen v. Juenet*, 6 Pa. Super. Ct. Rep. 1.

What Is a Purely Public Charity. — In *Episcopal Academy v. Philadelphia*, 150 Pa. St. 565, 30 W. N. C. (Pa.) 528, Mr. Justice Williams, delivering the opinion of the court, said: "It may be safely said that whatever is gratuitously done or given in relief of the public burdens or for the advancement of the public good is a public charity. In every such case, as the public is the beneficiary, the charity is a public charity. As no private or pecuniary return is reserved to the giver or any particular person, but all the benefit resulting from the gift or act goes to the public, it is a 'purely public charity,' the word 'purely' being equivalent to the word 'wholly.'"

A charitable use is public, not in the sense that it must be executed openly and in public, but in the sense of being so general and indefinite in its object as to be deemed of common and public benefit. Each individual immediately benefited may be private, and the charity may be distributed in private and by a private hand. It is public in its general scope and purpose and becomes definite and private only after the individual objects have been selected. *Bangor v. Rising Virtue Lodge No. 10*, 73 Me. 428, 40 Am. Rep. 369, *quoting from* *Saltonstall v. Sanders*, 11 Allen (Mass.) 456.

2. Charities Confined to Certain Individuals Not Exempt. — *Bangor v. Rising Virtue Lodge No. 10*, 73 Me. 428, 40 Am. Rep. 369; *Donohugh's Appeal*, 86 Pa. St. 306, *affirming* 12 Phila. (Pa.) 284, 35 Leg. Int. (Pa.) 4. See also *County v. Sisters*, 2 Del. Co. Rep. (Pa.) 149. And see *infra*, this section, *Rule as to Societies Whose Benefits Are Confined to Members*.

3. Purely Public Charity May Be Confined to a Certain Class. — *Kentucky Female Orphan School v. Louisville*, 100 Ky. 470; *Burd Orphan Asylum v. School Dist.*, 90 Pa. St. 21, *reversing* 34 Leg. Int. (Pa.) 291.

4. Purely Public Charity May Be Administered by a Private Corporation. — *Humphries v. Little Sisters of Poor*, 29 Ohio St. 204; *Donohugh's Appeal*, 86 Pa. St. 306, *affirming* 12 Phila. (Pa.) 284, 35 Leg. Int. (Pa.) 4. See also *People v. Commissioners of Taxes*, 36 Hun (N. Y.) 311, in which case it was held that the exemption granted by 1 Rev. Stat. *New York* 388, § 4, subd. 4, to every almshouse, applied to an almshouse maintained by a private corporation, for besides the fact that the statute in another place (1 Rev. Stat. 631, § 72), provided for the exemption of almshouses provided by any city, town, or county, such an almshouse as that in question took care of those who would otherwise be charges upon the county, and thus was to a certain extent an agency of the state for a purpose public in its nature, although the incorporators were private persons.

An exemption of "all asylums and charitable institutions supported in whole or in part by the state" includes property which is used solely for charitable purposes by an institution which has repeatedly received appropriations from the state by virtue of legislative acts. *San Francisco Ladies' Protection, etc., Soc. v. Story*, 32 Cal. 65. No such exemption is per-

sick, and more especially the indigent sick, are received and cared for.¹ An almshouse is a house devoted to the reception and support of the poor.² An exemption of such an institution is usually considered as including the grounds necessary for conducting it properly³ and the residences of such officers and

missible under the *California* Constitution of 1879.

But compare *People v. Western Seaman's Friend Soc.*, 87 Ill. 246, in which the rule stated in the text is doubted.

1. **What Is a Hospital.** — *Appeal Tax Ct. v. State University*, 50 Md. 457. See also *In re Sisters of Charity*, 7 U. C. L. J. 157.

Actual Use Necessary. — A hospital building is not a hospital in the true sense of the word and as such exempt from taxation unless it is actually in use as a hospital, but independent of such uses it is a mere house and comes strictly within the taxing laws. It was so held in the case of a hospital building the use of which had been discontinued. *Philadelphia v. Jewish Hospital Assoc.*, 148 Pa. St. 454.

2. **What Is an Almshouse.** — *People v. Commissioners of Taxes*, 36 Hun (N. Y.) 311. In this case it was held that a house devoted to the purpose of affording pecuniary and other relief to persons of Swiss origin in need of assistance was an almshouse within the meaning of the *New York* statute exempting such property from taxation.

An almshouse is a house provided for the poor, and therefore the exemption from taxation granted to almshouses by the *New York* statutes extends to a building which is appropriated wholly for poor colored orphans and where they are to have a place of refuge and to be boarded, clothed, and suitably educated, etc., gratuitously. *Colored Orphans' Assoc. v. New York*, 104 N. Y. 581, 18 Am. & Eng. Corp. Cas. 186.

A home for aged men incorporated under the general act for charitable purposes and having for its object "the support of respectable aged indigent Protestant men who are unable to support themselves," and who have been residents in the city where the home is located for five years preceding their application for support, is an almshouse, and as such exempt from taxation under 1 Rev. Stat. *New York* 388, § 4, although by a by-law a certain entrance fee is required to be paid by each beneficiary. *Matter of Vassar*, 127 N. Y. 1, reversing 58 Hun (N. Y.) 378, and overruling *Matter of Keech*, (Surrogate Ct.) 26 N. Y. St. Rep. 433, affirmed 32 N. Y. St. Rep. 227; *In re Lenox*, (Surrogate Ct.) 9 N. Y. Supp. 895; *Matter of Vanderbilt*, 2 Connolly (N. Y.) 319.

Buildings owned by a charitable corporation and used by it for the care and maintenance of aged indigent persons and the support and education of indigent orphans and half orphan children and other children left in a destitute and unprotected state and condition may properly be classed as almshouses, or poorhouses, or schoolhouses, or houses of industry, all of which are exempted by law from taxation. *Church Charity Foundation v. People*, 6 Dem. (N. Y.) 154.

A building erected by a benevolent society and entirely devoted to charitable purposes, either as a hospital for indigent sick or as a dispensary for the relief of the poor who call

there, the work of the corporation in all its departments being entirely gratuitous and no fee or return being exacted for medical attendance, food, clothing, or lodging, or for any other thing or reason whatever, is an almshouse and as such exempt from taxation. *Western Dispensary v. New York*, 56 N. Y. Super. Ct. 361.

In *New York Infant Asylum v. Westchester County*, 31 Hun (N. Y.) 116, the plaintiff was a charitable corporation whose object was to take charge of foundlings and other infants and provide for their support and moral, physical, intellectual, and industrial education; also to provide such lying-in wards and such methods of care and guidance as should tend to prevent the maternal abandonment of homeless infants, and diminish the moral dangers and personal sufferings to which homeless mothers were exposed. The corporation also had power to establish and maintain schools. In pursuance to its charter the corporation became the owner of certain lands on which were erected buildings and structures suitable for its purposes, including lying-in wards and places for the reception of homeless mothers and infants, and a schoolhouse, all of which property was devoted to the benevolent and reformatory objects of the institution. Upon a claim from taxation made by such corporation it was held that the purposes to which the property of the corporation was devoted were the same generally as those for which poorhouses and almshouses were instituted, and that the same immunity secured by statute to almshouses and poorhouses should be extended to the property of the plaintiff corporation.

What Is a "House of Industry." — The exemption from taxation of every "house of industry" granted by 1 Rev. Stat. *New York* (5th ed.) 906, § 4, extends to buildings of a society which are used to carry out the object of its existence, which is the custody, education, and employment of dependent, destitute, and friendless children who are there received and instructed in useful employments and after reaching a certain age are bound out to be further instructed in such employments. *Hebrew Benev. etc., Asylum v. New York*, 11 Hun (N. Y.) 116.

3. **Grounds Necessary for Conducting Institution Exempt.** — *Hennepin County v. Brotherhood of Gethsemane Church*, 27 Minn. 460, 38 Am. Rep. 298; *People v. Purdy*, 58 Hun (N. Y.) 386, affirming on opinion below 126 N. Y. 679.

Surrounding Lands Bought to Secure Isolation Held Exempt. — *Massachusetts General Hospital v. Somerville*, 101 Mass. 319.

Farm Used as Open-air Sanitarium Held Exempt. — *Pennsylvania Hospital v. Delaware County*, 169 Pa. St. 305, 36 W. N. C. (Pa.) 547, 15 Pa. Co. Ct. Rep. 548.

Effect of Intersection of Grounds by Opening of a Street. — Where a lot which is attached to a home maintained by a charitable institution,

servants as the good of the institution requires should live on the premises.¹

c. EFFECT OF SECTARIAN MANAGEMENT OF CHARITY. — The fact that a school which is conducted as a charity is under the exclusive management and control of a particular religious denomination or sect will not deprive it of its exemption from taxation as a purely public charity if the general public is admitted,² even though the members of the sect which conducts the school are preferred.³

f. EFFECT OF PAYMENT BY SOME OF THE PERSONS BENEFITED. — An institution does not lose its charitable character and consequent exemption from taxation by reason of the fact that those recipients of its benefits who are able to pay are required to do so, where no profit is made by the institution, and the amounts so received are applied in furthering its charitable purposes, and its benefits are refused to none on account of inability to pay therefor.⁴

and therefore is exempt from taxation, is intersected by the opening of a new street, and the part which is cut off from the main lot remains vacant and is not used for any other purpose, it does not become subject to taxation, but remains exempt. *Ladies' United Aid Soc. v. Philadelphia*, 14 Pa. Co. Ct. Rep. 215, 34 W. N. C. (Pa.) 260.

Grounds Not Exempt under Washington Statute. — *Thurston County v. Sisters of Charity*, 14 Wash. 264.

1. Residences of Officers. — *Harrison v. Bulcock*, 1 H. Bl. 68; *Jepson v. Gribble*, 1 Exch. Div. 151, 45 L. J. Exch. 502, 34 L. T. N. S. 493, 24 W. R. 460; *Wilson v. Fasson*, 48 J. P. 361; *Massachusetts General Hospital v. Somerville*, 101 Mass. 319.

2. Sectarian Management Does Not Deprive of Exemption. — *Hennepin County v. Grace*, 27 Minn. 503; *Gilmour v. Pelton*, 6 Am. L. Rec. 26, 5 Ohio Dec. (Reprint) 447, 2 Cinc. Wkly. L. Bul. 158, 7 Ohio Dec. (Reprint) 359, 5 Ohio Dec. 447, *affirmed* by Supreme Court, Dec. 12, 1883; *White v. Smith*, 43 W. N. C. (Pa.) 342, *reversing* 8 Pa. Super. Ct. Rep. 205.

3. Preference of Members of Sect Which Conducts School. — *Kentucky Female Orphan School v. Louisville*, 100 Ky. 470; *Episcopal Academy v. Philadelphia*, 150 Pa. St. 565, 30 W. N. C. (Pa.) 528; *Haverford College v. Rhoads*, 6 Pa. Super. Ct. Rep. 71.

4. Payment by Some Persons Benefited Does Not Prevent Exemption — England. — *Cawse v. Nottingham Lunatic Hospital*, (1891) 1 Q. B. 585, 60 L. J. Q. B. 485, 65 L. T. N. S. 155, 39 W. R. 461, 55 J. P. 582.

Kentucky. — *Louisville v. Nazareth Literary, etc.*, Inst. (Ky. 1896) 36 S. W. Rep. 994; *Kentucky Female Orphan School v. Louisville*, 100 Ky. 470.

Maryland. — *Appeal Tax Ct. v. St. Peter's Academy*, 50 Md. 321.

Minnesota. — *Hennepin County v. Brotherhood of Gethsemane Church*, 27 Minn. 460, 38 Am. Rep. 298.

Missouri. — *State v. Powers*, 10 Mo. App. 263, *affirmed* 74 Mo. 476.

New Jersey. — *Sisters of Charity v. Collector*, 52 N. J. L. 373.

New York. — *People v. Purdy*, 58 Hun (N. Y.) 386, *affirmed* 126 N. Y. 679.

Pennsylvania. — *Northampton County v. Lafayette College*, 128 Pa. St. 132, *affirming* 5 Pa. Co. Ct. Rep. 407; *Philadelphia v. Woman's Christian Assoc.*, 125 Pa. St. 572; *Haverford*

College v. Rhoads, 6 Pa. Super. Ct. Rep. 71; *Dickinson College v. Cumberland County*, 2 Pa. Dist. Rep. 378; *Beaver County v. Geneva College*, 2 Pa. Dist. Rep. 70; *Philadelphia v. Pennsylvania Hospital*, 8 Pa. Co. Ct. Rep. 72.

Wisconsin. — *St. Joseph's Hospital Assoc. v. Ashland County*, 96 Wis. 636.

A Library Association which permits the use of its library, first, by all persons within the library building free of charge or fee of any kind; second, by all persons who desire to take out books and who for that privilege pay a mere hire and leave a deposit as security for the return of the books; and, third, by members or commuters who pay an annual sum instead of hire for each time of taking a book, is a purely public charity within the meaning of the provision of the Constitution of *Pennsylvania* authorizing the exemption of such institutions. *Donohugh's Appeal*, 86 Pa. St. 306, *affirming* 12 Phila. (Pa.) 284, 35 Leg. Int. (Pa.) 4. See also *Mercantile Library Co. v. Philadelphia*, 14 Pa. Co. Ct. Rep. 204, 3 Pa. Dist. Rep. 139.

A Society Whose Object Is the Distribution of Bibles, none of the corporators or directors deriving any pecuniary benefit from its work, and its revenue being largely made up of contributions and gifts, without which it could not succeed, is exempt from taxation as a charity institution, although some of the Bibles are sold at a profit, where the majority are sold at the cost price or less, or given away altogether. *Montreal v. Montreal Auxiliary Bible Soc.*, *Quebec* L. R. 6 Q. B. 251.

Department Maintained for Profit. — The exemption from taxation granted by the *Pennsylvania* Constitution and statutes to institutions of purely public charity extends to a building forming part of a hospital, which building is reserved exclusively for the use of patients paying a higher rate than others, the object of the trustees in maintaining this department being to make a profit, where the use of the apparent profit is to extend the institution's capacity for good among the members of the community, and such apparent profit is applied to the general objects of charity, no portion thereof inuring to the benefit of any person administering to the charity. *Philadelphia v. Pennsylvania Hospital*, 154 Pa. St. 9.

Receipt of Revenue Sufficient to Keep Institution in Operation. — The rule stated in the text applies although the revenue derived from the charges made is sufficient to keep the institu-

g. RULE AS TO SOCIETIES WHOSE BENEFITS ARE CONFINED TO MEMBERS. — While there are decisions to the contrary,¹ the preponderance of authority is in favor of the doctrine that an exemption of benevolent and charitable institutions does not extend to a society which confines its benefits to members or their families.²

5. Cemeteries. — The laws of a great many states extend exemption from taxation to cemeteries³ or places of burial, which latter term is considered as meaning the same thing as cemeteries, and cannot be restricted to mean merely tenanted graves or plots of ground actually occupied by buried corpses.⁴

tion in operation. *Episcopal Academy v. Philadelphia*, 150 Pa. St. 565, 30 W. N. C. (Pa.) 528; *Kentucky Female Orphan School v. Louisville*, 100 Ky. 470.

Excess of Receipts Over Expenditures. — In England the rule has been applied even though in some years the receipts from such charges exceeded the expenses of conducting the institution. *Cawse v. Nottingham Lunatic Hospital*, (1891) 1 Q. B. 585, 60 L. J. Q. B. 485, 65 L. T. N. S. 155, 39 W. R. 461, 55 J. P. 582, *distinguishing* *Needham v. Bowers*, 21 Q. B. Div. 436, 59 L. T. N. S. 404, 37 W. R. 125.

And in *Wisconsin* the same has been held in reference to a hospital conducted by a religious order, which by its charter could make no profits, where the excess of receipts over expenditures was used partly in paying the building expenses and partly in advancing money without interest to aid in the erection of other hospitals of the same character, belonging to the order, in other places. *St. Joseph's Hospital Assoc. v. Ashland County*, 96 Wis. 636.

Giving of Scholarships Does Not Alone Constitute a School a Charity. — *Philadelphia's Appeal*, (Pa. 1888) 15 Atl. Rep. 683; *College v. Davis*, 2 Del. Co. Rep. (Pa.) 33. This is especially the case where such scholarships are given as a reward for intellectual merit and not on account of poverty. *Southwell v. Royal Holloway College*, (1895) 2 Q. B. 487, 64 L. J. Q. B. 791, 15 Reports 533, 73 L. T. N. S. 183, 44 W. R. 315, 59 J. P. 503.

1. Cases Holding Societies Whose Benefits Are Confined to Members and Their Families Exempt as Charities. — *Georgia*. — *Savannah v. Solomon's Lodge No. 1*, 53 Ga. 93.

Indiana. — *Indianapolis v. Grand Master*, 25 Ind. 518.

Louisiana. — *State v. Board of Assessors*, 34 La. Ann. 574.

Oregon. — *Hibernian Benev. Soc. v. Kelly*, 28 Oregon 173.

Virginia. — *Petersburg v. Petersburg Benev. Mechanics' Assoc.*, 78 Va. 431, 8 Am. & Eng. Corp. Cas. 484.

2. Rule that Such Institutions Are Not Exempt — *England*. — *In re Linen, etc., Drapers' Inst.*, 58 L. T. N. S. 949.

Maine. — *Bangor v. Rising Virtue Lodge No. 10*, 73 Me. 428, 40 Am. Rep. 369.

Massachusetts. — *Young Men's Protestant Temperance, etc., Soc. v. Fall River*, 160 Mass. 409.

Missouri. — See *State v. McGrath*, 95 Mo. 193; *State v. Central St. Louis Masonic Hall Assoc.*, 14 Mo. App. 596.

New Jersey. — See *State v. Paterson*, (N. J. 1898) 39 Atl. Rep. 655.

New York. — See *Jones's Estate*, 22 Abb. N. Cas. (N. Y. Surrogate Ct.) 50.

Ohio. — *Morning Star Lodge No. 26 v. Hay-slip*, 23 Ohio St. 144.

Pennsylvania. — *Donohugh's Appeal*, 86 Pa. St. 306, *affirming* 12 Phila. (Pa.) 284, 35 Leg. Int. (Pa.) 4; *Philadelphia v. Masonic Home*, 160 Pa. St. 572, 40 Am. St. Rep. 736, 34 W. N. C. (Pa.) 149; *Delaware County Institute of Science v. Delaware County*, 94 Pa. St. 163.

South Carolina. — *State v. Addison*, 2 S. Car. 499.

In *Bangor v. Rising Virtue Lodge No. 10*, 73 Me. 428, 40 Am. Rep. 369, the court held that a Masonic lodge was not exempt as a charity, and *distinguished* the cases in *Maine* and in other states in which such lodges had been held to be charitable institutions on the grounds that either the rules and regulations of the lodges were not before the court, or the decisions had been based upon some statute differing in its terms from that in force in *Maine*.

3. Exemption of Cemeteries. — *Hoboken v. North Bergen Tp.*, 43 N. J. L. 146; *People v. Davren*, (Supreme Ct.) 16 N. Y. Supp. 794, *affirmed* 131 N. Y. 601.

Active Measures Must Have Been Taken to Prepare Land for Burial Purposes — Mere Paper Dedication Insufficient. — *Woodlawn Cemetery v. Everett*, 118 Mass. 354. See also *German Evangelical Protestant Cemetery v. Brooks*, 8 Ohio Cir. Ct. Rep. 439, 4 Ohio Cir. Dec. 478.

Cemetery in Which Lots Are Sold Only to Members of a Particular Church Not Exempt. — *Brown v. City*, 1 Mona. (Pa.) 8.

4. Exemption of Places of Burial. — *Metairie Cemetery Assoc. v. Board of Assessors*, 37 La. Ann. 32.

As to What Is a Burying Ground Belonging to a Church or Congregation within the second section of chapter 260 of the *Maryland Act* of 1876, see *Appeal Tax Ct. v. Zion Church*, 50 Md. 352.

Burying Ground Need Not Be Owned or Used by Any Church. — Land used as a public burying ground and at least partly fenced and marked off from the rest of the tract of which it is a part is exempt from taxation under *Code Iowa* 1873, § 797 (*Code* 1897, § 1304), exempting 'public grounds, including all places for the burial of the dead,' whether or not it is a church burying ground or used as such by any church. *Mulroy v. Churchman*, 52 Iowa 238.

Whether Sale of Cemetery Lots Is a Use for Profit. — Under a constitutional provision exempting from taxation places of burial provided they are "not used or leased for purposes of private or corporate profit or in-

Exemption Dependent upon Use. — This exemption, like the others which have been noted, usually depends upon the property for which it is claimed being used for the purposes to favor which the grant is made.¹ Such use embraces not merely the actual burial of the dead, but also such permanent improvements upon the cemetery grounds as are essential to the use and enjoyment of the land for cemetery purposes,² but it cannot extend further.³

come," a cemetery does not lose its exemption because the corporation owning it sells plots of the ground to persons desiring to purchase and bury their dead therein, at a price which, when sold, yields a profit on the investment. Such sales do not in any manner change the use of the property, but rather preserve it and confirm its use and dedication as a place of burial. *Metairie Cemetery Assoc. v. Board of Assessors*, 37 La. Ann. 32. But compare *Brown v. Pittsburgh*, (Pa. 1888) 16 Atl. Rep. 43, in which it was held that an exemption of "all burial grounds not used or held for private or corporate profit" did not include a cemetery which had been bought as an investment for a church and the revenues from which were for the use of the church and might be appropriated to any purpose which to such church might seem fit.

Land Held for Burial Purposes Exempt Though Burials Therein Prohibited. — In *New York* it has been held that where, by the provisions under which a cemetery company was incorporated, its land held and used exclusively for cemetery purposes could not be devoted or used for any other purpose, and was exempt from taxation, the exemption applied to a tract of land purchased by the corporation in good faith for cemetery purposes at a time when such a use of the land was lawful, though before any burial was made in the cemetery the city within which it was located passed an ordinance forbidding the burial of the dead in any cemetery within the city limits, with certain exceptions not including the cemetery in question. *People v. Pratt*, 129 N. Y. 68, reversing 14 N. Y. Supp. 804, which affirmed 14 N. Y. Supp. 551. A rehearing of this case was denied, 30 N. E. Rep. 64.

1. Exemption Dependent upon Use. — See *supra*, this title, *General Rules of Construction*, subdiv. 4, b, (1) *General Principles*.

Removal of Bodies — Exemption Continues until All Are Removed. — *State v. Wesleyan Cemetery Assoc.*, 11 Mo. App. 560, 570.

An Exemption of "All the Property of" a Cemetery Company extends to an old graveyard which it has acquired in addition to its cemetery property, and which it has been clearing up by the removal of old graves and the acquisition of burial rights in order to sell the grounds and increase its funds, for such property is held and owned for purposes auxiliary to its corporate ends. And this is true even though such lands exceed the amount which the company is authorized to hold for its cemetery. *Swan Point Cemetery v. Tripp*, 14 R. I. 199.

2. Exemption Extends to Improvements Necessary for Use of Land as Cemetery. — *Appeal Tax Ct. v. Baltimore Cemetery Co.*, 50 Md. 432.

Exemption of Property Used for Purposes Appropriate to a Cemetery — Extension of Exemption. — A cemetery company which had by charter

the right to hold a certain amount of land and was exempted from taxation as to such land, which was to be taken and held for a cemetery, after it had acquired the full amount allowed by its charter purchased a tract upon the opposite side of the highway and upon such tract erected a small dwelling house occupied by the superintendent of the cemetery, who paid no rent, but whose salary was fixed with reference to this privilege, and two small barns used for the keeping of the horse and tools owned and used by the corporation for work on the cemetery grounds. By a later statute the corporation was authorized to take and hold so much real or personal estate as was necessary for the objects of its organization, any limit in the original act notwithstanding, to be devoted "exclusively to purposes connected with and appropriate to the objects of such corporation." It was held that the effect of this later statute was to confirm and justify the purchase of the lot above referred to and to extend to it the exemption granted in the original charter of the corporation. *Rural Cemetery v. Worcester County*, 152 Mass. 408.

3. Uses Not Entitling Land to Exemption. — The use of a parcel of land for growing trees and shrubs, cutting turf, and depositing stone, wood, and other materials, to be ultimately used in preparing and ornamenting a cemetery, is no dedication of the land for the purposes of a cemetery or burial place for the dead so as to exempt it from taxation under the *Massachusetts* statutes. *Woodlawn Cemetery v. Everett*, 118 Mass. 354.

A provision in the charter of a cemetery company that "said cemetery is hereby declared exempt from all taxes and assessments so long as the same shall remain dedicated to the purposes of a cemetery" does not exempt a tract of land belonging to the corporation which it rents out to its sexton, who uses it as a residence, and for market and ornamental gardening, and who pays to the corporation for such use an annual rent of one hundred and fifty dollars. *State v. Lange*, 16 Mo. App. 468.

A provision in the charter of a corporation, organized to lay out, inclose, and ornament a plat or piece of ground, to be used as a burial place, that "said piece of ground so held and platted shall be exempt from taxation" does not extend to exempt a separate and adjoining lot purchased, held, and used not for burial purposes but for an office and dwelling of the custodian of the ground, and for a supply of water. *Bloomington Cemetery Assoc. v. People*, 170 Ill. 377.

Land "Subservient to Burial Purposes." — A provision in the charter of a cemetery company exempting from taxation real or personal estate held by the company "subservient to burial uses" does not include two tracts of

Land Held for Future Use. — An exemption of cemeteries will include a reasonable quantity of land acquired and held for future use for burial purposes, when the growth of the cemetery shall require it, for the space required for burial purposes constantly increases, and it is only proper that land should be provided for future occupancy.¹

6. Manufacturers — *a.* **CUSTOMARY EXEMPTION.** — The desire of the states to encourage manufacturing industries within their borders has led many of them to grant exemptions from taxation to manufacturers, or property employed in manufacturing.²

b. **WHAT CONSTITUTES MANUFACTURING.** — Manufacturing is the production of articles for use from raw or prepared materials by giving to these materials new forms, qualities, properties, or combinations.³ The term, at least as used in connection with exemption from taxation, cannot mean the mere putting together of parts which have been already prepared by another,⁴

land owned by the company but separated by a public highway from the land in actual use for burial purposes, although such land has been platted into burial lots, where none of such lots has ever been sold, nor any portion of the tracts used for burial purposes, and the company has erected on one of the tracts buildings occupied by men in its employment and stables where its horses are kept, and the other tract is used as a pasture for horses, and, as occasion required, sand and mold have been taken from the tract and used on the burial grounds for improving them, and where it is not shown that there is any intention of using such land by extending the cemetery so as to embrace it. *People v. Graceland Cemetery Co.*, 86 Ill. 336. See also *Rosehill Cemetery Co. v. Kern*, 147 Ill. 483.

1. Land Held for Future Use. — *Hoboken v. North Bergen Tp.*, 43 N. J. L. 146. In *Sisters of Charity v. Collector*, 51 N. J. L. 89, Dixon, J., spoke of this case in the following language: "In *Hoboken v. North Bergen Tp.*, 43 N. J. L. 146, Mr. Justice Parker appears to have fortified his conclusion that a certain tract of land held by the city of Hoboken as a cemetery was exempt from taxation by reference to a special law passed in 1862. And in *Newark v. Clinton Tp.*, 49 N. J. L. 370, he seems to speak of the judgment in *Hoboken v. North Bergen Tp.* as resting on the special law. Since I sat with him in *Hoboken v. North Bergen*, I may be permitted to say that the judgment therein was fully warranted by the general provisions of the tax laws, which exempt from taxation the property of cities, and also cemeteries, and that the importance of the special law of 1862 lay in its recognition of the right of the city to hold the entire tract for the purposes of a cemetery. So far as my memory serves, the constitutionality of an exemption under a special law was not mooted in the case. The decision should not be regarded as maintaining such an exemption."

Amount Held Must Be Reasonable. — Under a provision in the charter of a cemetery company exempting from taxation all property "actually used by the corporation for burial purposes, or for the general use of lotholders, or subservient to burial uses, and which shall have been platted and recorded as cemetery grounds," an entire tract of land does not become exempt because it is platted into burial lots and one section thereof is used for burial

purposes. *Rosehill Cemetery Co. v. Kern*, 147 Ill. 483.

2. Object of Exemption in Favor of Manufacturers. — The statutory exemptions in *Pennsylvania* in favor of manufacturing corporations were intended to reach "that class of productive industries which the legislature had sought to encourage as a means of bringing and keeping within our borders capital and labor, to be employed * * * in the production of the staples of commerce." Williams, J., in *Com. v. Northern Electric Light, etc., Co.*, 145 Pa. St. 105.

3. What Is Manufacturing. — *Century Dict.*

In a legal sense the process of manufacture is supposed to produce some new article by the application of skill and labor to the raw material. *People v. Roberts*, 145 N. Y. 375, affirming 82 Hun (N. Y.) 352.

In *New Orleans v. Le Blanc*, 34 La. Ann. 596, the court, *per* Bermudez, C. J., said: "A manufacturer is not one who creates out of nothing, for that surpasses human power; neither is he one who produces a new article out of materials entirely raw. He is one who gives new shapes, new qualities, new combinations to matter which has already gone through some artificial process. A shoemaker is none the less a manufacturer because he does not also tan the leather; the tanner is none the less a manufacturer of leather because he does not breed and raise the bullocks from which the raw hides are taken. The tanner makes leather to sell, but does not buy hides to sell again. He produces the article of the leather and depends for his profit upon the labor which he bestows upon the raw material. In other words, dealers are middlemen between the manufacturer or the producer and the consumer. Manufacturers are the suppliers of the dealers or consumers."

4. Putting Together of Parts Manufactured by Others Not a Manufacture. — *Lake v. Guillothe*, 48 La. Ann. 870; *Brooklyn Cooperage Co. v. New Orleans*, 47 La. Ann. 1314; *Chickasaw Cooperage Co. v. Police Jury, etc.*, 48 La. Ann. 523. See also *People v. Wemple*, 138 N. Y. 582, affirming 63 Hun (N. Y.) 452, 133 N. Y. 323, reversing 62 Hun (N. Y.) 619, 16 N. Y. Supp. 602.

A person engaged in cutting and making coats and trousers out of jeans cloth which has already been manufactured by another is not a manufacturer of "textile fabrics" within

or the appropriation of an article which is furnished by nature.¹

Illustrations — What Are Manufactures. — The following have been held to be manufactures within exempting statutes: Publishing, printing, and selling books;² job printing, engraving, electrotyping, and lithographing;³ the building of iron and steel bridges, roofs, girders, viaducts, turntables, and similar articles;⁴ slaughtering and dressing meats,⁵ rice milling,⁶ the making of kindling wood out of green slabs by a mechanical process,⁷ the making of soda-water apparatus,⁸ the making of artificial illuminating gas,⁹ and, in *New York*, the production of electricity for illuminating purposes.¹⁰

the meaning of article 207 of the *Louisiana* Constitution of 1879, exempting the capital, machinery, and other property employed in such manufacture. *Cohn v. Parker*, 41 La. Ann. 894.

An exemption from taxation of articles manufactured within the state does not apply to stoves which are purchased without the state, and, after being brought within the state, are fitted up with the appendages of pipe and cooking vessels. *Naff v. Russell*, 2 Coldw. (Tenn.) 36.

1. Appropriation of Article Furnished by Nature Not a Manufacture. — Thus an exemption in favor of manufacturers would not extend to a corporation engaged in the liberation of natural gas or oil from the earth and its transportation to customers. *Com. v. Northern Electric Light, etc., Co.*, 145 Pa. St. 105. Nor does it extend to one whose business is collecting natural ice, storing, preserving, and preparing it for sale, transporting it to certain cities and selling it. *People v. Knickerbocker Ice Co.*, 99 N. Y. 181, *affirming* 32 Hun (N. Y.) 475.

That the production of artificial illuminating gas is a manufacture, see *infra*, this section.

2. Publishing, Printing, and Selling Books. — *Evening Journal Assoc. v. State Board of Assessors*, 47 N. J. L. 36, 54 Am. Rep. 114; *Press Printing Co. v. State Board of Assessors*, 51 N. J. L. 75. See also *People v. Roberts*, 90 Hun (N. Y.) 533.

3. Job Printing, Engraving, etc. — *Evening Journal Assoc. v. State Board of Assessors*, 47 N. J. L. 36, 54 Am. Rep. 114; *Press Printing Co. v. State Board of Assessors*, 51 N. J. L. 75.

A corporation organized to manufacture blank books and stationery, and as a necessary incident to that business to print, lithograph, and sell its product, is organized exclusively for manufacturing purposes within the meaning of the *Pennsylvania* statute exempting such corporations from taxation. *Com. v. William Mann Co.*, 150 Pa. St. 64, *reversing* 11 Pa. Co. Ct. Rep. 290.

4. Bridge Companies. — The exemption from taxation granted by the *Pennsylvania* Revenue Act of 1889 to corporations "organized exclusively for manufacturing purposes" extends to a bridge company which is exclusively engaged in making and selling iron and steel bridges, building roofs, girders, viaducts, turntables, and other articles of machinery composed wholly or in part of iron, wood, steel, or other suitable materials, which materials it buys from others in a rough and unfinished form and makes suitable for use at its own shops, selling the finished material for such use as may be intended or appropriate, and often framing, putting together, and erecting the said material into bridges, roofs, or other

structures or machinery. *Com. v. Keystone Bridge Co.*, 156 Pa. St. 500; *Com. v. Pittsburgh Bridge Co.*, 156 Pa. St. 507.

5. Slaughtering, Dressing Meats, etc. — A corporation whose business consists of buying sheep and lambs, slaughtering them, and converting the carcasses into mutton, refrigerating the meat by processes which improve the quality thereof and preserving it for a suitable length of time, using therefor a carefully devised refrigerating plant and appliances that assure with great certainty the result desired; and then the transportation of such mutton in refrigerating cars, and its sale; and also the converting of other parts of the sheep into tallow, ammonia, fertilizers, and other marketable products, is engaged in manufacturing within the exemption granted to corporations so engaged by the *New York* statutes. *People v. Roberts*, 20 N. Y. App. Div. 521.

6. Rice Milling. — *New Orleans v. Ernst*, 35 La. Ann. 746.

7. Kindling Wood. — A corporation engaged in making kindling wood out of green slabs of wood cut from logs, such kindling wood being produced by a process of cutting and drying, is a manufacturing corporation within the *New York* statute exempting such corporations from taxation, for it produces a new article different from the material out of which it is made, in form and to a certain extent in nature, inasmuch as it is quickly inflammable, by the use of machinery, skill, capital, and labor. *People v. Roberts*, 20 N. Y. App. Div. 514.

8. Soda-water Apparatus. — A company engaged in the manufacture of soda-water apparatus and everything relating to that business may be clearly considered a manufacturing corporation within an exemption of such corporations from taxation, although it purchases from a glassware manufactory glassware to the extent of several thousand dollars in value per year, where such glassware is made from models furnished by the company and is sold by it only in connection with the soda-water apparatus made by it, and is a part thereof. *People v. Roberts*, 29 N. Y. App. Div. 585.

9. Making of Artificial Illuminating Gas. — *Covington Gas-Light Co. v. Covington*, 84 Ky. 94; *Covington v. Covington Gas-Light Co.*, (Ky. 1886) 2 S. W. Rep. 326; *Consolidated Gas Co. v. Baltimore*, 62 Md. 588, 50 Am. Rep. 237; *Nassau Gas-Light Co. v. Brooklyn*, 89 N. Y. 409, *affirming* 25 Hun (N. Y.) 567; *Com. v. Allegheny Gas Co.*, 1 Dauph. Co. Rep. (Pa.) 93.

10. Production of Electricity for Illuminating Purposes. — *People v. Wemple*, 129 N. Y. 543, *reversing* 15 N. Y. Supp. 718; *People v. Wemple*, 129 N. Y. 664, 42 N. Y. St. Rep. 280, *re-*

What Are Not Manufactures. — The following have been held not to be manufactures within exempting statutes: Publishing a newspaper;¹ repairing vessels in dry docks;² furnishing steam power to tenants;³ making and selling ice cream;⁴ mixing teas, and roasting, grinding and mixing coffees;⁵ and, in *Maryland* and *Pennsylvania*, the production of electricity for illuminating purposes.⁶ In *Mississippi* an ice factory has been held not to be within a statutory exemption in favor of manufactures, but this decision was based upon the peculiar terms of the statute in question.⁷

Selling Manufactured Product. — The selling of the manufactured product is regarded as a necessary incident to the business of manufacturing,⁸ and in *Louisiana* it is held to be essential to entitle a manufacturer to exemption that the manufactured products should be sold to dealers and customers.⁹

c. WHAT MANUFACTURERS ARE EXEMPT — (1) *Corporations "Wholly Engaged in Carrying On Manufacture Within the State."* — The *New York* law exempting from franchise taxation every manufacturing corporation "wholly engaged in carrying on manufacture within this state"¹⁰ does not

versing 61 Hun (N. Y.) 53; *People v. Campbell*, 88 Hun (N. Y.) 527. But see the *Maryland* and *Pennsylvania* cases, *infra*, this subdivision.

Abrogation of Rule by Statute. — Chapter 353 of the *New York* Laws of 1889 took electric-light and power companies out of the exemption in favor of manufacturing companies. *People v. Wemple*, 129 N. Y. 543, reversing 15 N. Y. Supp. 718.

1. **Publishing a Newspaper.** — *Evening Journal Assoc. v. State Board of Assessors*, 47 N. J. L. 36, 54 Am. Rep. 114; *Press Printing Co. v. State Board of Assessors*, 51 N. J. L. 75.

2. **Repairing Vessels in Dry Docks.** — *People v. New York Floating Dry-Dock Co.*, 92 N. Y. 487.

3. **Furnishing Steam Power to Tenants.** — A corporation whose purpose by its charter is "manufacturing steam, and supplying the same to the buildings and real estate owned by said corporation," is merely a landlord supplying its tenants with steam power in order more readily to rent its buildings and rooms, and not a manufacturer or producer of anything; therefore it is not within the exemption from taxation granted to manufacturing corporations. *Com. v. Arrott Mills Co.*, 145 Pa. St. 69.

4. **Making and Selling Ice Cream.** — *New Orleans v. Mannesier*, 32 La. Ann. 1075.

5. **Mixing Teas and Coffees.** — *People v. Roberts*, 145 N. Y. 375, affirming 82 Hun (N. Y.) 352.

6. **Production of Electricity for Illuminating Purposes.** — *Frederick Electric Light, etc., Co. v. Frederick City*, 84 Md. 599, 6 Am. Elec. Cas. 644; *Com. v. Northern Electric Light, etc., Co.*, 145 Pa. St. 105, 28 W. N. C. (Pa.) 520; *Com. v. Brush Electric Light Co.*, 145 Pa. St. 147; *Com. v. Edison Electric Light Co.*, 145 Pa. St. 131, 27 Am. St. Rep. 683, 28 W. N. C. (Pa.) 531; *Com. v. Edison Electric Light, etc., Co.*, 170 Pa. St. 231; *Com. v. Edison Electric Light, etc., Co.*, 1 Dauph. Co. Rep. (Pa.) 127. But see the *New York* cases, *supra*, this subdivision.

In *Com. v. Northern Electric Light, etc., Co.*, 145 Pa. St. 105, 28 W. N. C. (Pa.) 520, the court considered that an electric-light company was a manufacturing company within the

ordinary meaning of the term, and based its decision on the ground that such a company was engaged in the service of its customers in a quasi-public capacity and was therefore not within the meaning of the statutes exempting manufacturing corporations, which had for their object the encouragement of the production of staples of commerce.

7. **Ice Factory.** — An ice factory is not exempt from taxation under the *Mississippi* Act of March 9, 1882, exempting, for a period of ten years, "the machinery used for the manufacture of cotton and woolen goods, yarns, or fabrics composed of these or other materials, or for the making of all kinds of machinery or implements of husbandry, or all other things or articles not prohibited by law," for the words "all other things or articles not prohibited by law" must, by a well-known rule of statutory interpretation, be referred to the particular words which they immediately follow, and will include only articles or things *ejusdem generis* with those specifically enumerated, and there is nowhere in the statute any indication of a legislative intention to extend the exemption further. *Greenville Ice, etc., Co. v. Greenville*, 69 Miss. 86.

8. **Selling of Manufactured Product an Incident to Manufacture.** — *In re Consolidated Electric Storage Co.*, (N. J., 1893) 26 Atl. Rep. 983; *Com. v. William Mann Co.*, 150 Pa. St. 64, reversing 11 Pa. Co. Ct. Rep. 290.

Retailing Beer Manufactured by Retailer. — In *Louisiana* it has been held that a statute exempting from municipal taxation persons selling articles manufactured by themselves within the state did not exempt a saloon keeper who retailed by the glass beer manufactured by himself, as such business was entirely distinct from the immediate sale of the beer from the manufactory. *New Orleans v. Guth*, 11 La. Ann. 405.

9. **Manufactured Products Must Be Sold.** — *Nicholson v. Board of Assessors*, 48 La. Ann. 1570, citing *New Orleans v. Le Blanc*, 34 La. Ann. 597; *New Orleans v. Ernst*, 35 La. Ann. 747; *State v. Board of Assessors*, 36 La. Ann. 347.

10. **Corporation Must Be "Wholly" Engaged in Manufacturing.** — The exemption granted by section 3 of the *New York* Corporation Tax

extend to a corporation which conducts business within the state, but whose manufacturing plant is located elsewhere,¹ even though all of the corporation's general business is carried on within the state.²

(2) *Manufacturing Companies "Carrying On Business in the State."* — The exemption granted by statute in *New Jersey* to manufacturing companies "carrying on business in this state"³ does not apply to a company which

Act of 1880 (Laws 1880, c. 542), to "manufacturing corporations carrying on manufacture within this state" was limited and modified by chapter 193 of the Laws of 1889, which inserted the words "wholly engaged in" before the words "carrying on manufacture" so that a corporation which is not wholly engaged in such manufacture within the state is not within the exemption. *People v. Campbell*, 144 N. Y. 166, *affirming* 80 Hun (N. Y.) 95. See also *People v. Wemple*, 133 N. Y. 323.

Therefore a corporation which carries on any business other than that within the terms of the exemption is totally without the exempting clause and is subject to tax upon all its capital. *People v. Campbell*, 145 N. Y. 587, *affirming* 80 Hun (N. Y.) 466; *People v. Roberts*, 90 Hun (N. Y.) 533; *Matter of Tiffany*, 80 Hun (N. Y.) 486. The case last cited seems to be *overruled* in its specific application to the corporation concerned therein by *People v. Campbell*, 144 N. Y. 166, *affirming* 80 Hun (N. Y.) 95, in which case it was held that the corporation of Tiffany & Co. was within the exemption because by its charter it was authorized only to manufacture gold and silverware, etc., and to sell its own goods, and the purchase and sale of other goods by it was *ultra vires*; and while it was subject to a tax on the capital employed in such unauthorized transactions, it could not be subjected to a tax upon the capital employed in its legitimate corporate business. This distinction between *ultra vires* transactions and authorized transactions is also noted in the case of *People v. Roberts*, 90 Hun (N. Y.) 533, and *People v. Campbell*, 145 N. Y. 587, which *distinguished* on that ground the case of *People v. Campbell*, 144 N. Y. 166.

What Constitutes Being Wholly Engaged in Manufacturing Within the State. — The exemption granted by the *New York* laws to manufacturing corporations wholly engaged in manufacturing within the state applies to a foreign corporation all of whose capital within the state is employed in the management of a large manufactory owned by it within the state, although such corporation also maintains within the state an agency where the products of manufactories outside of the state are sold, no capital being employed in such agency and it not selling the products of the factory situated within the state. *People v. Roberts*, 29 N. Y. App. Div. 585.

What Constitutes Manufacturing Within the State. — The provision of chapter 542 of the *New York* Laws of 1880 exempting from franchise taxation corporations carrying on manufacturing within the state applied to a foreign corporation which in the ordinary and regular course of its business and in good faith, and not for the purpose of evading the law, was actually carrying on any part of its manufacturing operations within the state, although such operations were comparatively a small portion of all those carried on by the company.

People v. Wemple, 133 N. Y. 323, *reversing* 16 N. Y. Supp. 602. In this case the court recognized the fact that chapter 353 of the Laws of 1889 amended the statute under which the decision was made so as to restrict the exemption to corporations "wholly" engaged in manufacturing within the state.

Corporation Need Not Be Organized under General Law for Incorporating Manufacturing Companies. — A corporation which is in fact a manufacturing company and is engaged in manufacturing operations is entitled to the exemption granted by chapter 542 of the *New York* Laws of 1880, although it was not organized under the general law for incorporating manufacturing companies, as the exemption is not restricted to such companies. *People v. Wemple*, 129 N. Y. 664, 42 N. Y. St. Rep. 280, *reversing* 61 Hun (N. Y.) 53; *Nassau Gas-Light Co. v. Brooklyn*, 89 N. Y. 409, *affirming* 25 Hun (N. Y.) 567.

1. Carrying on Business Within State Does Not Give Exemption. — *People v. Wemple*, 138 N. Y. 582, *affirming* 63 Hun (N. Y.) 452; *People v. Horn Silver Min. Co.*, 105 N. Y. 76, *affirming* 38 Hun (N. Y.) 276.

The exemption granted by the *New York* laws to manufacturing corporations "wholly engaged in carrying on manufacture within this state" does not apply to a domestic corporation which operates two plants, one within the state, but the larger in another state, and sells within the state the product of such larger plant. *People v. Roberts*, 11 N. Y. App. Div. 449. In this case the corporation was engaged in selling cattle and manufacturing them into food and other articles, and it was considered that the fact that the product of its foreign plant was stored within the state for a few days in a refrigerator was not sufficient to authorize the corporation to say that as to such articles it was engaged in manufacturing within the state.

2. Entire General Business Being Conducted in State Does Not Give Exemption Where Manufacturing Plant Located Elsewhere. — *People v. Roberts*, 4 N. Y. App. Div. 388.

3. What Constitutes Carrying on Business Within the State. — A corporation of *New Jersey* which by contract with another corporation located within the state gives to it the exclusive right to make phonographs and take all made at the cost of materials and labor, with a percentage of profits and depreciation, having also an office and factory where parts of the phonographs are made, within the state, is "a manufacturing company carrying on business in this state," and as such exempt from state taxes under the *New Jersey* Act of April 18, 1884. *North American Phonograph Co. v. State Board of Assessors*, 54 N. J. L. 430.

Ownership of Patent Rights. — A company cannot claim exemption under the statute noted in the text because of capital invested in patent rights under which an article is manu-

has an office in the state but whose factories are located in other states.¹ Nor can capital stock which is used to acquire the right to manufacture a certain article outside of the state be taken into account in determining whether a company has a sufficient amount of its capital invested in manufacturing to entitle it to the exemption.²

(3) *Corporations "Organized Exclusively for Manufacturing Purposes."* — Under the *Pennsylvania* statute exempting from taxation corporations "organized exclusively for manufacturing purposes"³ it has been held that the possession by a manufacturing corporation of a power ancillary to its manufacturing business, as to mine for ore, which has never been used and the use of which has been effectually declined by the character of its business organization, does not deprive such a company of its exemption.⁴ And the cases have gone further than this by holding that where a manufacturing corporation, organized under the general law, employs a portion of its capital in mining and similar operations to provide the raw material for its manufacture, it loses its exemption from taxation only as to so much of its capital as is employed in such operations, and retains its exemption to that which is employed in strictly manufacturing business;⁵ and the same has been held even where the company engaged in operations not directly connected with its manufacturing business.⁶

(4) *Manufacturers of Certain Specified Articles.* — In *Louisiana* the exemption from general taxation is not extended to all manufacturing enterprises, but is confined to the capital, machinery, and property employed in the manufacture of certain specified articles.⁷ This section will be devoted to a dis-

factured by another company within the state. *Edison United Phonograph Co. v. State Board of Assessors*, 57 N. J. L. 520.

1. *Location of Office Within State Does Not Give Exemption.* — *American Glucose Co. v. State*, 43 N. J. Eq. 280.

2. *Capital Used to Acquire Right to Manufacture Outside the State Cannot Be Taken Into Account.* — *Electric Storage Battery Co. v. State Board of Assessors*, 60 N. J. L. 66; *Edison United Phonograph Co. v. State Board of Assessors*, 57 N. J. L. 520.

3. *What Is a Corporation Organized Exclusively for Manufacturing Purposes.* — A corporation organized under the General Corporation Act of *Pennsylvania* of 1874 for the purpose of manufacturing may be exempt from taxation as a corporation "organized exclusively for manufacturing purposes," although its charter gives it also a power to buy, sell, and deal as a merchant, for such mercantile clause in the charter is void, not being authorized by any act of assembly. *Com. v. Thackara Mfg. Co.*, 156 Pa. St. 510; *Com. v. Lippincott*, 156 Pa. St. 513.

A corporation whose capital is partly invested in patent rights and which has the sole manufacturing of the articles covered by such patent rights is "organized exclusively for manufacturing purposes" within the provision of the *Pennsylvania* law exempting such corporations from taxation on their capital stock. *Com. v. Westinghouse Air Brake Co.*, 151 Pa. St. 276.

4. *Possession of Ancillary Power to Engage in Other than Manufacturing Operations Does Not Forfeit Exemption.* — *Com. v. Pottsville Iron, etc., Co.*, 157 Pa. St. 500, *distinguishing Com. v. Westinghouse Electric, etc., Co.*, 151 Pa. St. 265, on the ground that it was never shown in that case that the company was organized as

a manufacturing company by the law creating it or that it had had by any distinct corporate act limited and defined the objects or purposes of its organization.

5. *Exercise of Power Ancillary to Manufacturing Business Does Not Totally Forfeit Exemption.* — *Com. v. Juniata Coke Co.*, 157 Pa. St. 507; *Com. v. Savage F. Brick Co.*, 157 Pa. St. 512; *Com. v. East Bangor Consol. Slate Co.*, 162 Pa. St. 599, *overruling Com. v. East Bangor Consol. Slate Co.*, 10 Pa. Co. Ct. Rep. 363; *Com. v. Coplay Iron Co.*, 11 Pa. Co. Ct. Rep. 295; *Com. v. Thomas Iron Co.*, 12 Pa. Co. Ct. Rep. 654.

6. *Operations Not Directly Connected with Manufacturing Business.* — *Com. v. Lackawanna Iron, etc., Co.*, 129 Pa. St. 346; *Com. v. Mahoning Rolling Mill Co.*, 129 Pa. St. 360; *Com. v. William Mann Co.*, 150 Pa. St. 64, *reversing* 11 Pa. Co. Ct. Rep. 290; *Com. v. Weikel, etc., Co.*, 150 Pa. St. 72; *Com. v. Westinghouse Air Brake Co.*, 151 Pa. St. 276; *Com. v. Allegheny Gas Co.*, 1 Dauph. Co. Rep. (Pa.) 93; *Com. v. Thackara Mfg. Co.*, 156 Pa. St. 510; *Com. v. Lippincott Co.*, 156 Pa. St. 513.

7. *Exemptions in Louisiana.* — *Nicholson v. Parker*, 44 La. Ann. 76. See *Louisiana Constitution* of 1898, art. 230.

Incidental Production of Article the Manufacture of Which Gives Exemption. — Property does not become exempt from taxation under article 207 of the *Louisiana Constitution* of 1879 (Const. 1898, art. 230), exempting property employed in the manufacture of various enumerated articles, because one of such articles is incidentally produced in the course of other manufacturing, where the principal business is the manufacture of an article which does not entitle the property to exemption. Thus, property engaged in milling rice cannot claim

cussion of what is within the meaning of the various terms used to describe products the manufacture of which is favored by exemption.

"Furniture and Other Articles of Wood." — As used in this connection the term "furniture" is considered to be confined to wooden furniture, and property employed in the manufacture of wire furniture is not exempt.¹ The term "articles of wood" includes only articles manufactured from lumber, and which are complete in themselves and ready for immediate, convenient and general use without further manipulation or work on them.²

"Textile Fabrics." — Another exemption is in favor of property employed in the manufacture of "textile fabrics," by which is meant the conversion of textile material into manufactured articles, such as rope, fish lines, and other articles of like nature, either twisted or woven, or worked into another state or condition.³

exemption as being engaged in the manufacture of "flour," which is one of the articles the manufacture of which, under the constitution, gives exemption, because as an unavoidable incident of the milling business refuse is produced which is utilized and sold under the name of "rice flour" or "rice polish." *State v. Board of Assessors*, 36 La. Ann. 347.

Incidental Production of Article Not Giving Exemption. — But where the principal business of a manufacturer is the making of articles the manufacture of which gives exemption, the property used for the manufacture of these articles is exempt although it may be incidentally employed in the manufacture of other articles of a like kind which do not give exemption. *State v. Board of Assessors*, 41 La. Ann. 534.

No Exemption in Favor of Manufacture of Articles of Paper. — Property employed in the manufacture of paper boxes is not exempt from taxation in *Louisiana*, for, though the constitution exempts property employed in the manufacture of "paper" and of "articles of wood," there is no exemption of property employed in the manufacture of articles of paper. *Washburn v. New Orleans*, 43 La. Ann. 226.

1. Property Employed in Manufacture of Wire Furniture Not Exempt. — *Gast v. Board of Assessors*, 43 La. Ann. 1104.

2. What the Term "Articles of Wood" Includes. — *Carpenter v. Brusle*, 45 La. Ann. 456; *Carre v. New Orleans*, 41 La. Ann. 996. See also *Jones v. Raines*, 35 La. Ann. 996.

The readiness of the articles manufactured for immediate use is the test as to whether or not the exemption applies. *Whited v. Bledsoe*, 49 La. Ann. 325.

The exemption includes property used in the manufacture of the following articles:

Barrels and hogsheads from rough logs and splits. *New Orleans v. Le Blanc*, 34 La. Ann. 596.

Doors, sashes, and blinds. *Martin v. New Orleans*, 38 La. Ann. 397, 58 Am. Rep. 194; *Carpenter v. Brusle*, 45 La. Ann. 456.

Boxes. *Martin v. New Orleans*, 38 La. Ann. 397, 58 Am. Rep. 194; *Carpenter v. Brusle*, 45 La. Ann. 456.

Laths. *Martin v. New Orleans*, 38 La. Ann. 397, 58 Am. Rep. 194; *Rosedale Cypress Lumber, etc., Co. v. Brusle*, 45 La. Ann. 459; *Carpenter v. Brusle*, 45 La. Ann. 456.

Shingles, crosssties, weatherboarding dressed and ready for use, pickets. *Carpenter v.*

Brusle, 45 La. Ann. 456; *Rosedale Cypress Lumber, etc., Co. v. Brusle*, 45 La. Ann. 459.

Dressed lumber, planed, tongued and grooved, mouldings, and turned stair work. *Carpenter v. Brusle*, 45 La. Ann. 456.

Dressed flooring, moulded window cases, car roofing, and car siding cut to length. *Rosedale Cypress Lumber, etc., Co. v. Brusle*, 45 La. Ann. 459.

But compare *Whited v. Bledsoe*, 49 La. Ann. 325, in which case it was held that the exemption did not apply where the articles manufactured consisted of planed, dressed, tongued, and grooved weatherboarding, floorings, ceilings, and mouldings, because no fixed shape or dimension was given thereto, and the articles were therefore not ready for immediate use, but had to be cut into lengths to suit, and afterwards put together by a carpenter or builder.

What Are Not Articles of Wood Within the Exemption. — The exemption does not extend to property employed in the manufacture of planks and other raw lumber. *Martin v. New Orleans*, 38 La. Ann. 397, 58 Am. Rep. 194; *Jones v. Raines*, 35 La. Ann. 996; *Rosedale Cypress Lumber, etc., Co. v. Brusle*, 45 La. Ann. 459; *Carre v. New Orleans*, 41 La. Ann. 996; *Carpenter v. Brusle*, 45 La. Ann. 456. Or of "shooks," which are described as "boxes knocked down," and are pieces of wood sawed or cut into the proper size and shape and packed into bundles either for shipment or for manufacture into boxes. *Washburn v. New Orleans*, 43 La. Ann. 226.

3. What Is Manufacture of Textile Fabrics. — *Waterbury v. Atlas Steam Cordage Co.*, 42 La. Ann. 723; *New Orleans v. Arthurs*, 36 La. Ann. 98; *Hernsheim v. Atlas Steam Cordage Co.*, 42 La. Ann. 726.

What Is Not a Manufacture of Textile Fabrics. — A person engaged in cutting and making coats and trousers out of jean cloth which has already been manufactured by another is not a manufacturer of "textile fabrics" within the meaning of article 207 of the *Louisiana Constitution of 1879*, and the "capital, machinery, and other property" employed therein are not exempt from taxation. *Cohn v. Parker*, 41 La. Ann. 894. In this case, the court, *per Watkins, J.*, distinguished the case of *New Orleans v. Arthurs*, 36 La. Ann. 98, in the following language: "In that case, the payment of the tax demanded by the city was resisted by the defendant on the ground that

"Machinery." — The exemption of property used in the manufacture of machinery does not extend to property used to make railing, posts, and bridges,¹ or linotype.²

"Chemicals." — The term "chemicals" as used in the exempting clause above referred to does not include illuminating gas,³ nor soda water, vichy, seltzer, and similar drinks.⁴

"Leather" and "Shoes" — Capital, machinery, and property employed in the manufacture of "shoe uppers" is not employed in the manufacture of "leather" or of "shoes," and is not exempt.⁵

"Fertilizers." — The machinery used in applying to animal matter and the garbage of a city certain processes which vaporize the moisture, dispose of the gases, separate the grease and oils, and convert the residuum into a fertilizer, is exempt as being employed in the manufacture of fertilizers.⁶ But the exemption does not extend to a mill which produces cottonseed meal, which, though it can be used as a fertilizer, is not produced primarily for that purpose and is used quite as freely for food.⁷

"Stationery." — Property used in the printing and publication of a newspaper is not exempt as being employed in the manufacture of stationery.⁸ Nor is property used in printing bill heads, orders, and other forms for commercial purposes within such an exemption.⁹

"Boat Building." — The exemption of property employed in "boat building" cannot extend to dry docks which are constructed for the purpose of repairing boats, even though on one or more occasions a boat has been entirely rebuilt in the docks.¹⁰

(5) *Manufacturers Employing a Certain Number of Hands.* — The exemption granted by the Constitution of *Louisiana* is further restricted to factories in which not less than five hands are employed.¹¹ And in order to be entitled to this exemption a factory must usually and customarily employ the required number of hands. It is not sufficient that it does so when in full operation, where it frequently employs only a less number.¹²

the property assessed was 'a manufactory of fish lines, ropes, packing, and other hempen articles,' and therefore exempt as being 'employed in the manufacture of textile fabrics.' The alleged exemption was maintained by this court, and the defendant relieved from the payment of the tax. Such articles as fish lines and ropes can only be made by being woven from raw materials, and are themselves 'textile fabrics.' But nets and hammocks made out of lines and ropes would not be textile fabrics."

1. Railing, Posts, and Bridges Not Machinery. — *Benedict v. New Orleans*, 44 La. Ann. 793.

2. Linotype Machine Not Exempt. — Linotype, or lines of type made for use in printing, are not machinery, and the linotype machine used in making them is therefore not exempt from taxation. *Nicholson v. Board of Assessors*, 43 La. Ann. 1570.

3. Property Used in Manufacturing Illuminating Gas Not Exempt. — *Shreveport Gas, etc., Co. v. Assessors*, 47 La. Ann. 65.

4. Manufacture of Soda Water, etc., Not Exempt. — *Crescent City Seltz., etc., Water Co. v. New Orleans*, 48 La. Ann. 768.

5. Manufacture of "Shoe Uppers" Not Exempt. — *Ricks v. Board of Assessors*, 43 La. Ann. 1075.

6. What Amounts to the Manufacture of Fertilizers. — *Southern Chemical, etc., Co. v. Board of Assessors*, 48 La. Ann. 1475.

7. Mill Producing Cotton Meal Not Exempt. — *St. Landry Cotton Oil Co. v. McGee*, 49 La. Ann. 750.

8. Publication of Newspaper Not a Manufacture of Stationery. — *Nicholson v. Parker*, 44 La. Ann. 76. In this case the court, *per* Fenner, J., distinguished the case of *State v. Dupré*, 42 La. Ann. 561.

9. Property Used for Printing Bill Heads, etc. — A person who prints bill heads, orders, and other forms for commercial purposes on paper bought by him, and who cuts and folds the paper into shapes for such purposes, as well as to serve for ledgers and commercial books, is not a manufacturer of stationery, and therefore is not entitled to the exemption granted by the *Louisiana* Constitution to property employed in such manufacture. *Patterson v. New Orleans*, 47 La. Ann. 275.

10. Dry Docks Not Exempt as Property Employed in Boat Building. — *Robertson v. New Orleans*, 45 La. Ann. 617.

11. Exemption Restricted to Factories Employing Not Less than Five Hands. — *New Orleans v. Arthurs*, 36 La. Ann. 68; *Waterbury v. Atlas Steam Cordage Co.*, 42 La. Ann. 723; *Hernsheim v. Atlas Steam Cordage Co.*, 42 La. Ann. 726; *Matter of Southern Wood Mfg., etc., Co.*, 49 La. Ann. 926; *Union Stave Co. v. Langridge*, (La. 1898) 24 So. Rep. 304.

12. Not Less than Five Hands Must Be Customarily Employed. — *Moore v. New Orleans*, 48 La. Ann. 1452.

d. WHAT PROPERTY IS WITHIN EXEMPTION—(1) *General Rule*.—An exemption from taxation in favor of a manufacturing establishment must include the land upon which the manufactory is situated and everything necessary for the conduct of the business.¹

(2) *Leased Property Not Exempt as "Employed in Manufacture."*—Property leased for manufacturing purposes is not exempt from taxation as against the owner by the provision of the *Louisiana* Constitution exempting property "employed in the manufacture of" certain specified products.²

(3) *Raw Material Not Exempt*.—An exemption from taxation in favor of a manufacturing establishment does not include an exemption of raw materials in the hands of the owner, though such material be intended to be furnished to the manufacturer for the conduct of his business;³ nor does it include vessels which are used to convey such raw materials to the manufacturer.⁴

(4) *Apportionment of Exemption*.—In *Louisiana*, *New Hampshire*, and *Pennsylvania* the courts have considered that a corporation which is engaged partly in manufacturing operations which entitle it to exemption, and partly in other business, is entitled to exemption from taxation as to that portion of its plant or that proportion of its capital which is actually engaged in manufacturing.⁵

7. *Mines*.—In order to entitle property to the benefit of a statutory exemption of mines and mining claims it is necessary that it should actually produce some of the metals the mining of which is to be favored; and it is not sufficient that it has been entered and paid for as a mining claim.⁶

Extent of Exemption.—Such an exemption does not cover the product of a mine,⁷ nor mills, hoisting works, machinery, and other surface improvements.⁸

1. *Exemption Includes Land and Everything Necessary for Conduct of Business*.—*Alexander v. Huntsville*, 24 Ont. Rep. 665; *Franklin Needle Co. v. Franklin*, 65 N. H. 177.

Office and Office Furniture.—Having an office and office furniture is merely incidental to the business carried on by a manufacturing corporation, and the value of the one and the rental of the other do not constitute capital stock separate from that used and employed in the business of manufacturing so as to be without an exemption granted to the capital stock of corporations engaged in manufacturing. *People v. Roberts*, 20 N. Y. App. Div. 514.

What Exemption of Gas Works as Manufactory Includes.—An exemption of gas works as manufactories includes the tank and all the machinery and realty belonging to the company and used for making gas. *Covington Gas-Light Co. v. Covington*, 84 Ky. 94; *Covington v. Covington Gas-Light Co.*, (Ky. 1886) 2 S. W. Rep. 326. But it does not include the pipes used for conveying the gas, after it is made, to the places where it is consumed, nor lamp posts, gasometers, etc., for those are not part of the machinery employed in the manufacture of the gas. *Covington Gas-Light Co. v. Covington*, 84 Ky. 94; *Covington v. Covington Gas-Light Co.*, (Ky. 1886) 2 S. W. Rep. 326; *Consolidated Gas Co. v. Baltimore*, 62 Md. 588, 50 Am. Rep. 237.

Effect of Occupation of Factory by Owner as Dwelling.—The exemption of a factory under article 207 of the *Louisiana* Constitution of 1879 on account of the character of the articles manufactured therein is not affected by the fact that the premises are occupied by the owner and his family as a dwelling, where it is shown that the premises and the articles

manufactured and in process of manufacture require constant protection and watching. *New Orleans v. Arthurs*, 36 La. Ann. 98.

2. *Leased Property Not Exempt*.—*State v. Board of Assessors*, 46 La. Ann. 859.

3. *Raw Material Not Exempt*.—*Westmore Lumber Co. v. Orne*, 48 Vt. 90.

4. *Vessels Used to Convey to Manufacturer Not Exempt*.—*Martin v. New Orleans*, 38 La. Ann. 397, 58 Am. Rep. 194.

5. *Apportionment of Exemption—Louisiana*.—*Washburn v. New Orleans*, 43 La. Ann. 226; *Martin v. New Orleans*, 38 La. Ann. 397, 58 Am. Rep. 194; *Ivens, etc., Mach. Co. v. Parker*, 42 La. Ann. 1103; *Southern Chemical, etc., Co. v. Board of Assessors*, 48 La. Ann. 1475; *Taylor Bros. Iron Works Co. v. New Orleans*, 44 La. Ann. 554; *Smith v. Board of Assessors*, 44 La. Ann. 91.

New Hampshire.—*Souhegan Nail, etc., Factory v. McConihe*, 7 N. H. 309.

Pennsylvania.—*Com. v. Thackara Mfg. Co.*, 156 Pa. St. 510; *Com. v. J. B. Lippincott Co.*, 156 Pa. St. 513; *Com. v. Juniata Coke Co.*, 157 Pa. St. 507; *Com. v. Savage F. Brick Co.*, 157 Pa. St. 512; *Com. v. East Bangor Consol. Slate Co.*, 162 Pa. St. 599; *Com. v. Lackawanna Iron, etc., Co.*, 129 Pa. St. 346; *Com. v. Mahoning Rolling Mill Co.*, 129 Pa. St. 360; *Com. v. Westinghouse Air Brake Co.*, 151 Pa. St. 276; *Com. v. William Mann Co.*, 150 Pa. St. 64; *Com. v. Weikel, etc., Co.*, 150 Pa. St. 72; *Com. v. Allegheny Gas Co.*, 1 Dauph. Co. Rep. (Pa.) 93.

6. *Exemption Applies Only to Property Actually Producing Minerals*.—*Dyke v. Whyte*, 17 Colo. 296.

7. *Product of Mine Not Exempt*.—*Hope Min. Co. v. Kennon*, 3 Mont. 35.

8. *Surface Improvements Not Exempt*.—*Gold*

8. Pensions and Bounties. — The exemption from taxation granted by statute in *New York* to pensions extends to property in which such pension money is invested by the pensioner and which is necessary and convenient for the support of himself and family, while the property is retained by him.¹

Property Purchased in Part with Pension Money. — But where such property is only partly paid for with pension money the exemption extends only to such proportion of its value as the pension money invested therein represents.²

Exemption of Pay and Bounty. — The provision of the *New York* statutes exempting from taxation the pay and bounty of an officer or private in the military service of the United States exempts a bounty paid by a town.³

9. Imports and Exports. — The provision of the Federal Constitution that "no state shall without the consent of the Congress lay any imposts or duties on imports or exports except what may be absolutely necessary for executing its inspection laws" operates to exempt such imports and exports from taxation under the general laws of the several states.⁴

When Imports Become Taxable. — The exemption of imports continues only so long as they remain the property of the importer in his warehouse, in the forms or packages in which they were imported. When the packages are sold or broken up and the goods mixed with the general mass of the property within the state, they become taxable.⁵

10. Mortgages. — In *Maryland* it has been held that a statutory provision exempting from taxation "mortgages upon property in this state and the mortgage debts respectively secured thereon" did not exempt the mortgages of building societies, as in such mortgages there was no provision for the pay-

Hill v. Caledonia Silver Min. Co., 5 Sawy. (U. S.) 575.

A Flume constructed for the purpose of and necessary to the working of a mining claim is not exempt. *Hart v. Plum*, 14 Cal. 148.

1. Exemption Extends to Property Purchased with Pension Money. — *People v. Williams*, 6 Misc. Rep. (N. Y. Supreme Ct.) 185; *Lapolt v. Maltby*, 10 Misc. Rep. (N. Y. County Ct.) 330; *Toole v. Oneida County*, 16 Misc. Rep. (N. Y. Supreme Ct.) 653, *affirmed* 13 N. Y. App. Div. 471, 4 N. Y. Ann. Cas. 124.

Where Pensioner Is the Beneficial though Not the Legal Owner of Property. — The rule set out in the text applies even though the pensioner be a lunatic and the title to the property be in his committee as such, for assuming that the purchase by the committee and taking the title in his own name was unauthorized, and that the committee as such cannot legally hold real estate of the lunatic, it follows that he holds title to the property in question as trustee of the lunatic and has a mere naked title without interest, the lunatic being the beneficial owner. *People v. Williams*, 90 Hun (N. Y.) 501.

Personal Nature of the Privilege. — Prior to the enactment of chapter 347 of the *New York* Laws of 1897 the exemption referred to in the text was personal to the pensioner and did not extend to property owned by another, even though the other was his wife. And, though this rule has been changed by the statute above referred to, that statute had no retroactive effect. *People v. Feitner*, 157 N. Y. 363, *affirming* 32 N. Y. App. Div. 23.

2. Property Exempt Only to Extent of Pension Money Invested Therein. — *Matter of Murphy*, 9 Misc. Rep. (N. Y. Supreme Ct.) 647; *Worden*

v. Oneida County, (Supreme Ct.) 54 N. Y. Supp. 952; *Matter of Peek*, 80 Hun (N. Y.) 122; *McKibben v. Oneida County*, 25 N. Y. App. Div. 361; *People v. Wells*, 10 Misc. Rep. (N. Y. Supreme Ct.) 195; *Ernenwein v. Oneida County*, 24 Misc. Rep. (N. Y. Supreme Ct.) 216; *Toole v. Oneida County*, 24 Misc. Rep. (N. Y. Supreme Ct.) 218; *Tucker v. Utica*, (Supreme Ct.) 54 N. Y. Supp. 855.

Property May Be Assessed. — Under the statute referred to in the text the property of a pensioner may be assessed in the ordinary way, and if he claims an exemption, he must state the facts in writing; and if the pension money used in purchasing exceeds the assessed valuation of the property, the assessors must enter "exempt" on the margin opposite the pensioner's name, while if the pension money so used is less than the valuation, the assessors must enter upon the assessment rolls that the property is exempt to the extent of the pension money so used. *People v. Reilley*, 21 Misc. Rep. (N. Y. Supreme Ct.) 363. Therefore, property purchased in part with pension moneys is not beyond the jurisdiction of the assessors to make an assessment thereon. *McKibben v. Oneida County*, 25 N. Y. App. Div. 361.

3. Bounty Paid by Town Within Exemption. — *People v. Wells*, 10 Misc. Rep. (N. Y. Supreme Ct.) 195.

4. Imports and Exports Exempt from Taxation. — *Low v. Austin*, 13 Wall. (U. S.) 29; *Clarke v. Clarke*, 3 Woods (U. S.) 408; *Blount v. Munroe*, 60 Ga. 61; *State v. Pinckney*, 10 Rich. L. (S. Car.) 474.

What Is an Export. — See *EXPORT*, *post*.

5. When Imports Lose Their Exempt Character. — *Low v. Austin*, 13 Wall. (U. S.) 29; *State v. Pinckney*, 10 Rich. L. (S. Car.) 474.

ment of the sums named therein as the consideration for which they were executed, nor any part thereof, as mortgage debts.¹

11. Household Furniture. — The exemption in the *Massachusetts* statute of all household furniture of every person, not exceeding one thousand dollars in value, includes all furniture appertaining to the dwelling and kept for use in the household, and there is no limitation to the exemption save to that of one thousand dollars in value. The fact that a large portion of the furniture for which exemption is claimed is kept in sleeping rooms used solely by occasional guests or permanent boarders does not take it out of the exemption.²

12. Tools of Mechanics. — In *Iowa* it has been held that an exemption of "the tools of any mechanic," up to a certain value, includes the press, types, and other implements necessary for a printer to carry on his business;³ but this has been denied in *Mississippi*.⁴

13. Fire Engines. — An exemption of "fire engines and all implements for extinguishing fires" means an engine the primary purpose of which is to extinguish fires, and cannot include the works of a water company which supplies water for ordinary uses as well as for occasional use in times of fire.⁵

14. Growing Crops. — Fruit trees are not within the exemption granted by the *California* Constitution to growing crops.⁶

15. Premiums Loaned in State. — In *Maryland* it has been held, under an act imposing a tax upon the gross premiums received by foreign insurance companies doing business within the state, but exempting therefrom such premiums as were loaned within the state, that an investment by a foreign corporation of funds received from premiums in water bonds of the city of Baltimore was exempt, as the acquisition of such bonds constituted a loan to the city and not a mere purchase.⁷

16. Moneys of Foreign Capitalists Sent to State for Investment. — The provision of the *New York* laws exempting agents of moneyed corporations or capitalists from taxation for moneys in their possession or under their control, transmitted to them for the purpose of investment or otherwise, and also exempting demands belonging to nonresidents of the state and sent to or deposited in the state for collection, is designed to afford to the foreign capitalist who invests his funds in New York every conceivable protection, and the capital is exempt whether invested or uninvested, and whether the securities are taken away or remain within the state for collection.⁸

Death of Capitalist. — And this exemption is not affected by the death of one of the capitalists who transmitted money from a foreign country, where it is shown that his intention to invest a certain portion of the fund in United States securities was expressed even in his will.⁹

17. Personal Property Situated Without the State. — The *Vermont* statutes exempt from taxation personal property owned by inhabitants of that state but situated and taxed in another state.¹⁰ But the exemption does not extend to a debt due to a citizen of Vermont, although it be secured by mortgages on real property in another state, for the *situs* of the debt is at the domicile of

1. Exemption of Mortgages Does Not Include Mortgages of Building Societies. — Appeal Tax Ct. *v.* Rice, 50 Md. 302.

2. What Exemption of Household Furniture Includes. — Day *v.* Lawrence, 167 Mass. 371.

3. Exemption of Tools of Mechanics Includes Printing Presses, etc. — Smith *v.* Osburn, 53 Iowa 474.

4. Printing Presses, etc., Held Not Exempt. — Frantz *v.* Dobson, 64 Miss. 631, 60 Am. Rep. 68.

5. Exemption of Fire Engines Does Not Include Waterworks. — Matter of Des Moines Water Co., 48 Iowa 324.

6. Fruit Trees Not Exempt as Growing Crops. — Cottle *v.* Spitzer, 65 Cal. 456, 52 Am. Rep. 305.

7. What Constitutes a Loan of Premiums Within the State. — State *v.* Insurance Co. of North America, 55 Md. 492.

8. Scope of Exemption of Foreign Capital. — Williams *v.* Wayne County, 78 N. Y. 561, reversing 14 Hun (N. Y.) 343.

9. Exemption Not Affected by Death of Capitalist. — People *v.* Commissioners of Taxes, 42 Hun (N. Y.) 560, affirmed 105 N. Y. 629.

10. Exemption of Property Situated Without the State. — Hughes *v.* Kelley, 69 Vt. 443.

the owner, and is not affected by the locality of the security.¹

18. Savings Institutions. — In *Pennsylvania* it has been held that an exemption of "savings institutions" from a specified tax did not extend to a building association.²

Deposits in Savings Bank. — The exemption granted by the laws of *New York* to "deposits in any bank for savings" is considered to extend to the surplus fund of such a bank.³ And in *Massachusetts* such an exemption includes a guaranty fund required to be set aside out of the net profits for the protection of depositors.⁴

Limited Exemption of Deposits. — A statute exempting savings banks from taxation "on all deposits not exceeding two thousand dollars made in the name of any one person" means that each deposit in the name of a single person is exempt up to the sum of two thousand dollars, and if it exceeds that amount the two thousand dollars are to be deducted from the amount assessed for taxation; not that all deposits of over two thousand dollars are to be taxed as a whole.⁵

Capital Not Exempt. — In *Iowa* it has been held that a statute providing that "the franchise of all such [savings] banks, the savings and funds deposited therein, and mortgages and other securities wherein the same are invested are not to be taxed, but are expressly exempted therefrom," did not exempt capital invested in such mortgages and securities.⁶

19. Students in Public Schools. — An exemption from capitation tax in favor of students in public schools includes law students who are studying at such schools and are also under indentures to advocates.⁷

20. Persons of Color. — In *Connecticut* it has been held that an exemption from taxation of the personal and real estate of "persons of color" extended to all persons proved to be of African descent, and also having and disclosing visibly the peculiar and distinctive color of that race, and to such persons only.⁸

1. Debt Due Citizen Not Exempt Though Secured by Mortgage on Property in Another State. — *Bullock v. Guilford*, 59 Vt. 516.

2. Building Association Not Within Exemption of Savings Institutions. — *Bourguignon Bldg. Assoc. v. Com.*, 98 Pa. St. 54.

3. Surplus Fund Exempt. — *People v. Peck*, 157 N. Y. 51, affirming 32 N. Y. App. Div. 624, which affirmed 22 Misc. Rep. (N. Y.) 477; *People v. Barker*, 154 N. Y. 122, reversing 19 N. Y. App. Div. 64. But compare *People v. Coleman*, 135 N. Y. 231, affirming 18 N. Y. Supp. 675.

Exemption Extends to Bank Incorporated by Another State. — Such exemption extends to a savings bank incorporated by another state, but which under the statutes of its domicile has obligations and duties to its depositors similar to those of a savings bank incorporated in *New York*. *People v. Barker*, 154 N. Y. 122, reversing 19 N. Y. App. Div. 64.

Exemption Held to Apply in Favor of Depositors. — In *People v. Dederick*, (Supreme Ct.) 54 N. Y. Supp. 519, it was held that the provision of *New York Laws 1896*, c. 908, § 4, subdiv. 14, exempting from taxation "the deposits in any bank for savings which are due depositors," must be held as describing the property of the depositor and exempting the depositors in savings banks from taxation on their deposits. This conclusion was founded on the reasoning that the language used applied quite as much to the property of the depositor as to the property of the bank, and as such deposits were debts due from the bank it would be entitled to deduct them from its assessment for taxation under section 21, subdiv. 4, of the law re-

ferred to, and, therefore, unless the exemption had the meaning given to it above, it would be entirely superfluous. In this case Parker, P. J., delivering the opinion of the court, said: "The cases of *People v. Coleman*, 135 N. Y. 231, and *People v. Barker*, 154 N. Y. 122, are not authority upon the question here presented, except so far as they recognize the relation of debtor and creditor between the bank and the depositor. In each case the exemption claimed by the bank was not for its deposits, but for its surplus accumulations." A contrary decision to that set out above was, however, rendered in *Matter of Haight*, 32 N. Y. App. Div. 496.

4. Guarantee Fund Exempt. — *Suffolk Sav. Bank, Petitioner*, 149 Mass. 1. The statute under consideration in this case exempted deposits invested in certain specified ways, among them in real estate used for banking purposes; and it was held that an entire bank building was exempt, though certain parts were not used for banking purposes.

5. Construction of Limited Exemption. — *German Sav. Bank v. Archbold*, 104 U. S. 708, reversing 15 Blatchf. (U. S.) 398.

6. Capital Not Exempt. — *German American Sav. Bank v. Burlington*, 54 Iowa 609.

7. Who May Be Exempt as Students in Public Schools. — *Ex p. Bourdages*, 11 L. C. Rep. 457. In this case it was further decided that Laval University was a public school, such as to entitle its students to the exemption.

8. Who Are Exempt as Persons of Color. — *Johnson v. Norwich*, 29 Conn. 407. In this case the exemption was held to apply to a

21. Corporations and Corporate Stock Generally — a. INTRODUCTORY. — In the earlier legislative history of the United States, when the practice of creating corporations by special act of the legislature prevailed, it was by no means unusual for the charter of a corporation to contain a grant of exemption from taxation.¹ This practice has fallen into disuse with the adoption by most if not all the states of constitutional provisions forbidding special legislation and requiring the enactment of general laws under which persons desiring to do so may associate themselves as corporate bodies;² but many of the special exemptions which have been granted still remain in force, and there are at the present time many general laws exempting certain classes of corporations,³ though such exemptions are for the most part not absolute, but limited, the corporations favored being required to make some payment in lieu of taxes, or a certain kind of taxation being substituted for all others.⁴

b. WHETHER EXEMPTION OF CAPITAL STOCK AND PROPERTY EXEMPTS SHARES IN HANDS OF SHAREHOLDERS. — The question has frequently arisen

quadroon, or person having one-fourth African negro blood.

1. Special Exemption by Charter. — See *State v. State Bank*, 6 Blackf. (Ind.) 349; *State v. State Bank*, 7 Blackf. (Ind.) 393; *Connerville v. State Bank*, 16 Ind. 105.

2. See the title CORPORATIONS, vol. 7, p. 642.

3. Exemption of Personal Property of Corporations Whose Stock Is Taxed. — The *Connecticut* Act of 1826 declared that the personal property of corporations whose stock was then taxable should not be assessed or taxed. Therefore, the stock of banks being of itself taxable, their personal property was exempted. *Savings Bank v. New London*, 20 Conn. 111.

Exemption of Stock in Foreign Corporations. — Section 270 of the Revised Laws of *Vermont* exempts from taxation "shares of stock in a corporation situated in another state, when all the stock of such corporation is taxed in such state to the holders, whether residing within or without such state, or when the corporation is taxed in such state for all its stock." *Foster v. Stevens*, 63 Vt. 175. See also *Smalley v. Burlington*, 63 Vt. 443. This exemption extends to shares in the stock of a bank situated in Quebec, Canada, the entire capital stock of which is taxed under the laws of that province, as the word "state" employed by the statute quoted should be construed to mean a foreign state as well as one of the United States. *Foster v. Stevens*, 63 Vt. 175; *Bugbee v. Stevens*, 63 Vt. 185.

Exemption of Shares of Stock where Corporation Is Taxed upon Its Capital Stock or Property. — Section 11 of the *Ohio* Act of May 11, 1878, required the officers of joint-stock companies, with certain exceptions, to list for taxation all their personal property, which, by the terms of the statute, was made to include all such real estate as was necessary to the daily operations of the company and all their moneys and credits within the state. Section 13 of the same act provided that "no person shall be required to list for taxation any share or shares of the capital stock of any company the capital stock of which is taxed in the name of such company." It was held that the tax provided for in section 11 of the act embraced the capital of the companies within the effect thereof, and that the shareholders in such companies were not required to list their shares for taxation. *Jones v. Davis*, 35 Ohio St. 474.

Section 59 of the *Ohio* Act of April 5, 1859, providing that "no person shall be required to list for taxation any certificate of the capital stock of any company the capital stock of which is taxed in the name of the company," did not exempt from taxation shares in a foreign corporation, owned by residents of Ohio, when but a small part of the property of the company was subject to taxation in that state. The exemption applied only to shares of those corporations which were required to return their capital and property for taxation in the state. *Sturges v. Carter*, 114 U. S. 511.

Where, under the statutes of a state, corporations are required to list their property for taxation and the stockholders are exempt from taxation upon their stock, the fact that a corporation has failed to list its property, or that its property is situated in another state, and therefore not subject to taxation within the state where such law prevails, does not deprive the stockholders of such exemption. *Whitaker v. Brooks*, 90 Ky. 68.

What Corporations Are Included in the Phrase "Incorporated Companies." — The provision of 1 Rev. Stat. *New York*, c. 13, tit. 1, § 4, sub-div. 7, exempting from taxation the personal property of incorporated companies, applies only to business corporations and does not include corporations for religious, literary, and charitable purposes. This conclusion results from the fact that other subdivisions of the same section make limited exemptions of the property of religious, charitable, and literary institutions, thus showing that they are not within the scope of subdivision 7; besides which the antecedent legislature of the state has shown that the words "incorporated company" are used only to designate business and stock corporations. *Catlin v. Trinity College*, 113 N. Y. 133, *affirming* 49 Hun (N. Y.) 278; *Catlin v. Domestic, etc., Missionary Soc.*, 113 N. Y. 625, 22 N. Y. St. Rep. 189.

4. Exemption from General Taxation Resulting from Taxation in a Specified Manner. — Where the legislature has exercised its taxing power by taxing all the property of a corporation in a specified manner provided by charter or other act, and has intimated no design to subject it to further taxation, the property of such corporation will be held exempt from taxes imposed by general laws. *New York, etc., R. Co. v. Sabin*, 26 Pa. St. 242.

whether or not an exemption of the capital stock and property of a corporation will relieve the individual stockholders from taxation upon their shares of stock; and the decided preponderance of authority supports the view that it will not,¹ but the contrary doctrine prevails in *Connecticut* and *New Jersey*.²

c. WHETHER EXEMPTION OF SHARES IN HANDS OF SHAREHOLDERS EXEMPTS CAPITAL STOCK AND PROPERTY. — Similarly, it has been held that a grant of exemption in favor of the shares in the hands of the shareholders does not relieve the corporation from taxation upon its capital stock and property,³ though there is considerable authority in support of the

1. **Exemption of Capital and Property Does Not Exempt Shares of Stock** — *United States*. — *Mobile, etc., R. Co. v. Tennessee*, 153 U. S. 486. But compare *Tennessee v. Whitworth*, 117 U. S. 129, *affirming* 22 Fed. Rep. 75.

Louisiana. — *Citizen's Bank v. Bouny*, 32 La. Ann. 239; *State v. Board of Assessors*, 47 La. Ann. 149⁸.

Maryland. — *Tax Cases*, 12 Gill & J. (Md.) 117.

North Carolina. — *State v. Petway*, 2 Jones Eq. (55 N. Car.) 396; *Belo v. Forsyth County*, 82 N. Car. 415, 33 Am. Rep. 688.

Tennessee. — *Union Bank v. State*, 9 Yerg. (Tenn.) 490; *Memphis v. Memphis City Bank*, 91 Tenn. 574; *Memphis v. Home Ins. Co.*, 91 Tenn. 558, *distinguishing Tennessee v. Whitworth*, 117 U. S. 129; *Union Bank v. State*, 9 Yerg. (Tenn.) 490.

The Same Rule Has Been Applied in cases where the exemption of the capital stock arose from the fact that it was invested in national securities which are exempt from taxation, or that the corporation was a national bank.

United States. — *Bradley v. People*, 4 Wall. (U. S.) 459; *Van Allen v. Assessors*, 3 Wall. (U. S.) 573, *affirming* as to this point *Utica v. Churchill*, 33 N. Y. 161, which *affirmed* 43 Barb. (N. Y.) 550; *People v. Commissioners of Taxes, etc.*, 4 Wall. (U. S.) 244; *Louisville First Nat. Bank v. Com.*, 9 Wall. (U. S.) 353; *Lionberger v. Rouse*, 9 Wall. (U. S.) 468. See also *Rosenblatt v. Johnston*, 104 U. S. 462.

Alabama. — *Maguire v. Revenue, etc., Com'rs*, 71 Ala. 401, 6 Am. & Eng. Corp. Cas. 452.

Indiana. — *Wright v. Stilz*, 27 Ind. 338, *overruling* *Whitney v. Madison*, 23 Ind. 331.

Kentucky. — *Deposit Bank v. Daviess County*, (Ky. 1897) 39 S. W. Rep. 1030.

Louisiana. — *New Orleans v. Canal, etc., Co.*, 32 La. Ann. 157.

Maine. — *Stetson v. Bangor*, 56 Me. 274.

New York. — *Williams v. Weaver*, 75 N. Y. 30, *affirmed* 100 U. S. 547; *People v. Dolan*, 36 N. Y. 59.

North Carolina. — *Kyle v. Fayetteville*, 75 N. Car. 445.

Texas. — *Harrison v. Vines*, 46 Tex. 15.

And in *South Carolina* the court has sustained a tax on United States bank stock in the hands of citizens of that state. *Bulow v. Charleston*, 1 Nott. & M. (S. Car.) 527. And on dividends arising from such stock. *State v. Tax Collector*, 2 Bailey (S. Car.) 654. See also *City Council v. Weston*, Harp. L. (S. Car.) 240.

Language Held to Exempt Both Capital and Shares of Stock. — *Maryland Acts of 1821*, c. 131, extended the charters of several banks, upon

condition that they would build a certain road and pay a specified school tax. Section 11 of the act provided that upon any of the banks accepting and complying with the conditions of the act, "the faith of the state is hereby pledged not to impose any further tax or burden upon them during the continuance of their charters under this act." It was held that this exempted the capital stock of the banks, as an aggregate, from taxation, and also exempted the stockholders from being taxed as persons on account of their shares, and that a subsequent act imposing a tax upon the stockholders in such banks was void as impairing the obligation of the contract. *Gordon v. Appeal Tax Ct.*, 3 How. (U. S.) 133.

2. **Contrary Doctrine.** — *Bridgeport v. New York, etc., R. Co.*, 36 Conn. 255, 4 Am. Rep. 63; *State v. Branin*, 23 N. J. L. 484; *State v. Bentley*, 23 N. J. L. 532; *State v. Jones*, 38 N. J. L. 83; *State v. Powers*, 24 N. J. L. 400; *Singer Mfg. Co. v. Heppenheimer*, 58 N. J. L. 633, *reversing* 54 N. J. L. 439. See also *State v. Haight*, 31 N. J. L. 399.

Corporate Bonds. — A provision in the charter of a corporation exempting it and its property from taxation does not exempt from taxation bonds of the corporation in the hands of their owners, whether such owners be stockholders or not. *State v. Branin*, 23 N. J. L. 484.

3. **Exemption of Shares Does Not Include Capital Stock and Property.** — *Shelby County v. Union, etc., Bank*, 161 U. S. 149; *Mercantile Bank v. Tennessee*, 161 U. S. 161; *Com. v. Minersville Water Co.*, 13 Pa. Co. Ct. Rep. 17; *Memphis v. Memphis City Bank*, 91 Tenn. 574; *Union, etc., Bank v. Memphis*, (Tenn. 1898) 46 S. W. Rep. 557; *State v. Hernando Ins. Co.*, 97 Tenn. 85 [*overruling* *Union Bank v. State*, 9 Yerg. (Tenn.) 490; *Memphis v. Hernando Ins. Co.*, 6 Baxt. (Tenn.) 527; *Memphis v. Farrington*, 8 Baxt. (Tenn.) 539; *Bank of Commerce v. McGowan*, 6 Lea (Tenn.) 703; *State v. Butler*, 13 Lea (Tenn.) 400; *State v. Butler*, 86 Tenn. 614; *Memphis v. Union, etc., Bank*, 91 Tenn. 546; *State v. Bank of Commerce*, 95 Tenn. 221].

A provision in the charter of a corporation that "said company shall pay to the state an annual tax of one-half of one per cent. on each share of the capital stock subscribed, which shall be in lieu of all other taxes," lays a tax upon the shares of stock in the hands of the stockholders and exempts them from any further taxation on account of their own share of such shares. *Farrington v. Tennessee*, 95 U. S. 679, *reversing* *Memphis v. Farrington*, 8 Baxt. (Tenn.) 539; *Bank of Commerce v. Tennessee*, 161 U. S. 134; *Shelby County v. Union, etc., Bank*, 161 U. S. 149; *Mercantile*

contrary view.¹

d. EXTENT OF EXEMPTION — (1) General Rules. — The general rules for the construction of exempting statutes, with the limitations, which have been set forth in a previous part of this article,² apply with full force to exemptions in favor of corporations and corporate stock.³

(2) *What Exemption of Capital Stock Includes.* — An exemption of the capital stock of a corporation includes its gross income,⁴ and also the property which such stock represents.⁵ But such an exemption has been held not to extend to the accumulated profits of the corporation.⁶

Increase of Capital Stock. — It has been held that an exemption of the capital stock of a corporation granted by its charter extends to an increase of capital

Bank *v. Tennessee*, 161 U. S. 161, 173. But this provision does not exempt the corporation and all its property from further taxation. *Shelby County v. Union*, etc., Bank, 161 U. S. 149; *Mercantile Bank v. Tennessee*, 161 U. S. 161, 173. But compare *Tennessee v. Bank of Commerce*, 53 Fed. Rep. 735.

1. *Exemption of Shares of Stock Includes Capital and Property.* — *Baltimore v. Baltimore*, etc., R. Co., 6 Gill (Md.) 288; *Philadelphia*, etc., R. Co. *v. Bayless*, 2 Gill (Md.) 355; *State v. Philadelphia*, etc., R. Co., 45 Md. 361, 24 Am. Rep. 571; *State v. Baltimore*, etc., R. Co., 48 Md. 49; *State v. Hannibal*, etc., R. Co., 37 Mo. 265; *Singer Mfg. Co. v. Heppenheim*, 58 N. J. L. 633, reversing 54 N. J. L. 439; *Hancock v. State*, (N. J. 1898) 41 Atl. Rep. 846.

2. See *supra*, this title, *General Rules of Construction*.

3. *Exemption of Realty Does Not Include Personality.* — *Richmond*, etc., R. Co. *v. Brogden*, 74 N. Car. 707.

Exemption in Favor of Domestic Corporations Does Not Necessarily Extend to Foreign Corporations. — *People v. Roberts*, 91 Hun (N. Y.) 158, affirmed without opinion, 149 N. Y. 608.

Exemption of Property and Shares of Stock Precludes Taxation of Franchises. — *Wilmington*, etc., R. Co. *v. Reid*, 13 Wall. (U. S.) 264, reversing 64 N. Car. 226. And this rule holds good although the exemption is limited to a term of years and the legislature is authorized to impose a tax upon the capital stock when the annual profits exceed a certain amount. *Raleigh*, etc., R. Co. *v. Reid*, 13 Wall. (U. S.) 269, reversing 64 N. Car. 155.

Exemption of Stock and Income Precludes Taxation of Body Politic. — *Nichols v. New Haven*, etc., Co., 42 Conn. 103.

4. *Exemption of "Stock" Includes "Gross Income."* — *State v. Hood*, 15 Rich. L. (S. Car.) 177.

5. *Exemption of Capital Stock Includes Property* — *United States*. — *Central R., etc., Co. v. Wright*, 164 U. S. 327.

Connecticut. — *New Haven v. City Bank*, 31 Conn. 106.

Florida. — *Atlantic*, etc., R. Co. *v. Allen*, 15 Fla. 637.

Indiana. — *Connersville v. State Bank*, 16 Ind. 105; *State v. Brackenridge*, 7 Blackf. (Ind.) 395.

Maryland. — *Gordon v. Baltimore*, 5 Gill (Md.) 231; *Baltimore v. Baltimore*, etc., R. Co., 6 Gill (Md.) 288; *State v. Cumberland*, etc., R. Co., 40 Md. 22; *Tax Cases*, 12 Gill & J. (Md.) 117.

Missouri. — *Scotland County v. Missouri*, etc., R. Co., 65 Mo. 123; *Hannibal*, etc., R. Co. *v. Shacklett*, 30 Mo. 550.

Pennsylvania. — *Lackawanna County v. Scranton First Nat. Bank*, 94 Pa. St. 221.

Tennessee. — *Bank of Commerce v. McGowan*, 6 Lea (Tenn.) 703.

As the stock is the representative of the property of a company, the exemption of one must be considered as an exemption of both unless the exemption be made on the ground of selection to show which is intended to be taxed to the exclusion of the other. *Tax Cases*, 12 Gill & J. (Md.) 117.

An Exemption of a Bank, by Its Corporate Name, from all taxes exempts the property of the bank. *State Bank v. Charleston*, 3 Rich. L. (S. Car.) 342.

When Exemption of Capital Stock May Not Include Property. — Where the charter of a railroad company provides that "the capital stock of said company shall be forever exempt from taxation, and the road, with all its fixtures and appurtenances, * * * shall be exempt from taxation for the period of twenty years from the completion of the road, and no longer," the railroad and its appurtenances are taxable after twenty years from the time when the road is completed, even though the capital stock, which remains exempt, is all invested in the railroad, because the language used in the grant of exemption shows that such was the intention of the legislature. *Tennessee v. Whitworth*, 117 U. S. 129, affirming 22 Fed. Rep. 75, and following *Railroad Companies v. Gaines*, 97 U. S. 697, which affirmed the judgment of the Supreme Court of Tennessee affirming *Memphis*, etc., R. Co. *v. Gaines*, 3 Tenn. Ch. 604.

6. *Accumulated Profits Not Exempt.* — *Bank of Commerce v. Tennessee*, 161 U. S. 134; *Shelby County v. Union*, etc., Bank, 161 U. S. 149; *State v. Bank of Commerce*, 95 Tenn. 221; *State Bank v. Milwaukee*, 18 Wis. 281.

Exemption Held Limited to Property up to Par Value of Stock. — A provision in the law under which an insurance company is organized that companies organized under the laws of the state shall pay certain fees "as required by this section, which shall be in lieu of all fees or taxes whatever, except that they may be taxed upon their paid-up capital stock, the same as other property in the county, for county and municipal purposes," does not exempt from taxation property owned by the corporation beyond the par value of its capital stock. Such property is subject to taxation. *St. Louis Mut. L. Ins. Co. v. Board of Assess-*

authorized by subsequent legislation, in the absence of any provision expressly subjecting it to taxation.¹

(3) *What Property Is Within Exemption.*—The general rule is that an exemption in favor of the property of a corporation, whether made in express terms or resulting from an exemption of its capital stock, applies only to such property as is necessary to the corporation for the accomplishment of the purposes of its creation and the transaction of its legitimate business.²

ors, 56 Mo. 503. In this case the court distinguished the cases of *Hannibal*, etc., R. Co. v. Shacklett, 30 Mo. 550, and *State v. Hannibal*, etc., R. Co., 37 Mo. 265.

1. Exemption Applies to Increase of Capital.—*State v. Norwich*, etc., R. Co., 30 Conn. 290. See also *Nichols v. New Haven*, etc., Co., 42 Conn. 103, in which case the court recognized the rule set out in the text, although in the case at bar the legislature had expressly subjected the increase of capital stock to taxation.

Increase under Charter Authority After Adoption of Constitutional Provision Forbidding Exemption.—Where the charter of a corporation grants to it an exemption from taxation as to its capital stock, in consideration of a certain payment thereon, and authorizes an increase of capital stock, the exemption will attach to additional stock issued after the adoption of a constitutional provision forbidding such exemptions, for the contract contained in the original charter must be upheld. *State v. Bank of Commerce*, 95 Tenn. 221; *Tennessee v. Bank of Commerce*, 53 Fed. Rep. 735.

2. Exemption Extends Only to Property Necessary for the Purposes of the Corporation—*United States*.—*Ford v. Delta*, etc., Land Co., 164 U. S. 662; *Tucker v. Ferguson*, 22 Wall. (U. S.) 527; *Bank of Commerce v. Tennessee*, 104 U. S. 493; *Wilmington*, etc., R. Co. v. Reid, 13 Wall. (U. S.) 264; *McHenry v. Alford*, 168 U. S. 651.

Georgia.—*Atlanta v. Georgia Pac. R. Co.*, 74 Ga. 16; *Ordinary v. Central*, R., etc., Co., 40 Ga. 646. See also *Wright v. Southwestern R. Co.*, 64 Ga. 783.

Illinois.—*Illinois Cent. R. Co. v. Irvin*, 72 Ill. 452; *Illinois Cent. R. Co. v. People*, 119 Ill. 137; *Matter of Swigert*, 119 Ill. 83, 24 Am. & Eng. R. Cas. 494, 59 Am. Rep. 789.

Kentucky.—*Farmers' Bank v. Henderson*, 7 Ky. L. Rep. 453.

Massachusetts.—*Worcester v. Western R. Corp.*, 4 Met. (Mass.) 564.

Minnesota.—*Ramsey County v. Chicago*, etc., R. Co., 33 Minn. 537; *Todd County v. St. Paul*, etc., R. Co., 38 Minn. 163; *St. Paul v. St. Paul*, etc., R. Co., 39 Minn. 112; *Morrison County v. St. Paul*, etc., R. Co., 42 Minn. 451; *State v. Northern Pac. R. Co.*, 32 Minn. 294, 17 Am. & Eng. R. Cas. 475.

Mississippi.—*Mobile*, etc., R. Co. v. Moseley, 52 Miss. 127; *McCulloch v. Stone*, 64 Miss. 378; *Vicksburg*, etc., R. Co. v. Bradley, 66 Miss. 518.

New Jersey.—*State v. Mansfield*, 23 N. J. L. 510; *State v. Collectors*, 26 N. J. L. 519, affirming 25 N. J. L. 315; *State v. Collector*, 38 N. J. L. 270; *State v. Haight*, 34 N. J. L. 319; *State v. Leggett*, 41 N. J. L. 319; *State v. Jersey City*, 41 N. J. L. 471; *State v. Fuller*, 40 N. J. L. 328; *State v. Flavell*, 24 N. J. L. 370; *State v. Ross*, 24 N. J. L. 497; *State v.*

Binnering, 42 N. J. L. 528; *State v. Blundell*, 24 N. J. L. 403; *State v. Powers*, 24 N. J. L. 406; *State v. Leester*, 29 N. J. L. 541; *Cook v. State*, 33 N. J. L. 474; *State v. Hancock*, 35 N. J. L. 537. See also *Gardner v. State*, 21 N. J. L. 557.

North Carolina.—*Raleigh*, etc., R. Co. v. Wake County, 87 N. Car. 414.

North Dakota.—*Fargo*, etc., R. Co. v. Brewer, 3 N. Dak. 34.

Pennsylvania.—*Lackawanna Iron*, etc., Co. v. Luzerne County, 42 Pa. St. 424; *Western New York*, etc., R. Co. v. Venango County, 5 Pa. Super. Ct. Rep. 304; *New York*, etc., R. Co. v. Sabin, 26 Pa. St. 242; *Schuylkill County v. Citizens' Gas Co.*, 148 Pa. St. 162; *Allegheny County v. McKeesport Diamond Market*, 123 Pa. St. 164; *Erie County v. Erie*, etc., Transp. Co., 87 Pa. St. 434; *Lehigh County v. Bethlehem South Gas*, etc., Co., 4 Pa. Dist. Rep. 723; *Railroad v. Berks County*, 6 Pa. St. 70. See also *Shamokin Valley R. Co. v. Livermore*, 47 Pa. St. 465, 86 Am. Dec. 552; *West Chester Gas Co. v. Chester County*, 30 Pa. St. 233.

Tennessee.—*State v. Butler*, 86 Tenn. 614; *De Soto Bank v. Memphis*, 6 Baxt. (Tenn.) 415, 32 Am. Rep. 530; *Bank of Commerce v. McGowan*, 6 Lea (Tenn.) 703, affirmed 104 U. S. 496; *Union Bank v. State*, 9 Yerg. (Tenn.) 490; *Memphis*, etc., R. Co. v. Gaines, 3 Tenn. Ch. 604.

Vermont.—*Vermont Cent. R. Co. v. Burlington*, 28 Vt. 193; *Eldridge v. Smith*, 34 Vt. 484.

Canada.—*Ex p. European*, etc., R. Co., Mich. T. (Can.) 1871.

It is true that the capital stock of a corporation may in a general sense be said to be all the property in which the capital is invested, so that an exemption of the capital stock without other words of limitation may operate to exempt all the property of a corporation; but where the purposes for which a corporation may hold property are specified in connection with the exemption from taxation, the designated exemption must be held to apply only to property acquired for such purpose. *Bank of Commerce v. Tennessee*, 104 U. S. 193.

If a corporation, created for a specific purpose, and exempted from taxation by its charter, invests its funds in property to be used for speculation or a direct profit, and not for the specific purposes contemplated by the charter and the objects pretended by the incorporators, such property, real or personal, is liable to taxation, although the ultimate appropriation of such profits may be to the object specified. The means employed must be consistent with and necessary to the attainment of the proposed object. *State v. Leester*, 28 N. J. L. 103.

Property held by a railroad company under

Exemption of All Property. — There are cases in which such exemptions have been held to extend to all the property of the corporations favored, but these decisions rest upon the particular terms of the statutes construed.¹

c. EFFECT OF CHANGE OF NAME, OR IN MANNER OF ACCOMPLISHING OBJECTS OF INCORPORATION. — A mere change in the name of a corporation without a change in its business will not deprive it of an exemption from

a provision in its charter allowing it to hold such property, but not used by it for railroad purposes and rented out for a coal yard, is not exempt from taxation as property necessary for the uses of the company. *Cook v. State*, 33 N. J. L. 474.

Meaning of "Necessary." — The word "necessary" as used in the text does not mean "indispensable," but embraces all property which is suitable and proper for carrying into execution the powers granted to the corporation. *State v. Hancock*, 35 N. J. L. 537. In this case the court, *per* Beasley, C. J., said: "In the case of *State v. Mansfield*, 23 N. J. L. 510, this term 'necessary' is put in sharp contrast to the word 'convenient.' But this, I think, is clearly a mistake; and it is a mistake which has introduced confusion." See also *Milwaukee, etc., R. Co. v. Milwaukee*, 34 Wis. 271; *Chicago, etc., R. Co. v. Bayfield County*, 37 Wis. 188.

Proof of Necessity for Use. — The mere declaration under oath of an officer or servant of a corporation that certain property is necessary for its uses will not entitle such property to an immunity from taxation under a grant of exemption to all property "suitable and proper for carrying into execution the powers granted to the corporate body." *State v. Woodruff*, 36 N. J. L. 94.

Necessity a Question of Fact. — What is necessary for the uses of a corporation, and thus exempt under a grant of exemption to all property "suitable and proper for carrying into execution the powers granted to the corporate body," must be determined by the court according to the facts of each particular case. *State v. Woodruff*, 36 N. J. L. 94.

Property Used Mainly for Corporate Purposes Within Exemption. — *Osborn v. Hartford, etc., R. Co.*, 40 Conn. 498.

Property Necessary to Execute Powers Granted by Amendments to Charter Exempt. — *State Board of Assessors v. Morris, etc., R. Co.*, 39 N. J. L. 193.

What Property Is Necessary for a Bank. — An exemption from taxation in favor of a banking corporation includes the bank building. *New Orleans v. Branch of State Bank*, 10 La. Ann. 762. And this exemption is not affected by the fact that one room in such building is temporarily rented and occupied by a lessee to the exclusion of the bank. *New Haven v. City Bank*, 31 Conn. 106. It also includes real property purchased by such bank for the purpose of securing a debt or taken in satisfaction of the debt. *Farmers' Bank v. Com.*, 6 Bush (Ky.) 127; *Farmers' Bank v. Henderson*, 7 Ky. L. Rep. 453. See also *Dyer v. Branch Bank*, 14 Ala. 622. But compare *Bank of Commerce v. Tennessee*, 104 U. S. 493, in which case the charter of the bank provided that it might "purchase and hold a lot of ground for the use of the institution as a place of business

* * * and may hold such real or personal property and estate as may be conveyed to it to secure debts due the institution," and also that the bank should "pay to the state an annual tax of one-half of one per cent. on each share of capital stock, which shall be in lieu of all other taxes." The bank having purchased a lot of ground with a building thereon, as a place of business, and also become the owner of other lots through taking a deed to them as security for the repayment of loans made, it was held that the exemption from taxation extended only to so much of the bank building as was actually used for banking purposes, and that such parts of the building as were rented out, and the other property of the bank, were subject to taxation. See also *Union Bank v. State*, 9 Yerg. (Tenn.) 490.

What Property Is Necessary for a Plank-road Company. — The lot of land adjoining a plank road and owned and used by the plank-road company as a residence for its tollgate keeper, is exempt from taxation under *How. Annot. Stat. Michigan*, § 3583, providing that plank-road companies shall pay to the state an annual tax of five per cent. of their net profits, which shall be in lieu of all other taxes on the property of said companies. *Detroit, etc., Plank-road Co. v. Detroit*, 81 Mich. 562.

Land Held Not Necessary for Water Company. — An exemption from local taxation possessed by a water company does not extend to a large amount of unproductive mountain land not used for improvements, dams, or reservoir purposes, but held by the company merely because the different tracts lie along the stream used for supplying water and slope towards it and drain into it, the holding being for the reason that the company fears that a nuisance which will contaminate the stream may be erected on such lands. *Roaring Creek Water Co. v. Girton*, 142 Pa. St. 92.

1. Exemption of All Property. — *Osborn v. New York, etc., R. Co.*, 40 Conn. 491; *Dyer v. Branch Bank*, 14 Ala. 622; *State v. Leester*, 29 N. J. L. 541; *Columbia, etc., R. Co. v. Chilberg*, 6 Wash. 612.

In *State v. Leester*, 29 N. J. L. 541, the court said: "However impolitic we may deem such an exemption, and however disposed, as we certainly are, to discountenance the extension of chartered powers by implication, this language is too plain to be mistaken. The obvious intention is not only to authorize the erection of a library building, properly so called, and to exempt it from taxation, but to allow the association to acquire and hold real and personal estate, including stocks, not exceeding in value their designated capital, and to rent their real estate, and derive a revenue from it and from stocks, to be applied to the objects contemplated, all of which is in terms declared to be free from taxation."

taxation;¹ nor will a change in the manner of accomplishing the objects of the incorporation have that effect. Thus, the object of a canal company being transportation, it does not lose a charter exemption by reason of an act of the legislature changing it into a railroad company, for this is a mere change in the manner of transportation and cannot affect the charter rights of the corporation in the absence of a legislative declaration that the change shall have such effect.²

f. EFFECT OF CONSOLIDATION OF CORPORATIONS — (1) General Rule. — The general rule is that when two or more corporations consolidate under legislative authority, the consolidated corporation will, in the absence of restrictions in the law authorizing the consolidation or in the general statutes or constitution in force at the time, become entitled to any rights in regard to exemption from taxation which the constituent corporations or any of them possessed.³

(2) *Extent of Exemption.* — But consolidation cannot enlarge the exemption enjoyed by one of the constituent corporations. The exemption extends only to such property as, before the consolidation, such corporation was entitled to hold free from taxation, and does not extend to property which it held subject to the taxing power, or to property acquired by the consolidated corporation from other sources.⁴

(3) *Rule Where Consolidation Has the Effect of Forming an Entirely New Corporation.* — Where a consolidation takes place under such conditions that the existence of the original corporations is completely terminated and a new corporation is formed, exemptions from taxation possessed by one or more of the original corporations are extinguished,⁵ especially if at the time of con-

1. Change of Name Does Not Deprive Corporation of Exemption. — *Memphis v. Memphis City Bank*, 91 Tenn. 574.

2. Change in Manner of Accomplishing Corporate Objects. — *Nichols v. New Haven, etc., Co.*, 42 Conn. 103.

3. Consolidated Corporation Entitled to Exemptions Possessed by Constituent Corporations — *United States.* — *Central R., etc., Co. v. Georgia*, 92 U. S. 665; *Southwestern R. Co. v. Georgia*, 92 U. S. 676, note; *Tomlinson v. Branch*, 15 Wall. (U. S.) 460; *Tennessee v. Whitworth*, 117 U. S. 139, *affirming* 22 Fed. Rep. 81; *Philadelphia, etc., R. Co. v. Maryland*, 10 How. (U. S.) 376.

Florida. — *Atlantic, etc., R. Co. v. Allen*, 15 Fla. 637.

Kentucky. — See *Com. v. Nashville, etc., R. Co.*, 93 Ky. 430.

Maryland. — *State v. Philadelphia, etc., R. Co.*, 45 Md. 361, 24 Am. Rep. 511.

Mississippi. — *Natchez, etc., R. Co. v. Lambert*, 70 Miss. 779; *Louisville, etc., R. Co. v. Taylor*, 68 Miss. 361.

New Jersey. — *State v. Woodruff*, 36 N. J. L. 94; *Cook v. State*, 33 N. J. L. 474.

North Carolina. — See *Cheraw, etc., R. Co. v. Anson*, 88 N. Car. 519.

Express Repeal of Exemption. — Of course when the consolidation act expressly provides that the taxation exemptions of the constituent corporations shall not inure to the benefit of the consolidated corporation, the latter does not acquire such exemptions. *Petersburg v. Petersburg R. Co.*, 29 Gratt. (Va.) 773.

4. Extent of Exemption. — *Central R., etc., Co. v. Georgia*, 92 U. S. 665; *Chesapeake, etc., R. Co. v. Virginia*, 94 U. S. 718; *Tomlinson v. Branch*, 15 Wall. (U. S.) 460; *Charleston v. Branch*, 15 Wall. (U. S.) 470; *Delaware R.*

Tax, 18 Wall. (U. S.) 206, *affirming* *Minot v. Philadelphia, etc., R. Co.*, 2 Abb. (U. S.) 323; *Philadelphia, etc., R. Co. v. Maryland*, 10 How. (U. S.) 376; *Southwestern R. Co. v. Georgia*, 92 U. S. 676, note; *Wilmington, etc., R. Co. v. Alsbrough*, 110 N. Car. 137. See also *State v. Philadelphia, etc., R. Co.*, 45 Md. 361, 24 Am. Rep. 511.

Improvements. — Any repairs or improvements made upon the original property of the constituent corporations would be subject to the same rules of taxation as such original property. *Branch v. Charleston*, 92 U. S. 677.

New Jersey Doctrine. — The doctrine in New Jersey is somewhat different from that stated in the text. Thus, an act of the legislature consolidated a railroad and a canal company, of which the former had an exemption as to all property "suitable and proper for carrying into execution the powers granted to the corporate body." After the consolidation, lands the title to which was in the canal company were occupied and used for the necessary purposes of the railroad company, and it was held that these lands were exempt, the court saying: "The Act of February 15, 1831, consolidates these companies with an express provision that such consolidation shall be subject to all the provisions, reservations, and conditions contained in their original charters. This carries the exemption to all property owned by said companies which is necessary for the uses of either. There is an absolute community of interest between them, and so far as taxation is concerned it matters not to which company the estate may have been conveyed." *State v. Woodruff*, 36 N. J. L. 94.

5. Exemption Lost Where Consolidation Results in Formation of Entirely New Corporation — *United States.* — *Atlantic, etc., R. Co.*

solidation there is in force a constitutional provision forbidding exemptions such as the original corporations possessed,¹ or if the organization of the new corporation is such that it is unable, or is not required, to perform the conditions upon which the exemption claimed was dependent.²

22. Railroad Companies — a. WHAT IS A RAILROAD COMPANY. — The terms "railroad" and "railway company" as used to indicate the objects of grants of exemption from taxation are not, it has been held, confined to companies which operate their roads by steam power, but include one which utilizes horse power;³ nor is it necessary to entitle a company to such an exemption that it should operate any particular length of road.⁴ In *Canada* it is held sufficient to entitle a company to such an exemption that it actually operates a railroad, though it be organized as a mining or bridge company.⁵

b. WHAT PROPERTY IS WITHIN GENERAL EXEMPTION — General Rule. — The general rule that an exemption of the property of a corporation includes only so much as is necessary to carry out the objects of its existence⁶ is

Georgia, 98 U. S. 359; Norfolk, etc., R. Co. v. Pendleton, 156 U. S. 667.

Arkansas. — Arkansas Midland R. Co. v. Berry, 44 Ark. 17.

Georgia. — Atlanta, etc., Air-Line R. Co. v. State, 63 Ga. 483.

Kentucky. — Com. v. Nashville, etc., R. Co., 93 Ky. 430.

Mississippi. — Adams v. Yazoo, etc., R. Co., (Miss. 1893) 24 So. Rep. 200.

North Carolina. — See Cheraw, etc., R. Co. v. Anson, 88 N. Car. 519.

1. Existence of Constitutional Prohibition Against Exemptions at Time of Consolidation. — St. Louis, etc., R. Co. v. Berry, 113 U. S. 465, *affirming* 41 Ark. 509; Keokuk, etc., R. Co. v. Missouri, 152 U. S. 301, *affirming* 99 Mo. 30; Keokuk, etc., R. Co. v. Scotland County, 152 U. S. 317, *affirming* 41 Fed. Rep. 305; Adams v. Yazoo, etc., R. Co., (Miss. 1898) 24 So. Rep. 200. See also Atlantic, etc., R. Co. v. Georgia, 98 U. S. 359; Maine Cent. R. Co. v. Maine, 96 U. S. 499, *affirming* 66 Me. 488; Louisville, etc., R. Co. v. Palmes, 109 U. S. 244; Arkansas Midland R. Co. v. Berry, 44 Ark. 17; Atlanta, etc., Air-Line R. Co. v. State, 63 Ga. 483; State v. Butler, 13 Lea (Tenn.) 400.

Overruled Cases. — The cases of Keokuk, etc., R. Co. v. Missouri, 152 U. S. 301, and Keokuk, etc., R. Co. v. Scotland County, 152 U. S. 317, must be held to overrule the conclusion reached in Scotland County v. Missouri, etc., R. Co., 65 Mo. 123, that the Missouri, Iowa and Nebraska Railroad Company, which was the one under consideration in the cases in the United States Supreme Court, was exempt from taxation. In that case the Supreme Court of Missouri did not consider the point upon which the United States Supreme Court rested its decision, viz., that the consolidation of corporations amounted in effect to the formation of a new corporation. *Secor v. Singleton*, 9 Fed. Rep. 809, which recognized the Missouri case as conclusive, must also be considered overruled to that extent.

2. Formation of New Corporation Unable or Not Required to Fulfil Conditions of Exemption. — Maine Cent. R. Co. v. Maine, 96 U. S. 499, *affirming* 66 Me. 488. In this case each of the original corporations was exempt from taxation save when the amount of its net income exceeded ten per cent., in which case it was

subject to a special tax, to be determined by the legislature, upon such excess. The amount of the tax was to be based upon the reports which certain officers of the original corporations were required to make to the legislature, and under the organization of the new corporation it was impossible for such reports to be made with any degree of accuracy. It was held that the limited exemptions were abrogated.

3. Exemption of Railway Companies Includes Street-railway Company Operating by Horse Power. — *Ex p. Zebley*, 10 Can. L. T. 381.

Railroad Operated by Horse Power, etc., Expressly Excluded from Exemption. — The general exemption of railroad property contained in the *Wisconsin* statutes is restricted so as not to apply to "any railroad that now is or shall be operated by horse, cable, or electrical power, whether now or hereafter constructed, in any city or village." This exception as to horse railroads was made when they began to come into use, and was extended to electric and cable roads when these came into use. *State v. Anderson*, 90 Wis. 550.

4. Exemption Not Dependent upon Length of Road Operated. — *State v. District Ct.*, 54 Minn. 34.

5. Company Need Not Be Incorporated as a Railroad Company. — The exemption from local taxation granted by Rev. Stat. *Nova Scotia*, c. 53, § 9, subsec. 30, to "the roadbed, rolling stock, track, wharves, station houses, and buildings of all railway companies in the province," extends to a company which was organized and incorporated as a mining company, but was furthermore given the right to hold and work a railway for the purpose of its own mines and operations, and also for general traffic and the conveyance of passengers and freight for hire, and the transaction of other business connected with mines and railways, and which, accordingly, maintains a railway for such purposes, as such a company is a railway company within the meaning of the statute. *International Coal Co. v. Cape Breton County*, 22 Can. Sup. Ct. Rep. 305, *reversing* 24 Nova Scotia 496. See also *Ex p. Fredericton*, etc., R. Bridge Co., 29 New Bruns. 127, *Fredericton*, etc., R. Bridge Co. v. Fredericton, 10 Can. L. T. 92.

6. See *supra*, this section, *Corporations and Corporate Stock Generally*.

usually considered to apply with its full force to railroad companies.¹ Therefore, it remains only to discuss what property is necessary for the purposes of such a company.

In *New Jersey* it is considered that buildings suitable and proper for a railroad company's legitimate business are presumed to be used therefor, and consequently are within an exemption of its property until the contrary is shown,² and that indispensability of property is not the test of exemption, but a railroad may and should consult the safety and comfort of its passengers as well as its own convenience and safety, and may hold and use, exempt from taxation, such property as experience and judgment suggest as appropriate to these ends.³

In *Wisconsin* it is considered that, under a statute exempting "property necessarily used in operating" railroads, a railroad company's right to exemption is coextensive with its right of condemnation; that is, it may hold exempt such land, and such land only, as it could appropriate for its use under the right of eminent domain.⁴

Illustrations. — Exemptions in favor of railroad property have been extended to the right of way or roadbed,⁵ water stations,⁶ telegraph lines,⁷ machinery,⁸

1. Rule as to Uncompleted Railroads. — In endeavoring to ascertain what property is within a grant of exemption from taxation in favor of a railroad company, the test of actual use by the company for its purposes may be a proper one where the company has completed its road and appendages; but where the company is engaged in the work of constructing its road, such test is not applicable, and the exemption must be extended to property which has been acquired as a means of carrying into effect the objects of the charter, is fairly within the plan upon which the work is being executed, and will be necessary for the business of the company when its contemplated improvements are completed, and is, meanwhile, not actually used for any other purposes. *State v. Haight*, 35 N. J. L. 40.

Exemption of Workshops. — The term "workshop" in a grant to a railroad company of exemption from taxation as to all real estate held for workshop location, embraces foundries, engine houses, depots, machine shops, necessary offices, and all the appurtenances used for manufacturing and repairing engines, cars, and other stock required for the operation of the road. *Richmond, etc., R. Co. v. Alamance County*, 76 N. Car. 212; *Richmond, etc., R. Co. v. Alamance County*, 84 N. Car. 504, 7 Am. & Eng. R. Cas. 339.

2. Presumption of Proper Use. — *State v. Wetherill*, 41 N. J. L. 147.

3. Safety and Comfort of Passengers, etc., Should Be Considered. — *State v. Leggett*, 41 N. J. L. 319. In this case the court said further: "If it be conceded or shown that lands held are devoted to a proper and legitimate use, before it should be taxed for an excess in the quantity actually used, the unreasonableness of the amount should be manifest or more clearly shown than it is in this case."

Lands Convenient for Authorized Uses Exempt. — A general exemption of the property of railroad corporations includes land not exceeding the width prescribed by the charter of a railroad company over which it is authorized to lay out its road and buildings erected thereon which are convenient for the uses to which

the road can be applied under the charter. *State v. Collector*, 38 N. J. L. 270.

4. Right to Exemption Coextensive with Right of Condemnation. — *Milwaukee, etc., R. Co. v. Milwaukee*, 34 Wis. 271; *Chicago, etc., R. Co. v. Bayfield County*, 87 Wis. 188. "This rule," said the court in the case first cited, "seems reasonable and just, and it may furnish a more certain test by which to determine, in any given case, whether specific railroad property is or is not exempt from taxation. For these reasons we are strongly inclined to adopt it as a correct rule."

Property Held for Future Use. — As a railroad company may condemn property which is not necessary for its present use, but will be necessary for railroad purposes in the immediate future, so it may hold such property exempt from taxation. *Chicago, etc., R. Co. v. Bayfield County*, 87 Wis. 188. But compare *Milwaukee, etc., R. Co. v. Milwaukee*, 34 Wis. 271, in which case it was held that the exemption did not include lots which, though originally acquired for depot grounds or yards, were in a marsh and had never been reclaimed or used for that purpose.

5. Right of Way or Roadbed. — *Worcester v. Western R. Corp.*, 4 Met. (Mass.) 564; *Hannibal, etc., R. Co. v. Shacklett*, 30 Mo. 550; *State v. Hannibal, etc., R. Co.*, 37 Mo. 265; *Livingston County v. Hannibal, etc., R. Co.*, 60 Mo. 516; *Caldwell County v. Hannibal, etc., R. Co.*, 60 Mo. 521; *State v. Collector*, 38 N. J. L. 270; *Petersburg R. Co. v. Northampton County*, 81 N. Car. 487. See also *St. Joseph v. Hannibal, etc., R. Co.*, 39 Mo. 476.

6. Water Stations. — *Railroad v. Berks County*, 6 Pa. St. 70.

7. Telegraph Lines. — *In re Canadian Pac. R. Co.*, 10 Can. L. T. 269.

8. Machinery. — *Hannibal, etc., R. Co. v. Shacklett*, 30 Mo. 550; *State v. Hannibal, etc., R. Co.*, 37 Mo. 265; *Livingston County v. Hannibal, etc., R. Co.*, 60 Mo. 516; *Caldwell County v. Hannibal, etc., R. Co.*, 60 Mo. 521; *Richmond v. Richmond, etc., R. Co.*, 21 Gratt. (Va.) 604. See also *St. Joseph v. Hannibal, etc., R. Co.*, 39 Mo. 476.

rolling stock,¹ offices,² passenger and freight depots³ and terminal facilities,⁴ a railroad bridge leased by such a company,⁵ engine and car houses,⁶ repair shops,⁷ and other property necessarily used in keeping the road in repair.⁸ And in the case of a passenger-railroad company, the exemption has been held to extend to its horses and stables.⁹

But Such Exemptions Have Been Held Not to Include steamboats,¹⁰ dwelling houses for

1. **Rolling Stock.** — *Richmond v. Richmond*, etc., R. Co., 21 Gratt. (Va.) 604. See also *Northampton County v. Passenger R. Co.*, 8 Pa. Co. Ct. Rep. 442.

2. **Offices.** — *Railroad v. Berks County*, 6 Pa. St. 70.

Ticket Offices. — *Day v. Joiner*, 6 Baxt. (Tenn.) 441.

3. **Depots.** — *Wright v. Southwestern R. Co.*, 64 Ga. 783; *Ordinary v. Central R., etc., Co.*, 40 Ga. 646; *Worcester v. Western R. Corp.*, 4 Met. (Mass.) 564; *Hannibal, etc., R. Co. v. Shacklett*, 30 Mo. 550; *State v. Hannibal, etc., R. Co.*, 37 Mo. 265; *Livingston County v. Hannibal, etc., R. Co.*, 60 Mo. 516; *Caldwell County v. Hannibal, etc., R. Co.*, 60 Mo. 521; *Petersburgh R. Co. v. Northampton County*, 81 N. Car. 489. See also *St. Joseph v. Hannibal, etc., R. Co.*, 39 Mo. 476.

Oil Houses are included within the meaning of the term "depots," and are exempt as being necessary to a railroad. *Railroad v. Berks County*, 6 Pa. St. 70. But compare *Ordinary v. Central R., etc., Co.*, 40 Ga. 646.

Depot Grounds. — An exemption of property "necessarily used in operating" a railroad includes lots in which a private person is permitted from time to time to pile salt for shipment over the railroad, especially where such lots are a portion of the depot grounds of the railroad in actual use. *Milwaukee, etc., R. Co. v. Milwaukee*, 34 Wis. 271.

Unused Portion of Depot Grounds Not Exempt. — A part of the depot grounds of a railroad company which has been for many years inclosed as a separate and distinct tract of land, being erroneously supposed to belong not to the railroad company, but to another owner, and which has not been in any way used or even claimed by the company, is not land owned by the company and used in operating its road so as to exempt it from taxation as land by reason of the payment by the company of the privilege tax provided by law. *Vicksburg, etc., R. Co. v. Lewis*, 68 Miss. 29.

4. **Railroad Yards.** — *Wright v. Southwestern R. Co.*, 64 Ga. 783; *Milwaukee, etc., R. Co. v. Milwaukee*, 34 Wis. 271.

The exemption granted by sections 607 and 608 of the *Mississippi Code of 1880*, in favor of railroad companies which accept the provision of such statute and pay the privilege tax provided for therein, of all land except such as is owned by the company and not used in operating the road, extends to a two-acre lot upon which are located a section house, turntable, and other improvements of the company. A part of such lot cannot be sold for taxes even though none of the improvements are actually thereon, for such part is so connected with the other part of the lot which is actually used for the purposes of the road as to entitle it to the exemption. *Vicksburg, etc., R. Co. v. Bradley*, 66 Miss. 518.

Land Held to Increase Terminal Facilities. —

An exemption of the property of a railroad company covers land acquired and held under statutory authority to increase its depot and terminal facilities. *State v. Jersey City*, 41 N. J. L. 471.

5. **Leased Railroad Bridge.** — *State v. Mutchler*, 41 N. J. L. 96.

6. **Engine Houses.** — *Worcester v. Western R. Corp.*, 4 Met. (Mass.) 564.

Car Houses. — *Worcester v. Western R. Corp.*, 4 Met. (Mass.) 564; *Railroad v. Berks County*, 6 Pa. St. 70.

7. **Repair Shops.** — *Wright v. Southwestern R. Co.*, 64 Ga. 783; *Ordinary v. Central R., etc., Co.*, 40 Ga. 646; *Western New York, etc., R. Co. v. Venango County*, 5 Pa. Super. Ct. Rep. 304; *Milwaukee, etc., R. Co. v. Milwaukee*, 34 Wis. 271. But compare *Railroad v. Berks County*, 6 Pa. St. 70.

8. **Property Necessary to Keep Road in Repair.**

— An exemption from taxation granted to a railroad company of any real or personal estate that might be necessary for the construction, maintenance, and management of its railroad extends to a steam digger and small portion of track, used solely in getting gravel for the repair and maintenance of the roadbed of the company's main line, though the track and digger are on land not belonging to the company, and the track connects with another railroad and not immediately with the line of the company using and operating it. *Louisville, etc., R. Co. v. Taylor*, 68 Miss. 361.

An exemption from taxation of property "necessarily used in operating" a railroad includes parcels of land necessarily used by the company for the preservation and protection of its road, or for the purpose of obtaining gravel and earth therefrom for its road, such land being adjacent to the railroad. *Milwaukee, etc., R. Co. v. Milwaukee*, 34 Wis. 271.

A provision of a charter of a railroad company exempting it from taxation extends to a tract of gravel land purchased to provide materials for the repair of its road, and also to a branch road connecting said gravel pits with its tramway, as such property is necessary to the maintenance of the roadbed within the meaning of the exemption. *State v. Hancock*, 35 N. J. L. 537, reversing 33 N. J. L. 315.

But compare *Wright v. Southwestern R. Co.*, 64 Ga. 783; *Todd County v. St. Paul, etc., R. Co.*, 38 Minn. 163, 31 Am. & Eng. R. Cas. 482, in which cases it was held that timber lands held by a railroad company for the purpose of procuring cross-ties and lumber therefrom were not exempt.

9. **Horses and Stables of Passenger-railroad Company Exempt.** — *Northampton County v. Passenger R. Co.*, 8 Pa. Co. Ct. Rep. 442. *Contra*, *People's St. R. Co. v. Scranton*, 8 Pa. Co. Ct. Rep. 633.

10. **Steamboats Not Exempt.** — Steamboats owned by a railroad company are not exempt from taxation, for they are not railroad prop-

the accommodation of workmen,¹ nor woodyards, coal lots, coal chutes, and the like.²

In **Maine** and **Massachusetts** exemptions in very restricted terms have been held not to extend to any property outside of the right of way.³ And a similar doctrine has been announced in *Georgia*.⁴

Hotels. — An exemption in favor of a railroad company will include a hotel owned and operated by it, where such hotel is necessary for the accommodation of passengers on the road,⁵ but not where the hotel is kept for the entertainment of the general public,⁶ though it is a means of attracting travel over the road.⁷

Grain Elevators, Warehouses, and Docks. — A railroad company may hold exempt from taxation, as necessary to the carrying on of its business, property such as grain elevators, warehouses, and docks, when the property is used only to assist in the transportation of freight over its road, or to store it for a reasonable time while awaiting delivery to the consignee;⁸ but such exemption will not extend to an elevator in which grain is stored for an indefinite time at fixed rates of storage,⁹ nor to elevators, warehouses, or docks maintained by others than the railroad company for their own benefit, though the railroad

erty, the right to carry by water not being incident to the right to carry by rail. *Illinois Cent. R. Co. v. Irvin*, 72 Ill. 452.

1. Dwelling Houses for Workmen. — Dwelling houses and lands for the accommodation of the workmen of a railroad company are not necessary appendages of a railroad or of a transportation business, although they are convenient therefor, and consequently they are not within a general exemption from taxation of the property of such a company. *State v. Mansfield*, 23 N. J. L. 510.

2. Woodyards, etc. — *Railroad v. Berks County*, 6 Pa. St. 70.

3. Exemptions Not Extending to Land Outside of Right of Way. — *Portland, etc., R. Co. v. Saco*, 60 Me. 106; *Boston, etc., R. Co. v. Cambridge*, 8 Cush. (Mass.) 237.

4. Exemption Held Not to Extend to Car Sheds, etc. — A contract between a municipal corporation and a street-railroad company that the "road, rolling and live stock" of the latter shall be exempt from taxation does not exempt lots and houses used as apartments for the hands employed by the company, for shelters for cars, stables, blacksmith shops, for storing lumber, and other conveniences. *Atlanta St. R. Co. v. Atlanta*, 66 Ga. 104.

5. Hotel Necessary for Accommodation of Passengers Exempt. — *State v. Baltimore, etc., R. Co.*, 48 Md. 49; *Chicago, etc., R. Co. v. Crawford County*, 48 Wis. 666. See also *Milwaukee, etc., R. Co. v. Crawford County*, 29 Wis. 116. But compare *Day v. Joiner*, 6 Baxt. (Tenn.) 441. Where the hotel is not kept for the accommodation of the public at large, the exemption will not be lost by reason of the fact that commercial travelers coming in on the railroad are entertained in the hotel while they transact their business in the vicinity, or because the person by whom the hotel is conducted, and who occupies it free of rent as the tenant of the railroad, takes the profits of the hotel business. *Chicago, etc., R. Co. v. Crawford County*, 48 Wis. 666.

6. Hotel Kept for General Public Not Exempt. — An exemption from taxation of "property necessarily used in operating" a railroad does

not include a hotel kept for the accommodation and entertainment of the general public, although some of the rooms are used as waiting rooms for passengers, and there are other conveniences for passengers there, such as a platform by means of which passengers may enter and leave the cars. *Milwaukee, etc., R. Co. v. Crawford County*, 29 Wis. 116.

7. Hotel Useful Merely to Attract Travel Over Road Not Exempt. — *State v. Baltimore, etc., R. Co.*, 48 Md. 49; *Hennepin County v. St. Paul, etc., R. Co.*, 42 Minn. 238.

8. Grain Elevators and Warehouses Used Merely to Assist in Business of Road Exempt. — *Detroit Union R. Depot, etc., Co. v. Detroit*, 88 Mich. 347; *Pennsylvania R. Co. v. Jersey City*, 49 N. J. L. 540, *affirmed* 51 N. J. L. 564; *Petersburgh R. Co. v. Northampton County*, 81 N. Car. 487; *State v. Nashville, etc., R. Co.*, 86 Tenn. 438; *Chicago, etc., R. Co. v. Bayfield County*, 87 Wis. 188; *Milwaukee, etc., R. Co. v. Milwaukee*, 34 Wis. 271. See also *Illinois Cent. R. Co. v. People*, 119 Ill. 137; *Matter of Swigert*, 119 Ill. 83, 24 Am. & Eng. R. Cas. 494, 59 Am. Rep. 789; *State v. Baltimore, etc., R. Co.*, 48 Md. 49.

Adding of Penalty to Freight Charge. — The fact that a small penalty is added to the freight charge in order to induce shippers to remove their grain from a railroad company's elevator within a reasonable time does not take the structure out of that class of improvements which are necessary for railroad purposes, nor deprive it of the resulting exemption. *Pennsylvania R. Co. v. Jersey City*, 49 N. J. L. 540, *affirmed* 51 N. J. L. 564. See also *Matter of Swigert*, 119 Ill. 83, 24 Am. & Eng. R. Cas. 494, 59 Am. Rep. 789.

Coal Docks Held Exempt. — *Chicago, etc., R. Co. v. Bayfield County*, 87 Wis. 188.

The Rule Stated in the Text Is Denied in Pennsylvania. — *Eric County v. Eric, etc., Transp. Co.*, 87 Pa. St. 434; *Railroad v. Berks County*, 6 Pa. St. 70.

9. Elevator Where Grain Is Stored for Indefinite Time Not Exempt. — *Milwaukee, etc., R. Co. v. Milwaukee*, 34 Wis. 271. See also *State v. Baltimore, etc., R. Co.*, 48 Md. 49.

company is the owner of such structures or of the land on which they are situated.¹

c. WHAT EXEMPTION OF "RIGHT OF WAY" INCLUDES. — The weight of authority is in favor of the view that an exemption of the "right of way" of a railroad company will include the necessary structures placed thereon for the use of the railroad,² but the court of *Arizona* dissents from this doctrine, and considers that such an exemption covers only the land.³

d. EXEMPTION OF LANDS GRANTED IN AID OF CONSTRUCTION. — A statutory exemption in favor of lands acquired by a railroad company by grant, donation, or subscription in aid of the construction of its road does not extend to land purchased by the company from the United States and conveyed to it by patent without reference to the purpose for which it is to be used.⁴ A charter exemption of the capital stock and dividends of a railroad company has been held not to carry with it an exemption of lands granted to the company by the state to aid in the construction of its road.⁵ But such lands have been held exempt under a statutory provision that the "property" of corporations constructing railroads "is taxed through the shares of the stockholders."⁶

e. EXEMPTION OF LAND "AT" TERMINUS. — A grant to a railroad company of a right to hold exempt from taxation a tract of land not exceeding a certain size "at" the terminus of its road, for its necessary purposes, does not mean that such tract must include the point where the rails end, but intrusts the company with the exercise of a reasonable discretion in purchasing and holding such property, and extends the exemption to a tract located near the terminus where the company may find it most convenient for its terminal business.⁷

f. RULE AS TO BRANCH LINES AND LEASED OR PURCHASED ROADS. — A charter exemption in favor of a railroad company does not extend to branch lines which it is subsequently authorized to build, but which are required to be kept distinct from the main line,⁸ nor to lines which it may subsequently acquire and operate by lease, purchase, or otherwise obtaining an interest therein.⁹

1. Elevators or Docks Owned by Railroad Companies and Leased to Others Not Exempt. — *Illinois Cent. R. Co. v. People*, 119 Ill. 137 (elevator); *Matter of Swigert*, 119 Ill. 83, 24 Am. & Eng. R. Cas. 494, 59 Am. Rep. 789 (elevator); *St. Louis County v. St. Paul, etc., R. Co.*, 45 Minn. 510 (dock).

Warehouses Built by Private Individuals on Railroad Property. — A limited exemption from taxation in favor of a railroad corporation does not extend to warehouses built by private individuals for their own private benefit, and belonging to them, though they are erected on land leased from a railroad company and constituting a part of its roadway. *Gilkerson v. Brown*, 61 Ill. 486.

2. Exemption of "Right of Way" Includes Necessary Structures Thereon. — *New Mexico v. U. S. Trust Co.*, 172 U. S. 171, 186; *U. S. Trust Co. v. Atlantic, etc., R. Co.*, 8 N. Mex. 673. See also *Northern Pac. R. Co. v. Carland*, 5 Mont. 146, 17 Am. & Eng. R. Cas. 364.

3. Contrary Doctrine in *Arizona*. — *Atlantic, etc., R. Co. v. Lesueur*, (*Arizona* 1888) 37 Am. & Eng. R. Cas. 368; *Atlantic, etc., R. Co. v. Yavapai County*, (*Arizona* 1889) 39 Am. & Eng. R. Cas. 543. In the case first cited the court said that the contrary view expressed in *Northern Pac. R. Co. v. Carland*, 5 Mont. 146, 17 Am. & Eng. R. Cas. 364, was mere dictum.

4. Exemption of Lands Granted in Aid of Construction Does Not Extend to Lands Acquired by

Purchase Without Reference to Use. — *Cairo, etc., R. Co. v. Parks*, 32 Ark. 131.

5. Lands Granted in Aid of Railroad Not Within Exemption of Capital and Dividends. — *St. Louis, etc., R. Co. v. Loftin*, 98 U. S. 559, affirming 30 Ark. 693; *Memphis, etc., R. Co. v. Loftin*, 105 U. S. 258.

6. Land Grant Exempt under Provision that Property Is Taxed through Shares of Stockholders. — *Tallman v. Treasurer*, 12 Iowa 531.

7. Meaning of Exemption of Land "at" Terminus. — *State v. Receiver of Taxes*, 38 N. J. L. 299.

8. Branch Lines Kept Distinct from Main Line Not Exempt. — An exemption granted by charter to the stock of a railroad company does not extend to a branch line built under authority of a subsequent act of the legislature, the stockholders in the branch having by the terms of the act nothing whatever to do with the main line. *State v. Chicago, etc., R. Co.*, 89 Mo. 523. See also *Chicago, etc., R. Co. v. Guffey*, 120 U. S. 569. Compare *Atlantic, etc., R. Co. v. Allen*, 15 Fla. 637.

9. Leased Line Not Exempt. — *Lake Shore, etc., R. Co. v. Grand Rapids*, 102 Mich. 374.

Purchased Line Not Exempt. — *Burlington, etc. R. Co. v. Putnam County*, 5 Dill. (U. S.) 289.

Road Operated Jointly with Company Owning It. — An exemption from taxation granted to a railroad by its charter does not cover another

g. EFFECT OF VARIATION IN ROUTE. — Variations in the route over which the railroad may run do not affect the identity of the corporate body, and therefore an exemption from taxation will not be lost by a lawful change in the route, but will attach to the new location and the line thereon.¹

23. Canals. — Exemptions from taxation have been frequently granted in favor of canals, both for navigation and for irrigation.²

What Property Is Within Exemption. — In reference to the former class, such exemptions have been held to extend to reservoirs created to supply the canal with water,³ houses occupied by lock tenders and toll collectors,⁴ piers and basins belonging to the canal company and used for the purpose of accommodating the boats engaged in navigating the canal and for the reception of their cargoes,⁵ machinery used for a contemplated improvement,⁶ a horse railroad operated in connection with the canal, the engine and machinery for raising cars upon the inclined planes along the railroad, and the engine houses, the houses and gardens occupied by the engineers tending the engines, and the collectors' and engineers' offices.⁷

Property Not Within Exemption. — But such exemptions have been held not to extend to buildings at the junction of the canal and a railroad, used for receiving and transshipping merchandise to and from the canal and the railroad, houses used as boarding houses for workmen, horses for drawing the cars on the railroad, and the barns and stables for them,⁸ a house used for the residence of an assistant superintendent of the canal,⁹ nor to lands of the canal company which are leased to others for their exclusive use and occupancy in discharging and shipping coal carried over the canal.¹⁰

24. Public Property and the Instrumentalities of Government — *a. GENERAL RULE.* — It is well settled as a general rule that public property and the various instrumentalities of government, whether, in *England* and her colonies, appertaining to the crown, or, in the *United States*, to the federal government, the various states, or the political subdivisions of the states, are not subject to taxation.¹¹

railroad which it subsequently acquires the right to operate jointly with the company owning it, but its interest in such road is subject to a tax which has been by statute imposed upon the property. *State v. Northern Pac. R. Co.*, 32 Minn. 294, 17 Am. & Eng. R. Cas. 475.

1. Exemption Not Lost by Variation in Route. — *Charlestown v. Middlesex County*, 1 Allen (Mass.) 199; *Cheraw, etc., R. Co. v. Anson*, 88 N. Car. 519.

2. Exemption of Irrigation Canal Used Exclusively by Owners — **What Constitutes Such Exclusive Use.** — *Empire Land, etc., Co. v. Rio Grande County*, 21 Colo. 244, reversing 1 Colo. App. 205.

3. Reservoirs. — *Wayne County v. Delaware, etc., Canal Co.*, 15 Pa. St. 351.

4. Houses of Lock Tenders and Toll Collectors. — *Wayne County v. Delaware, etc., Canal Co.*, 15 Pa. St. 351.

A house erected as a toll house by an incorporated canal company, and so built as to be occupied not merely as the collector's office, but as his family's residence, is, notwithstanding the fact of its being the residence of the collector and a building of some pretensions, a constituent part of the canal, and as such partakes of its exemption from taxation. *Schuylkill Nav. Co. v. Berks County*, 11 Pa. St. 202.

5. Piers and Basins. — *State v. Betts*, 24 N. J. L. 555. In this case it was held further that a pier remained exempt although the boatmen

at the canal used it free of charge, and a certain business company occupied about one-third as a coal depot, paying no rent, and its coal coming through the canal, and the other part was occupied indiscriminately by all persons bringing coal through the canal; and even though some part was used for storing lumber that did not come by way of the canal. See also *Lehigh Valley R. Co. v. Newark*, 44 N. J. L. 323.

6. Machinery Used for Contemplated Improvement. — *New Orleans v. Carondelet Canal, etc., Co.*, 36 La. Ann. 396; *Carondelet Canal Nav. Co. v. New Orleans*, 44 La. Ann. 394. In this case the court further said: "The machinery being exempt, the place on the banks of the stream selected to store it and other materials, to protect them from loss and decay, is also exempt. That buildings of some sort are required cannot be doubted."

7. Horse Railroad, etc. — *Wayne County v. Delaware, etc., Canal Co.*, 15 Pa. St. 351.

8. Exemption Does Not Include Buildings for Transshipping Merchandise, etc. — *Wayne County v. Delaware, etc., Canal Co.*, 15 Pa. St. 351.

9. Residence of Assistant Superintendent Not Exempt. — *Morris Canal, etc., Co. v. Cleaver*, 46 N. J. L. 407.

10. Lands Leased to Others. — *State v. Love*, 37 N. J. L. 60.

11. Public Property and the Instrumentalities of Government Not Taxable — *England*, — *Attv. Gen. v. Hill*, 2 M. & W. 160; *Mersey Docks v.*

Exemption Not Dependent upon Express Grant. — This immunity is in almost all jurisdictions confirmed by some express constitutional or statutory grant of exemption, but it is by no means dependent thereon, for it rests upon the most fundamental principles of government, being necessary in order that the

Cameron, 11 H. L. Cas. 443; Atty.-Gen. v. Hill, 2 M. & W. 160.

Canada. — Atty.-Gen. v. Montreal, 13 Can. Sup. Ct. Rep. 352; Cornwallis v. Canadian Pac. R. Co., 19 Can. Sup. Ct. Rep. 702; Quirt v. Reg., 19 Can. Sup. Ct. Rep. 510; Parsons v. Le Conseil de Sorel, 15 Rev. Leg. 417; Consumers' Gas Co. v. Toronto, 27 Can. Sup. Ct. Rep. 453, 17 Can. L. T. 321.

United States. — Van Brocklin v. Tennessee, 117 U. S. 151, reversing 15 Lea (Tenn.) 33; M'Culloch v. Maryland, 4 Wheat. (U. S.) 316; Weston v. Charleston, 2 Pet. (U. S.) 449; Kansas Pac. R. Co. v. Prescott, 16 Wall. (U. S.) 603; Pollard v. Hagan, 3 How. (U. S.) 212; Union Pac. R. Co. v. McShane, 22 Wall. (U. S.) 444; McGoon v. Scales, 9 Wall. (U. S.) 23; Tucker v. Ferguson, 22 Wall. (U. S.) 527; Wisconsin Cent. R. Co. v. Price County, 133 U. S. 496; Hussman v. Durham, 165 U. S. 144, affirming 88 Iowa 29; Union Pac. R. Co. v. Lincoln County, 1 Dill. (U. S.) 314; U. S. v. Baltimore, etc., R. Co., 17 Wall. (U. S.) 322; Calhoun County v. American Emigrant Co., 93 U. S. 124; Wheeling, etc., Transp. Co. v. Wheeling, 99 U. S. 273; Merchants' Nat. Bank v. U. S., 101 U. S. 1, 2 Browne's Nat. Bank Cas. 100; Dobbins v. Erie County, 16 Pet. (U. S.) 435; Louisville First Nat. Bank v. Com., 9 Wall. (U. S.) 353; Thomson v. Union Pac. R. Co., 9 Wall. (U. S.) 579, 591; Osborn v. U. S. Bank, 9 Wheat. (U. S.) 738; Colorado Co. v. Commissioners, 95 U. S. 259, reversing 2 Colo. 628; Wisconsin Cent. R. Co. v. Price County, 133 U. S. 496; Collector v. Day, 11 Wall. (U. S.) 123. See also Nathan v. Louisiana, 8 How. (U. S.) 73.

Alabama. — Pollard v. State, 65 Ala. 628; Swann v. State, 77 Ala. 545; Bonner v. Phillips, 77 Ala. 427.

Arkansas. — Biscoe v. Coulter, 18 Ark. 423; School Dist. v. Howe, 62 Ark. 481. See also St. Louis, etc., R. Co. v. Loftin, 30 Ark. 693; Witt v. Armstrong, (Ark. 1887) 6 S. W. Rep. 225.

California. — People v. Doe G. 1,034, 36 Cal. 220; Low v. Lewis, 46 Cal. 549; Doyle v. Austin, 47 Cal. 353; People v. Morrison, 22 Cal. 73; People v. Shearer, 30 Cal. 645; Hall v. Dowling, 18 Cal. 619. See also People v. Cohen, 31 Cal. 210.

Connecticut. — West Hartford v. Water Com'rs, 44 Conn. 360.

Georgia. — Richmond County Academy v. Augusta, 90 Ga. 634.

Idaho. — Quivey v. Lawrence, 1 Idaho 313. See also People v. Owyhee Lumber Co., 1 Idaho 420.

Illinois. — People v. J. S., 93 Ill. 30, 34 Am. Rep. 155; Fagan v. Chicago, 84 Ill. 227; Chicago v. People, 80 Ill. 384; Sanitary Dist. v. Martin, 173 Ill. 243.

Indiana. — State v. Garton, 32 Ind. 1; Edgerton v. Huntington School Tr., 126 Ind. 261, 33 Am. & Eng. Corp. Cas. 163.

Iowa. — Goodrich v. Beaman, 37 Iowa 563; Iowa Homestead Co. v. Webster County, 21

Iowa 221; Des Moines Nav., etc., Co. v. Polk County, 10 Iowa 1; Scott v. Chickasaw County, 46 Iowa 253; Iowa R. Land Co. v. Story County, 36 Iowa 48; Moriarty v. Boone County, 39 Iowa 634; Stockdale v. Treasurer, 12 Iowa 536; Chicago, etc., R. Co. v. Davenport, 51 Iowa 451; Reynolds v. Plymouth County, 55 Iowa 90; Hays v. McCormick, 83 Iowa 89; Gibson v. Howe, 37 Iowa 168; Guthrie County v. Carroll County, 34 Iowa 108; Sully v. Poorbaugh, 45 Iowa 453; Callanan v. Wayne County, 73 Iowa 709.

Kansas. — Kohn v. Barr, 52 Kan. 269; Durker v. Greenwood County, 29 Kan. 697; Board of Regents v. Hamilton, 28 Kan. 376; Blue-Jacket v. Johnson County, 3 Kan. 299; Flint v. Jackson County, 43 Kan. 656; Saline County v. Young, 18 Kan. 440; Douglas County v. Union Pac. R. Co., 5 Kan. 616; Hobson v. Dutton, 9 Kan. 477.

Kentucky. — Louisville v. Com., 1 Duv. (Ky.) 295, 85 Am. Dec. 624; Louisville Bridge Co. v. Louisville, 81 Ky. 189.

Louisiana. — Grand Lodge, etc., v. New Orleans, 46 La. Ann. 717.

Maine. — Camden v. Camden Village Corp., 77 Me. 530; Stetson v. Bangor, 56 Me. 274.

Massachusetts. — Somerville v. Waltham, 170 Mass. 160; Wayland v. Middlesex County, 4 Gray (Mass.) 500; Worcester County v. Worcester, 116 Mass. 193. See also Worcester v. Western R. Corp., 4 Met. (Mass.) 564.

Michigan. — Auditor General v. Williams, 94 Mich. 180.

Mississippi. — Dixon v. Doe, 23 Miss. 84; Meridian v. Phillips, 65 Miss. 362; State v. Levee Com'rs, 75 Miss. 132.

Nebraska. — Donovan v. Klope, 6 Neb. 124.

Nevada. — Wright v. Cradlebaugh, 3 Nev. 341; Hale, etc., Gold, etc., Min. Co. v. Storey County, 1 Nev. 104.

New Hampshire. — Grafton County v. Haverhill, (N. H. 1894) 40 Atl. Rep. 399.

New Jersey. — Newark v. Verona Tp., 59 N. J. L. 94; Public Schools v. Trenton, 30 N. J. Eq. 667; State v. Gaffney, 34 N. J. L. 131; Newark v. Belleville Tp., 61 N. J. L. 455; Newark v. Clinton Tp., 49 N. J. L. 370.

New York. — Hassan v. Rochester, 67 N. Y. 528; Matter of Hamilton, 148 N. Y. 310; Smith v. Buffalo, 90 Hun (N. Y.) 118; People v. Board of Assessors, 111 N. Y. 505, affirming 47 Hun (N. Y.) 383. See also People v. Hess, 157 N. Y. 42, affirming 27 N. Y. App. Div. 631.

North Carolina. — Ruffin v. Orange County, 69 N. Car. 498, 1 Thomp. Nat. Bank Cas. 806.

Ohio. — Zumstein v. Consolidated Coal, etc., Co., 54 Ohio St. 264.

Oklahoma. — Topeka Commercial Security Co. v. McPherson, (Okla. 1898) 54 Pac. Rep. 489.

Pennsylvania. — Erie County v. Erie, 1 Pa. Co. Ct. Rep. 540; Directors of Poor v. School Directors, 42 Pa. St. 21; Township v. Directors, 1 Woodw. (Pa.) 175.

South Carolina. — Columbia v. Tindal, 43 S. Car. 547.

functions of government be not unduly impeded, and that the government be not forced into the inconsistency of taxing itself in order to raise money to pay over to itself, which money could be raised only by other taxation;¹ and the express exemptions are considered to be inserted in the tax laws only from abundant caution, and because the assessment of taxes is made by local

Tennessee. — *Eastman v. Nashville*, 13 Lea (Tenn.) 717; *Anderson v. Van Brocklin*, 15 Lea (Tenn.) 33.

Utah. — *Springville v. Johnson*, 10 Utah 351.

Virginia. — *Black v. Sherwood*, 84 Va. 906; *Western Union Tel. Co. v. Richmond*, 26 Gratt. (Va.) 1; *Andrews v. Auditor*, 28 Gratt. (Va.) 115.

Washington. — *Washington Iron-Works Co. v. King County*, (Wash. 1898) 54 Pac. Rep. 1004.

Wisconsin. — *Wisconsin Cent. R. Co. v. Taylor County*, 52 Wis. 37; *Denniston v. Unknown Owners*, 29 Wis. 351; *Whitney v. Gunderson*, 31 Wis. 359; *Whitney v. Nelson*, 33 Wis. 365; *Whitney v. Morrow*, 36 Wis. 438. See also *Treat v. Lawrence*, 42 Wis. 330; *Eaton v. Lyman*, 33 Wis. 34.

Wyoming. — *Ivinson v. Hance*, 1 Wyoming 270.

Lands Held in Trust for United States Exempt. — *North Wisconsin R. Co. v. Barron County*, 8 Biss. (U. S.) 414.

Government Buildings on Leased Land Exempt. — *Andrews v. Auditor*, 28 Gratt. (Va.) 115.

Property Must Be Owned by State or Municipality. — In order that property may have the character of "public property used for public purposes" within the exemption authorized by the *Texas* Constitution, it is necessary that the ownership should be in the state or some of its municipal subdivisions. *St. Edward's College v. Morris*, 82 Tex. 1.

Land Held by a City under a Contract of Purchase Not Exempt. — *Milwaukee v. Milwaukee County*, 95 Wis. 424.

Mortgages Deposited with State Treasurer Not Exempt. — *State v. Haight*, 35 N. J. L. 279.

County Property Exempt Though Situated Outside of County. — *Camden County v. Washington Tp.*, 60 N. J. L. 367.

What Property of the Crown May Be Subject to Land Tax. — The exemption from taxation under the *English Land Tax Act* applies only to institutions which were in existence at the time when the tax was made perpetual; and land made chargeable with the tax when it was made perpetual would remain so chargeable even in the hands of the queen, if purchased for the crown. *Colchester v. Kewney*, L. R. 1 Exch. 368, 35 L. J. Exch. 204, 12 Jur. N. S. 743, 14 L. T. N. S. 888, 14 W. R. 994, 4 H. & C. 445.

Minerals Detached from Government Lands Taxable. — *Forbes v. Gracey*, 94 U. S. 762.

The Bank of the United States Was an Instrumentality of Government, and therefore exempt from state taxation. *M'Culloch v. Maryland*, 4 Wheat. (U. S.) 316; *Osborn v. U. S. Bank*, 9 Wheat. (U. S.) 738. Compare *Com. v. Morrison*, 2 A. K. Marsh. (Ky.) 75.

Armory of National Guard Exempt. — *National Guard v. Tener*, 13 W. N. C. (Pa.) 310.

Market House Not Exempt. — The language found in section 3 of article 9 of the Constitution of *Minnesota*, whereby it is provided that

"public property used exclusively for any public purpose" shall, by general laws, be exempted from taxation, and the legislation on the subject (*Gen. Stat.* 1894, § 1512), cannot be construed as authorizing the exemption of real property owned and leased by a private person who receives and retains all revenues derived from such leasing, although, under a contract with the owners, the authorities of the municipality in which the property is situated have ordained that such property shall be a public market house or place, and shall be exempt from taxation, and it is thereafter exclusively used for such public purpose, the authorities regulating the business to the extent necessary for the public welfare. *State v. Cooley*, 62 Minn. 183.

Bridge Across Interstate River Not Exempt. — A bridge across the Ohio river at Louisville, within the territorial jurisdiction of the state of Kentucky, is not exempt from state taxation as an agency or means employed by the federal government to carry into effect any of its powers. *Louisville Bridge Co. v. Louisville*, 81 Ky. 189.

1. Immunity of Property of the United States from State Taxation Rests upon Fundamental Principles of Government. — *Van Brocklin v. Tennessee*, 117 U. S. 151. In this case Mr. Justice Gray, delivering the opinion of the court, said that the statement of Mr. Justice McLean in *U. S. v. Railroad Bridge Co.*, 6 McLean (U. S.) 531, that "in the admission of new states into the Union, compacts were entered into with the federal government that they would not tax the lands of the United States" was, as applied to the case before him, an inadvertence which impaired the weight of his dictum, based upon it, that "this implies that the states had power to tax such land, if unrestrained by compact."

Implied Exemption in Favor of Public Corporation. — The Bank of Tennessee is a public corporation, chartered for the benefit of the state, and though in the act of incorporation there is no express provision exempting the property of the bank from taxation, yet such exemption is necessarily implied. *Nashville v. State Bank*, 1 Swan (Tenn.) 269.

Exemption Implied as to Property of County Only When Devoted to Public Uses. — In the absence of any express exemption of the property of counties, an exemption can be implied only as to property which is actually appropriated to public uses, and cannot be extended to county property which is devoted to private uses, particularly when an income is derived therefrom in the same manner as from similar property belonging to private individuals. *Essex County v. Salem*, 153 Mass. 141.

No Implied Exemption in Favor of the Property of Municipalities in Illinois. — *Sanitary Dist. Martin*, 173 Ill. 243. See also *Matter of Swigert*, 123 Ill. 267; *Cook County v. Chicago*, 103 Ill. 646.

officers who, though skilled in the valuation of property, are presumably unlearned in legal distinctions.¹

Exemption of Property of United States Absolute. — The moment when the title to property becomes vested in the United States, the property becomes exempt from taxation, and this exemption is not dependent upon the property being used as a means or instrumentality for the execution of any of the powers of the federal government.²

Exemption of State, County, and Municipal Property Dependent upon Use for Public Purposes. — In many jurisdictions it is considered, or expressly provided by statute, that the state, counties, and municipalities are not entitled to any such absolute exemption in regard to their property, but that the exemption in their favor extends only to such property as is used for public purposes.³

b. PUBLIC MUST HAVE A PRESENT INTEREST IN PROPERTY. — In order for property to be within the exemption now under consideration it is necessary that the government or the public have a present interest therein. A mere reversionary interest will not support the exemption,⁴ nor will the fact that the state may be ultimately entitled to share in the proceeds of the property.⁵

c. WHAT PROPERTY OF MUNICIPALITIES IS EXEMPT. — The exemption in favor of municipalities has been held to include a city fire department,⁶ a public park,⁷ a public cemetery for the burial of the poor,⁸ a reformatory for

1. Object of Express Exemptions. — *West Hartford v. Water Com'rs*, 44 Conn. 368.

2. Exemption of Property of United States Not Dependent upon Use as Instrumentality of Government. — *People v. U. S.*, 93 Ill. 30, 34 Am. Rep. 155. Thus, the immunity applies to lands struck off to the United States for taxes assessed by the general government as well as to land permanently owned for public purposes. *Van Brocklin v. Tennessee*, 117 U. S. 151, reversing 15 Lea (Tenn.) 33.

3. Exemption of County or Municipal Property Dependent upon Use for Public Purposes — *Connecticut*. — *West Hartford v. Water Com'rs*, 44 Conn. 360.

Illinois. — *People v. Chicago*, 124 Ill. 636.

Iowa. — *Guthrie County v. Carroll County*, 34 Iowa 108; *Sully v. Poorbaugh*, 45 Iowa 453; *Callanan v. Wayne County*, 73 Iowa 709.

Kentucky. — *Com. v. Louisville*, (Ky. 1898) 47 S. W. Rep. 865.

Maine. — *Camden v. Camden Village Corp.*, 77 Me. 530.

Massachusetts. — *Wayland v. Middlesex County*, 4 Gray (Mass.) 500. See also *Essex County v. Salem*, 153 Mass. 141.

New Jersey. — *Newark v. Clinton Tp.*, 49 N. J. L. 370.

North Carolina. — *Atlantic, etc., R. Co. v. Carteret County*, 75 N. Car. 474.

Ohio. — *Scott v. Athens*, 1 Ohio N. P. 94, 1 Ohio Dec. 84.

Texas. — See *St. Edward's College v. Morris*, 82 Tex. 1.

See also *infra*, this section, *What Property of Municipalities Is Exempt*.

Property Held by a City as Trustee for Private Individuals Not Exempt. — *McChesney v. People*, 99 Ill. 216; *St. Louis v. Wenneker*, 145 Mo. 230.

4. Reversionary Interest of State or City Not Sufficient to Support Exemption. — *Fall v. Marysville*, 19 Cal. 391.

Toll Bridges are not the property of the state, and thus exempt from taxation, because the

act under which they are authorized provides that they shall continue the property of the persons who build them for ninety-nine years from the time of the passing of the act, and no longer, or because commissioners appointed by the act to carry it into execution have executed an indenture demising the bridges to be erected in pursuance of the act for the entire term, as such an instrument is not a lease in its effect and operation, and the bridges when built become, during the term, the absolute property of the proprietors, and the state has no interest in them. *Passaic, etc., Bridge v. State*, 21 N. J. L. 384, affirmed 22 N. J. L. 593.

Remote and Contingent Interest. — A constitutional exemption from taxation of the property of a state will not apply to property in which the state's interest is not immediate, but very remote and contingent. *Thomson v. Union Pac. R. Co.*, 9 Wall. (U. S.) 579.

5. Property Not Exempt Because State May Ultimately Share in Proceeds. — The assets of an insolvent bank are not exempt from taxation because the state is a stockholder. *Ryan v. Gallatin County*, 14 Ill. 78.

6. Fire Department Exempt. — *Owensboro v. Com.*, (Ky. 1899) 49 S. W. Rep. 320; *Erie County v. Erie*, 113 Pa. St. 360, 18 W. N. C. (Pa.) 309. In reference to the case last cited it has been said that it "may require reconsideration, unless, notwithstanding the Act of 1873 [which repealed pre-existing exemptions], it may be sustained on the ground that property owned by municipal bodies and used for public purposes is never subject to tax laws unless the legislative intent to include it is clear." *Philadelphia v. Barber*, 160 Pa. St. 123.

7. Public Park. — *Owensboro v. Com.*, (Ky. 1899) 49 S. W. Rep. 320. In this case the court considered that "the public park is public property, used for public purposes, and necessary to the proper government of a city."

8. Cemetery. — A cemetery purchased and owned by a city for the burial of the poor who die therein is exempt from taxation as public

boys, and the property necessarily connected therewith,¹ municipal gasworks,² land purchased and held by a city for the purpose of obtaining gravel therefrom for the construction and repair of its streets, though such land was situated in another city,³ and, in *New York*, a ferry landing.⁴

Wharves Owned by City. — In *Texas* a wharf owned in part by a city has been held exempt from taxation to the extent of the city's interest therein,⁵ but in *Kentucky* it is considered that wharf property of a city, not being of a governmental or public character, is taxable.⁶

Municipal Waterworks. — In several of the states the exemption in favor of municipalities has been held to include waterworks owned by a city and used for the purpose of supplying the city with pure water.⁷ But this is denied in *Kentucky* and *Pennsylvania*.⁸

Limitation of Exemption in New York. — The New York law exempting from taxation the property of municipal corporations held for public uses expressly excepts from the exemption such property as is not within the territorial limits of the municipality, and therefore such property is taxable, whether used for a public purpose or not.⁹

d. RULE AS TO GOVERNMENT SECURITIES. — Bonds, stocks, or other securities of the United States, issued in the exercise of the power of Congress to borrow money, are in the nature of instrumentalities of government and exempt from taxation by the states, and this exemption extends

property used for a purpose germane to the objects for which the municipality was created. *Newark v. Clinton Tp.*, 49 N. J. L. 370.

1. Reformatory. — *Newark v. Verona Tp.*, 59 N. J. L. 94.

2. Municipal Gasworks. — *Toledo v. Yeager*, 8 Ohio Cir. Ct. Rep. 318, 6 Ohio Cir. Dec. 273.

3. Land Held to Supply Gravel to Construct and Repair Streets. — *Somerville v. Waltham*, 170 Mass. 160.

4. Ferry Landing. — In *People v. Board of Assessors*, 111 N. Y. 505, *affirming* 47 Hun (N. Y.) 383, it was held that a ferry landing belonging to the city of New York, but situated in the city of Brooklyn, could not be taxed by the latter city, as the franchise to maintain the ferry conjoined with the ownership of the landing constituted a ferry property belonging to the city of New York and devoted to public use, the revenues arising therefrom being, by statute and municipal ordinance, irrevocably pledged for the payment of the public debt. And the exemption was not lost by reason of the fact that the ferry was operated by lessees of the city.

5. Wharf Property of City Exempt in Texas. — *Galveston Wharf Co. v. Galveston*, 63 Tex. 14.

6. Kentucky Rule — Wharf Property Taxable. — *Com. v. Louisville*, (Ky. 1898) 47 S. W. Rep. 865.

7. Waterworks Exempt. — *West Hartford v. Water Com'rs*, 44 Conn. 360; *Wayland v. Middlesex County*, 4 Gray (Mass.) 500; *Rochester v. Rush*, 80 N. Y. 302, *reversing* 15 Hun (N. Y.) 239. In the case first cited it was further held that the exemption was not affected by the fact that the water was sold to consumers, and the revenue thus derived was more than sufficient to pay the expenses of running the waterworks and interest on the debt incurred in constructing them.

Municipal corporations owning and operating waterworks for public or corporation purposes exclusively, and not "for pecuniary gain or profit," are not liable for the privilege tax

imposed on water companies by Acts 1887, c. 1, § 4, although they are not expressly exempted from such tax by that statute or any other. *Nashville v. Smith*, 86 Tenn. 213.

Water Company Contracting to Furnish Water to Village Not an Agency of Village Government. — A water company which has entered into a contract with a village to furnish it with certain water facilities for a specified consideration, including an exemption from village taxes, is not a means or agency of village government, nor exempt from township taxation as such. *People v. Forrest*, 97 N. Y. 97, *affirming*, 29 Hun (N. Y.) 546.

8. Contrary Doctrine in Kentucky and Pennsylvania. — *Covington v. Com.*, (Ky. 1897) 39 S. W. Rep. 836; *Chadwick v. Maginnes*, 94 Pa. St. 117.

Municipal property which yields a revenue, such as waterworks, is liable to taxation although it is used for a public purpose, under the provision of the Exemption Act of 1874 that all property from which any income or revenue is derived shall be subject to taxation. *Erie County v. Erie Water Works*, 113 Pa. St. 368. The particular provision upon which this decision rested was declared unconstitutional in *Sewickley v. Sholes*, 118 Pa. St. 165, but in *Philadelphia v. Barber*, 160 Pa. St. 123, the court said that the decision in *Erie County v. Erie Water Works*, 113 Pa. St. 368, might still be sustained under a prior act.

9. Limitation of Exemption of Property of Municipalities in New York. — *People v. Hess*, 157 N. Y. 42, *affirming* 27 N. Y. App. Div. 631; *Rochester v. Coc*, 25 N. Y. App. Div. 300. The statute referred to in the text and cited in the above cases is New York Laws 1896, c. 908, § 4. Before the passage of the law referred to such property was, under the principle of the common law, not liable to taxation. *People v. Hess*, 157 N. Y. 42, *affirming* 27 N. Y. App. Div. 631. See also *People v. Board of Assessors*, 111 N. Y. 505, *affirming* 47 Hun (N. Y.) 383.

to the capital invested in such securities.¹

Exemption Extends to Market Value of Securities. — The exemption is not limited to the par value of such bonds or securities, but extends to their market value when they are above par.²

1. United States Securities and Investments Therein Exempt from State Taxation. — *United States*. — *Banks v. Mayor*, 7 Wall. (U. S.) 16, *reversing* *People v. Hoffman*, 37 N. Y. 9, and *overruling* *People v. Gardiner*, 48 Barb. (N. Y.) 608; *Bank Tax Case*, 2 Wall. (U. S.) 200; *Grether v. Wright*, 75 Fed. Rep. 742; *Weston v. Charleston*, 2 Pet. (U. S.) 449, *reversing* *Harp. L. (S. Car.)* 340; *New York Bank v. Supervisors*, 7 Wall. (U. S.) 26; *Home Ins. Co. v. New York State*, 134 U. S. 594; *Hamilton Co. v. Massachusetts*, 6 Wall. (U. S.) 632; *Carroll v. Perry*, 4 McLean (U. S.) 25; *Savings Soc. v. Coite*, 6 Wall. (U. S.) 594, *affirming* *Coite v. Savings Soc.*, 32 Conn. 173; *People v. Commissioners of Taxes*, 2 Blaok. (U. S.) 620, *reversing* 26 N. Y. 163. See also *Omaha First Nat. Bank v. Douglas County*, 3 Dill. (U. S.) 330.

Alabama. — *National Commercial Bank v. Mobile*, 62 Ala. 284, 34 Am. Rep. 15.

California. — *People v. Home Ins. Co.*, 29 Cal. 533.

Illinois. — *Chicago v. Lunt*, 52 Ill. 414.

Indiana. — *Wright v. Stilz*, 27 Ind. 338.

Iowa. — *Ottumwa Sav. Bank v. Ottumwa*, 95 Iowa 176; *German American Sav. Bank v. Burlington*, 54 Iowa 609. See also *Campbell v. Centerville*, 69 Iowa 439.

Kentucky. — *State Bank v. Com.*, 9 Bush (Ky.) 46.

Louisiana. — *State v. Board of Assessors*, 35 La. Ann. 651; *Shreveport First Nat. Bank v. Board of Reviewers*, 41 La. Ann. 181; *Parker v. Sun Ins. Co.*, 42 La. Ann. 1172; *Home Ins. Co. v. Board of Assessors*, 42 La. Ann. 1131. See also *New Orleans v. New Orleans Canal, etc.*, Co., 29 La. Ann. 851.

Massachusetts. — *Greenfield v. Franklin County*, 135 Mass. 566.

Mississippi. — *Holly Springs Sav., etc., Co. v. Marshall County*, 52 Miss. 281.

Missouri. — *St. Louis Bldg., etc., Assoc. v. Lightner*, 42 Mo. 421; *St. Louis Bldg., etc., Assoc. v. Lightner*, 47 Mo. 393; *State v. Rogers*, 79 Mo. 283.

Nebraska. — *Dixon County v. Halstead*, 23 Neb. 697.

New Jersey. — *State v. Newark*, 39 N. J. L. 380; *State v. Metz*, 32 N. J. L. 199; *Newark City Bank v. Assessor*, 30 N. J. L. 13; *State v. Haight*, 35 N. J. L. 279, 31 N. J. L. 399, 34 N. J. L. 128.

New York. — *People v. Commissioners of Taxes, etc.*, 76 N. Y. 64; *People v. Barker*, 154 N. Y. 128, *affirming* 19 N. Y. App. Div. 628, which *affirmed* 17 Misc. Rep. (N. Y.) 180; *People v. Dolan*, 36 N. Y. 59; *Monroe County Sav. Bank v. Rochester*, 37 N. Y. 365; *People v. Home Ins. Co.*, 92 N. Y. 328, *affirmed* 119 U. S. 129; *People v. Platt*, 92 Hun (N. Y.) 349; *People v. Commissioners of Taxes, etc.*, 90 N. Y. 63; *People v. Board of Education*, 46 Barb. (N. Y.) 588; *International L. Assur. Soc. v. Commissioners of Taxes*, 28 Barb. (N. Y.) 318, 17 How. Pr. (N. Y.) 206; *People v. Assessors*, 44 Barb. (N. Y.) 148; *People v. Commissioners*

of Taxes, etc., 41 How. Pr. (N. Y. Supreme Ct.) 459; *British Commercial L. Ins. Co. v. Commissioners of Taxes, etc.*, 28 How. Pr. (N. Y. Ct. App.) 41; *People v. Commissioners of Taxes, etc.*, 25 How. Pr. (N. Y. Supreme Ct.) 9.

Pennsylvania. — *Pittsburg v. Pittsburg First Nat. Bank*, 55 Pa. St. 45; *Philadelphia Contributionship, etc., v. Com.*, 98 Pa. St. 48. See also *Strode v. Com.*, 52 Pa. St. 181.

Texas. — *Rosenberg v. Weeks*, 67 Tex. 578.

Vermont. — *Smalley v. Burlington*, 63 Vt. 443.

Income from United States Bonds Exempt. — *State Bank v. Com.*, 9 Bush (Ky.) 46.

Franchise Tax on Corporation Whose Capital Is Invested in Government Bonds. — A corporation is not exempt from taxation upon its franchises and privileges because a part of its capital is invested in government bonds. *Home Ins. Co. v. New York State*, 134 U. S. 594; *Hamilton Co. v. Massachusetts*, 6 Wall. (U. S.) 632; *People v. Home Ins. Co.*, 92 N. Y. 328, *affirmed* 119 U. S. 129; *Monroe County Sav. Bank v. Rochester*, 37 N. Y. 365; *Philadelphia Contributionship, etc., v. Com.*, 98 Pa. St. 48.

Taxation of Shareholders in Corporation Whose Capital Is Invested in Government Bonds. — The shareholders in a corporation may be taxed for the full value of their shares though a part of the capital stock be invested in government bonds. *St. Louis Bldg., etc., Assoc. v. Lightner*, 47 Mo. 393; *People v. Dolan*, 36 N. Y. 59. See also *supra*, this section, *Corporations and Corporate Stock Generally*.

Effect of Dealing in Government Bonds. — The capital of a private banking partnership which is invested continually in bonds of the United States is entitled to the same exemption from taxation that would be accorded to an individual who had invested his funds in such bonds. In this case the capital was invested in such bonds and securities solely for the purpose of making a profit, and so kept invested, although the identity of the bonds and securities was constantly changing by daily sales and new purchases. *Chicago v. Lunt*, 52 Ill. 414, *distinguishing* *People v. Bradley*, 39 Ill. 130 (*reversed* by *Bradley v. People*, 4 Wall. (U. S.) 459), and *McVeagh v. Chicago*, 49 Ill. 318, in which cases it was held that bank stock invested in government bonds was liable to taxation, by saying: "The question now presented is totally different. In this case there has been no creation of an artificial person with special privileges which it accepts with the condition that its capital stock, no matter how invested, shall be subject to taxation."

2. Exemption Extends to Market Value of Securities. — *People v. Barker*, 154 N. Y. 128, *affirming* 19 N. Y. App. Div. 628, which *affirmed* 17 Misc. Rep. (N. Y.) 180, *People v. Platt*, 92 Hun (N. Y.) 349; *People v. Commissioners of Taxes, etc.*, 90 N. Y. 63, *overruling* in regard to this point *People v. Commissioners of Taxes, etc.*, 76 N. Y. 64.

United States Legal-tender Notes. — United States legal-tender notes, treasury notes, or "greenbacks" are also exempt from state taxation.¹

State and Municipal Bonds. — In *Georgia* and *Louisiana* it is considered that, even in the absence of any express exemption, state and municipal bonds are not rendered taxable by general words in reference to taxation, such as that "all property shall be taxed."² But the court of *California* has taken the opposite view.³

Investment in Government Bonds, etc., to Escape Taxation. — United States bonds or other securities, or treasury notes which are legitimately held as an investment, remain exempt, though one purpose in securing them was to escape taxation to the extent of such investment.⁴ But exemption cannot be successfully claimed by a person whose investment in such securities or legal-tender notes has been colorable and temporary, and merely to avoid holding taxable property at the time when the assessment was made.⁵

Exemption May Be Computed with Reference to Average Holdings Throughout Year. — A state may lawfully provide that the deductions from the assessment of moneyed capital on account of the holding of greenbacks which are exempt from taxation shall be for the average of such property held throughout the year, although a much greater amount than such average may be held upon the day when the taxes are assessed, for it is perfectly competent for the state to make the taxation relate to the property held throughout the year, and such a regulation prevents frauds upon the taxing power by investing in such securities immediately before the day of the assessment and disposing of them immediately afterwards.⁶

e. RULE AS TO SALARIES AND EMOLUMENTS OF PUBLIC OFFICERS. — From the rule that the various instrumentalities of government are exempt from taxation, it follows that, as between the federal government and the government of a state, neither can impose any tax upon the salary or emolu-

1. **Legal-tender Notes** — *United States.* — *Shotwell v. Moore*, 129 U. S. 590; *Mitchell v. Leavenworth County*, 91 U. S. 206; *Banks v. Mayor*, 7 Wall. (U. S.) 16, *reversing* *People v. New York County*, 37 N. Y. 21; *New York Bank v. Supervisors*, 7 Wall. (U. S.) 26.

Illinois. — *Durbin v. People*, 54 Ill. App. 101.

Indiana. — *Ogden v. Walker*, 59 Ind. 460; *Montgomery County v. Elston*, 32 Ind. 27, 2 Am. Rep. 327, 1 Thomp. Nat. Bank Cas. 425.

Kansas. — *Mitchell v. Leavenworth County*, 9 Kan. 344.

Mississippi. — *Horne v. Green*, 52 Miss. 452, 1 Thomp. Nat. Bank Cas. 643.

North Carolina. — *Ruffin v. Orange County*, 69 N. Car. 498, 1 Thomp. Nat. Bank Cas. 806.

Texas. — *Rosenberg v. Weekes*, 67 Tex. 578; *Griffin v. Heard*, 78 Tex. 607.

Rule as to General Deposit in Bank. — When United States legal-tender notes or greenbacks are the subject of a general deposit in a bank, and a certificate of deposit is issued for them, the money represented by such certificate of deposit is taxable. *Durbin v. People*, 54 Ill. App. 101.

National-bank Notes are not entitled to any such exemption. *Montgomery County v. Elston*, 32 Ind. 27, 2 Am. Rep. 327, 1 Thomp. Nat. Bank Cas. 425. See also *Lilly v. Cumberland County*, 69 N. Car. 300; *Ruffin v. Orange County*, 69 N. Car. 498, 1 Thomp. Nat. Bank Cas. 806. *Contra*, *Horne v. Green*, 52 Miss. 452, 1 Thomp. Nat. Bank Cas. 643; *State v. Nevada First Nat. Bank*, 4 Nev. 348. See generally the title NATIONAL BANKS.

2. **Implied Exemption of State and Municipal Bonds.** — *Miller v. Wilson*, 60 Ga. 505; *State v. Board of Assessors*, 35 La. Ann. 651; *Shreveport First Nat. Bank v. Board of Reviewers*, 41 La. Ann. 181; *Parker v. Sun Ins. Co.*, 42 La. Ann. 1172.

3. **Contrary Doctrine in California.** — *People v. Home Ins. Co.*, 29 Cal. 533.

4. **Treasury Notes, etc., Exempt where Legitimately Held, though Held to Escape Taxation.** — *Griffin v. Heard*, 78 Tex. 607. See also *Holly Springs Sav., etc., Co. v. Marshall County*, 52 Miss. 281.

5. **Fraudulent Investment in Government Securities to Avoid Taxation.** — *Holly Springs Sav., etc., Co. v. Marshall County*, 52 Miss. 281; *Dixon County v. Halstead*, 23 Neb. 697; *Griffin v. Heard*, 78 Tex. 607. See also *Mitchell v. Leavenworth County*, 91 U. S. 206, *affirming* 9 Kan. 344; *Ogden v. Walker*, 59 Ind. 460.

Bona Fides of Transaction a Question for the Jury. — Where a private banker, about a month before the time fixed by law for the assessment of property, converted his assets into United States bonds, it was held that if the change in the character of the funds was merely temporary — the object being to escape taxation — such assets would be liable to be taxed, and that the question of the *bona fides* of the transaction was one of fact for the jury to determine. *Dixon County v. Halstead*, 23 Neb. 697.

6. **Exemption May Be Computed with Reference to Average Holdings Throughout the Year.** — *Shotwell v. Moore*, 129 U. S. 590, *affirming* 45 Ohio St. 632.

ments of a public officer of the other.¹

f. RIGHTS OF RAILROAD AND TELEGRAPH COMPANIES AS INSTRUMENTALITIES OF GOVERNMENT. — A railroad or telegraph company which has received aid from the federal government, and has assumed an obligation to make return therefor by rendering certain services to the government, as by transporting mail and troops and munitions of war, or giving precedence to government business in the transmission of messages over its wires, does not thereby become such an instrumentality of government as to be exempt from any taxation by the states.² But no state can impose upon it any taxation which will in any degree impede or interfere with the performance of the duties which it has undertaken, and as to which it is a governmental agency.³

g. QUASI-PUBLIC CORPORATIONS. — Cases have frequently arisen in which exemptions from taxation have been claimed by corporations on account of the public nature of the purposes for which their property was used. The courts of *Pennsylvania* have gone further than those of any other state in permitting such exemption, probably for the reason that the exemption is a limited and not an absolute one, it being allowed only in reference to local taxation, such corporations being taxed by the state upon their capital stock. This exemption has been held in that state to extend to all the property necessary to the business of any *quasi*-public corporation, such as railroad, electric-light, gas, and water companies.⁴

Railroads. — In *Massachusetts* railroad companies are allowed an exemption from taxation as to property which is necessarily used in their business, on account of such use being a public one.⁵ But this exemption is denied in

1. Salaries and Emoluments of Public Officers Not Taxable. — *Louisville First Nat. Bank v. Com.*, 9 Wall. (U. S.) 353; *Dobbins v. Erie County*, 16 Pet. (U. S.) 435; *Collector v. Day*, 11 Wall. (U. S.) 113; *Freedman v. Sigel*, 10 Blatchf. (U. S.) 327.

Who Are Not Public Officers. — This exemption in favor of public officers does not apply to an attorney at law, *State v. Fellowes*, 12 La. Ann. 344; a post-office clerk, *Melcher v. Boston*, 9 Met. (Mass.) 73; a post trader at a military reservation, *Cherry County v. Thacher*, 32 Neb. 350; or other person licensed to trade under the revenue laws of the United States, *State v. Bell*, Phil. L. (61 N. Car.) 76; nor to an auctioneer, though he be required to take out an annual license from the auditor of public accounts, *New Orleans v. Turpin*, 13 La. Ann. 56.

2. Railroad or Telegraph Company not Exempt from All Taxation by State on Account of Services to Government. — *Union Pac. R. Co. v. Lincoln County*, 1 Dill. (U. S.) 314; *Thomson v. Union Pac. R. Co.*, 9 Wall. (U. S.) 579; *Union Pac. R. Co. v. Peniston*, 18 Wall. (U. S.) 5; *Santa Clara R. Tax Case*, 9 Sawy. (U. S.) 165, 18 Fed. Rep. 385; *Western Union Tel. Co. v. Texas*, 105 U. S. 460; *Central Pac. R. Co. v. State Board of Equalization*, 60 Cal. 35; *Western Union Tel. Co. v. Richmond*, 26 Gratt. (Va.) 1. See also *State v. Newark*, 39 N. J. L. 380.

3. State Cannot Impose Taxation Which Impedes Performance of Services to Government. — *Western Union Tel. Co. v. Texas*, 105 U. S. 460; *Union Pac. R. Co. v. Peniston*, 18 Wall. (U. S.) 5. See also *Santa Clara R. Tax Case*, 9 Sawy. (U. S.) 165, 18 Fed. Rep. 385; *Western Union Tel. Co. v. Richmond*, 26 Gratt. (Va.) 1.

4. All Quasi-public Corporations Exempt from Local Taxation in Pennsylvania. — *Northampton*

County v. Easton Pass. R. Co., 148 Pa. St. 282; *Erie County v. Erie, etc.*, Transp. Co., 87 Pa. St. 437; *Pittsburgh's Appeal*, 123 Pa. St. 374, 23 W. N. C. (Pa.) 91; *Allegheny County v. McKeesport Diamond Market*, 123 Pa. St. 164; *Schuylkill County v. Citizens' Gas Co.*, 148 Pa. St. 162; *West Chester Gas Co. v. Chester County*, 30 Pa. St. 232; *Roaring-Creek Water Co. v. Girtan*, 142 Pa. St. 92; *West Manayunk Gas Light Co. v. Philadelphia*, 3 Pa. Dist. Rep. 52; *Northampton County v. Lehigh Coal, etc.*, Co., 75 Pa. St. 461; *Carbon Iron Co. v. Carbon County*, 39 Pa. St. 251; *St. Mary's Gas Co. v. Elk County*, 15 Pa. Co. Ct. Rep. 411; *Scranton v. Scranton Electric Light, etc.*, Co., 8 Pa. Co. Ct. Rep. 626; *Lancaster v. Edison Electric Illuminating Co.*, 8 Pa. Co. Ct. Rep. 631.

In *Coatesville Gas Co. v. Chester County*, 97 Pa. St. 476, *reversing* 1 Chest. Co. Rep. (Pa.) 153, the court, *per* Mercur, J., said: "The principle which appears to be recognized is that the public works of a corporation, used as such with their necessary appurtenances, shall be exempt from taxation as land, but be subject to it in another form." *Citing* the unreported case of *Northampton County v. Easton Gas Co.*

Rule Does Not Extend to Private Corporations. — The rule set out in the text does not apply to a private corporation. *Allegheny County v. McKeesport Diamond Market*, 123 Pa. St. 164; *Schuylkill County v. Citizens' Gas Co.*, 148 Pa. St. 162; *Carbon Iron Co. v. Carbon County*, 39 Pa. St. 251; *Scranton v. Scranton Electric Light, etc.*, Co., 8 Pa. Co. Ct. Rep. 626; *Lancaster v. Edison Electric Illuminating Co.*, 8 Pa. Co. Ct. Rep. 631.

5. Property of Railroads Exempt in Massachusetts as Devoted to Public Use. — *Worcester County v. Worcester*, 116 Mass. 193; *Worcester*

*Delaware, Iowa, and Rhode Island.*¹

Gas Companies. — A similar exemption, for a similar reason, has been extended in *Ohio* to the necessary works of gas companies,² but exemption is denied to such companies in *Kentucky* and *Massachusetts*.³

Water-power Company. — And in *Massachusetts* the property of a water-power company which has a right to use a portion of the public land covering navigable water for the purpose of erecting mills, to be employed or let, is considered not to be exempt from taxation as property appropriated to a public use, it not being used for purposes directly incident to the public accommodation.⁴

Educational Institutions. — The courts of several of the states, recognizing the public nature of institutions of learning established for the purposes of general education, have held the property of such institutions exempt from taxation because held for a public use.⁵

h. RULE AS TO POSSESSORY RIGHTS TO AND IMPROVEMENTS UPON PUBLIC LANDS. — Although public lands of the federal government are not subject to taxation by the states, the possessory right of an occupant of such lands may be taxed.⁶ And the same is true of improvements erected by the occupant upon such lands.⁷

i. INDIAN LANDS. — Lands of the Indians, whether held by them under their original title and right of occupancy, or granted to them by treaty with the United States, are not subject to taxation under the authority of the state within which they are located.⁸ But this exemption does not extend to

v. Western R. Corp., 4 Met. (Mass.) 564; *Boston, etc., R. Co. v. Cambridge*, 8 Cush. (Mass.) 237; *Wayland v. Middlesex County*, 4 Gray (Mass.) 500; *Charlestown v. Middlesex County*, 1 Allen (Mass.) 199; *Boston, etc., R. Co. v. Lowell, etc., R. Co.*, 124 Mass. 368.

1. Railroad Property Not Exempt Because Affected with a Public Use. — *Neary v. Philadelphia, etc., R. Co.*, 7 Houst. (Del.) 419, *affirming*; *Philadelphia, etc., R. Co. v. Neary*, 5 Del. Ch. 600; *Burlington, etc., R. Co. v. Spearman*, 12 Iowa 112; *Providence, etc., R. Co. v. Wright*, 2 R. I. 459.

2. Gas Companies Exempt in Ohio. — *Toledo v. Hosler*, 54 Ohio St. 418, *reversing* 10 Ohio Cir. Ct. Rep. 257, 6 Ohio Cir. Dec. 590, 3 Ohio Dec. 402.

3. Gas Companies Not Exempt in Kentucky and Massachusetts. — *Newport Light Co. v. Newport*, (Ky. 1892) 20 S. W. Rep. 434; *Com. v. Lowell Gas Light Co.*, 12 Allen (Mass.) 75.

4. Property of Water-power Company Not Exempt. — *Boston Water Power Co. v. Boston*, 9 Met. (Mass.) 199.

5. Exemption of Educational Institutions Resulting from Their Public Character. — *Tulane Education Fund v. Board of Assessors*, 38 La. Ann. 292; *Aplin v. State University*, 83 Mich. 467; *Willard v. Pike*, 59 Vt. 202.

The lot, buildings, and hall of the American Philosophical Society, in Independence square, in the city of Philadelphia, are not liable to taxation for state or city purposes, the society having the use of the lot for what might be called a public purpose, and the grant of the lot to the society having been accompanied by provisions against alienation and restricting the use, thus preserving it to its public purpose. *Philadelphia v. American Philosophical Soc.*, 42 Pa. St. 9.

6. Possessory Rights in Public Lands Taxable. — *State v. Moore*, 12 Cal. 56; *People v. Shearer*, 30 Cal. 645; *People v. Williamson*, 30 Cal. 646,

note; *People v. Frisbie*, 31 Cal. 148; *Quivey v. Lawrence*, 1 Idaho 313; *Hale, etc., Gold, etc., Min. Co. v. Storey County*, 1 Nev. 104; *Wright v. Cradlebaugh*, 3 Nev. 341.

7. Improvements upon Public Lands Taxable. — *People v. Shearer*, 30 Cal. 645; *Hart v. Plum*, 14 Cal. 148; *Quivey v. Lawrence*, 1 Idaho 313; *State v. Tucker*, 38 Neb. 56; *Crocker v. Donovan*, 1 Okla. 165; *Topeka Commercial Security Co. v. McPherson*, (Okla. 1898) 54 Pac. Rep. 489; *Ivinson v. Hance*, 1 Wyoming 270. See also *Topeka Commercial Security Co. v. McPherson*, (Okla. 1898) 52 Pac. Rep. 395. Compare *Chase County v. Shipman*, 14 Kan. 532.

8. Indian Lands Not Taxable under State Authority. — *United States.* — *Kansas Indians*, 5 Wall. (U. S.) 737, *reversing* *Blue Jacket v. Johnson County*, 3 Kan. 299, and *Miami County v. Wan-zop-pe-che*, 3 Kan. 364; *New York Indians*, 5 Wall. (U. S.) 761, *reversing* *Fellows v. Denniston*, 23 N. Y. 420.

Indiana. — *Revoir v. State*, 137 Ind. 332; *Me-shing-go-me-sia v. State*, 36 Ind. 310.

Kansas. — *Missouri River, etc., R. Co. v. Morris*, 13 Kan. 302; *Miami County v. Brackenridge*, 12 Kan. 114; *Douglas County v. Union Pac. R. Co.*, 5 Kan. 616.

Michigan. — *Auditor General v. Williams*, 94 Mich. 180.

Minnesota. — *Foster v. Blue Earth County*, 7 Minn. 140.

Wisconsin. — *Farrington v. Wilson*, 29 Wis. 383.

Land which has been patented to the principal chief of an Indian tribe, under a treaty, free from a restriction upon alienation imposed upon lands conveyed to other members of the tribe, does not thereby become subject to taxation, but remains exempt in the possession of such chief and his descendants where their tribal relations have not been severed. *Waupe-man-quah v. Aldrich*, 28 Fed. Rep. 489.

land which has been patented in fee simple to an Indian or half-breed who has severed his tribal relations.¹

25. Patent Rights. — Patent rights granted by the United States, and the capital invested therein, cannot be subjected to state or local taxation, for such taxation would be upon a property right which depends for its existence exclusively upon the Federal Constitution and Acts of Congress.²

VII. TERMINATION OF EXEMPTIONS — 1. **By Statutory Limitation** — *a.* **EXPIRATION OF TIME FOR WHICH GRANT WAS MADE.** — Where a grant of exemption from taxation is, by its terms, to remain in force for a limited time only, the exemption necessarily terminates at the expiration of such time.³

b. **COMPLETION OF WORKS OF GRANTEE.** — In a *South Carolina* case where an act of the legislature had provided that no tax should be assessed or levied upon a certain railroad until the road should have been completed, it was held that the road became liable to taxation when it was completed to such an extent that passengers and freight were transported between the two termini of the road by means of the tracks owned by it, three miles of track of another company which it operated under a lease, and a ferryboat belonging to the defendant company.⁴

c. **MAKING OF SPECIFIED PROFIT BY BENEFICIARY.** — In cases where the exemption is, by the terms of the grant, to continue only until the grantee shall earn a net income or make dividends equal to or exceeding a certain per cent. per annum upon the capital invested, the exemption ceases when the net income or dividends reach the amount specified.⁵

1. Property of Indian or Half-breed Who Has Severed His Tribal Relations Not Exempt. — *Pennock v. Commissioners*, 103 U. S. 44, *affirming Commissioners v. Pennock*, 18 Kan. 579; *Hilgers v. Quinney*, 51 Wis. 62. See also *State v. Miami County*, 63 Ind. 497; *Quinney v. Stockbridge*, 33 Wis. 505. And see generally the title **INDIANS**.

2. Exemption of Patent Rights and Capital Invested Therein. — *People v. Neff*, 19 N. Y. App. Div. 599; *People v. Harkness*, (Supreme Ct.) 44 N. Y. Supp. 51; *People v. Neff*, 15 N. Y. App. Div. 8; *Com. v. Westinghouse Electric, etc., Co.*, 151 Pa. St. 265; *Com. v. Westinghouse Air Brake Co.*, 151 Pa. St. 276.

What Is Not an Investment in Patent Rights. — Capital stock of a corporation used in the purchase of the exclusive right to use and sell a patented article within a certain territory is not invested in a "patent right," and therefore is not exempt. *Com. v. Central Dist., etc., Tel. Co.*, 145 Pa. St. 121, 27 Am. St. Rep. 677, 28 W. N. C. (Pa.) 515; *Com. v. Edison Electric Light Co.*, 145 Pa. St. 131, 27 Am. St. Rep. 683, 28 W. N. C. (Pa.) 533; *Com. v. Philadelphia Co.*, 145 Pa. St. 142, 28 W. N. C. (Pa.) 518; *Com. v. Brush Electric Light Co.*, 145 Pa. St. 147, 28 W. N. C. (Pa.) 527.

3. Termination at Expiration of Time Limited in Grant. — *Tennessee v. Whitworth*, 117 U. S. 129, *affirming* 22 Fed. Rep. 75; *Railroad Companies v. Gaines*, 97 U. S. 697; *Memphis, etc., R. Co. v. Gaines*, 3 Tenn. Ch. 604; *Wisconsin Cent. R. Co. v. Lincoln County*, 57 Wis. 137.

Effect of Constitutional Exemption for Limited Time and Provision that Property "May Be Taxed" Thereafter. — Article 10, § 3, of the Constitution of *Colorado* provides that "mines and mining claims bearing gold, silver, and other precious metals * * * shall be exempt from taxation for the period of ten years

from the date of the adoption of this constitution, and thereafter may be taxed as provided by law." On a question submitted to the Supreme Court of the state, it was held that, upon the expiration of the ten years of exemption, legislation was necessary to render effective the provision for the taxation of such lands. *Taxation of Patented Min. Lands*, 9 Colo. 622.

4. When a Railroad Is Completed So as to Terminate Exemption. — *Hand v. Savannah, etc., R. Co.*, 12 S. Car. 314.

5. Termination of Exemption by Reason of Making of Specified Profit by Beneficiary. — *Baltimore, etc., R. Co. v. Marshall County*, 3 W. Va. 319. See also *Mobile, etc., R. Co. v. Moseley*, 52 Miss. 127; *State v. Norwich, etc., R. Co.*, 30 Conn. 290. And the grantee cannot be taxed until the specified profit is made. *Baltimore, etc., R. Co. v. Wheeling*, 3 W. Va. 372.

Specified Profit Must Be Made upon Entire Capital. — A statutory provision that the stock, property, and profits of a railroad company whose lines extend through several states shall not be subjected to taxation "until and unless the net income of said * * * railroad shall exceed six per centum per annum upon their capital invested" means that the taxing power shall be exercised when that income is realized upon the entire road and the capital invested therein, and does not refer to the making of such income on the capital invested in that portion of the road which is within the state granting the exemption, through the earnings of such portion of the road. *Baltimore, etc., R. Co. v. Marshall County*, 3 W. Va. 319.

Increase of Capital. — An exemption such as is referred to in the text does not terminate when the specified net income or dividend is

d. EXPIRATION OF CHARTER OF GRANTEE. — An exemption granted to a corporation terminates upon the expiration of its charter, and its assets in the hands of receivers appointed to wind up its affairs are not exempt.¹

Minnesota Rule as to Forfeiture of Charter. — In *Minnesota*, where the charter of a corporation is declared forfeited and annulled, an exemption from taxation possessed by it continues during the three years for which the corporate existence of such bodies is preserved by statute in order to enable them to close up their affairs.²

e. EFFECT OF INCREASE IN VALUE OF PROPERTY SO AS TO EXCEED ORIGINAL LIMIT OF EXEMPTION. — In *Massachusetts* it is considered that when a corporation having a charter exemption of property not exceeding a certain value has acquired real property and the exemption has attached thereto, it will remain entirely exempt so long as the corporation owns it, though since its acquisition it has increased in value so as to exceed the original limit of the exemption.³

2. By Act of the Beneficiary — *a. ALIENATION OF PROPERTY.* — It follows as a natural consequence of the rule that exemption from taxation is a privilege personal in its nature,⁴ that property which has been held exempt from taxation becomes taxable when it is alienated by the owner who was entitled to hold it exempt and becomes vested in one who has no personal right of exemption.⁵

made upon the original capital, where such capital has been increased by legislative authority; but the entire capital at the time when a profit is made must be the basis of computation in determining whether such profit is sufficient to terminate the exemption. *State v. Norwich, etc., R. Co., 30 Conn. 290; Raleigh, etc., R. Co. v. Wake County, 87 N. Car. 414.*

Dividend in Confederate Money. — The charter of the North Carolina Railroad Company exempted its real estate from taxation until the dividends of profits of the company should exceed six per cent. The exemption was not terminated by the making of a dividend of fifteen per cent. or more, paid in Confederate money, as this was not such a dividend as was contemplated by the charter. *Richmond, etc., R. Co. v. Brogden, 74 N. Car. 707.*

Rental. — Nor was such exemption terminated by the road being leased to another company which paid a rental equal to six and a half per cent. per annum, where the North Carolina Railroad Company used more than the one-half per cent. in the payment of interest on its indebtedness, in creating a sinking fund, and for other necessary expenses. *Richmond, etc., R. Co. v. Brogden, 74 N. Car. 707.*

Fraudulent Diversion of Earnings to Obtain Continuance of Exemption. — Where the charter of a railroad company exempts it from taxation and provides that whenever any portion of the railroad is paying a specified interest on its cost such portion may be taxed, a claim of exemption may be successfully met by showing that the earnings of the portion of the road upon which a tax is sought to be imposed have been really sufficient to pay the specified interest, and that they have been fraudulently diverted with a view of obtaining a continuance of the exemption. *Mobile, etc., R. Co. v. Moseley, 52 Miss. 127.*

Effect of Provision for Taxation "Whenever" the Profits Exceed a Certain Amount. — In a

North Carolina case where the charter of a corporation provided that its property should be exempt from taxation for a certain time, and thereafter the legislature might impose a tax not exceeding a certain amount "whenever the annual profits shall exceed six per cent.," it was considered that the condition upon which depended the right to levy the tax provided for was not fulfilled and extinguished by the fact that in one year the net receipts would admit of a dividend in excess of the prescribed amount, but that the tax could be levied only from time to time as often as the profits reached such limit, and not when they fell short of it. The court said, however, "It is needless to determine the construction of the act in this regard." *Raleigh, etc., R. Co. v. Wake County, 87 N. Car. 414.*

1. Exemption Terminates upon Expiration of Charter of Grantee. — *Walters v. Western, etc., R. Co., 68 Fed. Rep. 1002.*

2. Minnesota Rule as to Forfeiture of Charter. — *Minnesota Cent. R. Co. v. Donaldson, 38 Minn. 115.*

3. Exemption Which Has Attached to Property Not Lost by Subsequent Increase in Value. — *Hardy v. Waltham, 7 Pick. (Mass.) 108; Harvard College v. Boston, 104 Mass. 470.* In the case last cited it was further held that the exemption was not affected by the fact that the corporation held other property more than sufficient in amount to exhaust the right of exemption.

4. See *supra*, this title, *Personal Nature of the Privilege.*

5. Property Becomes Taxable When Alienated. — *Chicago, etc., R. Co. v. Guffey, 120 U. S. 569; North Wisconsin R. Co. v. Barron County, 8 Biss. (U. S.) 414; Home of Friends v. Rouse, 8 Wall. (U. S.) 430; Newby v. Brownlee, 23 Fed. Rep. 320; Ex p. Gaines, 56 Ark. 227; American Emigrant Co. v. Iowa R. Land Co., 52 Iowa 323; Stryker v. Polk County, 22 Iowa 131; Litchfield v. Hamilton County, 40 Iowa 66.*

Alienation of Equitable Title Sufficient. — It is not necessary that the actual legal title of land be transferred, but the property may be taxed when the equitable title and entire beneficial interest are vested in a person not entitled to exemption.¹ Thus, land of the United States or of a state to which a private person has acquired a perfect right is taxable though the legal title has not been transferred by patent or otherwise.²

Lease for Nine Hundred and Ninety-nine Years Held to Terminate Exemption. — *Brainard v. Colchester*, 31 Conn. 407, *overruling* *Landon v. Litchfield*, 11 Conn. 251; *Lord v. Litchfield*, 36 Conn. 116, 4 Am. Rep. 41.

When Railroad Company Does Not Lose Exemption by Leasing Road. — A railroad company which possesses by charter an exemption from taxation does not lose such exemption by leasing its lines to another railroad company where it retains its own separate and independent existence, its own officers, its own capital stock, its own funded debt, and its own earnings, gross and net. *Com. v. Philadelphia, etc., R. Co.*, 164 Pa. St. 252, 35 W. N. C. (Pa.) 217.

Under What Circumstances Sale Will Not Terminate Exemption in Minnesota. — See *Nobles County v. Sioux City, etc., R. Co.*, 26 Minn. 294; *Minnesota Cent. R. Co. v. Melvin*, 21 Minn. 339.

1. Transfer of Equitable Title Sufficient to Terminate Exemption. — *McMahon v. Welsh*, 11 Kan. 280.

Lands Exempt until "Sold and Conveyed." — The same rule holds good in the case of lands granted to a railroad in aid of its road, and exempted "until sold and conveyed." *Winona, etc., Land Co. v. Minnesota*, 159 U. S. 526, *affirming* *Redwood County v. Winona, etc., Land Co.*, 40 Minn. 512; *Champaign County v. Reed*, 100 Ill. 304; *Brown County v. Winona, etc., Land Co.*, 38 Minn. 397; *State v. Winona, etc., R. Co.*, 21 Minn. 472. See also *Chippewa County v. St. Paul, etc., R. Co.*, 42 Minn. 295; *St. Paul, etc., R. Co. v. McDonald*, 34 Minn. 195; *St. Paul, etc., R. Co. v. Robinson*, 40 Minn. 360; *St. Paul, etc., R. Co. v. Shanks*, 40 Minn. 369 note.

Complete Sale Necessary to Terminate Exemption — Agreement to Sell Not Sufficient. — *Cornwallis v. Canadian Pac. R. Co.*, 19 Can. Sup. Ct. Rep. 702.

And such lands are, of course, not subject to taxation where the conditions of sale have not been complied with and the company has exercised its right of cancelling the agreement. *Illinois Cent. R. Co. v. Goodwin*, 94 Ill. 262; *Canadian Pac. R. Co. v. Burnett*, 5 Manitoba L. Rep. 395, *followed in* *Canadian Pac. R. Co. v. Cornwallis*, 10 Can. L. T. 353.

2. Public Lands May Be Taxed Before Issuance of Patent — United States. — *Deffebach v. Hawke*, 115 U. S. 392; *Van Brocklin v. Tennessee*, 117 U. S. 151; *Wisconsin Cent. R. Co. v. Price County*, 133 U. S. 496; *Carroll v. Perry*, 4 McLean (U. S.) 25; *Astrom v. Hammond*, 3 McLean (U. S.) 107; *Kansas Pac. R. Co. v. Prescott*, 16 Wall. (U. S.) 603, *reversing* *Kansas Pac. R. Co. v. Culp*, 9 Kan. 38; *Carroll v. Safford*, 3 How. (U. S.) 441; *Witherspoon v. Duncan*, 4 Wall. (U. S.) 210, *affirming* 21 Ark. 240; *Hussman v. Durham*, 165 U. S. 144, *affirming* 88 Iowa 29. See also *Maish v.*

Arizona, 164 U. S. 599; *Pitts v. Clay*, 27 Fed. Rep. 635.

Arkansas. — *Diver v. Friedheim*, 43 Ark. 203; *Smith v. Hollis*, 46 Ark. 17; *Witherspoon v. Duncan*, 21 Ark. 240; *Burcham v. Terry*, 55 Ark. 398, 29 Am. St. Rep. 42.

Florida. — *Mundee v. Freeman*, 23 Fla. 529.

Iowa. — *Stockdale v. Webster County*, 12 Iowa 536; *Barrett v. Kevane*, 100 Iowa 653; *Vinton v. Cerro Gordo County*, 72 Iowa 155; *Iowa R. Land Co. v. Davis*, 102 Iowa 128.

Kansas. — *Kohn v. Barr*, 52 Kan. 269; *Saline County v. Young*, 18 Kan. 440; *Oswalt v. Hollowell*, 15 Kan. 154; *Hobson v. Dutton*, 9 Kan. 477.

Nebraska. — *Bellinger v. White*, 5 Neb. 399; *Donovan v. Kloeke*, 6 Neb. 124.

South Dakota. — See *Danforth v. McCook County*, (S. Dak. 1898) 76 N. W. Rep. 940.

Texas. — *Pitts v. Booth*, 15 Tex. 453.

Washington. — *Puget Sound Agricultural Co. v. Pierce County*, 1 Wash. Ter. 159.

Wisconsin. — *Ross v. Outagamie County*, 12 Wis. 26; *McKay v. Outagamie County*, 12 Wis. 46; *Farnham v. Sherry*, 71 Wis. 568; *Whitney v. Gunderson*, 31 Wis. 359; *Whitney v. Nelson*, 33 Wis. 365; *Whitney v. Morrow*, 36 Wis. 438; *Eaton v. North*, 20 Wis. 449.

Taxation of Lands of Public Domain Not Deeded but Occupied. — The law of the territory of *Oklahoma* which provides for the taxation of lots not deeded, which is held to designate that species of property which an occupant of a lot upon a government town site in the territory has in the lot and its improvements, after entry of the land at the government land office, and its segregation from the public domain, is not in violation of those parts of the organic act of the territory which provides that no law of the territory "shall be passed interfering with the primary disposal of the soil," and "no tax shall be imposed on the property of the United States," and such property is subject to taxation under the territorial law. *Topeka Commercial Security Co. v. McPherson*, (Okla. 1898) 52 Pac. Rep. 305.

Taxation While Issue of Patent Is Suspended. — Land was purchased from the United States and paid for, by the location of a land warrant. It having been discovered that the assignment of the warrant was forged, the warrant was cancelled and the issue of a patent suspended. Subsequently, the grantee of the locator substituted the cash in lieu of the warrant, and a patent was thereupon issued, upon the original entry, to the party locating the warrant. It was held that, as against such patentee or his grantee, the land was subject to taxation from the date of the original entry. *Wheeler v. Merriman*, 30 Minn. 372.

Suspended Pre-emption Entry. — A pre-emption claimant under the laws of the United States made final proof, paid for his land, and re-

Equitable Title Must Be Perfect. — But in order that the land may be taxed the equitable title of the person not possessing an exemption must be perfect.¹

ceived from the proper officer a final receipt or certificate. Subsequently the commissioner of the general land office suspended further proceedings in regard to such entry solely because of an irregularity in the method of making said final proof, and directed that further proof be submitted. It was held that, as against the pre-emptor, the land was subject to taxation from the date of the receipt, notwithstanding the fact that the order in respect to further proof had not been complied with. *Polk County v. Hunter*, 42 Minn. 312.

Contract of Purchase. — In *Washington* it is considered that land held under a contract of purchase from the state is not land belonging to the state and exempt from taxation as such, but is taxable to the grantees under the provision of Laws Wash. 1893, p. 235, § 26, that "property held under a contract for the purchase thereof, belonging to the state, county, or municipality, and school and other state lands, shall be considered for all purposes of taxation as the property of the person so holding the same." And this although only a small part of the price has been paid and the contract stipulates that upon any default of payment of the annual instalments of the purchase price the contract may be declared forfeited and the state released from all obligations to convey the property. *Washington Iron-Works Co. v. King County*, (Wash. 1898) 54 Pac. Rep. 1004.

In *Texas* it has been held that lands which the state contracted to convey in consideration of the building of the state capitol were not subject to taxation as lands held under a contract of purchase from the state, and did not become taxable until the contractor had earned them, and thus acquired title thereto; for before earning them he had neither legal nor equitable title to the lands, even though they were leased to him pending the execution of his contract. *Taylor v. Robinson*, 72 Tex. 364. Compare *Taylor v. Robinson*, 34 Fed. Rep. 678, in which case the United States District Court in Texas took the opposite view of the question in a suit between the same parties.

Property Not Wholly Paid for Taxable. — Public lands which have been sold to be paid for by instalments may be taxed before they are fully paid for, where it does not appear that the purchaser has failed to make any payment when due. *Oswalt v. Hallowell*, 15 Kan. 154; *Prescott v. Beebe*, 17 Kan. 320; *Morgan v. Clay County*, 27 Kan. 229; *Logan v. Clark County*, 51 Kan. 747; *Dickinson County v. Baldwin*, 29 Kan. 538, *distinguishing* *Parker v. Winsor*, 5 Kan. 362, and *Douglas County v. Union Pac. R. Co.*, 5 Kan. 615; *Townsen v. Wilson*, 9 Pa. St. 270. But compare *Willey v. Koons*, 49 Ind. 272; *Henderson v. State*, 53 Ind. 60.

Taxation of Property Not Wholly Paid for to Extent of Purchaser's Interest. — School lands sold by the state, but to which the equitable title of the purchaser has not been completed by full payment of the purchase money, are subject to taxation to the extent of the purchaser's interest therein, such interest to be

determined by the amount paid and invested in improvements on such lands. *State v. Tucker*, 38 Neb. 56.

Lands Held Not Subject to Taxation until Patented. — In *Des Moines Nav., etc., Co. v. Polk County*, 10 Iowa 1, it was held that lands granted by the United States to the state of Iowa for the improvement of the navigation of the Des Moines river, and by the state granted to the Des Moines Navigation and Railroad Company, in consideration of the improvements by it, were not the property of the company so as to become subject to taxation before the title was conveyed by patent, although they had been certified by the register of the Des Moines River Improvement to the company.

Express Provision Against Taxation Before Issuance of Patent. — The rule set out in the text does not apply to lands sold under a treaty with the Indians which expressly provides that the land shall not be subject to taxation until patents have been issued therefor. *Parker v. Winsor*, 5 Kan. 362.

1. Equitable Title Must Be Perfect — *United States*. — *Kansas Pac. R. Co. v. Prescott*, 16 Wall. (U. S.) 603, *reversing* *Kansas Pac. R. Co. v. Culp*, 9 Kan. 38; *Colorado Co. v. Commissioners*, 95 U. S. 259, *reversing* 2 Colo. 628; *Pitts v. Clay*, 27 Fed. Rep. 635.

Iowa. — *Reynolds v. Plymouth County*, 55 Iowa 90; *Iowa R. Land Co. v. Story County*, 36 Iowa 48.

Kansas. — *Missouri River, etc., R. Co. v. Morris*, 13 Kan. 302.

Minnesota. — *St. Paul, etc., R. Co. v. McDonald*, 34 Minn. 182.

Nebraska. — *Graff v. Ackerman*, 38 Neb. 720, *overruling* expressly *Edgington v. Cook*, 32 Neb. 551, and by implication *Hagenbuck v. Reed*, 3 Neb. 17.

Oklahoma. — *Topeka Commercial Security Co. v. McPherson*, (Okla. 1898) 54 Pac. Rep. 489.

South Dakota. — *Duncan v. Newcomer*, 9 S. Dak. 375.

Texas. — *Pitts v. Booth*, 15 Tex. 453; *Abney v. State*, (Tex. Civ. App. 1898) 47 S. W. Rep. 1043, *citing* 25 AM. AND ENG. ENCYC. OF LAW (1st ed.) 112.

Canada. — *Reg. v. Victoria Lumber, etc., Co.*, 5 British Columbia 288, 17 Can. L. T. 443. This case in effect *overrules* the contrary decision in *Victoria Lumber Co. v. Reg.*, 3 British Columbia 16, 16 Can. L. T. 409, considering that the question was not concluded by that decision, as the crown did not press the point involved.

Homestead Entries. — Until the expiration of five years after the filing of the declaratory statement, a person seeking to avail himself of the provisions of the Homestead Act requires no taxable interest in the land entered, for his interest is, by the terms of the act, dependent for its existence upon continued occupancy, and is liable to annihilation by an absence of six months. *Moriarty v. Boone County*, 39 Iowa 634; *Long v. Culp*, 14 Kan. 412.

Unconfirmed Judicial Sale. — Property of an

Railroad Land Grants. — Lands granted in aid of the construction of a railroad become the property of the company as soon as they are earned, and are therefore taxable when earned, although no patent has been issued.¹ But such lands are also subject to the rule that they are not taxable until the railroad company has done everything necessary to give it a complete equitable title.²

insane person which has been decided by the assessor to be exempt from taxation, under section 711 of the *Iowa* Revision (Code 1897, § 1304), exempting the estates of such persons as by reason of infirmity, etc., may, in the judgment of the assessors, be unable to contribute to the public revenue, does not become taxable in the hands of a purchaser at a judicial sale until such sale has been confirmed by the court, as before such time the purchaser has no enforceable title to the land, the confirmation being in the discretion of the court. *Ordway v. Smith*, 53 *Iowa* 589.

1. Lands Granted in Aid of Railroads Taxable When Earned, though Not Patented — *United States*. — *Myers v. Northern Pac. R. Co.*, 83 *Fed. Rep.* 358, 48 *U. S. App.* 620; *Northern Pac. R. Co. v. Wright*, 54 *Fed. Rep.* 67, *affirming* *Northern Pac. R. Co. v. Wright*, 51 *Fed. Rep.* 68. See also *Northern Pac. R. Co. v. Clark*, 153 *U. S.* 252.

Iowa. — *Burlington, etc., R. Co. v. Hayne*, 19 *Iowa* 137; *Iowa Homestead Co. v. Webster County*, 21 *Iowa* 221; *Dubuque, etc., R. Co. v. Webster County*, 21 *Iowa* 235; *Chicago, etc., R. Co. v. Holdsworth*, 47 *Iowa* 20; *Iowa R. Land Co. v. Fitchpatrick*, 52 *Iowa* 244; *Cedar Rapids, etc., R. Co. v. Carroll County*, 41 *Iowa* 153; *Whitehead v. Plummer*, 76 *Iowa* 181.

Kansas. — *Missouri River, etc., R. Co. v. Morris*, 13 *Kan.* 302.

Nebraska. — *Welton v. Merrick County*, 16 *Neb.* 83; *Elkhorn Land, etc., Co. v. Dixon County*, 35 *Neb.* 426; *Price v. Lancaster County*, 20 *Neb.* 252.

North Dakota. — *Northern Pac. R. Co. v. McGinnis*, 4 *N. Dak.* 494; *Wells County v. McHenry*, 7 *N. Dak.* 246; *Tyler v. Cass County*, 1 *N. Dak.* 369; *Jackson v. La Moure County*, 1 *N. Dak.* 238.

Oregon. — *Oregon, etc., R. Co. v. Lane County*, 23 *Oregon* 386.

Wisconsin. — *Wisconsin Cent. R. Co. v. Comstock*, 71 *Wis.* 88; *Wisconsin Cent. R. Co. v. Price County*, 64 *Wis.* 579.

When Legislative Action Is Necessary to Determine that Conditions of Grant Have Been Performed. — *Sioux City, etc., R. Co. v. Osceola County*, 43 *Iowa* 318. See also *Sioux City, etc., R. Co. v. Osceola County*, 50 *Iowa* 177.

Legislative Intent that Title Shall Not Pass until Patent Issued. — *Iowa Falls, etc., R. Co. v. Cherokee County*, 37 *Iowa* 483; *Iowa Falls, etc., R. Co. v. Woodbury County*, 38 *Iowa* 498.

Delay in Issue of Patent Caused by Mistake of Law. — In *Iowa Falls, etc., R. Co. v. Plymouth County*, 40 *Iowa* 609, it was held that lands which had been earned by a railroad company were not liable for taxes before the issuing of patents therefor, where the patents were withheld, not on account of any concealment or fraudulent practice of the railroad company, but because it had not complied with the terms of a certain statute to which it was erroneously

supposed to be subject, as in such case the company was not responsible for the delay.

2. Railroad Company Must Have Complete Equitable Title. — *Central Pac. R. Co. v. Howard*, 52 *Cal.* 229; *Goodrich v. Beaman*, 37 *Iowa* 563; *Cedar Rapids, etc., R. Co. v. Sac County*, 46 *Iowa* 243; *State v. Central Pac. R. Co.*, 21 *Nev.* 94.

Right Subject to Be Defeated. — A railroad company to which lands have been granted by the government to aid it in the construction of its road is not subject to taxation on such lands while its right thereto is subject to be defeated by its failure to build the road within the time limited, or by the settlement of the land by private persons under the pre-emption or homestead laws of the *United States*. *Central Pac. R. Co. v. Howard*, 52 *Cal.* 227.

Lands Incapable of Identification. — Public lands granted to a railroad company in aid of its road do not become taxable until they have been certified or set part to the company, as prior to such certification the lands are not capable of identification. *Cedar Rapids, etc., R. Co. v. Woodbury County*, 29 *Iowa* 247; *Cedar Rapids, etc., R. Co. v. Carroll County*, 41 *Iowa* 153; *Grant v. Iowa R. Land Co.*, 54 *Iowa* 673; *Doe v. Iowa R. Land Co.*, 54 *Iowa* 657. In the case first cited the court distinguished the cases of *Iowa Homestead Co. v. Webster County*, 21 *Iowa* 221, and *Dubuque, etc., R. Co. v. Webster County*, 21 *Iowa* 235, on the ground that the lands in question in those cases were susceptible of identification and were identified.

Land Held by United States Pending Determination of Claim Adverse to Railroad Company. — Land which has been earned by a railroad company does not become taxable where the *United States* continues to hold the title pending the determination of an adverse homestead claim. *Dickerson v. Yetzer*, 53 *Iowa* 681. See also *Grant v. Iowa R. Land Co.*, 54 *Iowa* 673; *Doe v. Iowa R. Land Co.*, 54 *Iowa* 657. In the case first cited the court distinguished the cases of *Iowa Homestead Co. v. Webster County*, 21 *Iowa* 221, and *Chicago, etc., R. Co. v. Holdsworth*, 47 *Iowa* 20.

Nor does such land become taxable because at one time after the earning of the lands the company had an opportunity to acquire perfect title, which opportunity lasted about a month, between the abandonment of one homestead entry and the making of another, where it does not appear that the company neglected that opportunity for the purpose of escaping taxation. *Dickerson v. Yetzer*, 53 *Iowa* 681.

Nonpayment of Costs of Surveying, Selecting, and Conveying Lands. — It has been held that such lands were not taxable where the railroad company had not fulfilled a duty imposed upon it to pay the costs of surveying, selecting, and conveying them. *Kansas Pac. R. Co. v. Prescott*, 16 *Wall. (U. S.)* 603, *reversing* *Kansas*

b. CESSATION OF USE GIVING EXEMPTION. — It has been shown in a preceding part of this article that in many cases the exemption of property depends upon its being used for certain designated purposes.¹ In such cases the exemption, as to any particular property, is lost when the owner ceases to use it for such purposes.²

Temporary Interruption. — But a mere temporary interruption of the use, such as closing a church or school during the summer months, or an open-air sanitarium during the seasons of cold and inclement weather, or a suspension of operations by a business corporation on account of some exigency, will not terminate the exemption where the property continues to be held in good faith for the purposes intended to be furthered by the grant of exemption.³

Pac. R. Co. v. Culp, 9 Kan. 38; *Union Pac. R. Co. v. McShane*, 22 Wall. (U. S.) 444; *Northern Pac. R. Co. v. Traill County*, 115 U. S. 600; *Van Brocklin v. Tennessee*, 117 U. S. 151; *White v. Burlington, etc., R. Co.*, 5 Neb. 393.

But the Act of Congress of July 10, 1886 (24 U. S. Stat. at L. 143), changed this rule by providing that no public lands except such as were unsurveyed should be exempt from taxation by reason of the lien of the United States for the cost of surveying, selecting, and conveying them. *State v. Central Pac. R. Co.* 20 Nev. 372.

The rule, however, remains the same as to unsurveyed lands, as they are expressly excepted from the operation of the act. *Northern Pac. R. Co. v. McGinnis*, 4 N. Dak. 494.

1. Exemption Dependent upon Use of Property. — See *supra*, this title, *General Rules of Construction*, subdiv. 4. *b. Exemptions Dependent upon Use of Property.*

2. Cessation of Use Terminates Exemption — United States. — *Gibbons v. District of Columbia*, 116 U. S. 404, 11 Am. & Eng. Corp. Cas. 492; *Home of Friendless v. Rouse*, 8 Wall. (U. S.) 430.

Connecticut. — *Hartford v. Hartford Theological Seminary*, 66 Conn. 475. See also *Lord v. Litchfield*, 36 Conn. 116, 4 Am. Rep. 41.

Illinois. — *Pace v. Jefferson County*, 20 Ill. 644; *People v. Peoria Mercantile Library Assoc.*, 157 Ill. 369.

Indiana. — *Orr v. Baker*, 4 Ind. 86.

Kansas. — *Miami County v. Brackenridge*, 12 Kan. 114.

Louisiana. — *Waterbury v. Atlas Steam Cordage Co.* 42 La. Ann. 723; *Electric Traction Co. v. New Orleans*, 45 La. Ann. 1475; *Hernsheim v. Atlas Steam Cordage Co.*, 42 La. Ann. 726.

Massachusetts. — *Old South Soc. v. Boston*, 127 Mass. 378.

Minnesota. — *Ramsey County v. Chicago, etc., R. Co.*, 33 Minn. 537; *State v. Minnesota Cent. R. Co.*, 36 Minn. 246.

New Jersey. — *State v. Axtell*, 41 N. J. L. 117; *Edison Phonograph Co. v. State Board of Assessors*, 55 N. J. L. 55.

Pennsylvania. — *Philadelphia v. Jewish Hospital Assoc.*, 148 Pa. St. 454; *White v. Smith*, 43 W. N. C. (Pa.) 342; *Grubb v. Weaver*, 19 Pa. Co. Ct. Rep. 609; *Moore v. Taylor*, 147 Pa. St. 481.

Virginia. — *Petersburg v. Petersburg Benev. Mechanics' Assoc.*, 78 Va. 431, 8 Am. & Eng. Corp. Cas. 484.

Change of Business. — When a corporation to which by its charter is granted exemption from

taxation changes its business and employs its capital in a totally different character of business, the exemption from taxation ceases unless preserved by valid legislative action. *Memphis City Bank v. Tennessee*, 161 U. S. 186, *affirming* *Memphis v. Memphis City Bank*, 91 Tenn. 574, which *distinguished* *State v. Butler*, 13 Lea (Tenn.) 400, and *State v. Butler*, 86 Tenn. 614; *Memphis City Bank v. Tennessee*, 161 U. S. 193.

Relinquishment of Location of Railroad — Subsequent Taking of Land for Depot Purposes — Not Exempt. — *Norwich, etc., R. Co. v. Worcester County*, 151 Mass. 69.

Circumstances Not Amounting to Cessation of Use. — See *People v. Baptist Theological Union*, 171 Ill. 304.

Language Held to Create Absolute Exemption Not Lost by Cessation of Use. — The act creating the board of water commissioners of the city of Detroit empowers it "to take and hold * * * such franchises and real or personal property * * * as may be needful or convenient for carrying out the intents and purposes of this act, and to sell and convey or lease the same whenever required by the interests of said city." The act further provides that the "property of the board, whether within or without the limits of the city of Detroit, shall be exempt from all taxes and assessments of every kind." The language creating this exemption is broad enough to cover property of the board which has been formerly used as a pumping station, but which is leased to a dry-dock company, the use as a pumping station having been abandoned. *Water Com'rs v. Auditor-Gen.*, (Mich. 1898) 73 N. W. Rep. 801.

Rule Does Not Prevail in England as to Exemptions from Land Tax. — Where land which was originally exempt from the land tax as being used for a charitable purpose, such as the site of an almshouse, ceases to be so used, and is, by an order of the court, held discharged from the charitable trusts to which it was originally subject, the exemption from taxation nevertheless remains if there is no provision of law imposing a land tax on such lands. *Cox v. Rabbitts*, L. R. 3 App. 473, 47 L. J. Q. B. 385, 38 L. T. N. S. 430, 26 W. R. 483, *affirming* 3 Q. B. Div. 307, 46 L. J. Q. B. 498, 36 L. T. N. S. 455, 25 W. R. 594.

3. Exemption Not Lost by Temporary Interruption of Use. — *Waterbury v. Atlas Steam Cordage Co.*, 42 La. Ann. 723; *Hernsheim v. Atlas Steam Cordage Co.*, 42 La. Ann. 726; *Old South Soc. v. Boston*, 127 Mass. 378; *Edison Phonograph Co. v. State Board of Assessors*,

c. RELEASE OR WAIVER OF EXEMPTION. — The possessor of an exemption from taxation may release or waive it.¹ But it has been said that the waiver must be clear, and every well-grounded doubt upon the subject should be resolved in favor of the exemption.²

d. FORFEITURE OF EXEMPTION. — A charter grant of exemption from

55 N. J. L. 55; *Pennsylvania Hospital v. Delaware County*, 169 Pa. St. 305, 36 W. N. C. (Pa.) 547, *reversing* 15 Pa. Co. Ct. Rep. 548.

1. Exemption May Be Waived. — *Austin v. Aldermen*, 7 Wall. (U. S.) 694, 1 Thomp. Nat. Bank Cas. 15.

An exemption from taxation may be waived by an agreement not to claim it, coupled with a failure to make such claim. *People v. Commissioners of Taxes, etc.*, (Supreme Ct.) 26 N. Y. Supp. 941.

What Amounts to a Renunciation of Exemption. — Where a college, soon after the passing of the first land-tax act, purchased land of a parish under authority of a private Act of Parliament, which provided that the college should pay all taxes to which the premises then were or should thereafter be subject, it was held that the lands purchased were not exempted from the land tax, as this stipulation was introduced for the express purpose of guarding against that form of exemption, and although the college might without such a proviso have held the property exempt, it must be considered as having renounced the benefit of the exemption. *All Souls College v. Costar*, 3 B. & P. 635.

The exemption from taxation granted by the charter of the Petersburg Railroad Company was lost upon the company's acceptance of the *Virginia* Act of April 2, 1853, which authorized its consolidation with another railroad company, and provided that "in no event shall the property of either of said companies within this commonwealth be exempt from taxation." *Petersburg v. Petersburg R. Co.*, 29 Gratt. (Va.) 773. See also *Hannibal, etc., R. Co. v. Shacklett*, 30 Mo. 550; *Livingston County v. Hannibal, etc., R. Co.*, 60 Mo. 516; *Caldwell County v. Hannibal, etc., R. Co.*, 60 Mo. 521; *State v. Hannibal, etc., R. Co.*, 37 Mo. 265; *St. Joseph v. Hannibal, etc., R. Co.*, 39 Mo. 476.

Failure of Consideration for Release of Exemption. — An act of the legislature undertook to postpone the first lien of an issue of corporate bonds in favor of a second issue which it authorized, and required that in consideration thereof the corporation should release an exemption from taxation which it possessed. The corporation accepted the act and released the exemption, but the act was subsequently declared unconstitutional. It was held that, the consideration of the relinquishment of the exemption having failed, the state could not insist upon its enforcement. *Hand v. Savannah, etc., R. Co.*, 17 S. Car. 219, 12 Am. & Eng. R. Cas. 495.

Effect of Release of Exemption upon Vested Rights of Holders of Bonds Which are a Lien on Exempt Property. — It was further considered in the same case that the act referred to was unconstitutional as interfering with the vested rights of the holders of the first issue of bonds, as the exemption from taxation of the corpora-

tion's property added largely to their security, and the bonds had been purchased by them upon the assurance that the property covered by the statutory lien would not be reduced in value by the imposition of taxes upon it, and therefore the state had no claim for taxes on the property of the corporation as against bonds of the first issue which were unaffected by estoppel. *Hand v. Savannah, etc., R. Co.*, 17 S. Car. 219, 12 Am. & Eng. R. Cas. 495.

When Renunciation of Exemption Is Ineffectual. — A renunciation of a grant of exemption by a corporation, in pursuance of an act of the legislature requiring it to renounce such grant in order to accept the provisions of the act, is ineffectual where the exaction by the legislature of such renunciation is in violation of the constitution of the state; and in such case the exemption remains unimpaired. *Citizens' Bank v. Board of Assessors*, 54 Fed. Rep. 73.

Exemption May Be Waived in Part. — *State v. Railroad Taxation Com'r*, 37 N. J. L. 240.

2. Waiver Must Be Clear. — *Swayne, J.*, in *Austin v. Aldermen*, 7 Wall. (U. S.) 694, 1 Thomp. Nat. Bank Cas. 15.

Circumstances Held Not to Amount to Waiver. — The second section of the *Maryland* Act of 1847, c. 158, ceded to the United States the site of the naval academy at Annapolis and exempted the personal property of the officers and agents of the federal government residing within the limits of the ceded territory from all taxes and assessments which might be at any time imposed by the state. It was held that the fact that such officers or agents exercised the right of voting at the general election previous to the time of levying a tax could not affect their right of exemption from taxation under this law. *Chauvenet v. Anne Arundel County*, 3 Md. 259.

Acquiescence in Some Particular Tax Does Not Constitute a Waiver of Exemption. — In *All Souls College v. Costar*, 3 B. & P. 635, Lord Alvanley, C. J., delivering the opinion of the court, said: "It is to be observed that no acquiescence on the part of the college in the payment of any particular assessment can prevent them from availing themselves of any exemption, if such exemption should be found to exist."

Effect of Long Acquiescence in Taxation. — But a long acquiescence of landowners in the imposition of taxes upon their land raises a presumption that an exemption which once existed has been surrendered. Given *v. Wright*, 117 U. S. 648. In this case the court, *per* Bradley, J., said: "The present case is a strong one. The nonuser consists of acquiescence in actual taxation or an actual invasion of the franchise, year by year, for a period of years [over sixty] reaching almost beyond the memory of man. It is not merely a case of nonuser, but one of disaffirmance of the privilege for this long period."

taxation may be forfeited by a failure on the part of the grantee to perform the things which are the consideration of the grant.¹

Question of Forfeiture Cannot Be Collaterally Raised. — The forfeiture of an exemption from taxation can be established only by a direct proceeding on the part of the public authorities and the decision of a proper tribunal, and the question of such forfeiture cannot be made an issue for the first time in the trial of a question of private right between other parties.²

3. By Repeal of Grant — *a.* **GENERAL RULE AS TO RIGHT TO REPEAL EXEMPTIONS.** — The general rule is that the legislature has the right to repeal, at any time it may see fit, an exemption from taxation which is contained in some general law, or has been granted as a mere gratuity, and is not the subject of a contract.³

1. Circumstances Amounting to Forfeiture. — *State v. Morgan*, 28 La. Ann. 482.

2. Question of Forfeiture Cannot Be Collaterally Raised. — *Mackall v. Chesapeake*, etc., Canal Co., 94 U. S. 308.

3. When Exemptions May Be Repealed — *United States*. — *East Saginaw Salt Mfg. Co. v. East Saginaw*, 13 Wall. (U. S.) 373; *Baltimore*, etc., R. Co. *v. Jefferson County*, 29 Fed. Rep. 305; *Titusville Second Nat. Bank v. Caldwell*, 13 Fed. Rep. 429; *West Wisconsin R. Co. v. Trempealeau County*, 93 U. S. 595, *affirming* 35 Wis. 258; *Tucker v. Ferguson*, 22 Wall. (U. S.) 527; *Welch v. Cook*, 97 U. S. 541; *Grand Lodge*, etc., *v. New Orleans*, 166 U. S. 143; *Delaware R. Tax*, 18 Wall. (U. S.) 206, *affirming* *Minot v. Philadelphia*, etc., R. Co., 2 Abb. (U. S.) 323; *Gilman v. Sheboygan*, 2 Black (U. S.) 513; *Christ Church v. Philadelphia County*, 24 How. (U. S.) 300. See also *Louisville Water Co. v. Kentucky*, 170 U. S. 127.

Alabama. — *Calhoun County v. Woodstock Iron Co.*, 82 Ala. 151. See also *Mobile*, etc., R. Co. *v. Kennerly*, 74 Ala. 566.

Connecticut. — *First Ecclesiastical Soc. v. Hartford*, 38 Conn. 274; *Lord v. Litchfield*, 36 Conn. 116, 4 Am. Rep. 41; *Brainard v. Colchester*, 31 Conn. 407. See also *Hart v. Cornwall*, 14 Conn. 228.

District of Columbia. — *Baltimore*, etc., R. Co. *v. District of Columbia*, 3 MacArthur (D. C.) 122.

Illinois. — *Ramsey v. Hoeger*, 76 Ill. 432; *Hayward v. People*, 145 Ill. 55.

Indiana. — *Hanna v. Allen County*, 8 Blackf. (Ind.) 352.

Iowa. — *Shiner v. Jacobs*, 62 Iowa 392.

Kansas. — *Miami County v. Brackenridge*, 12 Kan. 114.

Kentucky. — See *Newport v. Masonic Temple Assoc.* (Ky. 1898) 46 S. W. Rep. 697.

Louisiana. — *Campbell v. Waters*, 21 La. Ann. 325; *Grand Lodge v. New Orleans*, 44 La. Ann. 659; *New Orleans v. Lafayette Bank*, 27 La. Ann. 376. See also *State v. Morgan*, 28 La. Ann. 482.

Maryland. — *Appeal Tax Ct. v. Rice*, 50 Md. 302; *Appeal Tax Ct. v. Grand Lodge*, etc., 50 Md. 421; *Appeal Tax Ct. v. Baltimore Academy of Visitation*, 50 Md. 437; *Appeal Tax Ct. v. Regents*, 50 Md. 457.

Michigan. — *East Saginaw Mfg. Co. v. East Saginaw*, 19 Mich. 259, 2 Am. Rep. 82.

Mississippi. — *Holly Springs Sav., etc., Co. v. Marshall County*, 52 Miss. 281, 24 Am. Rep. 67.

Missouri. — *St. Joseph v. Hannibal*, etc., R.

Co., 39 Mo. 476; *Washington University v. Rowse*, 42 Mo. 308. See also *State v. Dulle*, 48 Mo. 282.

New Hampshire. — *Franklin St. Soc. v. Manchester*, 60 N. H. 342. See also *Brewster v. Hough*, 10 N. H. 138.

New Jersey. — *Mt. Pleasant Cemetery Co. v. Newark*, 50 N. J. L. 66; *Sisters of Charity v. Chatham Tp.*, 51 N. J. L. 89. See also *Little v. Bowers*, 46 N. J. L. 300; *State v. Railroad Taxation Com'r*, 38 N. J. L. 472, *affirming* 37 N. J. L. 228.

New York. — *People v. Roper*, 35 N. Y. 629; *People v. Board of Assessors*, 84 N. Y. 610, *affirming* 18 Hun (N. Y.) 386.

North Carolina. — *Wilmington*, etc., R. Co. *v. Alsbroom*, 110 N. Car. 137, 437.

Ohio. — *Zanesville v. Richards*, 5 Ohio St. 589.

Pennsylvania. — *Union Imp. Co. v. Com.*, 69 Pa. St. 140; *Wagner Free Institute v. Philadelphia*, 132 Pa. St. 612, 19 Am. St. Rep. 613, *affirming* 1 Pa. Co. Ct. Rep. 256; *Philadelphia v. Masonic Home*, 160 Pa. St. 572, 40 Am. St. Rep. 736; *Bourguignon Bldg. Assoc. v. Com.*, 98 Pa. St. 54; *Philadelphia v. Pennsylvania Hospital*, 134 Pa. St. 171; *Philadelphia v. Jewish Hospital Assoc.*, 148 Pa. St. 454; *Christ Church Hospital v. Philadelphia County*, 24 Pa. St. 229; *Londonderry v. Berger*, 7 Leg. Gaz. (Pa.) 231; *Mercantile Library Hall Co. v. Pittsburgh*, (Pa. 1887) 11 Atl. Rep. 667; *Society v. City*, 4 W. N. C. (Pa.) 213; *Gas Co. v. Chester County*, 10 W. N. C. (Pa.) 328; *Pittsburgh v. Library Hall Co.*, 3 Pa. Co. Ct. Rep. 519; *Appeals from Taxation*, 1 Phila. (Pa.) 418, 10 Leg. Int. (Pa.) 6; *Londonderry Tp. v. Berger*, 2 Pearson (Pa.) 230; *Presbyterian Church v. Montgomery County*, 3 Grant's Cas. (Pa.) 245. See also *Union Pass. R. Co. v. Philadelphia*, 83 Pa. St. 429.

South Carolina. — *State v. Addison*, 2 S. Car. 490; *Rose v. Charleston*, 3 S. Car. 369.

Tennessee. — *Nashville v. Ward*, 16 Lea (Tenn.) 27; *McCallie v. Chattanooga*, 3 Head (Tenn.) 317.

Texas. — *Austin v. Austin Gas Light*, etc., Co., 69 Tex. 180.

Utah. — *Judge v. Spencer*, 15 Utah 242.

Vermont. — *Herrick v. Randolph*, 13 Vt. 525.

Virginia. — *Com. v. Chesapeake*, etc., R. Co., 27 Gratt. (Va.) 344.

West Virginia. — *Probasco v. Moundsville*, 11 W. Va. 501.

Wisconsin. — *Weston v. Shawano County*, 44 Wis. 242.

Intent to Repeal Must Be Manifest. — But as repeals by implication are not favored, an exemption will not be considered to be repealed unless the legislative intent to repeal it be expressed, or necessarily implied from the language used.¹

b. RIGHT TO GRANT IRREPEALABLE EXEMPTIONS. — It is well established by authority that in the absence of constitutional restrictions it is entirely within the power of the legislature to grant absolute or limited exemptions from taxation, either for a limited time or in perpetuity, which it is beyond the power of succeeding legislatures to repeal.² But there

Where Duty Imposed in Connection with Exemption — Repeal of Exemption Relieves from Duty. — See *Louisville Water Co. v. Clark*, 143 U. S. 1 [affirming *Clark v. Louisville Water Co.*, 90 Ky. 515]; *Louisville Water Co. v. Kentucky*, 170 U. S. 127.

1. Legislative Intent to Repeal Exemption Must Be Manifest — *United States*. — *Savannah v. Jesup*, 106 U. S. 563.

Connecticut. — *Nichols v. New Haven, etc.*, Co., 42 Conn. 103.

Kentucky. — *Henderson v. Lambert*, 8 Bush (Ky.) 607; *Elizabethtown, etc., R. Co. v. Elizabethtown*, 12 Bush (Ky.) 233. See also *Henderson v. Strangers' Rest Lodge*, (Ky. 1891) 17 S. W. Rep. 215.

Maine. — See *State v. Knox, etc.*, R. Co., 78 Me. 92.

Mississippi. — *State v. Levee Com'rs*, 75 Miss. 132.

Missouri. — See *State v. Hannibal, etc.*, R. Co., 101 Mo. 136, 41 Am. & Eng. R. Cas. 581, affirming 39 Am. & Eng. R. Cas. 547.

New Jersey. — *State v. Society, etc.*, 43 N. J. Eq. 410.

Pennsylvania. — *Rounds v. Waymart*, 81 Pa. St. 395.

A statute of *New York* exempting from taxation "all lands belonging to this state or to the United States" was amended by an act extending the exemption to "all vessels engaged in the coasting trade." The following year the amended act was repealed. It was held that the repeal did not extend to the exemption of state and United States property. *Croner v. Cowdrey*, (Brooklyn City Ct.) 19 N. Y. Supp. 908, not affected as to this point by reversal of judgment in 139 N. Y. 471, 36 Am. St. Rep. 716.

2. Legislature Has Power to Grant Irrepealable Exemptions — *United States*. — *Delaware R. Tax*, 18 Wall. (U. S.) 206, affirming *Minot v. Philadelphia, etc.*, R. Co., 2 Abb. (U. S.) 323; *Jefferson Branch Bank v. Skelly*, 1 Black. (U. S.) 436; *Home of Friendless v. Rouse*, 8 Wall. (U. S.) 430; *Washington University v. Rouse*, 8 Wall. (U. S.) 439; *Wilmington, etc., R. Co. v. Reid*, 13 Wall. (U. S.) 264; *Raleigh, etc., R. Co. v. Reid*, 13 Wall. (U. S.) 269; *Tomlinson v. Jessup*, 15 Wall. (U. S.) 454; *Von Hoffman v. Quincy*, 4 Wall. (U. S.) 535; *Humphrey v. Pegues*, 16 Wall. (U. S.) 244; *Hoge v. Richmond, etc., R. Co.*, 99 U. S. 348; *Louisville, etc., R. Co. v. Gaines*, 3 Fed. Rep. 266, 2 Flipp. (U. S.) 621; *Wells v. Central Vermont R. Co.*, 14 Blatchf. (U. S.) 426; *Erie R. Co. v. Pennsylvania*, 21 Wall. (U. S.) 492; *Bailey v. Magwire*, 22 Wall. (U. S.) 215.

Arkansas. — *St. Louis, etc., R. Co. v. Loftin*, 30 Ark. 693.

Colorado. — *County Com'rs v. Colorado Seminary*, 12 Colo. 497.

Connecticut. — *Parker v. Redfield*, 10 Conn. 490; *Seymour v. Hartford*, 21 Conn. 481.

Delaware. — *State v. Smyrna Bank*, 2 Houst. (Del.) 99, 73 Am. Dec. 699.

District of Columbia. — *Baltimore, etc., R. Co. v. District of Columbia*, 3 MacArthur (D. C.) 122.

Georgia. — *State v. Georgia R., etc., Co.*, 54 Ga. 423.

Illinois. — *State Bank v. People*, 5 Ill. 303.

Kentucky. — *Bank Tax Cases*, 97 Ky. 590; *Louisville, etc., R. Co. v. Com.*, 10 Bush (Ky.) 44. See also *Kentucky Cent. R. Co. v. Bourbon County*, 82 Ky. 497.

Louisiana. — *Citizens' Bank v. Bouny*, 32 La. Ann. 239.

Maine. — *State v. Dexter, etc.*, R. Co., 69 Me. 44.

Maryland. — *Appeal Tax Ct. v. Grand Lodge, etc.*, 50 Md. 421.

Minnesota. — *First Div. St. Paul, etc., R. Co. v. Parcher*, 14 Minn. 297; *Nobles County v. Hamline University*, 46 Minn. 316.

Mississippi. — *Mississippi Mills Co. v. Cook*, 56 Miss. 40.

Missouri. — *St. Vincent's College v. Schaefer*, 104 Mo. 261.

New Jersey. — *State Board of Assessors v. Paterson, etc., R. Co.*, 50 N. J. L. 446; *Little v. Bowers*, 46 N. J. L. 300; *Mt. Pleasant Cemetery Co. v. Newark*, 52 N. J. L. 539; *Newark v. Mt. Pleasant Cemetery Co.*, 58 N. J. L. 168.

Oregon. — *Hogg v. Mackay*, 23 Oregon 339, 37 Am. St. Rep. 682.

Pennsylvania. — See *Philadelphia v. Pennsylvania Hospital*, 134 Pa. St. 171.

South Carolina. — *St. Philip's Church v. Charleston, McMull. Eq. (S. Car.)* 139.

Tennessee. — *State v. Bank of Commerce*, 95 Tenn. 221; *Knoxville, etc., R. Co. v. Hicks*, 9 Baxt. (Tenn.) 442; *State v. Whitworth*, 8 Lea (Tenn.) 594.

Vermont. — *Herrick v. Randolph*, 13 Vt. 525.

Virginia. — *Whiting v. West Point*, 88 Va. 905, 29 Am. St. Rep. 750; *Com. v. Chesapeake, etc., R. Co.*, 27 Gratt. (Va.) 344.

Wisconsin. — *West Wisconsin R. Co. v. Trempealeau County*, 35 Wis. 258, affirmed 93 U. S. 595.

Limitation of Rule. — Where lands are granted by the legislature to private persons, either natural or artificial, and conditions beneficial to the grantee are annexed to the grant, there can be no good ground of doubt that both the grant and all such conditions are irrevocable. But after a grant is once made, the legislature can no more bind any future

has been a continued dissent from this doctrine,¹ even in some of the cases which have recognized the rule as established.²

c. WHAT EXEMPTIONS ARE IRREPEALABLE. — It is generally considered that an exemption is irrepealable, without the consent of the beneficiary, where it partakes of the nature of a contract, the beneficiary making some payment, releasing some right, or performing some duty which furnishes the consideration therefor.³ In the absence of some such consideration, the exemption cannot be considered to be a contract.⁴

Exemptions Which Have Induced Citizens to Invest Their Means or Embark in New Enterprises. — A grant of exemption in favor of certain enterprises cannot be repealed so as to affect those who have, before such repeal, invested their means or embarked in such enterprises, being induced thereto by, and relying upon, the grant of exemption.⁵

legislature by exempting such land from taxation than it can bind it on any other subject. *Herrick v. Randolph*, 13 Vt. 525.

1. Cases Holding the Contrary Doctrine. — *Swann v. State*, 77 Ala. 545; *Debolt v. Ohio L. Ins., etc., Co.*, 1 Ohio St. 564; *Toledo Bank v. Toledo*, 1 Ohio St. 623; *Milan, etc., Plank-Road Co. v. Husted*, 3 Ohio St. 578; *Norwalk Plank-Road Co. v. Husted*, 3 Ohio St. 586; *Mott v. Pennsylvania R. Co.*, 30 Pa. St. 9, 72 Am. Dec. 664. See also *Brewster v. Hough*, 10 N. H. 138; *Wilmington, etc., R. Co. v. Alsbrook*, 110 N. Car. 137.

2. Cases Recognizing the Doctrine as Established but Disapproving It. — *Parker v. Redfield*, 10 Conn. 490; *State v. Georgia R., etc., Co.*, 54 Ga. 423; *West Wisconsin R. Co. v. Trempealeau County*, 35 Wis. 258. See also *Hogg v. Mackay*, 23 Oregon 339, 37 Am. St. Rep. 682; *Philadelphia v. Pennsylvania Hospital*, 134 Pa. St. 171.

3. Exemption Irrepealable When the Subject of a Contract — *United States*. — *Northwestern University v. People*, 99 U. S. 309; *New Jersey v. Yard*, 95 U. S. 104; *Wells v. Central Vermont R. Co.*, 14 Blatchf. (U. S.) 426; *Gordon v. Appeal Tax Ct.*, 3 How. (U. S.) 133; *Piqua Branch of State Bank v. Knoop*, 16 How. (U. S.) 369; *New Jersey v. Wilson*, 7 Cranch (U. S.) 164; *Pacific R. Co. v. Maguire*, 20 Wall. (U. S.) 36. See also *Williamson v. New Jersey*, 130 U. S. 189.

Dakota. — *Winona, etc., R. Co. v. Deuel County*, 3 Dakota 1.

Florida. — *Gonzales v. Sullivan*, 16 Fla. 791.

Illinois. — *State Bank v. People*, 5 Ill. 303.

Kentucky. — See *Com. v. Owensboro, etc., R. Co.*, 95 Ky. 60.

Louisiana. — *Citizens' Bank v. Bouny*, 32 La. Ann. 239; *Carondelet Canal Nav. Co. v. New Orleans*, 44 La. Ann. 394; *Grand Lodge v. New Orleans*, 44 La. Ann. 659.

Michigan. — *Detroit v. Detroit City R. Co.*, 76 Mich. 421.

Minnesota. — *First Div. St. Paul, etc., R. Co. v. Parcher*, 14 Minn. 297.

Missouri. — *South Pac. R. Co. v. Laclede County*, 57 Mo. 147; *Mechanics' Bank v. Kansas City*, 73 Mo. 555; *St. Vincent's College v. Schaefer*, 104 Mo. 261.

Montana. — *Northern Pac. R. Co. v. Carland*, 5 Mont. 146, 17 Am. & Eng. R. Cas. 364.

New Hampshire. — *Franklin St. Soc. v. Manchester*, 60 N. H. 342.

New Jersey. — *State v. Railroad Taxation*

Com'rs, 37 N. J. L. 240; *State v. Hoboken*, 43 N. J. L. 96.

Ohio. — *Matheny v. Golden*, 5 Ohio St. 361; *Kumler v. Traber*, 5 Ohio St. 442.

Tennessee. — *State v. Butler*, 86 Tenn. 614; *State v. Bank of Commerce*, 95 Tenn. 221.

Texas. — *International, etc., R. Co. v. Anderson County*, 59 Tex. 654; *International, etc., R. Co. v. Smith County*, 65 Tex. 21; *Austin v. Austin Gas-Light, etc., Co.*, 69 Tex. 180.

Canada. — *Ex p. St. John Bridge, etc., Co.*, 30 New Bruns. 551, 11 Can. L. T. 181.

Issue of Exempt Bonds by State or Municipality.

— The issuing of bonds by the state or by a municipality, under a statute providing that such bonds shall be exempt from taxation, constitutes a contract with the purchasers or holders thereof which would be impaired by subsequent taxation of the bonds. *Murray v. Charleston*, 96 U. S. 445; *Appeal Tax Ct. v. Patterson*, 50 Md. 354; *Newark City Bank v. Assessor*, 30 N. J. L. 13; *Merchants' Ins. Co. v. Newark*, 54 N. J. L. 138; *Com. v. Pittsburgh*, 13 Pa. Co. Ct. Rep. 5.

Lands Granted to Soldiers. — The exemption from taxation granted by the *Pennsylvania* statutes to lands granted to Revolutionary officers or soldiers formed "a part of the contract under which the grantee obtained the land from the state." *Coney v. Owen*, 6 Watts (Pa.) 435.

Future Making of Contracts Including Exemption from Taxation May Be Prohibited. — *Bank of Commerce v. Tennessee*, 163 U. S. 416. In this case the court affirmed the judgment of the state court in holding that the stock issued since the adoption of the new constitution was subject to taxation, but reversed so much as permitted a recovery of taxes beyond the one-half of one per cent. against the holders of shares issued before the adoption of such constitution, thus modifying the judgment in *Bank of Commerce v. Tennessee*, 161 U. S. 134, which had reversed the judgment of the state Supreme Court against all the stockholders.

4. There Must Be a Consideration. — *Lord v. Litchfield*, 36 Conn. 116, 4 Am. Rep. 41, *overruled* *Atwater v. Woodbridge*, 6 Conn. 223, 16 Am. Dec. 46; *Osborne v. Humphrey*, 7 Conn. 335; *Bradley v. McAtee*, 7 Bush (Ky.) 667; *Evansville, etc., R. Co. v. Com.*, 9 Cush (Ky.) 438; *Franklin St. Soc. v. Manchester*, 60 N. H. 342.

5. Investment of Means or Embarking in New Enterprises on Faith of Exemption — *Kentucky*. — *Bradley v. McAtee*, 7 Bush (Ky.) 667; *Com. v.*

Exemptions Contained in Charters of Corporations. — Since it is established as a general rule of law that the charter of a corporation is a contract, it follows that an exemption from taxation contained in such a charter is not subject to repeal.¹

Owensboro, etc., R. Co., 95 Ky. 60; Evansville, etc., R. Co. v. Com., 9 Bush (Ky.) 438.

Louisiana. — New Orleans v. Southern Bank, 11 La. Ann. 41; State v. Southern Bank, 23 La. Ann. 271.

Missouri. — See Scotland County v. Missouri, etc., R. Co., 65 Mo. 123.

New Hampshire. — Opinion of Court, 58 N. H. 623.

Pennsylvania. — Com. v. Pottsville Water Co., 94 Pa. St. 516; Com. v. Philadelphia, etc., R. Co., 164 Pa. St. 262.

Canada. — Alexander v. Huntsville, 24 Ont. Rep. 665.

Work Must Have Been Actually Commenced Before Repeal of Exemption. — Com. v. Owensboro, etc., R. Co., 95 Ky. 60.

When Construction of a Railroad Is Begun. — The construction of a road is begun so as to give effect to the exemption above referred to when the surveys have been made, the route has been located, and, in addition to this, rights of way have been obtained at great expense, all of which have approximated an expenditure of a quarter of a million dollars, and the work has been continuously carried forward, although the ground has not been broken before the repeal of the exemption act. Com. v. Louisville, etc., R. Co., (Ky. 1895) 31 S. W. Rep. 464.

But a mere survey and location of the route is not the beginning of the construction of a railroad, within the meaning of the exempting act, and a road upon which nothing more has been done prior to the taking effect of the repealing act is not exempt. Hodgenville, etc., R. Co. v. Com., (Ky. 1896) 34 S. W. Rep. 1075.

Purchase of Lands on Faith of Exemption. — Under the *Indiana Act of 1843* (Rev. Stat. 1843, p. 208, § 5) all lands sold by the United States were exempt from taxation "until the term of five years from the day of sale shall have expired." In 1847 an Act of Congress gave assent to the taxation of lands thereafter sold by the United States from and after the date of the sale, and on May 31, 1852, the legislature of Indiana enacted that "all real property within the state shall be subject to taxation." It was held that land purchased of the United States at any time within five years before the date of such later act was not subject to taxation until the expiration of five years from the date of sale. Thompson v. Holton, 6 McLean (U. S.) 386; Brooks v. Jasper County, 20 Ind. 416.

The *Arkansas Act of January 6, 1851*, § 14, provided that "to encourage by all just means the progress and completion of the reclamation by offering inducements to purchasers and contractors to take up said lands, the swamp and overflowed land shall be exempt from taxation for the term of ten years, or until said lands are reclaimed." It was held that this section constituted a contract between the state and persons who had purchased such lands upon the faith of the exemption, and that a subsequent law repealing the exemp-

tion before the period limited had expired was unconstitutional, as impairing the obligation of the contract. State v. County Ct., 19 Ark. 360.

Donation of Property on Faith of Exemption. — In *People v. Dohling*, 6 N. Y. App. Div. 86, the court considered that where the charter of a religious corporation authorized it to acquire land by gift and provided that such land should be exempt from taxation, a gift of land on the faith of that proposal was upon sufficient consideration, and it was beyond the power of the state to repeal the exemption as to such particular land, although it had the power to repeal the charter.

Grant Must Be Expressly for Purposes Giving Exemption. — Seymour v. Hartford, 21 Conn. 481.

1. Exemptions Contained in Corporate Charters Irrepealable. — *United States.* — Bank of Commerce v. Tennessee, 161 U. S. 134; Humphrey v. Pegues, 16 Wall. (U. S.) 244; Wilmington, etc., R. Co. v. Reid, 13 Wall. (U. S.) 264; Raleigh, etc., R. Co. v. Reid, 13 Wall. (U. S.) 269; Dodge v. Woolsey, 18 How. (U. S.) 331; Jefferson Branch Bank v. Skelly, 1 Black (U. S.) 436; St. Anna's Asylum v. New Orleans, 105 U. S. 362; Tomlinson v. Branch, 15 Wall. (U. S.) 460; Charleston v. Branch, 15 Wall. (U. S.) 470; Franklin Branch Bank v. Ohio, 1 Black (U. S.) 474; Welch v. Cook, 97 U. S. 541; Mobile, etc., R. Co. v. Tennessee, 153 U. S. 486. See also St. Louis, etc., R. Co. v. Berry, 113 U. S. 465, affirming 41 Ark. 509.

Alabama. — Mobile, etc., R. Co. v. Kennerly, 74 Ala. 566; Judson v. State, Minor (Ala.) 150.

Arkansas. — Oliver v. Memphis, etc., R. Co., 30 Ark. 128; St. Louis, etc., R. Co. v. Loftin, 30 Ark. 693; Memphis, etc., R. Co. v. Berry, 41 Ark. 436.

Colorado. — County Com'rs v. Colorado Seminary, 12 Colo. 497.

Florida. — Atlantic, etc., R. Co. v. Allen, 15 Fla. 637.

Georgia. — State v. Georgia R., etc., Co., 54 Ga. 423.

Illinois. — State Bank v. People, 5 Ill. 303; Illinois Cent. R. Co. v. McLean County, 17 Ill. 291; Neustadt v. Illinois Cent. R. Co., 31 Ill. 484; Illinois Cent. R. Co. v. Irvin, 72 Ill. 452; Illinois Cent. R. Co. v. Goodwin, 94 Ill. 262; People v. Soldiers' Home, etc., 95 Ill. 561.

Kentucky. — Johnson v. Com., 7 Dana (Ky.) 338.

Louisiana. — Grand Lodge v. New Orleans, 44 La. Ann. 659.

Maryland. — State v. Northern Cent. R. Co., 44 Md. 131; State v. Baltimore, etc., R. Co., 48 Md. 49; Appeal Tax Ct. v. Baltimore Cemetery Co., 50 Md. 432.

Minnesota. — First Div. St. Paul, etc., R. Co. v. Parcher, 14 Minn. 207; Stevens County v. St. Paul, etc., R. Co., 36 Minn. 467, 29 Am. & Eng. R. Cas. 225.

Mississippi. — Mobile, etc., R. Co. v. Moseley, 52 Miss. 127; Grand Gulf, etc., R. Co. v. Buck, 53 Miss. 246; Mississippi Mills Co. v.

Express Provision Subjecting Charter to Repeal or Amendment. — But the inconvenience which has resulted from the above doctrine has led to a very general practice of adopting either constitutional or statutory provisions to the effect that all charters of incorporation and other grants shall be subject to repeal or amendment in the discretion of the legislature. And an exemption granted subject to such a provision, or contained in a charter which contains also some such provision, may of course be repealed at any time.¹

d. EFFECT OF CONSTITUTIONAL PROHIBITION OF EXEMPTIONS. — The weight of authority is in favor of the view that the adoption of a constitutional provision prohibiting the exemption of certain classes of property repeals any pre-existing exemptions of such property which are not in the nature of contracts and therefore irrepealable.²

Cook, 56 Miss. 40. See also O'Donnell v. Bailey, 24 Miss. 386.

Missouri. — State v. Hannibal, etc., R. Co., 101 Mo. 136, 41 Am. & Eng. R. Cas. 581; St. Vincent's College v. Schaefer, 104 Mo. 261.

New Jersey. — State Board of Assessors v. Morris, etc., R. Co., 49 N. J. L. 193; Mt. Pleasant Cemetery Co. v. Newark, 52 N. J. L. 539; Newark v. Mt. Pleasant Cemetery Co., 58 N. J. L. 168.

North Carolina. — Richmond, etc., R. Co. v. Orange County, 74 N. Car. 506; Richmond, etc., R. Co. v. Brogden, 74 N. Car. 707; Cheraw, etc., R. Co. v. Anson, 88 N. Car. 519.

Pennsylvania. — Iron City Bank v. Pittsburgh, 37 Pa. St. 340.

Tennessee. — State v. Butler, 86 Tenn. 614; Memphis v. Memphis City Bank, 91 Tenn. 574; State v. Bank of Commerce, 95 Tenn. 221.

Virginia. — Com. v. Richmond, etc., R. Co., 81 Va. 355, 24 Am. & Eng. R. Cas. 482.

Exemption Contained in Amendment to Charter. — The rule stated in the text applies with equal force where the exemption is contained in an amendment to the original charter of the corporation. Barnes v. Kornegay, 62 Fed. Rep. 671; St. Louis, etc., R. Co. v. Loftin, 30 Ark. 603; Citizens' Bank v. Bouny, 32 La. Ann. 239; Com. v. Pottsville Water Co., 94 Pa. St. 516; Com. v. Philadelphia, etc., R. Co., 164 Pa. St. 262.

1. Exemption Granted Subject to Provision that All Charters or Grants May Be Repealed or Amended May Be Withdrawn — *United States.* — Hoge v. Richmond, etc., R. Co., 99 U. S. 348; Louisville Water Co. v. Clark, 143 U. S. 1, affirming Clark v. Louisville Water Co., 90 Ky. 515; Louisville Water Co. v. Kentucky, 170 U. S. 127; Tomlinson v. Jessup, 15 Wall. (U. S.) 454.

Georgia. — Macon, etc., R. Co. v. Goldsmith, 62 Ga. 463.

Kentucky. — Covington v. Com., (Ky. 1897) 39 S. W. Rep. 836; Deposit Bank v. Daviess County, (Ky. 1897) 39 S. W. Rep. 1030, *overruled*; Franklin County Ct. v. Deposit Bank, 87 Ky. 370; Newport v. Masonic Temple Assoc., (Ky. 1898) 46 S. W. Rep. 697.

Maryland. — Washington County v. Franklin R. Co., 34 Md. 159; Appeal Tax Ct. v. Baltimore Academy of Visitation, 50 Md. 437.

Michigan. — Detroit City St. R. Co. v. Guthard, 51 Mich. 180.

Missouri. — State v. St. Joseph's Convent of Mercy, 116 Mo. 575.

New Jersey. — State v. Person, 32 N. J. L. 566, affirming 32 N. J. L. 134. See also State

v. Douglass, 34 N. J. L. 82, affirmed by Douglass v. State, 34 N. J. L. 485; State v. Jersey City, 31 N. J. L. 575, 86 Am. Dec. 240.

Pennsylvania. — Iron City Bank v. Pittsburgh, 37 Pa. St. 340; Com. v. Fayette County R. Co., 55 Pa. St. 452; Jones, etc., Mfg. Co. v. Com., 69 Pa. St. 137; Union Imp. Co. v. Com., 69 Pa. St. 140; Wagner Free Institute v. Philadelphia, 132 Pa. St. 612, 19 Am. St. Rep. 613, 25 W. N. C. (Pa.) 437, affirming 1 Pa. Co. Ct. Rep. 256.

Wisconsin. — West Wisconsin R. Co. v. Trempealeau County, 35 Wis. 258, affirmed 93 U. S. 595.

Consolidation of Corporations. — Where a corporation which possesses an irrepealable exemption from taxation consolidates with other corporations under statutory authority so as to form a new corporation, at a time when there is in force a provision of general law that all charters may be repealed or amended, whatever exemption the consolidated corporation may acquire is repealable under the general law. Atlantic, etc., R. Co. v. Georgia, 98 U. S. 359; State v. Atlantic, etc., R. Co., 60 Ga. 268; State v. Northern Cent. R. Co., 44 Md. 131. It is not decided in these cases that the new corporation would acquire any exemption. For the rule as to the effect of such consolidation, see *supra*, this title, *Particular Subjects of Exemption* — *Corporations and Corporate Stock Generally* — *Effect of Consolidation of Corporations*.

Charters Not Subject to Provision of General Law Concerning Repeal and Amendment. — A charter grant of exemption may be irrepealable notwithstanding the fact that when it is made there is in force in the state a general law providing that all charters shall be subject to legislative amendment and repeal, where the particular charter is expressly, or by necessary inference from its wording, excepted from the operation of such general law. Trask v. Maguire, 18 Wall. (U. S.) 392; Home of Friends v. Rouse, 8 Wall. (U. S.) 430; Washington University v. Rouse, 8 Wall. (U. S.) 439; Western, etc., R. Co. v. State, 54 Ga. 428; State v. Dexter, etc., R. Co., 69 Me. 44; Scotland County v. Missouri, etc., R. Co., 65 Mo. 123; Singer Mfg. Co. v. Heppenheimer, 58 N. J. L. 633, reversing 54 N. J. L. 439.

2. Adoption of Constitutional Prohibition of Exemptions Repeals Previous Grants. — Police Jury v. Burthe, 21 La. Ann. 325; New Orleans v. Lafayette Bank, 27 La. Ann. 376; Grand Lodge v. New Orleans, 44 La. Ann. 659, distinguishing New Orleans v. Poydras Orphan

4. Effect of Inclusion of Exempt Property Within Different Territorial Jurisdiction. — In *Canada* it seems to be established as a general rule that an exemption from taxation as to certain property is not affected by its being included, by reason of a change of boundaries, within a territorial jurisdiction different from that within which it was situated when the exemption attached.¹

5. Effect of Termination of Exemption as Regards Taxation for the Current Year. — Where an exemption from taxation in reference to any particular property comes to an end before the assessment of taxes for the current year becomes final or the taxability of property for the year is determined, such property may be taxed for the current year.² But if the taxes have been finally assessed before such time, the property cannot be taxed until the succeeding year.³

Iowa Rule as to Public Lands. — Under the Iowa statutes, government lands entered and located, or lands purchased from the state, do not become taxable until the year after that in which the entry, location, or purchase is made.⁴

Asylum, 33 La. Ann. 850, and consequently also *distinguishing by implication* New Orleans Female Orphan Asylum *v.* Houston, 37 La. Ann. 68, and New Orleans *v.* Carondelet Canal, etc., Co., 36 La. Ann. 396, in which the case *distinguished* was *followed*; Sisters of Charity *v.* Chatham Tp., 51 N. J. L. 89; Mercantile Library Hall Co. *v.* Pittsburgh, (Pa. 1887) 11 Atl. Rep. 667; Society *v.* City, 4 W. N. C. (Pa.) 213; Gas Co. *v.* Chester County, 10 W. N. C. (Pa.) 328; Pittsburgh *v.* Mercantile Hall Library Co., 3 Pa. Co. Ct. Rep. 519; Wagner Free Institute *v.* Philadelphia, 1 Pa. Co. Ct. Rep. 256; Judge *v.* Spencer, 15 Utah 242.

Contrary Doctrine in Missouri. — In Missouri, on the other hand, it is considered that such a provision is intended to be prospective only, and to prohibit the making of such exemptions in future, but not to repeal those previously made. Scotland County *v.* Missouri, etc., R. Co., 65 Mo. 123; State *v.* St. Joseph's Convent of Mercy, 116 Mo. 575; State *v.* Greer, 78 Mo. 188; State *v.* Wesleyan Cemetery Assoc., 11 Mo. App. 570; Barry *v.* Wesleyan Cemetery Assoc., 10 Mo. App. 587.

Charter Grant of Exemption Abrogated by Adoption of Constitutional Prohibition Before Organization of Charter. — Planters' Ins. Co. *v.* Tennessee, 161 U. S. 193, *affirming* State *v.* Planters' F. & M. Ins. Co., 95 Tenn. 203; Planters' Ins. Co. *v.* Tennessee, 161 U. S. 198.

1. Exemption Not Lost by Inclusion of Property Within Different Territorial Jurisdiction. — Land of a railroad company which it held exempt from taxation under a statutory provision exempting its lands in the Northwest Territories did not become taxable by reason of an extension of the limits of the province of Manitoba so as to include such land. Cornwallis *v.* Canadian Pac. R. Co., 19 Can. Sup. Ct. Rep. 702.

Rule as to Exemption Granted by Municipal By-law. — See Water Com'rs *v.* Canada Southern R. Co., 20 Ont. App. 388, *distinguishing* Cornwallis *v.* Canadian Pac. R. Co., 19 Can. Sup. Ct. Rep. 702.

Union of Two Cities Does Not Terminate Exemption Granted by One. — *Ex p.* St. John Bridge, etc., Co., 30 New Bruns. 551, 11 Can. L. T. 181.

2. Property May Be Taxed for Current Year When Exemption Ceases Before Assessment Be-

comes Final. — Hunnewell *v.* Cass County, 22 Wall. (U. S.) 464; Watterson *v.* Kirkwood, 8 Kan. 463; Martin County *v.* Drake, 40 Minn. 137, 37 Am. & Eng. R. Cas. 389; Wisconsin Cent. R. Co. *v.* Lincoln County, 57 Wis. 137. See also State *v.* Certain Lands, 40 Ark. 34; Goddard *v.* Storch, 57 Kan. 714.

Land Purchased After Time for Listing for Taxation. — In State *v.* Certain Lands, 40 Ark. 34, it was held that the provision of section 5078 of Gantt's Digest, making it the duty of landholders to list their lands for taxation on or before the first of January of each year, was merely directory, and did not imply that lands of the state entered and purchased by private persons after the first of January should not be subject to taxation until the following year, but such lands became taxable as soon as they were purchased. The lands in question in this case were purchased in February, while the assessor was not required to complete his assessment until September, and the state's lien for taxes did not attach until October.

3. Property Cannot Be Taxed for the Current Year when Exemption Ceases After Final Assessment of Taxes. — *United States.* — Louisville Water Co. *v.* Kentucky, 170 U. S. 127.

Alabama. — See Swann *v.* State, 77 Ala. 545.

Illinois. — Fisher *v.* State, 16 Ill. 394.

Iowa. — Sully *v.* Poorbaugh, 45 Iowa 453; Des Moines Nav., etc., Co. *v.* Polk County, 10 Iowa 1; Tallman *v.* Butler County, 12 Iowa 531.

Kansas. — Long *v.* Culp, 14 Kan. 412.

Kentucky. — Newport *v.* Masonic Temple Assoc., (Ky. 1898) 46 S. W. Rep. 697.

Minnesota. — Martin County *v.* Drake, 40 Minn. 137, 37 Am. & Eng. R. Cas. 389.

Pennsylvania Rule as to Apportionment of Tax. — In Moore *v.* Taylor, 147 Pa. St. 481, it was held that where property was noted as exempt from taxation because at the time when it was assessed and returned it was in actual use as a regular place of religious worship, but later in the year such use ceased, the board of revision might charge it with a just proportion of taxes corresponding with the unexpired fraction of the current year.

4. Iowa Rule as to Public Lands. — McGregor, etc., R. Co. *v.* Brown, 29 Iowa 655; Moriarty *v.* Boone County, 39 Iowa 634; Goodnow *v.* Wells, 67 Iowa 654; Goodnow *v.* Litchfield, 67 Iowa 691. See Code Iowa, 1897, § 1301.

EXEQUATUR.—See the title CONSULS, vol. 7, pp. 8, 16.

EXERCISE.—To exercise means to carry on; to execute.¹

EXERCITOR. (See also the title SHIPS AND SHIPPING.)—In civil law, *exercitor maris* is one who fits out and equips a vessel, whether he be the absolute or qualified owner, or even a mere agent. "Managing owner" and "ship's husband" are the terms used in English and American laws to denote the same person as *exercitor maris*.²

EXHAUST.—See note 3.

EXHAUSTER.—An exhauster is an aspirator, exhaust fan, section fan, known by many names according to construction or purpose.⁴

EXHIBIT. (See also the titles BLOOD STAINS, vol. 4, p. 587; DEPOSITIONS, vol. 9, p. 337; DOCUMENTARY EVIDENCE, vol. 9, p. 877; EVIDENCE, vol. 11, p. 536; EXPERIMENTS IN EVIDENCE, p. 398, *post*; EXPOSURE OF PERSON, p. 536, *post*; HANDWRITING; INSPECTION AND PHYSICAL EXAMINATION; JURY AND JURY TRIAL; PHOTOGRAPHS; VIEW. And see 8 ENCYC. OF PL. AND PR. 736.)—To exhibit means to offer or to propose in a formal or public manner; to present or show in legal form; to present to a court.⁵ An exhibit

1. **Exercise a Trade.** (See also the titles FOREIGN CORPORATIONS; TAXATION (CORPORATE).) —To exercise a trade is to carry on a trade. "There is not, I think," said Jessel, M. R., "any principle of law which lays down what carrying on trade is. There are a multitude of things which together make up the carrying on of trade; but I know no one distinguishing incident, for it is a compound fact made up of a variety of things." A telegraph company domiciled in Copenhagen had three cables in connection with Newcastle and Aberdeen, communicating with the lines of the post office. They also had workrooms with clerks, in these cities and in London. Messages were sent over the lines of the post office, and the cables of this company, to Denmark, whence they were forwarded by the lines of this company and of foreign governments to different parts of the world. The charges for such messages were collected by the post office, and transmitted, after deducting its dues, to the Copenhagen company. This company was held to be *exercising* a trade in the United Kingdom within the meaning of an income-tax law, and under that law to be subject to tax. "Now that, as it appears to me," continues Jessel, M. R., "is a perfectly plain case of carrying on trade in this country. The company habitually receive money in this country from English subjects, for messages sent from England to places abroad, and they transmit those messages from stations in this country to places abroad. This, I think, makes it a carrying on of trade in this country." *Erichsen v. Last*, 8 Q. B. Div. 414.

Suffrage.—To exercise the right of suffrage is to vote. "When a man is spoken of as *exercising* a right, it is commonly understood that he is doing something." *U. S. v. Souders*, 2 Abb. (U. S.) 456, 461.

Exercise—Quo Warranto. (See also the title QUO WARRANTO.)—A statute provided that a writ of quo warranto might issue in case any person should usurp, intrude into, or unlawfully hold or exercise any county or township office. It was held that this act did not confer jurisdiction in quo warranto to oust a county officer for an abuse of his powers. The court said: "The words in the first clause apply

only to a person who is not an officer, and this is agreed to be the meaning of all of them, except the word *exercise*, which is said to include an abuse of office by a legally elected officer. That case is provided for specifically in the second clause, and, if so, it would be strange if by a forced and unnatural construction of one word in the first clause a larger power should be vested in the Courts of Common Pleas than the legislature chose to give them in relation to *de jure* officers, by the express language of the very next clause in the statute. Besides, the word *exercise* has an established legal meaning, and is here the equivalent of 'usurp,' except that it includes the idea of actually executing the office thus usurped." *Cleaver v. Com.*, 34 Pa. St. 284.

Patent. (See generally the title PATENT LAW.)—In a declaration for infringing a patent which granted that the plaintiff, and no others, should "make, use, exercise, and vend" his invention, and forbade all persons to "make, use, or put in practice" the same, or counterfeit or imitate it, without the plaintiff's license, the plaintiff alleged that the defendant without his license did expose to sale articles intended to imitate, and which did imitate, his invention. It was held on general demurrer that the count was bad as not stating anything which was necessarily an infringement of the patent. *Minter v. Williams*, 4 Ad. & El. 251, 31 E. C. L. 63.

2. *Bouv. Law Dict.*; *The Phebe, Ware* (U. S.) 267.

3. **Exhausted.**—An English statute provided that no free miner in the forest of Dean should have more than three gales granted to him at one time, nor should any miner have any other gale granted to him until one or more of the said three gales should be exhausted. In construing this provision *Malins, V. C.*, said: "In my opinion, *exhausting* does not mean working out every hundredweight of coal, but a mine is exhausted when there is not enough coal in it to make it worth working." *Ellway v. Davis*, L. R. 16 Eq. 297.

4. *Williams v. Barnard*, 41 Fed. Rep. 362 (a patent case).

5. *Com. v. Alsop*, 1 Brews. (Pa.) 345.

Indictment. (See also the title LIMITATION OF

is the name given to any particular document or other object which in the course of a cause is exhibited, *i. e.*, produced by either party, and in case of affidavit evidence referred to in the affidavit. Such documents when numerous are usually marked with some letter of the alphabet as a convenient mode of referring to and distinguishing them, and are then called "Exhibit A," "Exhibit B," etc.¹

EXHIBITION. (See also the titles OCCUPATION, BUSINESS, AND PRIVILEGE TAXES; THEATRES.) — See note 2.

ACTIONS. — A statute required an indictment to be brought and *exhibited* within a certain period. It was held that this did not require an *exhibition* of the indictment to the defendant personally. The court said: "It is contended that the use of the word *exhibit* requires that the indictment should be shown to the defendant within the statutory period. Perhaps, if we have only in view the ordinary meaning of the word *exhibit* at the present time, that is *exhibit* in the sense of showing, we might incline to the view urged by the defendant. But this view is opposed to the general opinion of the profession. An indictment brought into court within the statutory time has always been considered in time. Often it is difficult to discover the authority for professional opinions that are universally accepted. They have been acquiesced in so long that the reasons for them have been forgotten. The dictionaries give a meaning to the word *exhibit* which sustains the ordinary professional opinion. Webster says: '*Exhibit*. — To present in a public or official manner. "To *exhibit* a charge of high treason against the earl." (Clarendon.)' Bouvier gives the definition: '*Exhibit*. — To produce a thing publicly, so that it may be taken possession of, or seized. Dig. 10, 4, 2. To file of record; as, it is the practice in England in personal actions, when an officer or prisoner of the King's Bench is defendant, to proceed against such defendant in the court in which he is an officer by *exhibiting*, that is, filing, a bill against him. (Stephen Pl. 52, *n.*; 2 Sellon Pr. 74.)'" Com. v. Anspach, 15 W. N. C. (Pa.) 414.

To *exhibit* a complaint or information in criminal cases is to present the complaint, signed by some proper informing officer, to a court or public officer who has authority to receive the same, and to issue a warrant to apprehend the offender and bring him to trial. Newell v. State, 2 Conn. 38.

Filing. (See also **FILING**.) — In Hagood v. Robinson, 7 Rich. L. (S. Car.) 44, the court said: "What is meant by *exhibiting* his petition? I think now, as I did on circuit, that it does not mean the filing. For *exhibiting* means to show to any one, and certainly comprehends means of understanding what is wanted."

Gaming. (See also the title **GAMING**.) — A statute provided for a fine upon any person who should keep or *exhibit* any gaming table, bank, etc. In considering this provision the court said: "It is evident that the gaming contemplated as illegal by the statute is synonymous with betting. As the word *exhibiting* is intended to signify the act of displaying the bank or game for the purpose of obtaining bettors, so the word 'keeping' is intended to hold in readiness a table for the

purpose of obtaining bettors." Wolz v. State, 33 Tex. 336. See also Whitney v. State, 10 Tex. App. 379.

Present — Debts of Decedents. — A statute required that claims against a deceased person should be *exhibited* and presented to his representative. In considering this provision the court, in Willis v. Marks, 29 Oregon 501, said: "The word 'present,' in its ordinary signification, is well understood, and the same may be said of the word *exhibit*. They and their derivatives appear to have been used by the statute as synonymous." See also the title **DEBTS OF DECEDENTS**, vol. 8, pp. 1062, 1074.

Assignments for Benefit of Creditors. — The time limited for creditors to file their claims with an assignee, under an assignment for the benefit of creditors, expired on the 8th day of January. On that day the appellant, a creditor residing in Philadelphia, discovered that fact, although, by misreading his own entry, he had previously supposed the 18th of January was the last day. He thereupon forwarded his claim to the assignee at Newark, by mail, which ought to have been delivered at five o'clock in the afternoon, but was not in fact delivered until the next day. It was held that such claim was neither presented nor *exhibited* to the assignee, within the terms of the statute, within the time limited. Ellison v. Linsley, 33 N. J. Eq. 258. See also the title **ASSIGNMENTS FOR THE BENEFIT OF CREDITORS**, vol. 3, p. 134.

Stockholders. (See also the title **STOCKHOLDERS**.) — The *exhibition* of the books of a corporation to a stockholder can be completed only by showing the contents of the books, not their outsides merely. Brouwer v. Cotheal, 10 Barb. (N. Y.) 216, *affirmed* 5 N. Y. 562.

1. Chancery. — In Brown v. Redwyne, 16 Ga. 72, it was held that after a case in equity had gone to the jury it might be amended by the addition to it of copies of *exhibits*.

2. Exhibition. — A person who hires rooms on a public street where he and an assistant explain and illustrate to the public tricks and devices practiced by gamblers and swindlers, for the purpose of inducing those present to purchase copies of a book entitled "Gambling and Confidence Games Exposed," no admission fee being charged nor any money being paid except by purchasers of the book, is not engaged in conducting an *exhibition*, within the meaning of a city ordinance requiring persons engaged in giving *exhibitions* to procure a license from the mayor. People v. Royal, 23 N. Y. App. Div. 258.

A statute prohibiting the maintaining, without a license, of any public show, amusement, or *exhibition* does not apply to a school for the teaching of dancing, although admittance

EXISTENCE — EXISTING. — See note 1.

EX-OFFICERS. — Ex-officers are those who have been in office but have gone out.²

EX OFFICIO. (See also the titles OFFICIAL BONDS; PUBLIC OFFICERS.) — From office; by virtue of office; officially. A term applied to an authority derived from official character merely, not expressly conferred upon the individual, but rather annexed to the official position; also used of an act done in an official character, or as a consequence of office, and without any other appointment or authority than that conferred by the office.³

thereto is paid for. *Com. v. Gee*, 6 Cush. (Mass.) 175.

In *Harris v. Com.*, 81 Va. 240, it was held, as skating rinks were not enumerated in the act requiring a license to be taken out for public performances and *exhibitions*, that unless they were conducted so as clearly to show that they were properly public performances or *exhibitions* they could not be brought within the act.

A corporation authorized to give premiums to encourage improvement in the mechanical arts, in the breed, usefulness, and value of horses, etc., which maintains a driving track devoted annually for several successive days to horse racing, at which time the grounds are kept open, for pay, to the public, is not liable to a tax as conducting an *exhibition* of feats of horsemanship. The court said: "It is an *exhibition* of feats of horses, and not of their riders." *U. S. v. Buffalo Park*, 16 Blatchf. (U. S.) 189. See also the title AGRICULTURAL SOCIETIES, vol. 2, p. 18.

1. **Existing Lien.** — A statute gave a mechanic's lien to subcontractors, but provided that no such lien should take priority over any *existing* lien. It was held that the words "*existing* lien" meant a lien existing when the work commenced, and not when notice of the subcontract was served. *St. Louis, etc., R. Co. v. Kerr*, 153 Ill. 182. See also the title MECHANIC'S LIEN.

Existing Contract. (See also title LIMITATION OF ACTIONS.) — A statute provided that when any payment of principal or interest should be made upon an *existing* contract, if such payment should be made after the same became due, the limitation should commence from the time when the last payment was made. In construing this provision the court, in *Whitaker v. Rice*, 9 Minn. 13, said: "What is the meaning of the word *existing* in this section? Clearly it must have reference to the fact of the statute having run against the contract, or not. A contract once made is an *existing* contract until it is paid, or barred by the statute of limitations, or its obligation in some other way canceled. When once paid or otherwise satisfied, except by the running of the statute of limitations, it cannot be revived by a payment at all. There can be very little doubt, therefore, that where the statute speaks of *existing* contracts it expressly means such as are not barred by the statute of limitations."

Existing Laws. — See LAW, and the title STATUTES.

Existing Creditors. — A statute provided that under certain circumstances no mortgages or sales of personal property of which the vendor or mortgagor retained actual possession should

be valid against *existing* creditors. It was held that the term "*existing* creditors" was not limited to those who were creditors when the sale was made, but applied equally to those who became such before possession was changed, the bill of sale recorded, or notice given. *Fox v. Edwards*, 38 Iowa 215.

Existence. — In *Dorsey v. Phillips, etc.*, Constr. Co., 42 Wis. 583, the plaintiff, who was in the employ of the defendant company, was injured by being carried against a cattle chute. The jury found specially a negative answer to the question whether the plaintiff knew or had any means of knowing of the *existence* or location of the cattle chute in question. It was held that as both the words *existence* and "location" were used in the question, it must be taken to refer to exact location or distance from the track, and that the verdict was sustained by the evidence, although it clearly appeared from the plaintiff's own testimony that he had a general knowledge of the *existence* of the cattle chute.

Same — Instructions. — In *Silver Min. Co. v. Fall*, 6 Nev. 121, the trial court instructed that the "*existence* of such theory must be established by the plaintiff conclusively." This was held error. The court said: "The giving of this instruction is assigned as error by the plaintiff. By the words '*existence* of such theory' must be understood correctness of such theory. To say that the court meant that the *existence* of a theory must be conclusively proven would simply make nonsense of the instruction. The court evidently intended to say, and it must be assumed the jury so understood it, that the correctness of the theory must be so established. A theory *exists* if it be simply announced by a single individual. So there can be no question of preponderance of evidence to establish its *existence*, but there may be as to its correctness."

2. *Cordiell v. Frizell*, 1 Nev. 132.

3. *Abbott's Law Dict.*

A constitutional provision declared that the state board of equalization should consist of the governor, secretary of state, and others. It was held that the secretary and governor were not *ex officio* members of the board, that is, their membership was not the result of their holding certain state offices, but was the result of their appointment to such board by an independent and distinct provision of the constitution. *State v. Walker*, 97 Mo. 162.

Merger of the Offices. — As to whether making a person an *ex officio* officer by virtue of his holding another office merges the two into one, see *State v. Laughton*, 19 Nev. 202, 9 Am. & Eng. Corp. Cas. 79; *People v. Edwards*, 9 Cal. 286; *People v. Love*, 25 Cal. 520; *Lath-*

EXONERATION. (See also the title CONTRIBUTION AND EXONERATION, vol. 7, p. 325.)—See note 1.

EX PARTE.—On the part; of one part; on one side. A term applied to proceedings in an action had on the application, or at the instance, of one side only, and without notice or opportunity to oppose given to the other side, and to proceedings in which there is no adverse party.²

EXPATRIATION.—See the title CITIZENSHIP, vol. 6, p. 30.

EXPECT.—See note 3.

EXPECTANCY. (See also the titles ASSIGNMENTS, vol. 2, p. 1026; CATCHING BARGAIN, vol. 5, p. 764; MORTGAGES; PARENT AND CHILD; RELEASE;

rop *v.* Brittain, 30 Cal. 680; *People v. Ross*, 38 Cal. 76; *Territory v. Ritter*, 1 Wyoming 333; *Denver v. Hobart*, 10 Nev. 31; *People v. Leet*, 13 Ill. 261. See also the titles OFFICIAL BONDS; PUBLIC OFFICERS.

Disqualification.—An act of the *California* legislature, in regard to the state library, declared that it should be under the direction of five trustees, and that the chief justice of the Supreme Court should be an *ex officio* member of the board. It was held that the chief justice was constitutionally disqualified from taking the office, as it belonged to the executive department of the government, and that his disability created no vacancy in the board which could be filled. *People v. Sanderson*, 30 Cal. 160. See also the title PUBLIC OFFICERS.

And under a constitutional provision—such as Const. *Louisiana* 1868, art. 117—that no person shall hold more than one office of trust at the same time, the legislature cannot enact that the clerks of one class of courts shall be *ex officio* clerks of the courts of another grade. Describing the clerkship as an *ex officio* one does not make it less an office of trust. *Bouanchaud v. D'Hebert*, 21 La. Ann. 138.

Embezzlement.—A comptroller who is *ex officio* secretary of the board of county commissioners, and as such has the custody of certain municipal bonds, has such a possession thereof as will render a wrongful conversion of them embezzlement. *State v. White*, 66 Wis. 343, 12 Am. & Eng. Corp. Cas. 452. See also the title EMBEZZLEMENT, vol. 10, p. 1016.

Ex Officio Services.—A *Kentucky* statute provided that no fee bill should be made out, or compensation allowed, for any *ex officio* services rendered by any officer. It was held that the *ex officio* services intended by the statute were those services which related to the public interests or business of the county or state, as distinguished from those relating to the private interests of individuals. *Gilbert v. Marshall County*, 18 B. Mon. (Ky.) 427.

Power of Legislature.—In *State v. Laughton*, 19 Nev. 202, 9 Am. & Eng. Corp. Cas. 79, it was held that the legislature has power to make the lieutenant-governor *ex officio* state librarian, and to impose reasonable conditions precedent to the holding of the legislative office; also that the failure of the lieutenant-governor to give the bond required by statute, as *ex officio* state librarian, does not create a vacancy in the office of lieutenant-governor.

But in *California* an act of the legislature making the treasurer of San Joaquin county *ex officio* tax collector, in so far as it provided for the transfer of such office to take place

before an election of such treasurer should occur, was held to be unconstitutional and void. *People v. Kelsey*, 34 Cal. 470.

Termination.—“As the office of superintendent of public instruction is merely *ex officio*, derived from and dependent upon the presidency of the board of education, his powers and duties as superintendent ceased when the board was abolished.” *State v. Tilford*, 1 Nev. 246. See also the title PUBLIC OFFICERS.

1. Exoneration—Wills.—It has been held that directions in wills to pay debts in *exoneration* of the real estate did not exonerate the mortgaged property of the testator from its liability to pay the mortgage debt. *In re Newmarch*, 9 Ch. Div. 12; *In re Rossiter*, 13 Ch. Div. 355.

2. 1 Abb. Law Dict.

“The term *ex parte* implies an examination in the presence of one of the parties and in the absence of the other.” *Lincoln v. Cook*, 3 Ill. 62.

Ex Parte Paterna. (See also the title SUCCESSION.)—In *Banta v. Demarest*, 24 N. J. L. 433, it was said: “If the legislature had intended to exclude the father, only in case the land came from the mother herself, it is remarkable that they did not say so; that in so important a matter as the regulation of the descent of estates they should have inserted the words ‘part of,’ where, if they mean anything at all, they must mean something more than from the mother herself. * * * The phrases *ex parte materna* and *ex parte paterna* have a well-known signification in the law. They are found constantly used in the books to denote the line or blood of the mother or father, and have no such restricted or limited sense as from the mother or father exclusively. *Jackson v. Lyon*, 9 Cow (N. Y.) 664; *Den v. Jones*, 8 N. J. L. 348; 2 Black. Com. 224, note (25), 225, note (26), etc. And it is reasonable to suppose the legislature intended to use the words in the unrestricted sense in which they are commonly used.”

3. Expect. (See also the titles GUARANTY; PRECATORY TRUSTS.—A statement in a letter to a person sought to be retained as clerk of a boat then building, that the boat was *expected* out at a specified time, cannot be construed into a guaranty that she would be out at that time. *Johnson v. McCune*, 27 Mo. 171.

Expected to Arrive.—The words “*expected to arrive*” in a contract of sale have been held a mere representation, and not to import a warranty. *Bold v. Rayner*, 1 M. & W. 343. See also *Smith v. Myers* L. R. 7 Q. B. 139; and the title CONDITIONAL SALES, vol. 6, p. 463.

SALES; SPECIFIC PERFORMANCE; UNDUE INFLUENCE.) — I. An expectancy or chance is a mere hope unfounded in any limitation, provision, trust, or legal act whatever. Such is the hope which an heir apparent has of succeeding to the ancestor's estate. This is sometimes said to be a bare or mere possibility, and at other times less than a possibility.¹ II. An expectancy is an estate the right to the possession of which is postponed to a future period.²

EXPEDIENT. — See note 3.

EXPEDITION. — See note 4.

EXPEL. — See note 5.

1. *Jeffers v. Lampson*, 10 Ohio St. 107, *quoted in*; 2 *Fearne on Cont. Rem.* 22.

2. **Future Estates.** (See also the title REMAINDERS, REVERSIONS, AND EXECUTORY INTERESTS.) — *Campau v. Campau*, 19 Mich. 123; *Lawrence v. Bayard*, 7 Paige (N. Y.) 76.

An estate in *expectancy* is an estate the possession of which a person is entitled to have *in futuro*; an estate where the right to the perennity of the profits is postponed to some future period. It does not include a future acquisition by purchase. A conveyance of all their "right, title, interest, etc., as well in possession as in *expectancy*," in a certain piece of land, where the grantors had an interest therein upon which the deed might have operated, does not cover a subsequently acquired title of the grantors. *Valle v. Clemens*, 18 Mo. 486.

An estate in *expectancy* is defined to be "where the right to the possession is postponed to a future period." *Fenton v. Miller*, 108 Mich. 246, in which case it was held that an estate in *expectancy* was not created by the use of the words "as well in possession as in *expectancy*" in a deed, where the grantor's only estate was one in fee simple.

In *Hennessy v. Patterson*, 85 N. Y. 100, it was said: "Estates, in respect to the time of their enjoyment, are divided into estates in possession and estates in *expectancy*. The latter are declared to be those in which the right of possession is postponed to a future period, and are further divided into future estates and reversions." See also *Griffin v. Shepard*, 124 N. Y. 75; *Ham v. Van Orden*, 84 N. Y. 257; *Moore v. Littel*, 41 N. Y. 75; *Sage v. Wheeler*, 3 N. Y. App. Div. 40.

3. **Expedient** in the sense of "prudent." See *Prosser v. Montana Cent. R. Co.*, 17 Mont. 372.

4. **Expedition.** — The privilege of making nuncupative wills is extended to soldiers on an *expedition*. As to the meaning of *expedition* within this rule, see the title NUNCUPATIVE WILLS, and see *Pierce v. Pierce*, 46 Ind. 92; *Leathers v. Greenacre*, 53 Me. 561; *Gould v. Safford*, 39 Vt. 498.

Same—International Law. (See also the title INTERNATIONAL LAW.) — The Revised Statutes of the United States forbid any military *expedition* against the territory of a foreign prince or state. In *U. S. v. Ybanez*, 53 Fed. Rep. 538, it was said: "The term *expedition* employed in the statute is used to signify a march or voyage with martial or hostile intentions." And in considering the same provision the court, in *U. S. v. Hart*, 74 Fed. Rep. 727, said: "What, then, is a military *expedition*, as distinguished from a nonmilitary transportation

of persons for enlistment abroad? The term *expedition* signifies a journey or voyage by a body of men for some definite purpose. There are various kinds of *expeditions*. We have had *expeditions* of exploration, like Wilkes's *expedition*, Fremont's *expedition*, Greely's *expedition*, and Peary's *expedition*; and so there have been many military *expeditions*. We speak of Xerxes' *expedition* into Greece. A military *expedition*, therefore, is an undertaking by a body of men of a military character. There must be a body; because one or two men cannot constitute an *expedition*. To fall within the statute, it must be a military *expedition* carried on from this country. A mere lawful intent to enlist abroad cannot give a voyage a military character. The *expedition* must be military in character, as is admitted; and I cannot conceive how an *expedition* can be characterized as military, or be deemed to be carried on as a military *expedition* from this country within the language of the statute, unless it have some at least of the essential elements of a military body when it starts." See also *Wiborg v. U. S.*, 163 U. S. 632; *U. S. v. O'Sullivan*, 27 Fed. Cas. No. 15,975.

5. **Expelled.** — A plea set up an immemorial right of common on a close, and alleged that because a house was unlawfully erected on the close, so that without pulling it down the defendant could not enjoy his common, the defendant pulled down and removed the house, and in so doing necessarily *expelled* the plaintiff. It was held that the plea could not be construed as alleging that the defendant pulled down the house while the family were absent so that they could not return to it and were thereby *expelled*, and therefore that the plea was bad, because it justified the expulsion as made in pulling down the house, which was unjustifiable while the plaintiff's family were therein. The court, by Lord Denman, C. J., said: "We are therefore of opinion that the replication to the sixth plea to the last count is bad; and are therefore to consider whether that plea itself is good. It justifies the *expelling*, putting out, and removing the plaintiff and his family from the house, and also the taking his goods and chattels out of it to a certain distance, by the same right of common, and avers that for that purpose the defendant pulled down the house, and in so doing necessarily and unavoidably *expelled* and put out the plaintiff; which justification is not good, according to what we have already said, if an actual expulsion of them by force at the time is intended. The words 'ejected,' *expelled*, 'put out,' and 'removed' may be said to be satisfied, under some circumstances, by proof

EXPEND. — See note 1.

EXPENSE. — The word “expense” indicates expenditure; outlay; a disbursement of money; the payment of a price.²

that the house was destroyed in their absence, and by their being prevented from returning to it and re-entering it because on attempting to do so they found that it existed no longer as a habitable house. But, in the present case, looking at the language of the plea itself, this would be a forced construction, and the natural meaning of the words is that the pulling down and *expelling* were contemporaneous. If so, the same arguments that have been held fatal to the first set of pleas will also prove this to be bad in law.” *Perry v. Fitzhowe*, 8 Q. B. 757, 55 E. C. L. 757.

Same—Indignity. — A complaint alleged that the plaintiff, being a regular member of the defendant's dancing school, was *expelled* from the same by the defendant and had been greatly injured in his good name, etc. It was held that the complaint stated a sufficient cause of action. The court said: “In substance it was alleged that the defendant had willfully deprived the plaintiff of the enjoyment of a right that he had purchased of the defendant. The method of expulsion is not stated, but the word *expel* ordinarily means to drive or force out or reject. So that the defendant impliedly not only deprived the plaintiff of his right, but, with indignity and disgrace, put him out of the hall where, by his contract with defendant, he had a right to be.” *Smith v. Leo*, 92 Hun (N. Y.) 243.

1. Expend. — A statute provided that all funds raised under it for the construction of bridges should be *expended* by and under the joint control of the commissioners of highways. It was held that as the entire fund was to be *expended* not only by, but under the joint control of, the commissioners, they had the power to determine for what specific kind and style of bridge, as well as to whom and when, the joint fund should be paid. The court said: “If to *expend* is no more than to weigh out, pay out, or disburse, one may *expend* a fund without controlling the expenditure, as where the fund is that of another by whose order he expends it; or even when it is his own but his will is coerced, as to comply with the demand of a highwayman, or choose between the expenditure and other evils. But to control the expenditure is to hinder, restrain, or check it, in the exercise of a free will. The legislature provided that the appointees of the county should act jointly with the commissioners, not merely in *expending* but also in controlling the expenditure of the fund; and if the power extends at all beyond the mere act of disbursement we think it must, for the same reason, extend to the free exercise of judgment and choice between all the different specific objects presented as necessary and proper to effectuate the general purpose of the expenditure.” *Mercer County v. New Boston*, 13 Ill. App. 278.

Expend in the sense of “to dispose of,” see *Norman v. Central Kentucky Lunatic Asylum*, 92 Ky. 16.

2. Williams's Case, 12 Ct. of Cl. 199.

Current Expenses. — See **CURRENT**, vol. 8, p. 504.

Value and Expense. — Under a statute requiring the certificate of fence viewers to state “the amount of the *expense* of such building,” a certificate stating only that the ‘value of such rebuilding’ was a certain amount was held void. The court said: “The statute (sec. 1397, R. S.) requires such certificate to state ‘the amount of the *expense* of such building,’ etc. The certificate in evidence states only that the ‘value of such rebuilding is \$33,’ etc. This is a gross and material departure from the statute, which renders the certificate void on its face or *ipso facto*. The learned counsel of the appellant contends that the [word] ‘value’ is virtually the same as *expense*, or, if different, such word more nearly expresses the sense and intention of the provision, and that the *expense* might be incurred for an unreasonably costly and extravagantly ornamental fence, such as would be appropriate as an inclosure of a city or village lot or of the grounds about a costly mansion. By reference to the reviser's notes it will be seen that the changes made in these provisions were intended to limit and define what should be a lawful fence, to avoid this objection. But it is sufficient that ‘value’ is not the word used in the statute, and it is clear enough that the two words are very materially different in meaning.” *Voelz v. Breitenfeld*, 68 Wis. 496.

Attorney's Fees Held to Be within the Term. — In *Brady v. Dilley*, 27 Md. 582, the proper and reasonable fees of an attorney were held to be embraced in the term *expense*, it appearing that his services were indispensable to the trustee in the proper discharge of his trust. See also *Cain v. Warford*, 33 Md. 36.

Where the declaration for breach of an agreement to assign a lease alleged that the plaintiff had been “put to great *expenses*, amounting to a large sum of money,” etc., in investigating the title, it was held that he might, by way of damage, recover the amount of a bill of costs due to his attorney for investigating the title, though such bill was not paid before action brought. *Lord Denman, C. J.*, said: “If a plaintiff chooses to allege in his declaration that he has paid money, he must prove that he has paid it; but if he merely says that he has been ‘put to *expense*,’ the allegation is satisfied by proof that he has incurred a liability to pay.” *Richardson v. Chasen*, 10 Q. B. 756, 59 E. C. L. 756.

During the pendency of an action a receipt in full of the plaintiff's claim was executed by him to the defendant, in consideration of the receipt of a less sum than was due and the payment by the defendant of “all the *expenses*, if any, in this case.” It was held that parol evidence was admissible for the purpose of showing what *expenses* were contemplated by the terms used — as to whether it included attorneys' fees or only ordinary costs. The court said: “But, further than this, the term *expenses*, as connected with litigation, may have at least two meanings, the one including the ordinary costs or taxable *expenses*, and the other the extraordinary costs also, such as agents' and attorneys' fees, etc. We

think the defendant had a right to explain the meaning of the term and to show the real consideration." *Kohn v. Zimmerman*, 34 Iowa 545.

Attorneys' Fees Held Not Within the Term. — In *Thomas v. Jones*, 84 Ala. 304, it was held that the words "*expenses of sale*" occurring in a mortgage would include nothing more than ordinary *expense* of costs of foreclosure, and did not include such extraordinary charges as attorneys' fees.

In *Lester v. Mathews*, 56 Ga. 656, it was held that the words "*expenses of administration*" did not include fees against a will on an issue *devisavit vel non*.

In *United Land Co. v. Tottenham Local Board of Health*, 13 Q. B. Div. 640, it was held that the charges of a solicitor employed by an urban authority to conduct proceedings at the instance of an individual for stopping or diverting a highway were not *expenses* within a statute allowing payment of all *expenses* attending the review of a highway by a surveyor and the stopping up, diverting, or turning such highway.

In *Ball v. Vason*, 56 Ga. 264, it was held that the word *expense* did not include counsel fees.

Patent. — An agreement for the assignment of an English patent stipulated that any *expense* necessary to accomplish the issue of letters patent was to be paid by the assignee. It was held that the reasonably necessary *expenses* of transacting the business, beyond payments to the inventor, to the patent solicitors, and for counsel fees, should be included. *Chemical Electric Light, etc., Co. v. Howard*, 148 Mass. 352.

Counsel Fees — Expenses of Court. — Insolvent costs of the solicitor of the City Court of Atlanta were found not to be part of the "*expenses of court*" as that phrase was used in the Constitution of Georgia, which provided that the General Assembly should not have power to delegate to any county the right to levy taxes except for educational purposes, *expenses of courts*, etc. *Adair v. Ellis*, 83 Ga. 464.

So in *Houston County v. Kersh*, 82 Ga. 252, it was held that the costs of publishing the general presentments of the grand jury were not "*expenses of court*."

Special Assessments. (See also title SPECIAL ASSESSMENTS.) — Where it was the duty of commissioners to assess the *expense* of locating a road "upon the abutters, or upon the petitioners, or upon the town or county," it was held that the *expenses* included damages to landowners. *Brigham v. Worcester County*, 147 Mass. 447. See also *Damon v. Reading*, 2 Gray (Mass.) 274.

Same — Expenses of Paving Street. — Under an act conferring power upon a city to pave a street and to assess "the *expenses* thereof" upon the owners of adjacent lots it was held that the charges for establishing the grade, for advertising and surveying, as also a reasonable commission for collecting the tax, were included within the term *expenses*. *Dashiell v. Baltimore*, 45 Md. 615.

Expenses Incident to the Estate. — In *Stephens v. Milnor*, 24 N. J. Eq. 359, it was held that grading and flagging the sidewalks and grading and paving the streets in front of the

premises and fencing the lots were included in the direction to pay the *expenses* incident to the estate out of the income.

Services — Expenses Incurred. — By 6 & 7 Vict., c. 18, § 55, it was provided that the "*expenses incurred*" by the town clerk of any borough, in the performance of his duties in respect to the registration of the parliamentary voters of the borough, should be defrayed by the parishes and townships of the borough. It was held that the words "*expenses incurred*" applied only to such money as he had to pay, and not to remuneration for his labor. *Reg. v. Kingston-upon-Hull*, 2 El. & Bl. 182, 75 E. C. L. 182.

But under the English statute 5 & 6 Wm. IV., c. 76, § 92, it was held, that the fees of a clerk to justices of a borough, for business done in respect to persons apprehended by the police and brought before the justices, or in respect of informations or other proceedings taken by and at the instance of the police, must be paid out of the borough fund, as *expenses* necessarily incurred in carrying into effect the provisions of that act. *Reg. v. Gloucester*, 5 Q. B. 862, 48 E. C. L. 862.

In *Jones v. Carmarthen*, 8 M. & W. 605, it was held that the services of a public officer were not included under the term *expenses*.

In *Greer v. Greer*, 5 Redf. (N. Y.) 214, the testator by his will created a trust for his daughter, directing the trustee to hold the share of the estate belonging to her; to pay to her, until her majority, rents and income sufficient for her support and education; all the rents and income thereafter, "until she reached twenty-four years, and then the principal and accumulations. He further directed the trustee to deduct and retain "out of such rents, profits, interest, and income," while he held the share, "all proper and reasonable *expenses* and charges in and for the care and keeping of the same, the renting, investing, and reinvesting thereof, all taxes, etc., and the proper *expenses* and charges of collecting and applying such income." The trustee claimed that the words quoted were a provision for compensation in lieu of commissions. But the court held that the words "*expenses and charges*," etc., referred not to compensation of the trustee, but to necessary disbursements in administration, and imported an intent that the daughter should be supported out of the net income of the trust fund, and the trustee was entitled only to his statutory commissions.

But in *Hall v. Vermont, etc., R. Co.*, 28 Vt. 401, it was held that an allowance for reasonable *expenses* was not limited to cash expenditures, but extended also to personal services expended.

Expenses of Administration. — In *Gurney v. Maloney*, 38 Cal. 85, it was held that services rendered and money advanced at the request of an administrator for the benefit of an estate were *expenses of administration*. See also the title EXECUTORS AND ADMINISTRATORS, vol. 11, p. 720.

A., by will, gave the bulk of his estate to his two sons, and smaller portions to his daughters, and appointed the sons executors of the will. The will contained the following clause: "And I do order and direct that all

my just debts and *expenses* be duly paid and satisfied * * * out of the legacies bequeathed to my sons." It was held that the executors were not entitled to commissions for settling the estate. Said the court: "The word *expenses* is never used to signify *expenses* during the life of the testator; they would be debts. The clause may be read thus: 'All my debts, and the *expenses*, to be paid by my executors out of the property devised to my sons;' and I think this would mean the *expenses* of the executors in settling the estate, and the will making the sons executors would put it on them to pay the debts." *Matter of Haines*, 8 N. J. Eq. 506. See generally the title EXECUTORS AND ADMINISTRATORS, vol. II, p. 720.

Discounts. — The plaintiff and the defendant entered into contracts in the business of buying wood lots, cutting and marketing timber therefrom. The defendant agreed to advance the purchase money for the lots and all the money needed to pay the *expenses* of cutting and marketing the timber. For these advancements he was to be reimbursed upon settlement of accounts. It was held that the plaintiff was not chargeable with discounts paid by the defendant to raise money with which to make the advancement. The court said: "The term *expenses* used in its most general sense would perhaps be broad enough to include moneys expended in discounts for loans, but it may with equal propriety have been used in a more restricted sense, as covering merely 'the *expenses* of cutting and marketing the lumber,' for which, according to the express terms of the contract, the advances were to be made. This construction would be consistent with the statement that, in consideration of Stocker's assumption of the Slater & Hudnit note, the right to interest was relinquished. In view of the fact that no express provision is made in the contract, either for interest or discounts upon these advances, and of the somewhat ambiguous character of what is termed *expenses*, we think the true meaning and intent of the parties, in this respect, is to be ascertained from the full reading and spirit of the contract, and from the other evidence in the cause." *Stocker v. Hutter*, 134 Pa. St. 29.

Partnership — Individual Expenses. — By articles of partnership it was provided that each partner was to pay "his own individual *expenses*." It was held that this phrase "was manifestly intended to apply to private or family *expenses* not connected with the business of the partnership. But it would be an unjust and forced construction of the stipulation to extend it to extra *expenses* incurred when abroad on the business of the partnership." *Withers v. Withers*, 8 Pet. (U. S.) 355.

Same — Expenses Appertaining to Goods in Trade. — Where partners in trade contract that one partner shall receive a certain share of the profits arising from the sale of goods, deducting the "actual *expenses* that may appertain to the goods themselves," the *expenses* of clerk hire, advertising, and taxes are properly deducted from the gross amount. Said the court: "*Expenses* for clerk hire and advertising are as much incident to the transaction of mercantile business as those incurred for

insurance, freight, and storage; and the merchant might as reasonably calculate to procure goods without cost as to expect to keep them on hand for sale without their being subject to taxation." *Foster v. Goddard*, 1 Cliff. (U. S.) 158, *affirmed* 1 Black (U. S.) 506.

Change of Venue. — A statute provided that after the termination of any cause tried on change of venue from another county it should be the duty of the clerk of the court in which the cause was tried to make an itemized statement of all *expenses* incurred by his court in the trial of such cause and present it to the County Court of the county in which the cause originated, and that the County Court to whom any such bill of costs was presented should allow the same. It was held that the county in which a cause originated was liable for all the current *expenses* incurred in another county and the trial of the cause, as well as for the costs for which it was already responsible. *Hempstead County v. Royston*, 58 Ark. 113. See also the title CHANGE OF VENUE, 8 ENCYC. OF PL. AND PR. 991.

Ordinary Expenses of a Municipality. (See generally the titles MUNICIPAL CORPORATIONS; TAXATION.) — By the *Georgia* Act of 1874, extraordinary *expenses* are defined to be those incurred for paving or macadamizing the streets, for educational purposes, and for paying the public debt. All other *expenses* of municipal corporations are classed as ordinary current *expenses*, and the tax to cover the latter class is limited to one-half of one per cent., unless increased under authority of a vote of two-thirds of the legal voters. *Rome v. McWilliams*, 67 Ga. 106.

In *Livingston v. Pippin*, 31 Ala. 550, the court said: "Ordinary *expenses* are the expenditures which are necessary to carry into effect the ordinary powers of the corporation. These terms are used in contradistinction to extraordinary *expenses*, which would be a necessary means of carrying into effect extraordinary powers."

Costs and Expenses — Partition. — A statute provided that the court before whom any partition should be made should tax the costs and *expenses* which might accrue according to equity. It was held that the word *expenses* included those charges incurred in the proceedings to obtain partition which were not included in the word "costs." *Swartzell v. Rogers*, 3 Kan. 382. The court said: "The word *expenses*, used in this section, undoubtedly includes those charges incurred in the proceeding to obtain partition which are not included in the word 'costs.' That includes the charges of officers and persons whose services are required, and whose fees therefor are not fixed by law. In Ohio the charges allowed to the sheriff, the freeholders or commissioners, and the surveyor and his assistants employed in making partition, are fixed by law (1 Rev. L. 639-40), and would, therefore, be included in the term 'costs.' There would be some grounds in such a state of law for deciding that the term *expenses* included an allowance for services of others as the attorneys of the parties respectively employed in making the partition. But in this state no law has been passed specially fixing the fees either of

EXPENSIVE. — See note 1.

the sheriff, the freeholders, or the surveyor, for performing the services required of them in making partitions of real estate. It does not seem to be in the spirit of our laws relating to fees and the taxation of costs to include attorney's fees as a part of the taxable costs in a case, and we are of the opinion that by the term 'costs and expenses,' and in the section referred to, it was not the intention of the legislature to include the compensation due from the parties respectively to their attorneys or any part thereof."

Expenses of Importation — Fine. — The plaintiffs agreed to take five thousand crates of onions at a stated price, cash on arrival, and the defendants agreed to pay the plaintiffs one-half of the actual *expenses* advanced. A fine was imposed upon the onions without fault of the plaintiffs, for undervaluation, which fine the plaintiffs paid. It was held that the plaintiffs were entitled to recover one-half of such fine as *expenses*. *Seggermann v. Valentine*, 61 N. Y. Super. Ct. 245.

Expense — Patents. — The Revised Statutes of the United States, § 4929, authorize the issuance of a patent to any person who by his own industry, genius, efforts, and *expense* has invented, etc. In *Matthews, etc., Mfg. Co. v. Trenton Lamp Co.*, 73 Fed. Rep. 215, it was held that the word *expense* as used in this statute was not to be confined to the mere disbursement of money. The court said: "To maintain this proposition the counsel for defendants has delivered an argument which is undoubtedly very acute, but scarcely accurate. That it may be the more plausible, and that it may, to some extent, be based upon fact, he limits the word *expense* to mere pecuniary *expense*, and he proves by the cross-examination of the patentee that he did not expend any money in the production of these designs; that in fact the patentee was employed, at a regular salary, by the complainant as a designer in brass, and it was in the course of his regular employment, and during the fixed and regular hours of work, that he invented and produced the designs. And the insistence is that the designs were really produced at the *expense* of the complainant. This can hardly be assented to. No authority can be found to compel the limitation of the word *expense*, in the construction of this statute, to the expenditure of money. It may, indeed, be defined as a disbursement of money, but it is as well the employment and consumption of time and labor. Cent. Dict., tit. *Expense*."

Liability Incurred. — Under a statute of *California* which provides that "the trustees of any corporation formed under the general laws of this state shall have power to levy and collect, for the purpose of paying the proper and legal *expenses* of such corporation, assessments on the capital stock thereof," it was

held that debts already incurred were included within the term *expenses*. "In common speech and in contracts," said the court, "the term *expenses* signifies not only the cost of contemplated services, materials, etc., but also the charges for such as have been performed or furnished. * * * In these senses the term is employed in statutes, and its precise signification in each case must be ascertained from the context." *Sullivan v. Triunfo Gold, etc., Min. Co.*, 39 Cal. 459.

A government contract provided that an engineer officer should certify to materials furnished and *expenditures* incurred in the prosecuting of the contract. In construing this contract the attorney-general said: "The words '*expenditures* incurred' do not, in my opinion, mean liabilities incurred. The governing word is *expenditures*. * * * To incur a liability and to incur an *expenditure* are two different and distinct things; and while the word 'incur' is not frequently used in connection with *expenditure*, yet when thus used it means an *expenditure* actually made." *Improvement of South Pass of the Mississippi*, 16 Op. Atty.-Gen. 132.

Expenses — Chattel Mortgages. — In *Ferguson v. Hogan*, 25 Minn. 135, it was held, where a chattel mortgage provided for the payment of all *expenses* for sale of the mortgaged property out of the avails of such sale, that only such *expenses* were intended as were incurred in doing things which formed part of the proceedings of the sale.

Expenses in an Act of Congress. — When Congress appropriates money to pay *expenses*, it must mean those *expenses* which are necessarily incident to the work it directs to be done. *Dunwoody v. U. S.*, 22 Ct. of Cl. 269.

Expenses — Succession Duty. (See also the titles *SUCCESSION TAXES*; *WILLS*.) — In *Gosden v. Dotterill*, 1 Myl. & K. 56, it was held that a legacy free from all *expense* was not subject to the succession tax.

1. A statute of *Connecticut* provided that "whenever execution shall be levied upon any personal property, being in its nature perishable, or being live stock, the custody and preservation of which would be *expensive*, the same shall be sold at public vendue * * * at the expiration of seven days, instead of at the end of twenty-one days," as provided by the general law concerning sales on execution. It was held that "the word *expensive* here is not used in the sense which lexicographers attach to it, but in its popular sense, meaning that which would involve or require expense. There is not such a difference in the expense of keeping different kinds of stock, or different animals of the same kind, or different ones of any kind at different times, as to justify any other construction." *Webster v. Peck*, 31 Conn. 495. See generally the title *SHERIFFS' SALES*.

EXPERIMENTS (IN EVIDENCE).

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CROSS-REFERENCES.

See also the title *EVIDENCE*, vol. 2, p. 487, and the references there given.

I. DEFINITION. — An Experiment has been defined as "the operation of subjecting objects to certain conditions and observing the result, in order to test some principle or supposition, or to discover something new."¹

An Experiment in Evidence consists of the introduction in proof of either the circumstances or the result of this operation, or, it may be, both the circumstances and the result. And the introduction is, in some cases, effected by the performance of the experiment in the presence of the jury;² in others, by evidence of the experiment as performed elsewhere.³

II. SCOPE OF ARTICLE. — This article is designed to discuss the principles regulating the admissibility of evidence of experiments, including a notice of the manner and means of bringing it to the attention of the tribunal for whose consideration it is intended.

III. ADMISSIBILITY OF EVIDENCE OF EXPERIMENTS — 1. In General. — It is not intended, nor would it be practicable, to formulate any system of rules upon the subject of the admissibility of evidence of experiments, as an independent subject. The doctrines which regulate and control the introduction of evidence in general make no exception in point of principle when applied to cases involving the consideration of evidence of the character of which this article treats.

2. Criterion for Admissibility. — In accordance with that fundamental principle of the law of evidence that the object of all evidence is the ascertainment of the truth with reference to the existence or nonexistence of the facts in controversy, the criterion for the admissibility of evidence of experiments has always been sought in an answer to the question, Will such evidence tend to enlighten the jury and enable them more intelligently to consider the issues presented?⁴

Evidence of Experiments May Be Proof of Most Satisfactory Nature. — Under some circumstances, evidence of experiments, or an experiment itself before the jury, is proof of the most satisfactory character.⁵ It has been said, however, that evidence of this kind should be received with caution, and admitted only

1. Century Dictionary, 'Experiment.'

Experiments One of the Two Kinds of Observation. — According to Sir W. Hamilton, experiments are one of the two kinds of observation. He says: "Observation is of two kinds; for either the objects which it considers remain unchanged, or, previous to its application, they are made to undergo certain arbitrary changes, or are placed in certain factitious relations. In the latter case the observation obtains the specific name of experiment." See Century Dictionary, "Experiment."

2. Experiments as Relating to Questions of Fact. — The language of the text, "performance in the presence of the jury," is used because experiments in evidence have to do with questions of fact, which are usually determined by a jury. Of course, in trials without a jury, where the judge performs the functions of a jury, the same rules as to the admissibility of experiments govern.

3. See cases cited in succeeding notes.

4. Test of Admissibility. — *Farmers', etc., Bank v. Young*, 36 Iowa 47; *Burg v. Chicago*, etc., R. Co., 90 Iowa 106, 48 Am. St. Rep. 419; *Boyd v. State*, 14 Lea (Tenn.) 161. See opinion of Henderson, J., in *Clark v. State*, (Tex. Crim. App. 1897) 40 S. W. Rep. 992. And see *State v. Fletcher*, 24 Oregon 295.

"The Important Fact to Have in View," said Granger, C. J., in *Burg v. Chicago*, etc., R. Co., 90 Iowa 106, 48 Am. St. Rep. 419, "in passing upon the admissibility of such testi-

mony is, will it aid, rather than confuse, the jury in reaching its conclusions?"

An Experiment in the Presence of the Jury in an Action for Personal Injuries resulting from the alleged defective operation of a coal elevator, with a model of one of the elevator buckets, from defects in the original of which the injury is alleged to have resulted, for the purpose of showing the manner in which the bucket operated when in use, is not improper, when accompanied by an explanation that it is intended simply as an illustration of how the accident could have happened. *Pennsylvania Coal Co. v. Kelly*, 156 Ill. 9.

5. *Brooke v. Chicago, etc., R. Co.*, 81 Iowa 504; *Hart v. State*, 15 Tex. App. 202, 49 Am. Rep. 188.

Pouring the Contents of Alleged False Measure into Measure of Standard Capacity. — Thus, in a case referred to by White, P. J., delivering the opinion of the court in *Hart v. State*, 15 Tex. App. 202, 49 Am. Rep. 188, as "not at present accessible," the defendant, said the court, was on trial for selling grain by a false measure. To solve the question of his guilt the court had the supposed false measure and a standard measure brought before the jury, and the grain actually measured from the one into the other in the presence of the jury. Such proof, it was observed, was the best and most satisfactory evidence to the minds of the jurors which could possibly have been adduced of the fact in issue before them.

where it is obvious to the court that the jury will be enlightened rather than confused.¹ But whatever may have been, in particular instances, the language of the courts with reference to the admissibility of evidence of experiments, it will, in general, be found to be but an application of the controlling principle above indicated to the facts of the case under consideration.

3. Question of Admissibility One for Court to Determine — a. IN GENERAL. — Whether or not evidence of experiments is admissible is, under the circumstances of each case, a preliminary question for the determination of the court.² True, it has been intimated, at least in one instance, that where the competency of evidence of experiments depends upon questions of fact, as whether or not the conditions attending the experiment were, in point of fact, similar to those surrounding the original occurrence, the evidence should be allowed to go to the jury under appropriate instructions from the court.³ But this view is in conflict with the weight of authority, and is, it would seem, erroneous in principle.

b. TO WHAT EXTENT A MATTER OF JUDICIAL DISCRETION. — In determining this question of the admissibility of evidence of experiments, much must be left to the discretion of the presiding judge, and, it follows, the exercise of this discretion will not be interfered with by an appellate tribunal unless an abuse of it is made clearly to appear.⁴

As a Consequence of This Rule of Discretion it may be that the appellate court will refuse to reverse a judgment on account of the exclusion of certain evidence of experiments which the same tribunal would not have held it erroneous to admit.⁵

c. PRESUMPTION AS TO PROPER EXERCISE OF DISCRETION. — Where the object for which an experiment was permitted is not made apparent to the court of review, the presumption will be that such object was proper and legitimate, and the ruling of the trial court will be upheld.⁶

4. Experiments to Establish Immaterial or Irrelevant Facts. — Where evidence

1. See opinion of Miller, C. J., in *Chicago, etc., R. Co. v. Champion*, (Ind. 1892) 32 N. E. Rep. 874.

2. *Miller, C. J., in Chicago, etc., R. Co. v. Champion*, (Ind. 1892) 32 N. E. Rep. 874. See *infra*, this title, *Similarity of Circumstances and Conditions Question for Court to Determine*.

3. See dissenting opinion of Morse, J., in the case of *Klanowski v. Grand Trunk R. Co.*, 64 Mich. 279.

4. **Discretion of Court.** — *U. S. v. Ried*, 42 Fed. Rep. 134; *U. S. v. Ball*, 163 U. S. 673; *People v. Levine*, 85 Cal. 39; *Homan v. Franklin County*, 98 Iowa 692; *Ord v. Nash*, 50 Neb. 335; *Leonard v. Southern Pac. Co.*, 21 Oregon 555.

Experiment with Firearm. — In the case of *U. S. v. Ball*, 163 U. S. 673, which was the trial of an indictment for murder, the government introduced evidence tending to show that the deceased was killed with low-mould buckshot, as he was going home through a cornfield late at night; that he had twelve wounds in his breast, collarbone, and hips; that gun-wadding was found close to his body; and, as a circumstance going to show that the deceased was shot with a gun belonging to one of the defendants, evidence was given to the effect that this gun scattered low-mould buckshot "badly." The defendants introduced evidence that the gun did not scatter such shot, and requested the permission of the court to take the gun out and shoot it off

in the presence of a deputy marshal, in order to test the matter. The court denied the request, and the defendants excepted to the denial. Upon review, Mr. Justice Gray, delivering the opinion of the court, said: "The granting or refusal of such a request, first made in the midst of the trial, was clearly within the discretion of the court."

Indictment of Spiritualist for Fraudulent Use of Mails. — Where the defendant was indicted for using the United States mails for fraudulent purposes, by soliciting money upon representations that by the exercise of a supernatural power he was able to answer sealed letters addressed to spirit friends, the court refused, in the exercise of its discretion, to allow the defendant to give an exhibition or test of his power in open court. *U. S. v. Ried*, 42 Fed. Rep. 134.

Subjecting Witness to Test of Vision. — It has been held that a presiding judge is not compelled to allow counsel to test the power of vision of a witness under cross-examination by requiring him to go to a window of the court room and attempt to recognize a person on the street. It appeared that the person whom counsel had sent across the street for the purpose of the experiment was not within the range of vision of the court or jury. The action of the trial court was upheld as being matter within its discretion. *Heath v. State*, 91 Ga. 126.

5. *Ord v. Nash*, 50 Neb. 335.

6. *People v. Hope*, 62 Cal. 295.

of experiments offered would, if admitted, only tend to establish or disprove an immaterial issue or a fact irrelevant to the issues presented, exclusion should be the rule.¹ Thus, on the trial of an indictment for selling intoxicating liquor under a statute providing that all beverages containing more than a specified per centum of alcohol should be deemed intoxicating, evidence of experiments to show that the liquor was not in fact intoxicating was held to have been properly excluded.²

But in the Absence of Injury to the Complaining Party a judgment will not be reversed though such evidence was admitted.³

5. Experiments in Support of Facts or Theories Already Established. — Where evidence of experiments is offered to prove a fact or theory already established by the testimony, it seems that neither its rejection nor its admission is an error of which either party can complain.⁴

6. Experiments Ex Parte and Without Notice to Adverse Litigant. — The fact that experiments, evidence of which is sought to be introduced, were made *ex parte*, and without notice to the adverse litigant, does not render the evidence incompetent.⁵

Circumstances as Affecting Credibility. — The circumstances under which the experiments were made may, however, be considered by the jury as affecting its weight and sufficiency.⁶

1. Where Immaterial or Irrelevant Matters Sought to Be Established. — *Libby v. Scherman*, 146 Ill. 540, 37 Am. St. Rep. 191; *State v. Lindoen*, 87 Iowa 702; *Com. v. Brelsford*, 161 Mass. 61; *Ulrich v. People*, 39 Mich. 253.

Prosecution for Rape — Immaterial Issue. — In a prosecution for rape, where the prosecuting witness testified that prior to the outrage she and the defendant had engaged in a violent struggle, in the course of which the defendant had dragged her over a certain fence, evidence of experiments made in attempting to lift girls of different weights over the fence in question was excluded, the court holding the fact whether the prosecutrix was literally dragged over by force or got over voluntarily of no consequence in the case. *Ulrich v. People*, 39 Mich. 253.

2. Com. v. Brelsford, 161 Mass. 61. This case arose under a statute prohibiting the sale of intoxicating liquors and providing that any beverage containing more than one per centum of alcohol should be deemed intoxicating. The material question was not, as will be readily seen, whether the liquor was in fact intoxicating if taken in small quantities, but whether it contained the specified per centum of alcohol.

Intoxicating Liquors — Brewing Beverage in Presence of Jury. — The case of *State v. Lindoen*, 87 Iowa 702, was a trial upon an indictment for selling intoxicating liquors. The person from whom the defendant purchased the beverage in question testified as a witness for the defendant, naming the ingredients it contained and explaining the process of its manufacture. The witness had the ingredients in the court room, and was asked to mix them and show the jury the composition of the liquid claimed to be intoxicating. An objection to this proceeding, made by the state, was, it was held, properly sustained, as there was nothing in the experiment proposed which could have enlightened the jury as to the effect of the beverage upon a person who drank it.

3. Pennsylvania Coal Co. v. Kelly, 156 Ill. 9.

4. In Proof of Fact or Theory Already Established — Rule Stated. — In the case of *Stockwell v. Chicago*, etc., R. Co., 43 Iowa 470, an experiment was made by a portion of the jury upon the occasion of a view, had by consent of the parties and with the sanction of the court, the experiment, however, only going to demonstrate a fact already established by witnesses. The court held that such proceeding afforded no ground for disturbing the verdict, for the reason that the irregularity could not have prejudiced the objecting party.

The case of *Osborne v. Detroit*, 32 Fed. Rep. 36, was an action for damages against the city for injuries received by reason of a fall upon a defective sidewalk. Uncontradicted evidence showed that the plaintiff suffered a complete paralysis of the right side, and during the course of the trial the plaintiff's medical attendant was permitted, in sight of the jury, to thrust a pin into the plaintiff's side, to demonstrate her loss of feeling. Objection was taken to this proceeding, and exception reserved. The court said: "Even considering the testimony to have been improper, as there was not the slightest evidence offered by the defendant tending to show that the plaintiff was not completely paralyzed, * * * the defendant could not have been prejudiced by the testimony."

5. No Notice to Adverse Party of Experiment Required. — *Burg v. Chicago*, etc., R. Co., 90 Iowa 106, 48 Am. St. Rep. 419; *Byers v. Nashville*, etc., R. Co., 94 Tenn. 345. And see *Mississippi*, etc., R. Co. v. *Ayres*, 16 Lea (Tenn.) 725.

6. Byers v. Nashville, etc., R. Co., 94 Tenn. 353; *Moore v. State*, 96 Tenn. 213.

The Objection to Such Evidence goes not to its competency or admissibility, which is a matter for the court to determine, but to its weight and sufficiency before the jury; and especially is this the case where the experiment is made *ex parte*, and is such that it lies wholly within the power of one party, and wholly beyond the power of another party to

7. Experiments Exclusively in the Power of One Party to Make. — Though the experiments made were such as were wholly within the power of one party to make, and wholly without the power of the other party, the evidence is nevertheless admissible.¹ Thus where, in an action against a railroad company for killing a man on a bridge, the defendant offered evidence of experiments to show that it was impossible, though a vigilant outlook was maintained, and all modern appliances used, to stop a train between the points from which the person killed became first visible and that where he was struck by the locomotive, it was held that the evidence might be received, though it was entirely out of the power of the plaintiff to offer rebutting proof of a similar nature.²

8. Experiments Made with the Special View to Their Introduction in Evidence —
a. IN GENERAL. — The testimony of witnesses as to experiments may be competent though the experiments were made with a view to the introduction of such evidence on the trial of the cause.³ Evidence of experiments made under such circumstances has not, however, escaped denunciation as “manufactured evidence,”⁴ and in one case, where the distance between two persons when the one shot at the other was a material circumstance, in the determination of which the fact of the existence or absence of powder marks would have been significant, it was held that it was not permissible to exhibit to the jury a coat similar to that worn by the person shot at at the time, and to show the effect of a single experiment upon it;⁵ the ground of exclusion

make the experiment. *Byers v. Nashville, etc., R. Co.*, 94 Tenn. 353.

1. *Byers v. Nashville, etc., R. Co.*, 94 Tenn. 353.

2. *Byers v. Nashville, etc., R. Co.*, 94 Tenn. 353. In this case the court said: “We have been cited to quite a number of authorities to sustain the contention that such evidence is incompetent and inadmissible in cases where the experiment is not equally within the reach of both parties, but we have not been able to find this doctrine sustained.” None of these authorities is, however, cited or quoted by the court in its opinion; and in our investigation of the subject we have found no conflict whatever with the rule stated in the text.

3. *People v. Levine*, 85 Cal. 39; *Chicago, etc., R. Co. v. Legg*, 32 Ill. App. 218; *Burg v. Chicago, etc., R. Co.*, 90 Iowa 106, 48 Am. St. Rep. 419; *Byers v. Nashville, etc., R. Co.*, 94 Tenn. 353; *Moore v. State*, 96 Tenn. 212; *Clark v. State*, (Tex. Crim. App. 1897) 40 S. W. Rep. 992. And see *Boyd v. State*, 14 Lea (Tenn.) 161.

Possibility of Fabrication Does Not Warrant Exclusion. — “It has been urged,” said Henderson, J., in *Clark v. State*, (Tex. Crim. App. 1897) 40 S. W. Rep. 995, with reference to evidence of experiments made with reference to their introduction in evidence, “that such evidence is not admissible, on account of the danger of fabrication. But in our opinion this furnishes no good reason for its exclusion. All evidence, we might say, can, under circumstances, be fabricated; but the liability of fabrication rarely, if ever, alone, furnishes a good reason for the exclusion of evidence.”

4. “**Manufactured**” Evidence. — In the case of *Ulrich v. People*, 39 Mich. 245, Marston, J., delivering the opinion of the court, characterized evidence of experiments as “manufactured evidence.” This sort of evidence, he said, “is not the most reliable, and the cases are few where it ever should be admitted.”

Defense of Rule of Admission. — In the case of *Burg v. Chicago, etc., R. Co.*, 90 Iowa 106, 48 Am. St. Rep. 419, it was said with reference to evidence of experiments made by a party litigant pending trial: “We cannot adopt appellant’s view that it was an attempt to ‘manufacture *ex parte* testimony.’ Instances are without number where, pending litigation, the parties have made test measurements and trials relating to facts in dispute, and they have been regarded as competent and a quite satisfactory class of evidence upon questions of fact, and we are not favored with a suggestion against the reason of such a rule. Upon the question of admissibility of such evidence courts have never assumed that it was ‘manufactured’ in the sense in which the term is used in argument, and for that reason excluded it, even where the acts are those of the parties. Parties are made competent witnesses, and their testimony is admitted with the same legal presumptions as other witnesses; but, in weighing the evidence, all facts, including interest, that might reasonably affect its value, are to be considered.”

5. *Tesney v. State*, 77 Ala. 33.

Effect of Chemical on Cloth. — In the case of *Alabama G. S. R. Co. v. Collier*, 112 Ala. 681, it was held that in an action against a railroad to recover damages for injuries done to the plaintiff’s clothing by the explosion of a bottle containing a liquid fire extinguisher, which was hanging upon the wall of the car, it was not permissible on the trial to make a practical test as to whether such extinguisher would injure clothes when spilled upon them, by producing a bottle of the extinguisher and pouring it upon scraps of cloth in the presence of the court or jury. No reason whatever is given for the decision of the court, and so the case cannot be regarded as of much practical value as a precedent. It may be that the evidence was held inadmissible because it was not proved that the contents of the bottle with

being that the result of such an experiment depended too much upon the will and desire of the person making it.¹

b. WEIGHT AND SUFFICIENCY.—It is undoubtedly true, however, that the circumstance that the experiments were made with a view to the case on trial, and for the purpose of establishing or supporting a theory or hypothesis of the party making them, or at whose instance they were made, may be considered as affecting the weight and sufficiency of such evidence.²

IV. EVIDENCE OF EXPERIMENTS WITH REFERENCE TO ITS OBJECTS AND PURPOSES—**1. In General.**—For convenience of discussion, evidence of experiments, with reference to its objects and purposes, may be divided into three parts: (1) experiments to prove that from given conditions a certain result would follow; (2) experiments to prove that from given conditions an alleged result would not or need not follow; (3) experiments in support or explanation of opinion evidence. These heads will be considered in the order of enumeration.

2. Experiments to Prove that from Given Conditions a Certain Result Would Follow—*a. IN GENERAL.*—Where a party plaintiff alleges a certain result to have followed as a consequence of conditions proven, it has been held permissible for him, in support of this assertion, to introduce evidence of experiments made under like circumstances and conditions, with similar results.³ Thus, where, on the trial of an indictment for murder, the theory of the defense was suicide, the prosecution was allowed to introduce evidence of experiments with the weapon with which it was conceded the deceased had been killed, going to show that if discharged toward and no further from an object than a person could hold it from himself, powder burns or marks

which the experiment was made were identical with those of the bottle from which the plaintiff alleged his injury to have resulted. Again, the scraps of cloth in the experiment may not have been shown to be materially similar to that of which the plaintiff's clothes were made. If, however, it was shown that the conditions of the experiment were identical with those under which the original injury was alleged to have occurred, the case is in conflict with the weight of authority.

1. Rationale of Exclusion—Particular Case.—“Such evidence,” said the court in *Tesney v. State*, 77 Ala. 33, “superinduces the mischief of trying a collateral controverted matter by proving separate and distinct experiments, with results as variant as the manner of loading the pistols and the modes of making the experiments, dependent more or less on the wishes and feeling of the person making them, and tends to confuse the jury and withdraw their minds from the consideration of the main issue.”

2. Weight and Sufficiency for Jury.—*People v. Levine*, 85 Cal. 39; *Chicago, etc., R. Co. v. Legg*, 32 Ill. App. 218; *Burg v. Chicago, etc., R. Co.*, 90 Iowa 106, 48 Am. St. Rep. 419; *Byers v. Nashville, etc., R. Co.*, 94 Tenn. 353.

In the case of *People v. Levine*, 85 Cal. 39, which was the trial of an indictment for arson, an experiment was made with candles to ascertain how long they would burn, proof of which was admitted by the trial court, and this ruling was sustained on appeal.

3. Experiments to Show that Certain Results Would Follow.—*Brooke v. Chicago, etc., R. Co.*, 81 Iowa 504; *State v. Asbell*, 57 Kan. 398; *Eidt v. Cutter*, 127 Mass. 522; *State v. Isaac-*

son, 8 S. Dak. 69.

Illustration of Rule.—Where the theory of the plaintiff in an action for damages was that his intestate had sustained the injuries which caused his death by reason of having had his foot caught between the rails of a split switch, maintained by the defendant, evidence of experiments made by one of the plaintiff's attorneys by placing his foot between the rails, with testimony as to how and in what manner his foot was held, was declared to be competent. *Brooke v. Chicago, etc., R. Co.*, 81 Iowa 504. In this case the shoe worn by the person injured at the time of the injury was before the jury, “and,” as the court observed, “the witness who made the experiment was there, and the relative size of the shoes worn by each could be known.” It was very material to be ascertained, said the court, whether as the rails were situated a foot could or would be likely to be caught. And, continued the court, “we can hardly imagine testimony that would better show the fact than such experiments.”

Indictment for Exposing Poison—Experiments with Alleged Poisonous Substance.—Upon the trial of an indictment for maliciously exposing poison with intent that it should be taken by a horse, the owner of the horse which, it was alleged, had died from the effects of the poison, was allowed to testify, over the defendant's objection, that as soon as the horse died he with another cut the horse open and took out a portion of the contents of his stomach, and that thereupon some of the contents of the horse's stomach were administered to a hen, which died from the effects thereof within ten or twelve minutes. *State v. Isaacson*, 8 S. Dak. 69.

would have been discernible.¹ Indeed, a resort to experiments of this nature by one side or the other has become a common practice where the distance between the muzzle of the weapon discharged and the point of penetration is material and the presence or absence of powder marks is regarded as significant.²

And the Rule Above Given Applies in the Analogous Case where it is sought to be established by either party that under certain conditions a person could see or do something which he testifies he saw or did, or which it was his duty to see or do if circumstances permitted.³

b. REBUTTING PROOF.—Where one party introduces evidence of an experiment in support of his theory or hypothesis, the opposite party may give in proof evidence of a similar experiment with a different result from that claimed by his opponent.⁴

c. RULE AS TO SIMILARITY OF CIRCUMSTANCES AND CONDITIONS.—This question is discussed in a later portion of this article.⁵

1. *Boyd v. State*, 14 Lea (Tenn.) 161. The proof showed in this case that the deceased was found dead with a bullet-hole through her body and a pistol near by. There were, however, no powder marks on the clothing or person of the deceased, and the prosecution was permitted to prove the result of experiments made with the pistol found near the deceased, by discharging the weapon, at various distances, into a target of cloth of the kind of which the only garment which the deceased wore when found was made (muslin). The witnesses who made these experiments were allowed not only to testify as to the circumstances and results thereof, but to express opinions, founded upon such experiments, that the deceased could not have held and fired the weapon herself without some trace of powder stain or burn upon the muslin garment which covered her person.

2. *Experiments to Show Powder Marks.*—*People v. Levine*, 85 Cal. 39; *State v. Asbell*, 57 Kan. 398; *Sullivan v. Com.*, 93 Pa. St. 297; *State v. Blair*, cited in notes to Wharton's *Crim. Ev.*, § 312; *Boyd v. State*, 14 Lea (Tenn.) 161.

Such Experiments Now Common Practice.—In the case of *People v. Levine*, 85 Cal. 39, the court said: "It has been quite a common thing, in cases of homicide, to make experiments with firearms, to determine the carrying distance, the penetrating force, and the distance to which fire will be carried by firearms of certain pattern and calibre, and to prove the results of such experiments at the trial, as tending to show the guilt or innocence of the accused."

3. *Alabama G. S. R. Co. v. Burgess*, 114 Ala. 587; *Chicago, etc., R. Co. v. Legg*, 32 Ill. App. 218; *Elgin, etc., R. Co. v. Reese*, 70 Ill. App. 463; *Burg v. Chicago, etc., R. Co.*, 90 Iowa 106, 48 Am. St. Rep. 419; *Smith v. State*, 2 Ohio St. 512; *Byers v. Nashville, etc., R. Co.*, 94 Tenn. 345.

Experiments to Show that a Person May Be Recognized at Night by the Light of a Pistol's Discharge.—In a trial on an indictment for malicious shooting, the prosecuting witness having testified to his position and attitude in the parlor of a tavern the night when shot at, and sworn to the identity of the defendant as the person who shot at him, as seen through a glass window by the light of the pistol's flash,

the state was allowed to examine several witnesses who were not present at the shooting to prove experiments and observations subsequently made by them, at the same place, for the purpose of showing, by inference from such experiments and observations, that the prosecuting witness might or could have seen and recognized the defendant under the circumstances and in the manner related by him. *Smith v. State*, 2 Ohio St. 512.

Contributory Negligence.—In an action for damages for stock killed at a railroad crossing, in which the question of contributory negligence on the part of the person in charge of the stock was involved, it was held that evidence of witnesses as to experiments made by them to determine how far before the train reached the crossing it could be seen from the highway was admissible. *Elgin, etc., R. Co. v. Reese*, 70 Ill. App. 464.

4. *Evidence of Experiments in Rebuttal.*—*Lincoln v. Taunton Copper Mfg. Co.*, 9 Allen (Mass.) 181; *Eidt v. Cutter*, 127 Mass. 522; *Smith v. State*, 2 Ohio St. 512; *Leonard v. Southern Pac. Co.*, 21 Oregon 555. And see *People v. Levine*, 85 Cal. 39.

Where a railroad company introduced evidence of experiments to show that the plaintiff's stock could not have been seen in time to avoid the injury, it was held competent for the plaintiff in rebuttal to introduce evidence of experiments to show that the stock might have been seen. *Illinois Cent. R. Co. v. Burns*, 32 Ill. App. 196.

Where, on the Prosecution of an Indictment for Murder, the evidence tended to show that the person who committed the crime had worn a certain pair of rubber boots at the time, and the defendant testified that he could not get the boots on his feet, and made apparent efforts to put them on in the presence of the jury, without success, it was not error to allow a shoemaker to measure the defendant's feet and the boots and then testify that a foot of the defendant's size could wear the boots; nor was it improper to call other witnesses to put the boots on in the presence of the jury, and allow the shoemaker, after measuring their feet, to testify that he found them as large as the defendant's. *State v. Nordstrom*, 7 Wash. 506.

5. See *infra*, this section, *Experiments to Prove that from Given Conditions an Alleged*

3. Experiments to Prove that from Given Conditions an Alleged Result Would Not or Need Not Follow—*a. DIFFERENT RESULTS UNDER SIMILAR CONDITIONS.*—Where a defendant seeks to prove that an event, alleged to be the necessary and natural consequence of circumstances or conditions for which he is responsible, either was not or need not have been the result, evidence of experiments to show a different result from similar conditions is admissible.¹ Thus, where the plaintiff claimed to have sustained injuries by reason of the sudden acceleration of the speed of a moving car, as a result of the negligent releasing of the brakes when a coupling was about to be made, the trial court was held to have erred in excluding evidence of experiments made which tended to show that the speed of a moving car would not, under the circumstances of the case, be affected by releasing the brakes, in the manner sought to be established by the plaintiff's contention.² Similarly it has been held, in

Result Would Not or Need Not Follow—Rule as to Similarity of Circumstances and Conditions.

1. Experiments to Show that an Alleged Result Would Not or Need Not Follow—Illustrations of Rule.—The case of *Leonard v. Southern Pac. Co.*, 21 Oregon 555, was an action to recover damages for personal injuries sustained by the plaintiff on the occasion of the wrecking of the defendant's railroad train. The cause of the wreck was the collapse of a bridge, on the defendant's line of road, over which the defendant ran trains, and across which one of the defendant's trains was passing at the time of the accident. The plaintiff's contention was that the giving way of the bridge was due to structural defects, known, or which by the exercise of reasonable diligence might have been known, by the defendant. The theory of the defense was that the wreck was caused by a rail, loosened from its proper place and thrown diagonally across the track, by some person unknown, with deliberate evil intent. In support of this position the defendant introduced in court a rail which showed upon the outside of its bottom flange a dent or scar, claimed to have been made by the pony truck wheel in front of the engine coming in contact with the flange of the rail as it lay diagonally across the track. The plaintiff, in rebuttal, produced in court a wheel made to run on rails, and sections of iron rails, and requested a witness to show the jury the manner in which the wheel would come in contact with the rail, under the circumstances stated by the defendant. The section of rail upon which the wheel was to run was then placed in a horizontal position, and the wheel, brought into court for the purpose of the experiment, placed upon it and moved along it until forced in contact with another section of rail laid diagonally across the rail upon which the wheel moved, the result being to demonstrate that a wheel thus approaching and striking a crossed rail could strike it only on the ball or upper part, and not on the flange or bottom part, where the scar on the defendant's rail appeared.

Where the prosecutor alleged that his pocketbook had been abstracted through a cut in his coat, the testimony of the tailor to whom he carried the coat to be mended, as to experiments made to see whether such a pocketbook could have been removed through the cut made in it as it then was, was competent, especially where it appeared that the coat,

after having been mended, had been ripped open again. *People v. Morrgan*, 29 Mich. 4.

2. Effect of Release of Brakes on Moving Car.—In the case of *Chicago, etc., R. Co. v. Champion*, (Ind. 1892) 32 N. E. Rep. 874, it appeared that the appellee, an employee of the appellant, while in the discharge of his duties as such employee, in making a coupling between two cars in the appellant's yard, had his hand crushed. The right of recovery for the injury was based upon the alleged negligence of the appellant in employing and keeping in its employ a fellow servant of the appellee, one Leonard, a yard brakeman, who, it was alleged, was incompetent, unskilful, and negligent, and that the appellant, at the time of his employment, and during the time when he was in the service of the appellant, had notice of such incompetency; that while the appellee was performing his work in the appellant's yard, the appellee undertook to couple a car which Leonard was riding down upon a siding to a car which was standing upon the siding, and that when the appellee was in the act of making the coupling, and when the moving car was within six to eight inches of the other car, Leonard negligently loosed the brake on the moving car, which caused it suddenly to accelerate its speed and catch and mash the plaintiff's hand between the drawbars. During the trial the appellant placed a witness upon the stand and proposed to show that shortly before the trial a test was made upon the siding on which the accident took place, and at about the same place on the siding, by letting a car of the same kind as the one in use at the time of the injury down upon the siding; that Leonard, the same brakeman who was on the car at the time of the accident, was on the car, which was running at about the same rate of speed as the one which did the injury; that the brakes were set, and that when within eight or ten or twelve inches of the car to which it was to be coupled, the brake was let off by Leonard, and that when the brake was so let off the car did not show an increase of speed. The trial court excluded this evidence, and the ruling was assigned as a cause for a new trial. While the Supreme Court intended that it was probable that the circumstances attending the experiment were not precisely and minutely identical with those of the original incident, it was held nevertheless that they were sufficiently similar to make the result of the experiment admissible

an action against a railroad company for running over and killing a person on its track, where the defendant's negligence was in issue, that evidence of experiments is admissible to show that the person struck could not, though a vigilant outlook had been kept, have been seen until too late to stop the train.¹

b. SIMILAR RESULTS UNDER DIFFERENT CONDITIONS. — It is also competent for a defendant to introduce evidence of experiments going to show a similar result under different conditions, or under conditions existing at the time of the injury complained of and for which he is not responsible.²

c. RULE AS TO SIMILARITY OF CIRCUMSTANCES AND CONDITIONS — (1) *General Rule.* — Where a party seeks to show by evidence of experiments that an alleged result would or would not follow from the conditions proven, the experiments, evidence of which is sought to be introduced, must have been made under circumstances and conditions similar to those constituting, as it were, the premises from which the original event is alleged to have been

in evidence for what it was worth, and, therefore, that the judgment of the lower court must be reversed on account of its exclusion. *Compare, however, Chicago, etc., R. Co. v. Champion, 9 Ind. App. 510.*

1. *Illustrations of Rule.* — The case of *Byers v. Nashville, etc., R. Co., 94 Tenn. 345*, was an action against a railroad company for the death of a person struck by one of its trains while crossing a bridge. Upon the trial the testimony of a witness was offered, who, at the request of the company, made a test to see whether the train which caused the accident could have been stopped after the engineer saw or could have seen the man on the bridge. The witness proposed to prove that the train with which the experiment was made was the same which caused the accident, the test having, however, been made on a different day; that the experiment was made at the same place on the bridge, with the same number of coaches; that the circumstances of the test were that he had approached the bridge "on the lookout;" that as soon as a point was reached from which an object where the person killed was struck became visible, he applied every means known to him or other skilful engineers, and used every endeavor, to stop his train, and that it was impossible to do so before passing over the bridge, the entire train crossing the bridge before it could be stopped. The trial court declared this evidence incompetent and refused to receive it, but on appeal its exclusion was held to have been error, and the case reversed for that reason alone, the experiment having been made, it was said, under conditions "essentially the same as when the accident occurred." A very similar case was that of *Burg v. Chicago, etc., R. Co., 90 Iowa 106, 48 Am. St. Rep. 419*, which was an action against a railroad company for the alleged negligent killing of a three-year-old child, one of several children playing upon the track at the time of the accident. Two important questions in the case were (1) the distance at which the children could first be seen by the engineer of the approaching train, and (2) the possibility of stopping the train so as to prevent the accident, after the situation was or should have been known. The accident occurred in October, and in the following January and May the

defendant made certain tests with trains to ascertain the distance at which the children could have been seen, and also the distance required to stop the train when running at the same rate of speed as the train on the day of the accident. Some of the tests made were with the same train in use when the accident happened; others with a train claimed to be substantially like the former. The court admitted proof of these experiments over the objection of the plaintiff, it being urged that the conditions were so dissimilar as to render the tests incompetent. "It is true," said the court, "that they were not identically the same, but they were essentially so. It was at the same place, on the same track; in one case with the same train, and in the other with one so like it that it is not to be seen that it would not furnish a test sufficiently correct to be an aid in determining the fact to be found in the case. It is urged that the accident occurred about noon, and that the January test was made in the afternoon, when the sun would prevent seeing an object on the track. That does not appear to have been true in fact. So far as the record discloses, the opportunity for seeing at the different times was equally good. In fact we do not discover a difference as to conditions in any substantial particular. We think these tests were proper, and if fairly made, the facts thereby disclosed would be of great value in reaching a conclusion." *Compare, however, Chicago, etc., R. Co. v. Logue, 47 Ill. App. 292.*

2. *Similar Results Under Different Conditions.* — In an action for damages to the plaintiff's land from the operation of a neighboring copper mill, which it was alleged produced noxious gases and from which poisonous substances were discharged, so that the gases and liquid discharged from the mill reached and injured the land, the plaintiff was allowed to prove, by an expert witness, that copper had been obtained from grasses taken from his premises. The defendant, over the plaintiff's objection, was permitted to introduce counter expert testimony to the effect that copper frequently exists in vegetation generally, and in support of such opinion evidence was admitted of two experiments, similar to those made by the plaintiff's witness, upon grasses procured elsewhere, with the result that copper was ob-

the conclusion.¹ Thus, where a material question was the distance between the muzzle of the gun and the body of the victim of an alleged murderous design, evidence was excluded of the result of experiments as to powder marks made upon pasteboard targets by firing a gun at varying distances, upon the ground that the human body is fundamentally different in nature and texture from the substance upon which the experiments were made.²

tained in each instance. *Lincoln v. Taunton Copper Mfg. Co.*, 9 Allen (Mass.) 181. See also *Editt v. Cutter*, 127 Mass. 522.

1. General Rule as to Similarity of Circumstances and Conditions.—*Chicago, etc., R. Co. v. Logue*, 47 Ill. App. 292; *Chicago, etc., R. Co. v. Champion*, 9 Ind. App. 510; *Lake Erie, etc., R. Co. v. Mugg*, 132 Ind. 168; *Burg v. Chicago, etc., R. Co.*, 90 Iowa 106, 48 Am. St. Rep. 419; *State v. Asbell*, 57 Kan. 398; *Hawks v. Charlemont*, 110 Mass. 110; *Com. v. Piper*, 120 Mass. 185; *Editt v. Cutter*, 127 Mass. 522; *Kinney v. Folkerts*, 84 Mich. 616; *Leonard v. Southern Pac. Co.*, 21 Oregon 555. And see *Klanowski v. Grand Trunk R. Co.*, 64 Mich. 279; *Nosler v. Chicago, etc., R. Co.*, 73 Iowa 268.

Freezing Boot on Rail.—Where the theory of the defense was that an accident, alleged to have been caused by reason of a defective rail, whereby the foot of the plaintiff's intestate was caught and held so that he could not extricate himself in time to avoid injury, was, in fact, due to the freezing of his boot to the rail, in support of which evidence was offered to prove that the witness, on the same day, had experimented by placing his boot upon a rail, and that it froze thereto, the court held that such evidence was not admissible, for the reason that "the time of day was different, and the conditions as to warmth and moisture of the boot exposed may not have been, probably were not, the same." *Lake Erie, etc., R. Co. v. Mugg*, 132 Ind. 168.

More Apparent Similarity Held Insufficient.—In an action by a riparian owner for damages for removing stones from his property contiguous to the river, in consequence of which his land was washed away, evidence that the removal of stones at another place on the river bank produced the same effect which was alleged to have been produced at the place in question was held to be inadmissible, as it was not made to appear that all the conditions of the two events were the same, although witnesses testified that the two places were alike, so far as they could tell by the eye. *Hawks v. Charlemont*, 110 Mass. 110.

Experiment to Measure Force of Blow—Dynamometer.—The case of *Com. v. Piper*, 120 Mass. 185, was a trial upon an indictment for murder alleged to have been committed with a club or wooden bat. The defense offered a witness who proposed to testify that he was a manufacturer of an instrument known as the dynamometer, used for measuring the force of blows and the weight of falling bodies, and that he had experimented with a club or wooden bat of substantially the same form and weight as that with which the prosecution contended that the murder had been committed, and, further, what was the greatest registry in pounds attained. This evidence was held to have been properly excluded by

the trial court, on the ground that it was not shown that there was a similarity of conditions as between the experiment and the circumstances alleged.

Injury in Operation of Machine—Change of Construction.—Where, in an action for damages for injury to the plaintiff's arm by the alleged negligent operation of a blower, it appeared that its construction had been altered since the injury, it was held to be not improper that the trial court refused to permit the operation of the blower in the presence of the jurors, though they were permitted to examine it. *Kinney v. Folkerts*, 84 Mich. 616.

Time Consumed in Moving from One Point to Another.—Where it was regarded as material to consider the time which elapsed in the course of the plaintiff's movements between two points, the one where he testified that he stopped to listen for trains, the other the crossing where the injury occurred, and the distance up the track at which the train was visible from the first position, the plaintiff offered evidence of experiments by a witness, one Voelkner, the circumstances of and objections to which are stated by the Supreme Court in maintaining the propriety of its exclusion: "In the present case * * * Voelkner took for granted distances, locations, and probabilities of speed, none of which had been or could be verified. There were no elements of certainty in the comparison, which, to be of any value, must have been exact, and beyond dispute or variation." *Klanowski v. Grand Trunk R. Co.*, 64 Mich. 279. See, however, *dissenting opinion of Morse, J.*, in this case.

In *Nosler v. Chicago, etc., R. Co.*, 73 Iowa 268, evidence of experiments to ascertain how long it would take a team of horses to walk from the point where the plaintiff testified that he looked up and down the track for a train to the crossing where the accident happened was held admissible; but in this case there seems to have been no controversy as to the precise locality of the two points, respectively, nor uncertainty as to the fact that the experiments were made accordingly.

2. Experiment on Pasteboard Target.—*State v. Justus*, 11 Oregon 178, 50 Am. Rep. 470. The court, in this case, *citing with approval* the case of *Com. v. Piper*, 120 Mass. 185, said that "unless the experiments are shown to have been made under conditions the same as those existing in the case on trial, the tendency is to mislead and confuse the jury." "And in all the cases which have come under our observation," continued the court, "where such evidence has been held as admissible, the experiments were made with like means on the same kind of stuff or substance, or were based on a similarity of conditions or circumstances whereby the results produced betray with some certainty and uniformity a common similitude or agreement, and as a consequence

Where, however, the question was the point of contact as to the rail between a rail placed across a railroad track and the pony truck wheel of an engine in motion, a witness was permitted to use in an experiment before the jury a flange wheel twenty-six inches in diameter, whereas the wheel of the locomotive alleged to have struck the rail was as much as thirty-three inches in diameter.¹

(2) *Extent and Limits of Rule.*—The requirement that there shall be similarity of circumstances and conditions in order to the admissibility of evidence of experiments does not, however, exact more than what has been variously denominated as “substantial” or “essential” or “reasonable” similarity,² which, whatever be the term used, only means such a degree of similarity as that evidence of the experiments made will accomplish the

thereof furnish a safe foundation for inference or the truth of the matter sought to be established.” See, however, the case of *State v. Asbell*, 57 Kan. 398, in which the defendant was charged with the murder of his wife, whose body with a bullet-hole through the head, and a pistol near at hand, was found in the cellar of their dwelling house. The theory of the defense was suicide, but the hair around the bullet-hole was not singed nor burnt, nor were there any powder marks on the flesh, and the prosecution contended that if the deceased had fired the pistol herself it was necessarily held so close to her head that the hair would have been singed or burnt and the flesh powder-marked. In support of this theory the prosecution were permitted to introduce the evidence of a witness experienced in the use of firearms, who had conducted experiments by shooting at a paper target to which human hair was fixed, with the pistol with which the deceased was killed and with cartridges similar to those found therein, at distances ranging from six to ten feet, and the effect of the shooting as to singeing or burning the hair, and also as to powder marks upon the paper.

Wooden Target.—In the case of *Evans v. State*, 109 Ala. 11, the court, without a discussion of the point, held that it was error to admit the evidence of a witness who testified that he had, with a pistol, shot a hole through a dry plank, as an experiment to ascertain the size of the hole as compared with the ball which made it, a similar question having been raised in the case on trial. It does not clearly appear whether the bullet-hole with which the relative size of the projectile was directly under investigation was in wood or in some other material; but we infer from the report of the case that it was the wound which caused the death of the person with whose killing the defendant was charged.

1. *Leonard v. Southern Pac. Co.*, 21 Oregon 555. For the further facts of this case, see *supra*, the first note under the subdivision *Different Results under Similar Conditions.*

2. *Extent and Limits of Rule as to Similarity of Circumstances and Conditions.*—*Chicago, etc., R. Co. v. Champion*, (Ind. 1892) 32 N. E. Rep. 874; *Granger, C. J.*, in *Burg v. Chicago, etc., R. Co.*, 90 Iowa 106, 48 Am. St. Rep. 419; *Brooke v. Chicago, etc., R. Co.*, 81 Iowa 504; *Com. v. Piper*, 120 Mass. 185; *Eidt v. Cutter*, 127 Mass. 522; *State v. Isaacson*, 8 S. Dak. 69. See *Wilson v. State*, (Tex. Crim. App. 1896) 36

S. W. Rep. 587; *Clark v. State*, (Tex. Crim. App. 1897) 40 S. W. Rep. 992. And see *Chicago, etc., R. Co. v. Champion*, 9 Ind. App. 510.

Illustration of Rule.—Thus, in the case of *Chicago, etc., R. Co. v. Champion*, (Ind. 1892) 32 N. E. Rep. 874, where the material fact at issue was whether or not a car, moving at a slow rate of speed down a slight incline, with the brakes set, would, when the brakes were suddenly loosed, jump or spring forward, the court said: “If it would do so in one instance, it would, under ordinary conditions, repeat it every time the experiment was tried; for it would be the result of the operation of the laws of motion. The rate at which the car was moving, the suddenness with which the brakes were loosened, the degree of the inclination of the track, might affect the celerity of the movement, but would not affect the nature of the movement. If the question for investigation was the distance which it would jump, or the celerity of the movement, all these things might be important; but in determining whether it would or would not jump they are comparatively unimportant.”

But See in This Connection the case of *Wilson v. State*, (Tex. Crim. App. 1896) 36 S. W. Rep. 587, which was a criminal prosecution in which the testimony of one Hanson, taken before the examining court, was introduced in evidence by the state, the most material fact to which the witness testified being that he heard the appellant use certain threatening words, addressing the deceased, just before the fatal shot was fired. It was admitted that Hanson was a hundred yards away, and that the wind was blowing the sound from, and not towards, him. To test whether from his position he could have heard the words to which he testified, a number of persons went upon the ground on a day when conditions as to wind, etc., were supposed to be similar. Some of these parties were placed in the alleged position of the witness Hanson, and others at the well, at which point the shooting occurred, and the words ascribed to the appellant were spoken by those at the well in different ranges of voice from the lowest to the highest; and it was proposed to be proved by these parties that they did not hear such words so spoken at the well, at the position occupied by Hanson, and that their hearing was good, which proof was rejected, and the appellant excepted. This was held to have been error. See also the case of *Lake Erie, etc., R. Co. v. Mugg*, 132 Ind. 168, above cited.

desideratum of assisting the jury to an intelligent consideration of the issues of fact presented.¹

(3) *Similarity of Circumstances and Conditions Question for Court to Determine.* — Where the competency of evidence of experiments depends upon similarity of circumstances and conditions, the question is one for the court to determine.² As has been well said, in this connection, "in many instances a slight change in the conditions under which the experiment is made will so distort the result as to wholly destroy its value as evidence, and make it harmful rather than helpful. In other cases a principle may be established, by experiments made under circumstances quite different from the one under investigation, that will have an important and beneficial bearing upon the investigation."³

Instruction to Allow for Dissimilarities. — Where the circumstances and conditions of the experiments are not identical with those under which the injury occurred, the jury should be instructed to consider and make allowance for the differences.⁴

4. Experiments in Support or Explanation of Opinion Evidence — a. IN GENERAL. — It is very generally held that an expert witness who has given his opinion in evidence may also be permitted to testify as to the grounds of the opinion expressed, which frequently includes evidence of experiments made during the course of his investigation of the subject to which his testimony relates.⁵

1. See *Chicago, etc., R. Co. v. Legg*, 32 Ill. App. 218; *Illinois Cent. R. Co. v. Burns*, 32 Ill. App. 196; *State v. Justus*, 11 Oregon 178, 50 Am. Rep. 470; *Clark v. State*, (Tex. Crim. App. 1897) 40 S. W. Rep. 994.

Lack of Similarity of Circumstance and Condition Affects Not the Competency, but the Weight, of Evidence of Experiments. — *Clark v. State*, (Tex. Crim. App. 1897) 40 S. W. Rep. 994; *Illinois Cent. R. Co. v. Burns*, 32 Ill. App. 196.

2. **Question for Court to Determine.** — *Chicago, etc., R. Co. v. Champion*, (Ind. 1892) 32 N. E. Rep. 874. See also *supra*, this title, *Question of Admissibility One for Court to Determine.*

In an action against a city for personal injuries resulting to the plaintiff from having fallen in an excavation while walking along the defendant's streets on a cloudy night, the defendant, on the question of contributory negligence, furnished evidence of certain experiments made a year or more after the accident, the witnesses having made the experiments on a cloudy night with a light in an adjoining house similarly situated to one burning at the time of the accident, the evidence tending to show that there was sufficient light for the plaintiff, in the exercise of ordinary care, to have avoided the injuries. The trial court refused to admit this evidence. In this action the appellate tribunal said that "the rejecting of evidence tending to prove that the condition of the premises was, at a subsequent time, discernible by witnesses whose attention was specially directed to the subject, and under circumstances in some respects at least materially different from those surrounding the plaintiff below at the time of the accident, affords no ground of complaint by the city." *Ord v. Nash*, 50 Neb. 335.

3. *Miller, C. J., in Chicago, etc., R. Co. v. Champion*, (Ind. 1892) 32 N. E. Rep. 874.

4. *Pennsylvania Coal Co. v. Kelly*, 156 Ill. 9.

5. **Experiments in Support of Opinion Evidence.** — *Farmers, etc., Bank v. Young*, 36 Iowa 47;

Dickenson v. Fitchburg, 13 Gray (Mass.) 555; *Williams v. Taunton*, 125 Mass. 34; *McKay v. Lasher*, 121 N. Y. 477; *Dryer v. Brown*, 52 Hun (N. Y.) 321; *Boyd v. State*, 14 Lea (Tenn.) 161. And see *Collier v. Simpson*, 5 C. & P. 73, 24 E. C. L. 219; *Keith v. Lothrop*, 10 Cush. (Mass.) 453. See also generally the title **EXPERT AND OPINION EVIDENCE, post.**

Damage to Lands. — In the case of *Williams v. Taunton*, 125 Mass. 34, which was an action for damages for land taken by a city in the construction of waterworks, and for injury to contiguous property, the petitioners contended that their lands were injured from drainage by the filter basin of the respondent's waterworks. And it was held that an expert, who had testified that the point of drainage of surrounding lands by a filter basin, on land taken for that purpose, might be determined, could be asked if the level at which water stands under soil generally had been determined by experiment, and allowed to state the result of experiments made by him in his laboratory in proving that fact. This ruling was maintained upon the proposition that any witness qualified as an expert to whom questions of science or skill are put should be permitted, in expressing an opinion, to testify as to the experiments, if any, upon which his opinion is based.

Effect of Discharge on Load of Shot — Area of Spread. — In the case of *State v. Jones*, 41 Kan. 309, it was material on the question of self-defense to ascertain the distance of the defendant from the deceased at the time when he fired the musket by which the deceased had been killed. A witness experienced in the use and manufacture of firearms, who had experimented to ascertain how far guns and muskets would carry shot compactly, was held competent to testify to the experiments made, and to give his opinion, based on such experiments, as to the extent to which shot would scatter in a given distance when discharged from a musket.

Rationale of Rule. — Evidence of experiments in support of opinion evidence is admissible, it has been held, that the court and jury may perceive the force of the witness's reasoning, the soundness or fallacy of his logic, and in such manner judge of his capacity to give an opinion on the subject, the correctness of his conclusions, and, consequently, the weight due the opinion expressed.¹

b. WHETHER EXPERT WITNESS PERMITTED TO TESTIFY AS TO EXPERIMENTS ON DIRECT EXAMINATION OR ONLY ON CROSS-EXAMINATION. — It has been held that an expert who has testified to his opinion in a matter at issue, as ascertained by experiments, will not be permitted to state, in his examination in chief, the details of the experiments upon which his opinion was based, though it was said that in order to test the accuracy of the witness he might be interrogated upon the subject on cross-examination.² But the general rule, with better reason, is that an expert witness may be permitted in the first instance to testify as to the experiments upon which his conclusion is founded.³ Indeed, it is not inconceivable that a witness might express an opinion, susceptible either of absolute demonstration by an experiment before the jury or of satisfactory and conclusive support by testimony as to experiments elsewhere made, and yet, unless opposing counsel chose to cross-examine as to experiments, nothing but the bare unsupported opinion of the witness would get to the jury.⁴

c. EXPERIMENTS IN SUPPORT OF OPINION OF NONEXPERT WITNESS. — In this connection it has been intimated that where the opinion of a witness is not admissible because of lack of expert qualification, evidence of experiments offered in support of it will not be received.⁵ But where the trial court had

Handwriting Expert — Blackboard Illustrations. — It is not error to permit an expert witness on the subject of handwriting to make illustrations on the blackboard before the jurors for the purpose of explaining his testimony and rendering it more intelligible to them. *McKay v. Lasher*, 121 N. Y. 477; *Dryer v. Brown*, 52 Hun (N. Y.) 321.

1. *Dickenson v. Fitchburg*, 13 Gray (Mass.) 555.

2. **At What Stage of Trial Expert May Testify as to His Experiments.** — *Ingledew v. Northern R. Co.*, 7 Gray (Mass.) 91. See, however, *Lincoln v. Taunton Copper Mfg. Co.*, 9 Allen (Mass.) 181.

3. *Lewiston Steam Mill Co. v. Androscoggin Water Power Co.*, 78 Me. 274; *Lincoln v. Taunton Copper Mfg. Co.*, 9 Allen (Mass.) 181. And see *Keith v. Lothrop*, 10 Cush. (Mass.) 453; *Sexton v. North Bridgewater*, 116 Mass. 200; *Hawkins v. Fall River*, 119 Mass. 94.

4. **This Precise Question Was Decided in the case of *Lewiston Steam Mill Co. v. Androscoggin Water Power Co.***, 78 Me. 274, upon the considerations above adverted to. "If the reasons on which the intelligent opinion of an expert is founded can only be furnished to the jury by cross-examination," said the court, "this case makes it evident that as wise a counselor as the plaintiff's would never 'give aid and comfort' to his adversary by such a cross-examination."

5. **Experiments in Support of Opinion of Nonexpert Witness.** — *Tesney v. State*, 77 Ala. 38; *Per Head, J.*, in *Miller v. State*, 107 Ala. 40.

In the case of *Klanowski v. Grand Trunk R. Co.*, 64 Mich. 279, where the fact was material as to the time which elapsed while the plaintiff was moving from the point where he testified that he stopped to look for the approach of trains and the railroad crossing

where he was struck, the plaintiff offered to prove an experiment by a witness, made by going "somewhere near" the telegraph pole, opposite which the plaintiff testified he stopped, for the purpose above stated, waiting there for the appearance of the same train which caused the injury to the plaintiff, and then seeing how long it took him to reach the crossing. The evidence was excluded by the trial court, in which connection the Supreme Court said on review: "The testimony was not admissible. It is never proper to leave to witnesses the determination of matters which can be determined by the jury. With the facts established in regard to the various elements of plaintiff's story, their effect would be within the estimate of any intelligent jury."

Nonexpert Witness — Knowledge of Evidentiary Facts. — Where the prosecution sought to prove that the death of a horse was due to poison maliciously exposed by the defendant, evidence that the owner of the horse and the prosecuting witness, as soon as the horse died, removed a portion of the contents of the horse's stomach and administered it to a hen, which soon died from the effects, was held to be admissible, although neither the owner of the horse nor the prosecuting witness was an expert. "A nonexpert," said the court, "shown to be familiar with evidentiary facts, may, when the expression of an opinion is not involved, ordinarily state the result of his observations with reference to such facts. An ordinary nonprofessional witness in possession of his faculties who takes a section from the stomach of a horse and feeds it to a hen, which dies in ten minutes after eating the same, may testify as to such facts, when material, for the same are as observable to him as to a professional witness." *State v. Isaacson*, 8 S. Dak. 69.

permitted a witness to express an opinion that a pistol must, when discharged, have been held "very close" to clothing to scorch it, and to testify, in support of this opinion, as to several experiments made, it was held on review that no error had been committed, though the witness was not an expert, as the opinion expressed was but a matter of common knowledge, with reference to which expert testimony should not, in fact, have been received.¹

V. EVIDENCE OF EXPERIMENTS WITH REFERENCE TO THE MANNER AND MEANS OF ITS INTRODUCTION — 1. Experiments in Presence of Jury — *a.* IN GENERAL. — As has been before stated, evidence of the kind under consideration may be introduced by the performance of the experiments in the presence of the jury,² as well as by testimony of the details of the experiments as performed elsewhere. Thus where the plaintiff claimed that paralysis had resulted from the injuries complained of, her medical attendant was permitted to thrust a pin into her side in the presence of the jury to demonstrate her insensibility to pain.³ And where, upon the trial of an indictment for burg-

1. *Miller v. State*, 107 Ala. 40. Head J., though delivering the opinion of the court, disagreed with the majority upon the admissibility of such testimony.

2. *Experiments in Presence of Jury.* — *Osborne v. Detroit*, 32 Fed. Rep. 36; *People v. Hope*, 62 Cal. 295; *People v. Levine*, 85 Cal. 39.

Shades of Ink — *Experiment Showing Effect of Blotter.* — Where, in an action on a note, one of two alleged joint makers pleaded forgery, and under the circumstances it became material to be known whether both names had been written with the same ink, an experiment illustrating the effect of the use of a blotting pad on one name and not on the other, as accounting for the difference in the color or shade of the ink as the two names appeared on the note, was held to have been improperly excluded from the evidence. *Farmers, etc., Bank v. Young*, 36 Iowa 47. In this case an expert, called by the defendant, testified that in his opinion the signatures were not made with the same ink. Being recalled by the plaintiff, he stated that since his examination by the defendant he had examined writing upon the court record, made with the same ink, which apparently differed in color. He accounted for this difference upon the theory that a blotting pad had been used in one instance and not in another. Being asked to point out the difference on the record, and illustrate the effect of the blotting pad, the objection of the defendant thereto was sustained. As stated, this action of the court was held to have been erroneous, as, it was held, the witness should have been permitted to illustrate his testimony as requested.

Comparison of Footprints. — In the case of *Stokes v. State*, 5 Baxt. (Tenn.) 621, 30 Am. Rep. 72, where a material question at issue was whether a certain footprint discovered near the scene of the crime with which the defendant was charged was made by the defendant or not the prosecution brought into court during the trial a pan of soft earth, of about the same consistency as that in which the imprint had been made, and requested the defendant to put his foot in it. Although the prisoner was told by the court that he need not do as requested, and the jury was instructed that the prisoner's refusal to submit to the proposed test was not to be taken as

evidence against him, a judgment of conviction was reversed, the Supreme Court holding that the trial judge should not have permitted the pan of mud to be set before the jury and the defendant requested to put his foot in it. "We are satisfied," said the court, "the jury was improperly influenced thereby." But see in this connection the case of *Walker v. State*, 7 Tex. App. 245, 32 Am. Rep. 595, which was a trial upon an indictment for murder, in which evidence of the fact that the examining magistrate had compelled the defendant to make his footprints in an ash heap, and that they corresponded with tracks discovered at the scene of the crime, was held admissible. And see also *State v. Graham*, 74 N. Car. 646, 21 Am. Rep. 493, where the defendant was charged with having stolen corn from the field of his employer, and footprints were discovered, the morning after the theft, leading from and toward the premises where the defendant lived. When arrested the officer having him in charge required the prisoner to put his foot in the tracks, and testimony to this effect, as well as to the effect that the defendant's boot fitted the track, was admitted on the trial. Exception was taken to the admission of this testimony, but the Supreme Court sustained the ruling of the lower court.

On the Trial of a Complaint for the Sale of Intoxicating Liquors it is not error to refuse to allow samples of the liquor taken from the defendant's premises to be tasted by the jury, for the purpose of determining whether or not the liquor is intoxicating. *Com. v. Brelsford*, 161 Mass. 61.

3. **Experiment to Show Paralysis and Insensibility to Pain.** — In the case of *Osborne v. Detroit*, 32 Fed. Rep. 36, which was an action for damages resulting from a fall alleged to have been caused by a defective sidewalk, it was contended, before the appellate tribunal, that the trial court had committed error in permitting the plaintiff's medical attendant, who had not been sworn, to demonstrate her loss of feeling, due to paralysis, by thrusting pins in the side of the plaintiff claimed to be affected. The objection urged was that the doctor was not sworn as to the instrument he used, nor was the plaintiff sworn to behave naturally while she was being experimented upon. But the objection was not sustained.

lary, certain implements alleged to be burglar's tools, were exhibited to the jury, and a witness introduced by the prosecution offered to show by experimenting before the jury with a small steel bar, not in evidence, the adaptability of the tools to their alleged design, the action of the trial court in permitting the exhibition was upheld.¹ It has been held, however, that the trial court may, in the exercise of its discretion, refuse to suspend the trial for the purpose of giving a party an opportunity to make an experiment in the presence of the jury.²

b. EXPERIMENTS BY JURORS THEMSELVES.—It is a very generally recognized rule that if the members of a jury, during the course of their deliberations, make experiments, without the consent of the trial court, for the purpose of ascertaining facts testified to on the trial, such conduct is ground for a new trial or a reversal of the judgment.³ Thus, where the jury experimented to ascertain the audibility of the human voice in conversation in an adjoining room with the door closed between, and to determine whether or not the same person would make shorter footprints running than walking, it was held that a judgment of conviction could not be sustained.⁴ And though the defendant's counsel himself actually invites the jurors to make certain experiments, the means for which are in their possession, yet if they do so, the irregularity will warrant a new trial upon the application of the defendant.⁵ Where, however, an experiment was made by a portion of the jury upon the occasion of a view, had by consent of the parties, and with the sanction of the court, which only went to demonstrate a fact already established beyond dispute by the defendant's witnesses, it was held that no ground for disturbing the verdict, at the

1. *People v. Hope*, 62 Cal. 295.

2. **Need Not Delay Progress of Trial.**—In an action for personal injuries an expert witness stated that the dilated condition of the plaintiff's eyes was traceable to the abnormal condition of the heart as a result of the injuries complained of, and was permitted, without objection, to make certain experiments with the plaintiff's eyes in the presence of the jury. The defense requested permission of the court to make similar experiments on some other person to show that the same results would be produced though the subject of the experiment was in a normal condition. This request was refused by the court on the ground of the necessary delay in procuring a subject whose condition could be shown to be perfectly normal, and it was held that such refusal was not error as being within the discretion of the court. *Homan v. Franklin County*, 98 Iowa 692. See also *Heath v. State*, 91 Ga. 126.

Where the Time it Would Take a Candle to Burn to a given length was a material fact, as supporting the theory of the prosecution as to the defendant's guilt, it was held that the court might admit evidence of experiments to ascertain this. But there was no error in the court's refusing, in the exercise of its discretion, to suspend the trial in order that the defendant might try the experiment in the presence of the jury. Evidence of similar experiments, with different results from those made by the prosecution, would have been admissible. *People v. Levine*, 85 Cal. 39.

3. **Experiments Made by the Jury.**—*Yates v. People*, 38 Ill. 531; *State v. Sanders*, 68 Mo. 202, 30 Am. Rep. 782; *Dillard v. State*, 58 Miss. 368; *Jim v. State*, 4 Humph. (Tenn.) 289.

Illustrations.—In the case of *Yates v. People*, 38 Ill. 531, which was a trial upon an in-

dictment for murder, the theory of the defense was suicide the weapon used being a pistol found near the person of the deceased. On the trial a pistol was shown to the jury and identified as the property of the defendant, but it was not proved to have been the weapon found near the body of the deceased, by the agency of which, it was conceded, the deceased came to his death. After the retirement of the jurors the pistol which had been shown to them on the trial was sent to them, without the knowledge of the prisoner, his counsel, or the court, and the jurors experimented with it to determine whether, under the circumstances proven, the deceased could have shot himself with that weapon. Such conduct was held on appeal to warrant a new trial. See also, to the same effect, *Forehand v. State*, 51 Ark. 553.

Experiment in Presence of Court and Accused.—In the case of *Dillard v. State*, 58 Miss. 368, where the theory of the prosecution was that the deceased received the wounds which caused his death, when seated upon his horse, from a knife in the hands of a person standing upon the ground, the jurors were permitted to inspect the horse alleged to have been ridden by the deceased at the time of the difficulty, and to experiment to ascertain whether the injuries sustained by the person killed could have been inflicted by a knife held by one on the ground. The Supreme Court held this to be no error, provided it was done in the presence of the trial court and the accused, and that in the absence of a showing on the record to the contrary the presumption would be that the inspection and experiments were so made.

4. **Transmissibility of Voice in Conversation—Footprints.**—*Jim v. State*, 4 Humph. (Tenn.) 289.

5. *State v. Sanders*, 68 Mo. 202, 30 Am. Rep. 782.

instance of the plaintiff, was afforded, for the reason that prejudice could not have been done him by reason of such conduct.¹

c. **AFFIDAVITS OF JURORS AS TO EXPERIMENTS MADE BY THEM.** — Affidavits of jurors as to experiments made by them during the course of their deliberations have been held inadmissible in evidence for the purpose of impeaching the verdict.²

2. **Experiments Out of Presence of Jury.** — Where experiments, evidence of which is sought to be introduced, have been made out of court, their introduction in proof is, of course, effected by the parol testimony of witnesses as to the details of circumstances and result. And for the more intelligent understanding of such testimony the objects or materials used in making the experiments are frequently allowed to be exhibited; as, for instance, the cloth or muslin targets used in experiments made for the purpose of ascertaining the effect of the discharge of a weapon as to powder marks.³

1. *Stockwell v. Chicago, etc., R. Co.*, 43 Iowa 470.

See also *State v. Coupenhaver*, 39 Mo. 430; *State v. Alexander*, 66 Mo. 148.

2. **Affidavits of Jurors — Impeaching Verdict.** — *State v. Sanders*, 68 Mo. 202, 30 Am. Rep. 782.

3. *Sullivan v. Com.*, 93 Pa. St. 297.

EXPERT AND OPINION EVIDENCE.

BY CHARLES SUMNER LOBINGIER, M. A., LL.M.

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CROSS-REFERENCES.

For matters of *PROCEDURE*, see *ENCYCLOPÆDIA OF PLEADING AND PRACTICE*, vol. 8, p. 743.

For other matters of *SUBSTANTIVE LAW* and *EVIDENCE* related to this subject, see the title *EVIDENCE*, this work, vol. 11, p. 484, and the references there given.

I. DEFINITION. — Expert opinion evidence is testimony in the form of an opinion, based upon facts proved or assumed, concerning a matter involving scientific or technical knowledge, and not within the experience of the ordinary witness.¹

1. **Expert Opinion Evidence Defined — England.** — *Van der Donckt v. Theilussou*, 8 C. B. 812, 65 E. C. L. 812.

Canada. — *Cain v. Uhlman*, 20 Nova Scotia 148.

Alabama. — *Mobile L. Ins. Co. v. Walker*, 58 Ala. 290.

California. — *Toomes's Estate*, 54 Cal. 509, 35 Am. Rep. 83.

Georgia. — *Doster v. Brown*, 25 Ga. 24.

Illinois. — *Linn v. Sigsbee*, 67 Ill. 75; *West Chicago St. R. Co. v. Fishman*, 169 Ill. 196; *National Gas Light, etc., Co. v. Miethke*, 35 Ill. App. 629.

Indiana. — *Nelson v. Johnson*, 18 Ind. 329.

Maine. — *Sweetser v. Lowell*, 33 Me. 446; *Heald v. Thing*, 45 Me. 392; *Clark v. Rockland Water Power Co.*, 52 Me. 68.

Maryland. — *Baltimore, etc., Turnpike Co. v. Cassell*, 66 Md. 419; *Stumore v. Shaw*, 68 Md. 11, 6 Am. St. Rep. 412; *Metropolitan Sav. Bank v. Manion*, 87 Md. 68.

Massachusetts. — *Dickenson v. Fitchburg*, 13 Gray (Mass.) 546.

Michigan. — *Kelley v. Richardson*, 69 Mich. 430.

New Hampshire. — *Rochester v. Chester*, 3 N. H. 349; *Peterborough v. Jaffrey*, 6 N. H. 462; *Beard v. Kirk*, 11 N. H. 397; *Page v. Parker*, 40 N. H. 47; *Jones v. Tucker*, 41 N. H. 546; *Boardman v. Woodman*, 47 N. H. 120; *Dole v. Johnson*, 50 N. H. 452.

New York. — *Slater v. Wilcox*, 57 Barb. (N. Y.) 604; *Carpenter v. Blake*, 2 Lans. (N. Y.) 206; *Nelson v. Sun Mut. Ins. Co.*, 71 N. Y. 453; *People v. Augsburg*, 97 N. Y. 501; *Slocovich v. Orient Mut. Ins. Co.*, 108 N. Y. 56; *Doyle v. Manhattan R. Co.*, 128 N. Y. 488; *Rochester, etc., R. Co. v. Budlong*, 10 How. Pr. (N. Y. Supreme Ct.) 289.

Oregon. — *Pendleton v. Saunders*, 19 Ore-gon 9.

Pennsylvania. — *Mish v. Wood*, 34 Pa. St. 451; *Travis v. Brown*, 43 Pa. St. 9, 82 Am.

II. ORIGIN AND HISTORY — 1. In the English Law — a. EARLIEST STAGE — EVIDENCE NOT PRODUCED. — In the earliest period of the English law that which we now term expert opinion evidence was unknown. Indeed, evidence of any kind, produced according to modern rules, was no part of that primitive procedure. The jurors reached their conclusions for the most part from personal knowledge already possessed,¹ and while they were never quite the same as mere witnesses,² yet the information which they received from outside sources was at first not only inconsiderable, but was most informally acquired.³ Gradually, however, the practice of producing evidence in open court came into vogue,⁴ and as this increased the right to rely upon prior personal knowledge became correspondingly curtailed.⁵

b. INTERMEDIATE STAGE — EXPERT EVIDENCE RECEIVED BY COURT AND TRANSMITTED TO JURORS THROUGH INSTRUCTIONS. — The change in the method of producing evidence did not at once result in bringing the opinions of experts before the jurors. The opinions which were offered earliest appear to have been those of medical witnesses.⁶ But when this class of testimony was first admitted it was received for the purpose of enlightening the court, and if it reached the jury at all it did so through the medium of the court's charge.

Whether Wound Was Mayhem. — Thus, as early as 1353, in an appeal of mayhem⁷ tried at Southwark, after the justices had failed to determine from their own inspection whether a wound was mayhem, they ordered that surgeons of skill from London should be called "to inform the king and his court"⁸ on this point.

Legitimacy of Posthumous Child. — In 1619 an ejectment case turned on a question of the legitimacy of a posthumous child, and the court, having first received the testimony of "two doctors of physic," held as a matter of law "that it might well be, as the physicians had affirmed, that ten months may be said properly to be the time *mulieribus pariendo constitutum*;" and the record closes by reciting, "So the court delivered to the jury that the said Elizabeth, who was born forty weeks and more after the death of the said Edmund Andrews, might well be the daughter of the said Edmund."⁹

Growth of the Practice. — Meanwhile the gradual establishment of the rule was evidenced by a remark of Mr. Justice Saunders that "if matters arise in our law which concern other sciences or faculties, we commonly apply for the aid of that science or faculty which it concerns. Which is an honorable and commendable thing in our law. For thereby it appears that we don't despise all other sciences but our own, but we approve of them and encourage them as things worthy of commendation."¹⁰

Dec. 540; *Ardesco Oil Co. v. Gilson*, 63 Pa. St. 146; *Struthers v. Philadelphia, etc.*, R. Co., 174 Pa. St. 291.

Rhode Island. — *Buffum v. Harris*, 5 R. I. 243.

Vermont. — *Mason v. Fuller*, 45 Vt. 29; *State v. Phair*, 48 Vt. 366; *Dean v. McLean*, 48 Vt. 412, 21 Am. Rep. 130.

Virginia. — *Bird v. Com.*, 21 Gratt. (Va.) 800.

1. Basis of Early Verdicts. — 2 Pollock and Maitland's Hist. Eng. Law 619, 622, 625; Thayer, *The Jury and Its Development*, 5 Harv. L. Rev. 297 *et seq.*; Bigelow's Hist. of Procedure in England 335, 336; 1 Stubbs's Const. Hist. Eng. (4th ed.) 660; Forsyth on Trial by Jury (2d Am. ed.) 124; Chamberlain, *American System of Trial by Jury*, 23 Jour. Soc. Sci. 91 *et seq.*; Bushell's Case, Vaugh. 135, 6 How. St. Tr. 999; *Wright v. Crump*, 7 Mod. 1.

2. Juror Distinguished from Witness. — Thayer, *Select Cases on Evidence* 666; 2 Pollock and

Maitland's Hist. Eng. Law 619, *compare* pp. 622, 625, 626.

3. 2 Pollock and Maitland's Hist. Eng. Law 625.

4. Thayer, *Treatise on Evidence at Common Law*, 122 *et seq.*; 2 Pollock and Maitland's Hist. Eng. Law 619; Stephen, *Growth of Trial by Jury in England*, 10 Harv. L. Rev. 150, 159.

5. Thayer, *Treatise on Evidence at Common Law* 139-140; Stephen, *Growth of Trial by Jury in England*, 10 Harv. L. Rev. 150, 159.

6. See *Liber Assise* 145, 5; *Alsop v. Bowtrell*, Cro. Jac. 541. This was natural, since medical witnesses have always constituted the most numerous class of experts, and at that early day there were few others who could have been called such.

7. *Liber Assise* (28 Edw. III.) 145, pl. 5.

8. The original text reads *ad informandum dominum regem & cur.*

9. *Alsop v. Bowtrell*, Cro. Jac. 541.

10. *Buckley v. Thomas*, 1 Plowd. 118 (1553).

Informal Expert Assistance. — Sometimes the assistance of experts was obtained by the court without the formality of an open examination, and so late as 1703 Lord Holt, pending the consideration of a motion in arrest of judgment, which raised the question of the negotiability of a promissory note, took occasion "to speak with two of the most famous merchants in London" concerning their customs in connection with the use and indorsement of such paper.¹

c. MODERN STAGE — EXPERT AND OPINION EVIDENCE GIVEN DIRECTLY TO THE JURY — Transition. — Meanwhile cases were occurring where evidence produced in open court was actually heard by the jurors, and as the court failed to instruct them regarding its force and effect, they in reality passed upon it themselves. As in the preceding stage, this process appears to begin with the reception of medical testimony.

Medical Testimony — Witchcraft. — At a famous trial for witchcraft at Bury St. Edmunds in 1665, Dr. Thomas Browne, "a person of great knowledge," after viewing the accused "was desired to give his opinion what he did conceive of them; and he was clearly of opinion that the persons were bewitched."²

Causation. — Thereafter, during the same century, such testimony was admitted before the jury regarding the cause of blood in a certain portion of the body of a murdered person,³ and the cause of death.⁴

Handwriting. — Another practice which prepared the way for the employment of experts was that of receiving opinions relative to the genuineness of handwriting.⁵

Final Establishment. — Still, so late as 1782 Lord Mansfield found it necessary to defend a ruling by which he admitted the testimony of an engineer concerning the cause of a harbor's decay.⁶ From this time on, however, the admissibility of opinions as evidence for the jury seems not to have been questioned, and the difficulty lies rather in the application of the rule.

2. In Other Legal Systems. — The employment of expert opinion evidence was a feature of the Roman law,⁷ and of some of the continental systems of jurisprudence founded thereon.⁸

III. POLICY OF AND PROPOSED CHANGES IN THE PRACTICE. — The practice of admitting opinions in evidence and the abuses to which it has led have been the occasion of considerable criticism from judges⁹ and from writers on jurisprudence.¹⁰ Among the evils thus complained of are the want of satisfactory standards of expertness, with its result of inviting the testimony of charlatans,¹¹ the partisan, conflicting, and hence unreliable character of the evi-

1. "At another day, Holt, Chief Justice, declared that he had desired to speak with two of the most famous merchants in London, to be informed of the mighty ill consequences that it was pretended would ensue by obstructing this course; and that they had told him it was very frequent with them to make such notes, and that they looked upon them as bills of exchange, and that they had been used for a matter of thirty years, and that not only notes, but bonds for money, were transferred frequently and indorsed as bills of exchange." *Buller v. Crips*, 6 Mod. 29. Compare with this the recent proposals for the appointment by the court of an "assessor" in the person of an expert where the testimony of those experts called by the parties is conflicting and the court wishes to be further informed. See Endlich, *Proposed Changes in the Law of Expert Testimony*, 32 Am. L. Rev. 851, 865, 867.

2. *A Trial of Witches*, 6 How. St. Tr. 687, 697.

3. *Trial of the Earl of Pembroke*, 6 How. St. Tr. 1310, 1337 (1678).

4. **Cause of Death.** — *R. v. Green*, 7 How. St. Tr. 159 (1679); *Trial of Borosky*, 9 How. St. Tr. 1, 21 (1682); *R. v. Cowper*, 13 How. St. Tr. 1106 *et seq.*

5. In *Folkes v. Chadd*, 3 Doug. 157, 26 E. C. L. 63, Lord Mansfield referred to this practice as a ground for admitting opinion evidence generally. See the title **HANDWRITING**.

6. *Folkes v. Chadd*, 3 Doug. 157, 26 E. C. L. 63.

7. **Expert Evidence in Roman Law.** — Enderman 243; Rogers on Expert Testimony (2d ed.), § 2.

8. Rogers on Expert Testimony (2d ed.), § 2.

9. **Criticisms by Judges.** — See the observations of the courts in these cases: *Rutherford v. Morris*, 77 Ill. 397; *State v. Watson*, 65 Me. 74; *People v. Morigan*, 29 Mich. 4.

10. **Criticisms of Commentators.** — See an article on Proposed Changes in the Law of Expert Testimony, 32 Am. L. Rev. 851, and compare 11 Harv. L. Rev. 169; Best on Evidence, § 514; Taylor on Evidence, §§ 58, 1877; 1 Redfield on Wills 103.

11. **Want of Proper Standards.** — Heald v. Thing, 45 Me. 392; Best on Evidence, § 514;

dence often produced by so-called expert witnesses,¹ the prolongation of trials and consequent increase of expense on account of the number of such witnesses called,² and the oftentimes confusing effect on the jury of the hypothetical method of questioning.³ Practical remedies for these evils are among the most active quests on the part of contemporary law reformers.

IV. GENERAL PRINCIPLES AS TO ADMISSIBILITY AND COMPETENCY — 1. General Rule Regarding Opinions. — The law does not look with favor upon the introduction of opinions in evidence.⁴ As a rule, witnesses are expected to testify to facts, and it is for the court or jury to draw conclusions and form opinions from the facts thus brought before them.⁵ Even when opinions are admitted, the ostensible purpose is to inform the jurors concerning some fact,⁶ and evidence which is sometimes received from necessity has been said to be less an opinion than a conclusion of fact.⁷

Endlich, "Proposed Changes in the Law of Expert Testimony," 32 Am. L. Rev. 851.

1. Partisan and Conflicting Character of Testimony. — *Waters v. Thorn*, 22 Beav. 547; *Evans v. Knight*, 1 Add. Ecc. 229; *Clark v. State*, 12 Ohio St. 483, 40 Am. Dec. 481.

2. "Experience has shown that opposite opinions of persons professing to be experts may be obtained to any amount; and it often occurs that not only many days, but even weeks, are consumed in cross-examinations, to test the skill or knowledge of such witnesses and the correctness of their opinions, wasting the time and wearying the patience of both court and jury, and perplexing instead of elucidating the questions involved in the issue." *Winans v. New York, etc., R. Co.*, 21 How. (U. S.) 101.

3. Endlich, "Proposed Changes in the Law of Expert Testimony," 32 Am. L. Rev. 851, 853.

4. "Great stress was laid upon the opinion of the broker. But we all think the jury ought not to pay the least regard to it. It is mere opinion, which is not evidence. It is opinion after an event. It is opinion without the least foundation from any previous precedent or usage. It is an opinion which, if rightly formed, could only be drawn from the same premises from which the court and jury were to determine the cause, and therefore it is improper and irrelevant in the mouth of a witness." Lord Mansfield in *Carter v. Boehm*, 3 Burr. 1905.

"In general, witnesses must speak to facts, and their opinions are not evidence." Nash, J., in *Sikes v. Paine*, 10 Ired. L. (32 N. Car.) 280, 51 Am. Dec. 389.

5. Facts, Not Opinions, Usually Required — United States. — Congress, etc., *Spring Co. v. Edgar*, 99 U. S. 645; *Connecticut Mut. L. Ins. Co. v. Lathrop*, 111 U. S. 612.

Alabama. — *Talladega Ins. Co. v. Peacock*, 67 Ala. 253; *Alabama G. S. R. Co. v. Tapia*, 94 Ala. 226.

Illinois. — *Schmidt v. Pfau*, 114 Ill. 494; *Ogden v. People*, 134 Ill. 599; *Chicago, etc., R. Co. v. Esten*, 178 Ill. 197, citing 7 AM. AND ENG. ENCYC. OF LAW (1st ed.) 492; *Central R. Co. v. Allmon*, 147 Ill. 479, citing 7 AM. AND ENG. ENCYC. OF LAW (1st ed.) 492.

Indiana. — *Lake Erie, etc., R. Co. v. Juday*, 19 Ind. App. 461, citing 7 AM. AND ENG. ENCYC. OF LAW (1st ed.) 492.

Iowa. — *Muldowney v. Illinois Cent. R. Co.*, 36 Iowa 462; *Spears v. Mt. Ayr*, 66 Iowa 721.

Kansas. — *Parsons v. Lindsay*, 26 Kan. 426. *Maryland.* — *Flickinger v. Wagner*, 46 Md. 580.

Massachusetts. — *Perkins v. Augusta Ins., etc., Co.*, 10 Gray (Mass.) 312, 71 Am. Dec. 654; *Simmons v. New Bedford, etc., Steamboat Co.*, 97 Mass. 361, 93 Am. Dec. 99; *Com. v. Scott*, 123 Mass. 222, 25 Am. Rep. 81.

Michigan. — *Marcott v. Marquette, etc., R. Co.*, 49 Mich. 99.

Missouri. — *Spencer v. Metropolitan St. R. Co.*, 120 Mo. 154.

New Hampshire. — *Robertson v. Stark*, 15 N. H. 109; *Spear v. Richardson*, 34 N. H. 428.

New York. — *Norman v. Wells*, 17 Wend. (N. Y.) 136; *Lincoln v. Saratoga, etc., R. Co.*, 23 Wend. (N. Y.) 425; *Lamoure v. Caryl*, 4 Den. (N. Y.) 370; *Morehouse v. Mathews*, 2 N. Y. 514; *Teerpenning v. Corn Exch. Ins. Co.*, 43 N. Y. 279; *Allen v. Stout*, 51 N. Y. 668; *People v. Murphy*, 101 N. Y. 126, 54 Am. Rep. 661; *Schneider v. Second Ave. R. Co.*, 133 N. Y. 583.

North Carolina. — *Bailey v. Pool*, 13 Ired. L. (35 N. Car.) 404; *State v. Starnes*, 94 N. Car. 973.

Ohio. — *Cincinnati Mut. Ins. Co. v. May*, 20 Ohio 211; *Stillwater Turnpike Co. v. Coover*, 26 Ohio St. 520; *State v. Rhoads*, 29 Ohio St. 171.

Oregon. — *Wilson v. Maddock*, 5 Oregon 480.

South Carolina. — *Ward v. Charleston City R. Co.*, 19 S. Car. 521, 45 Am. Rep. 794.

Texas. — *Houston, etc., R. Co. v. Smith*, 52 Tex. 178; *Campbell v. State*, 10 Tex. App. 560.

Vermont. — *Clifford v. Richardson*, 18 Vt. 620.

West Virginia. — *State v. Musgrave*, 43 W. Va. 689, citing 7 AM. AND ENG. ENCYC. OF LAW (1st ed.) 492.

Wisconsin. — *Strong v. Stevens Point*, 62 Wis. 255.

6. *Lamoure v. Caryl*, 4 Den. (N. Y.) 370; *Moffitt v. Hereford*, 132 Mo. 519, citing 7 AM. AND ENG. ENCYC. OF LAW (1st ed.) 490-494.

7. "Such evidence has been said to be competent from necessity, on the same ground as the testimony of experts, as the only method of proving certain facts essential to the proper administration of justice. Nor is it a mere opinion which is thus given by a witness, but a conclusion of fact to which his judgment, observation, and common knowledge have led him in regard to a subject-matter which requires no special learning or experiment, but

Necessity of Receiving Opinions. — There are circumstances, however, under which opinions are said to be admissible from necessity, as when they are the best evidence¹ or when the facts and events by which the judgment of the witness was determined cannot be reproduced or adequately described to the jury.²

2. General Rule Regarding Expert Evidence. — The General Rule as to the admissibility of expert evidence is that persons having technical and peculiar knowledge on certain subjects are allowed to give their opinions when the question involved is such that the jurors are incompetent to draw their own conclusions from the facts without the aid of such evidence.³

which is within the knowledge of men in general." *Com. v. Sturdivant*, 117 Mass. 122, 19 Am. Rep. 401.

1. **Best Evidence.** — *State v. Pike*, 49 N. H. 399, 6 Am. Rep. 533, *dissenting* opinion of Doe, J., subsequently, in *Hardy v. Merrill*, 56 N. H. 227, 22 Am. Rep. 441, adopted as the law in that state.

"And generally opinions are competent in the classes of cases in which they are the best testimony, as where a mere description without an opinion would generally convey a very imperfect idea of the force, meaning, and inherent character of the thing described." *Wilson v. New York, etc., R. Co.*, 18 R. I. 598.

2. **United States.** — *Connecticut Mut. L. Ins. Co. v. Lathrop*, 111 U. S. 612.

California. — *Healy v. Visalia, etc., R. Co.*, 101 Cal. 585; *Holland v. Zollner*, 102 Cal. 633.

Connecticut. — *Grant v. Thompson*, 4 Conn. 203, 10 Am. Dec. 119; *Dunham's Appeal*, 27 Conn. 192.

Georgia. — *Potts v. House*, 6 Ga. 324, 50 Am. Dec. 329.

Iowa. — *Yahn v. Ottumwa*, 60 Iowa 429.

Kansas. — *Atchison, etc., R. Co. v. Miller*, 39 Kan. 419.

Maryland. — *Townshend v. Townshend*, 7 Gill (Md.) 10; *Davis v. State*, 38 Md. 15.

Massachusetts. — *Parker v. Boston, etc., Steamboat Co.*, 109 Mass. 449; *Com. v. Sturdivant*, 117 Mass. 122, 19 Am. Rep. 401; *May v. Bradlee*, 127 Mass. 414.

Michigan. — *Underwood v. Waldron*, 33 Mich. 232.

Minnesota. — *McKillop v. Duluth St. R. Co.*, 53 Minn. 532.

Missouri. — *Elsner v. Supreme Lodge, etc.*, 98 Mo. 640.

New Hampshire. — *Hardy v. Merrill*, 56 N. H. 227, 22 Am. Rep. 441.

New Jersey. — *Matter of Vanauken*, 10 N. J. Eq. 186.

New York. — *M'Kee v. Nelson*, 4 Cow. (N. Y.) 355, 15 Am. Dec. 384; *DeWitt v. Barly*, 17 N. Y. 340; *Clapp v. Fullerton*, 34 N. Y. 190, 90 Am. Dec. 681.

North Carolina. — *Clary v. Clary*, 2 Ired. L. (24 N. Car.) 78.

Ohio. — *Steamboat Clipper v. Logan*, 18 Ohio 375; *Stewart v. State*, 19 Ohio 302, 53 Am. Dec. 426; *Shelby v. Clagett*, 46 Ohio St. 549, *citing* 7 AM. AND ENG. ENCYC. OF LAW (1st ed.) 492; *Lake Shore, etc., R. Co. v. Gaffney*, 6 Ohio Cir. Ct. Rep. 94, *citing* 7 AM. AND ENG. ENCYC. OF LAW (1st ed.) 492.

Pennsylvania. — *Graham v. Penn. R. Co.*, 139 Pa. St. 149, *citing* 7 AM. AND ENG. ENCYC. OF LAW (1st ed.) 493.

Rhode Island. — *Wilson v. New York, etc., R. Co.*, 18 R. I. 491.

South Carolina. — *State v. James*, 31 S. Car. 218.

Tennessee. — *Gibson v. Gibson*, 9 Yerg. (Tenn.) 329; *Norton v. Moore*, 3 Head (Tenn.) 480; *Dove v. State*, 3 Heisk. (Tenn.) 348.

Texas. — *Powers v. State*, 23 Tex. App. 42.

Vermont. — *Clifford v. Richardson*, 18 Vt. 620; *Fulsome v. Concord*, 46 Vt. 135.

Virginia. — *Tyler v. Sites*, 90 Va. 542, *citing* 7 AM. AND ENG. ENCYC. OF LAW (1st ed.) 493.

West Virginia. — *State v. Welch*, 36 W. Va. 693, *citing* 7 AM. AND ENG. ENCYC. OF LAW (1st ed) 502.

Wisconsin. — *Knoll v. State*, 55 Wis. 249, 42 Am. Rep. 704.

Wyoming. — *Union Pac. R. Co. v. Gilland*, 4 Wyoming 395.

3. **The Rule and Its Reason** — *England.* — *Folkes v. Chadd*, 3 Doug. 157, 26 E. C. L. 63; *Campbell v. Rickards*, 5 B. & Ad. 840, 27 E. C. L. 207.

United States. — *Milwaukee, etc., R. Co. v. Kellogg*, 94 U. S. 469; *Connecticut Mut. L. Ins. Co. v. Lathrop*, 111 U. S. 612; *St. Louis, etc., R. Co. v. Farr*, 12 U. S. App. 520; *New York Electric Equipment Co. v. Blair*, 79 Fed. Rep. 896.

Alabama. — *Alabama Mineral R. Co. v. Jones*, 114 Ala. 519.

California. — *Hastings v. Steamer Uncle Sam*, 10 Cal. 341; *Grigsby v. Clear Lake Water Works Co.*, 40 Cal. 396.

Connecticut. — *Taylor v. Monroe*, 43 Conn. 36.

Georgia. — *Parker v. Chambers*, 24 Ga. 518.

Illinois. — *Chicago v. McGiven*, 78 Ill. 347; *Illinois Cent. R. Co. v. People*, 143 Ill. 434; *Doud v. Guthrie*, 13 Ill. App. 653; *Sallwasser v. Hazlitt*, 18 Ill. App. 243; *Ohio, etc., R. Co. v. Nuetzel*, 43 Ill. App. 108; *Walker v. Bernstein*, 43 Ill. App. 568.

Indiana. — *Evansville, etc., Straight Line R. Co. v. Fitzpatrick*, 10 Ind. 120; *Humphries v. Johnson*, 20 Ind. 190; *Hilton v. Mason*, 92 Ind. 157; *Indiana, etc., R. Co. v. Hale*, 93 Ind. 79.

Iowa. — *Whitmore v. Bowman*, 4 Greene (Iowa) 148; *Pelamourges v. Clark*, 9 Iowa 1; *Bills v. Ottumwa*, 35 Iowa 107; *Hamilton v. Des Moines Valley R. Co.*, 36 Iowa 31; *Muldowney v. Illinois Cent. R. Co.*, 36 Iowa 462; *Kline v. Kansas City, etc., R. Co.*, 50 Iowa 656.

Kansas. — *Roberts v. Brown County*, 21 Kan. 248; *Monroe v. Latin*, 25 Kan. 351; *Parsons v. Lindsay*, 26 Kan. 426; *State v. Baldwin*, 36 Kan. 1.

Maine. — *Cottrill v. Myrick*, 12 Me. 222; *Tebbetts v. Haskins*, 16 Me. 283; *State v. Watson*, 65 Me. 74; *Snow v. Boston, etc., R. Co.*, 65 Me. 230; *Lewiston Steam Mill Co. v. Androscoggin Water Power Co.*, 78 Me. 274.

Maryland. — *Higgins v. Carlton*, 28 Md. 115, 92 Am. Dec. 666; *Davis v. State*, 38 Md. 15;

The Test of the Admissibility of Expert Testimony is not whether the subject-matter is common or uncommon,¹ nor whether the witness can claim superior judgment or powers of reasoning,² or better comprehends and appreciates the matter at issue,³ but whether the question upon which the evidence is offered is one of science or skill.⁴

Subjects to Which Applicable. — And while the subjects to which this kind of evidence is applicable are not confined to specified callings and professions,⁵ they must relate to some particular department of human knowledge.⁶

Speculative Data. — The opinion of an expert on mere speculative data is inadmissible.⁷ But a witness speaking as an expert on a question of science

Baltimore, etc., *Turnpike Co. v. Cassell*, 66 Md. 419; *Stumore v. Shaw*, 68 Md. 11, 6 Am. St. Rep. 412.

Massachusetts. — *Com. v. Rogers*, 7 Met. (Mass.) 500, 41 Am. Dec. 458; *Donnelly v. Fitch*, 136 Mass. 558; *Connelly v. Hamilton Woolen Co.*, 163 Mass. 156.

Michigan. — *Hill v. Lafayette Ins. Co.*, 2 Mich. 476; *McNally v. Colwell*, 91 Mich. 527, 30 Am. St. Rep. 494.

Minnesota. — *Sowers v. Dukes*, 8 Minn. 23; *Krippner v. Biehl*, 28 Minn. 139; *Morris v. Farmers' Mut. F. Ins. Co.*, 63 Minn. 420.

Mississippi. — *Jones v. Finch*, 37 Miss. 461, 75 Am. Dec. 73; *Dillard v. State*, 58 Miss. 368.

Missouri. — *Wagner v. Jacoby*, 26 Mo. 530; *Newmark v. Liverpool, etc., F., etc., Ins. Co.*, 30 Mo. 160; *Rosenheim v. America Ins. Co.*, 33 Mo. 230; *Thompson v. Ish*, 99 Mo. 160, 17 Am. St. Rep. 552; *Naughton v. Staggs*, 4 Mo. App. 271.

Nebraska. — *Atchison, etc., R. Co. v. Lawler*, 40 Neb. 356.

New Hampshire. — *Marshall v. Columbia Mut. F. Ins. Co.*, 27 N. H. 157; *Robertson v. Stark*, 15 N. H. 109; *Concord R. Co. v. Greely*, 23 N. H. 237; *Page v. Parker*, 40 N. H. 47; *Jones v. Tucker*, 41 N. H. 546; *Whittier v. Franklin*, 46 N. H. 23, 88 Am. Dec. 185.

New Jersey. — *Koccis v. State*, 56 N. J. L. 44; *Cook v. State*, 24 N. J. L. 843.

New York. — *Jefferson Ins. Co. v. Cotheal*, 7 Wend. (N. Y.) 72; *Norman v. Wells*, 17 Wend. (N. Y.) 136; *Lincoln v. Saratoga, etc., R. Co.*, 23 Wend. (N. Y.) 425; *New York v. Pentz*, 24 Wend. (N. Y.) 668; *Slater v. Wilcox*, 57 Barb. (N. Y.) 604; *Clark v. Bruce*, 12 Hun (N. Y.) 274; *Bearss v. Copley*, 10 N. Y. 93; *Teepening v. Corn Exch. Ins. Co.*, 43 N. Y. 279; *Ferguson v. Hubbell*, 97 N. Y. 507, 49 Am. Rep. 544; *Young v. Johnson*, 123 N. Y. 226; *Hoffman v. Delaware, etc., Canal Co.*, 16 N. Y. App. Div. 572; *Reynolds v. Van Beuren*, 10 Misc. Rep. (N. Y. C. Pl.) 703; *Rochester, etc., R. Co. v. Budlong*, 10 How. Pr. (N. Y. Supreme Ct.) 289; *Clark v. Baird*, 9 N. Y. 183.

North Carolina. — *Sikes v. Paine*, 10 Ired. L. (32 N. Car.) 280, 51 Am. Dec. 389; *DeBerry v. Carolina Cent. R. Co.*, 100 N. Car. 310.

North Dakota. — *Ouverson v. Grafton*, 5 N. Dak. 281.

Ohio. — *Crowell v. Western Reserve Bank*, 3 Ohio St. 406; *Cleveland, etc., R. Co. v. Ball*, 5 Ohio St. 568; *Baltimore, etc., R. Co. v. Schultz*, 43 Ohio St. 270.

Oregon. — *State v. Anderson*, 19 Oregon 448.

Pennsylvania. — *Forbes v. Caruthers*, 3 Yeates (Pa.) 527; *Mish v. Wood*, 34 Pa. St. 451; *Monongahela Water Co. v. Stewartson*, 96 Pa. St. 436; *Coyle v. Com.*, 104 Pa. St. 117.

Rhode Island. — *Buffum v. Harris*, 5 R. I. 243.

South Carolina. — *State v. Clark*, 15 S. Car. 403.

Tennessee. — *Nashville, etc., R. Co. v. Carroll*, 6 Heisk. (Tenn.) 347; *Bruce v. Beall*, 99 Tenn. 303.

Texas. — *Cooper v. State*, 23 Tex. 331; *Fort Worth, etc., R. Co. v. Thompson*, 75 Tex. 501. *Vermont.* — *Lester v. Pittsford*, 7 Vt. 158; *Cavendish v. Troy*, 41 Vt. 99; *Stowe v. Bishop*, 58 Vt. 498, 56 Am. Rep. 569.

West Virginia. — *Welch v. Franklin Ins. Co.*, 23 W. Va. 288.

Wisconsin. — *Cole v. Clarke*, 3 Wis. 323; *Veerhusen v. Chicago, etc., R. Co.*, 53 Wis. 689; *Neilson v. Chicago, etc., R. Co.*, 58 Wis. 516.

"Witnesses skilled in any art or science may be called to say what in their judgment would be the result of certain facts submitted to their consideration, but not to give an opinion on things with which a jury may be supposed to be equally well acquainted." *Ramadge v. Ryan*, 9 Bing. 333, 23 E. C. L. 296.

1. **Common or Uncommon Subject-matter Not the Test.** — *Taylor v. Monroe*, 43 Conn. 36.

2. **Superior Judgment Not the Test.** — *State v. Watson*, 65 Me. 74; *New England Glass Co. v. Lovell*, 7 Cush. (Mass.) 319.

3. *Ferguson v. Hubbell*, 97 N. Y. 507, 49 Am. Rep. 544. See also *Van Wycklen v. Brooklyn*, 118 N. Y. 424; *Young v. Johnson*, 123 N. Y. 226; *Hoffman v. Delaware, etc., Canal Co.*, 16 N. Y. App. Div. 572.

4. **Test of Admissibility** — *England.* — *Ramadge v. Ryan*, 9 Bing. 333, 23 E. C. L. 296.

Connecticut. — *Taylor v. Monroe*, 43 Conn. 36. *Illinois.* — *Chicago v. McGiven*, 78 Ill. 347.

Maine. — *State v. Watson*, 65 Me. 74.

Massachusetts. — *New England Glass Co. v. Lovell*, 7 Cush. (Mass.) 319.

New York. — *People v. Rector*, 19 Wend. (N. Y.) 569; *Hoffman v. Delaware, etc., Canal Co.*, 16 N. Y. App. Div. 572.

West Virginia. — *State v. Musgrave*, 43 W. Va. 690, citing 7 AM. AND ENG. ENCYC. OF LAW (1st ed.) 493.

5. "The subjects to which this kind of evidence is applicable are not confined to classed and specified professions. It is applicable wherever peculiar skill and judgment, applied to a particular subject, are required to explain results or trace them to their causes." *M'Fadden v. Murdock*, 111 Rep. 1 E. C. L. 211.

6. *Hoffman v. Delaware, etc., Canal Co.*, 16 N. Y. App. Div. 572.

7. **Speculative Data** — *Alabama.* — *Storey v. Union Bank*, 34 Ala. 637.

Arkansas. — *Ebos v. State*, 34 Ark. 520.

may be asked, in the presence of a given effect, of what causes it either was or might be the result, the hypothesis thus assumed leaving the truth or falsity open to the jury.¹

Ethical Questions. — The opinion of experts not founded on science, but on a mere question of morals or duty, is inadmissible.²

Abstract Questions of Science. — The opinions of experts are likewise inadmissible upon mere abstract questions of science having no proper relation to the facts upon which the jury is to pass.³ But it is no longer a valid objection that the expert is called upon to give an opinion upon the precise question which the jury is to determine.⁴

V. QUALIFICATIONS OF EXPERTS — 1. Expert Defined. — An expert is one possessing, in regard to a particular subject or department of human activity, knowledge not acquired by ordinary persons;⁵ or, as defined by a scientific writer, "an expert is one who can see all sides of a subject."⁶

Maine. — *Heald v. Thing*, 45 Me. 392; *State v. Pike*, 65 Me. 111.

Maryland. — *Walker v. Rogers*, 24 Md. 237.

Massachusetts. — *Com. v. Piper*, 120 Mass. 185.

Michigan. — *People v. Hare*, 57 Mich. 505.

Mississippi. — *Anonymous*, 37 Miss. 54.

Missouri. — *J. D. Marshall Livery Co. v. McKelvy*, 55 Mo. App. 240.

New Hampshire. — *Spear v. Richardson*, 37 N. H. 23.

New York. — *Lee v. Bennett*, 1 How. App. Cas. (N. Y.) 187; *Strohm v. New York, etc., R. Co.*, 96 N. Y. 305; *Brush v. Long Island R. Co.*, 10 N. Y. App. Div. 535.

Pennsylvania. — *Sinnott v. Mullin*, 82 Pa. St. 333.

Texas. — *Cooper v. State*, 23 Tex. 331.

Wisconsin. — *Vosburg v. Putney*, 80 Wis. 529.

Illustrations — Fit of Passion. — *Ebos v. State*, 34 Ark. 520.

Impregnation. — *Anonymous*, 37 Miss. 54.

Abstract Questions. — "Hypothetical questions are allowed to be put to experts; but the hypothesis upon which they are examined must be based upon facts admitted or established by the evidence, or which, if controverted, the jury might legitimately find on weighing the evidence. Purely imaginary or abstract questions, assuming facts or theories for which there is no foundation in the evidence, are not admissible as matter of right." *People v. Augsbury*, 97 N. Y. 501. But compare *Jamison v. New York, etc., R. Co.*, 11 N. Y. App. Div. 50.

1. Causative Hypothesis. — *Moyer v. New York Cent., etc., R. Co.*, 98 N. Y. 645.

2. Ethical Questions. — *Grand Rapids, etc., R. Co. v. Ellison*, 117 Ind. 234; *Allen v. Burlington, etc., R. Co.*, 57 Iowa 623; *Missouri Pac. R. Co. v. Mackey*, 33 Kan. 299; *Raymond v. Lowell*, 6 Cush. (Mass.) 524; *Nowel v. Wright*, 3 Allen (Mass.) 166, 80 Am. Dec. 62; *Ramadge v. Ryan*, 9 Bing. 333, 23 E. C. L. 296.

"Hence the opinion of even physicians that no sane man in a Christian country would commit suicide, not being founded on the science or phenomena of the mind, but rather a theory of morals, religion, and future responsibility, is not evidence." *St. Louis Mut. L. Ins. Co. v. Graves*, 6 Bush (Ky.) 290.

In *Ramadge v. Ryan*, 9 Bing. 333, 23 E. C. L. 296, it was said: "If in this cause any

specific rules of the medical profession had been given in evidence, the defendant perhaps might have been allowed to show that the plaintiff, by violating those rules, had rendered himself unworthy of the countenance of his brethren. But the question here was whether a physician, in refusing to consult with the plaintiff, had honorably and faithfully discharged his duty to the medical profession. The answer to that might depend altogether on the temper and peculiar opinions of the individual witness, and was a point on which the jury were as capable of forming a judgment as the witness himself."

3. "Whatever diversity of opinion there may have been in relation to the admissibility of the opinions of experts upon questions of art or science, it is agreed on all hands that such opinions, to be admissible, must always be predicated upon and relate to the facts established by the proofs in the case. Mere professional opinions upon abstract questions of science, having no proper relation to the facts upon which the jury are to pass, evidently tend to lead their minds away from the true and real points of inquiry, and should, therefore, always be excluded." *Champ v. Com.*, 2 Metc. (Ky.) 17, 74 Am. Dec. 388.

4. *Transportation Line v. Hope*, 95 U. S. 297; *Atchison, etc., R. Co. v. Myers*, 63 Fed. Rep. 793; *Van Wycklen v. Brooklyn*, 118 N. Y. 424; *Fox v. Buffalo Park*, 21 N. Y. App. Div. 321.

5. Expert Defined — England. — *Van der Donckt v. Thellusson*, 8 C. B. 812, 65 E. C. L. 812.

Alabama. — *Tullis v. Kidd*, 12 Ala. 648; *Mobile L. Ins. Co. v. Walker*, 58 Ala. 290.

Georgia. — *Everett v. State*, 62 Ga. 65.

Michigan. — *McEwen v. Bigelow*, 40 Mich. 215.

New Hampshire. — *Jones v. Tucker*, 41 N. H. 546; *Dole v. Johnson*, 50 N. H. 452.

New York. — *Bearss v. Copley*, 10 N. Y. 93; *Robertson v. Knapp*, 35 N. Y. 91; *Roberts v. Johnson*, 58 N. Y. 613; *Nelson v. Sun Mut. Ins. Co.*, 71 N. Y. 453; *Haas v. Green*, 7 Misc. Rep. (N. Y. C. Pl.) 176.

Pennsylvania. — *Ardesco Oil Co. v. Gilson*, 63 Pa. St. 146.

Rhode Island. — *Buffum v. Harris*, 5 R. I. 243.

Vermont. — *State v. Phair*, 48 Vt. 366; *Dean v. McLean*, 48 Vt. 412, 21 Am. Rep. 130.

6. Scientific Definition. — *Dr. George M.*

2. Sources of Knowledge. — This knowledge may be derived from experience¹ or from study and direct mental application.² But mere casual observation³ or desultory and superficial reading on a subject⁴ will not constitute one an

Beard, "The Scientific Study of Human Testimony," 13 Popular Science Monthly 328.

1. Knowledge from Experience Received — *California*. — Toomes's Estate, 54 Cal. 309, 35 Am. Rep. 83.

Illinois. — Emrick v. Merriman, 23 Ill. App. 24.

Maryland. — Baltimore, etc., Turnpike Road Co. v. Leonhardt, 66 Md. 70.

Massachusetts. — Lincoln v. Barre, 5 Cush. (Mass.) 590.

Nebraska. — Sioux City, etc., R. Co. v. Finlayson, 16 Neb. 578, 49 Am. Rep. 724.

New York. — Slater v. Wilcox, 57 Barb. (N. Y.) 604; Clark v. Bruce, 12 Hun (N. Y.) 274.

Pennsylvania. — Monongahela Water Co. v. Stewartson, 96 Pa. St. 436.

Vermont. — Fairchild v. Bascomb, 35 Vt. 398; Mason v. Fuller, 45 Vt. 29; Wright v. Williams, 47 Vt. 222.

"When the subject under investigation requires special skill and knowledge, they [the jurors] may be aided by the opinion of persons whose pursuits or studies or experience have given them a familiarity with the matter in hand." Baltimore, etc., Turnpike Road Co. v. Leonhardt, 66 Md. 77.

2. Knowledge from Study Sufficient — *England*. — Collier v. Simpson, 5 C. & P. 73, 24 E. C. L. 219.

Georgia. — Central R. Co. v. Mitchell, 63 Ga. 173, 1 Am. & Eng. R. Cas. 145.

Illinois. — Siebert v. People, 143 Ill. 571; Citizens' Gas Light, etc., Co. v. O'Brien, 19 Ill. App. 231.

Indiana. — Fort Wayne v. Coombs, 107 Ind. 75, 57 Am. Rep. 82.

Massachusetts. — Swett v. Shumway, 102 Mass. 365; Howard v. Great Western Ins. Co., 109 Mass. 384.

Mississippi. — Caleb v. State, 39 Miss. 721.

New Hampshire. — Taylor v. Grand Trunk R. Co., 48 N. H. 304, 2 Am. Rep. 229; State v. Wood, 53 N. H. 484.

North Carolina. — State v. Clark, 12 Ired. L. (34 N. Car.) 151; Melvin v. Easley, 1 Jones L. (46 N. Car.) 386, 62 Am. Dec. 171.

South Carolina. — State v. Terrell, 12 Rich. L. (S. Car.) 321.

Virginia. — Mendum v. Com., 6 Rand. (Va.) 794.

To the contrary see Soquet v. State, 72 Wis. 659.

Illustrations — Engineering. — In Central R. Co. v. Mitchell, 63 Ga. 173, objection was made to the testimony of the witness, an engineer, as to what the books put down as the most valuable class of earth for embankments, or cuts, as to the character of slopes, of banks, etc., what the authorities give as the rule of construction of walls of cuts, and similar testimony. He testified: "The rules for construction of cuts, etc., which I have given are found in books on engineering. I give these rules solely from what I recollect of the books. These rules are found in Mahan, Gillespie, and Gilmore, and many others." The court said: "The expert was competent to testify. Every expert derives much of his knowledge

from books as well as from experience, and can give his opinion based upon the knowledge acquired from both sources."

Effect of Strychnine. — "The character and effects of strychnia were properly inquired into from the physicians. It is but recently known [1859] as a poison, and the most experienced physicians have had little opportunity of judging of its effects on the human system from cases within their practice. Five medical men were examined, only two had had the opportunity of testing its effects. But they all concurred in pronouncing that the cases under their treatment and observation at this time were affected by strychnia. * * *

But a medical man having acquired his knowledge from books, lectures, and oral instruction is prepared to decide upon the character of the poison and its effects, and his title to credit both scientifically and otherwise can be judged of from his examination by the jury. So, too, it seems to me that Cowen, J., in Norman v. Wells, 17 Wend. (N. Y.) 162, put his finger on the very matter now before us when, speaking of the qualification of scientific men to give their opinions, he said: 'It must in its very nature be confined to scientific men, extensive and trained observers, deriving skill from professional experience or something in the nature of it.' What is this something in the nature of it? Must it not be education in the particular before the court which enables one by previous training to speak as accurately of the matter as observation would do?" State v. Terrell, 12 Rich. L. (S. Car.) 321.

As to Materia Medica. — "Sir H. Halford, the president of the College of Physicians, was called. He stated that he considered the medicine proper, and that it was sanctioned by books of authority. He stated that the writings of Dr. Merriman and Sir Astley Cooper were considered of authority in the medical profession. Bompas, Serjt.: I submit that medical books cannot be cited — more especially those of living authors. Sir Astley Cooper and Dr. Merriman might be called. Wilde, Serjt.: I wish to show that these books are acted upon by persons in the medical profession. Tindal, C. J.: I do not think that the books themselves can be read, but I do not see any objection to your asking Sir Henry Halford his judgment and the grounds of it, which may be, in some degree, founded on books, as a part of his general knowledge." Collier v. Simpson, 5 C. & P. 73, 24 E. C. L. 219.

3. Casual Observation Insufficient — *California*. — Goldstein v. Black, 50 Cal. 462.

Kansas. — Missouri Pac. R. Co. v. Finley, 38 Kan. 550.

Massachusetts. — Perkins v. Stickney, 132 Mass. 217.

Michigan. — People v. Millard, 53 Mich. 63.

New Hampshire. — Page v. Parker, 40 N. H. 47; Ellingwood v. Bragg, 52 N. H. 488.

New Jersey. — Wheeler, etc., Mfg. Co. v. Buckhout, 60 N. J. L. 102.

4. Desultory Reading Insufficient. — Missouri Pac. R. Co. v. Finley, 38 Kan. 550; People v. Millard, 53 Mich. 76.

expert therein. Thus the editor of a stock journal who has read extensively on the disease known as foot-rot is not thereby qualified to testify as to whether or not that disease is contagious.¹ And a lawyer is not competent to testify concerning the symptoms and causes of Texas fever merely by reading on the subject and hearing in court the testimony of experts.²

3. Degree of Expertness Required.—It is not required that the expert testimony should be the most perfect obtainable,³ nor that the witness should at the time be actively engaged in the occupation concerning whose lore he has been called to testify,⁴ though long abandonment thereof may be a sufficient ground for exclusion.⁵

1. Editor of Stock Journal Testifying as to Disease Known as "Foot Rot."—*Dole v. Johnson*, 50 N. H. 452. The court in this case concludes thus: "In view of all these considerations, and of the evidence reported by the case submitted to us, we are strongly of the opinion that the witness, having confessedly no veterinary skill nor practice, having also no professional education, not being in any true sense a man of science, because not instructed and prepared by a long course and habit of study concerning the diseases of domestic animals, did not possess the legal qualifications of an expert."

2. Lawyer Testifying Relative to "Texas Fever."—*Missouri Pac. R. Co. v. Finley*, 38 Kan. 550.

3. General Rule as to Degree of Expertness—United States.—Congress, etc., *Spring Co. v. Edgar*, 99 U. S. 645; *Mutual F. Ins. Co. v. Alvord*, 61 Fed. Rep. 752.

Iowa.—*State v. Cole*, 63 Iowa 695; *Hyde v. Woolfolk*, 1 Iowa 159; *State v. Hinkle*, 6 Iowa 380.

Massachusetts.—*Tucker v. Massachusetts Cent. R. Co.*, 118 Mass. 546; *Lawrence v. Boston*, 119 Mass. 126; *Perkins v. Stickney*, 132 Mass. 217.

Minnesota.—*Beckett v. Northwestern Masonic Aid Assoc.*, 67 Minn. 298.

New Hampshire.—*Dole v. Johnson*, 50 N. H. 452.

North Carolina.—*State v. Secrest*, 80 N. Car. 450; *Yates v. Yates*, 76 N. Car. 142.

Virginia.—*Richmond Locomotive Works v. Ford*, 94 Va. 627.

"But to say that none shall be permitted to give their opinions except those of the highest professional skill or those who had given their lives to chemical experiments would, in this country at least, render it impossible in most cases to find the requisite skill and ability." *State v. Hinkle*, 6 Iowa 380.

4. Witness Need Not Be Engaged in the Occupation at Time Testimony Given.—See *Smith v. Library Board*, 58 Minn. 112, citing 7 AM. AND ENG. ENCYC. OF LAW (1st ed.), 512. "But it by no means follows that one who is not in the actual practice of medicine may not be skilled in the science, so as to be able to give correct opinions as to the existence or cause of disease. Clinical practice is doubtless a most efficient mode of acquiring such knowledge, by enabling the practitioner, from his own observation, to verify the assertions or theories of others, or to correct errors into which they may have fallen; and it may be that medical opinions not brought to this test are not worthy of much reliance as the basis of the

verdict of a jury. But if one asserts an ability to give correct opinions upon any art or science, from an acquaintance with the subject, acquired by observation and study, we cannot perceive on what ground he can be rejected because he has not been in the actual practice of his profession. This circumstance, as already observed, may deprive his testimony of much weight with the jury, but is no ground for excluding it." *Tullis v. Kidd*, 12 Ala. 648.

"Dr. T. had, for more than twenty years of his life, been a practicing physician, and, though he had retired as a general practitioner, was not wholly separated from practice at the time of the trial. He still practiced some in his own family. But irrespective of this last circumstance, we think he was an expert relatively to the special subject-matter on which he was examined. One who had ever studied anatomy and physiology sufficiently to become a physician would not be likely to err in forming opinions upon such questions as Dr. T. was called upon to answer, such as the force by which blood would flow from a wound in the throat, made by cutting while in life or after death; whether the blood would be likely to touch and stain the clothing of the person who made the incision; what artery would have been severed by the gash described; whether the deceased could have inflicted it upon herself, and with what result as to the jetting out or spurring of the blood; what differences in the effects would have ensued from different positions of the body; what degree of force in a blow would be required to suspend animation so as to arrest the flow of blood, etc." *Everett v. State*, 62 Ga. 65.

In *Bearss v. Copley*, 10 N. Y. 93, the witness had been engaged in the tanning business over four years and had done all kinds of work in the process of tanning, but at the time when he was called was studying law. His opinion was held admissible as to the cause of black rot in hides in the process of tanning.

5. Effect of Long Abandonment.—In *McEwen v. Bigelow*, 40 Mich. 215, the witness had been a plumber, but had abandoned that business twenty years before. The court said: "This was a long time to be out of a business that must have changed so greatly in that time. * * * Presumptively there must, in a business like this, be much better expert evidence than that of a person so long out of the business. The court is not obliged to receive the evidence of every person called who may appear to have some little knowledge of the business, but who has no personal knowledge of the matters in controversy."

Expert in Another Occupation. — An expert in one occupation is competent to testify as an expert in another and analogous one where the first is such as to give him the opportunity of acquiring superior knowledge and experience in matters of skill and science connected with the other.¹ But the rule will not be so extended as to include a remote and disconnected vocation,² and any application of it is condemned by high scientific authority.³

4. Summary. — On the whole it can hardly be said that there is any well-

1. Expert in Another and Related Occupation —
United States. — Pope v. Filley, 9 Fed. Rep. 65.
Alabama. — Barnes v. Ingalls, 39 Ala. 193.
Mobile, etc., R. Co. v. Blakely, 59 Ala. 471;
Nelson v. Wood, 62 Ala. 175.

Georgia. — Walker v. Fields, 28 Ga. 237.

Iowa. — Kilbourne v. Jennings, 38 Iowa 533.
Louisiana. — Langfitt v. Clinton, etc., R. Co., 2 Rob. (La.) 217.

Massachusetts. — Gossler v. Eagle Sugar Refinery, 103 Mass. 331.

Michigan. — Detroit, etc., R. Co. v. Van Steinburg, 17 Mich. 99; Grand Rapids, etc., R. Co. v. Huntley, 38 Mich. 537, 31 Am. Rep. 321.

Nebraska. — Omaha Auction, etc., Co. v. Rogers, 35 Neb. 61.

New York. — Murphy v. New York Cent. R. Co., 66 Barb. (N. Y.) 125; Pullman v. Corning, 9 N. Y. 93.

North Carolina. — Sikes v. Paine, to Ired. L. (32 N. Car.) 280, 51 Am. Dec. 389.

Pennsylvania. — Ardesco Oil Co. v. Gilson, 63 Pa. St. 146; U. S. v. Tarr, 4 Phila. (Pa.) 405, 18 Leg. Int. (Pa.) 214.

Vermont. — James v. Hodsden, 47 Vt. 127.

Wisconsin. — Brabbits v. Chicago R. Co., 38 Wis. 289.

Ambrotypist on Photography. — An ambrotypist and daguerreotypist, whose business is closely connected with that of the photograph painter, is competent to give his opinion as an expert as to whether photographs are well executed. Barnes v. Ingalls, 39 Ala. 193.

Stationary Engineer on Valve of Locomotives. — The witness was employed to manage an engine in a manufactory, but was not a locomotive engineer. His opinion was held admissible as to the effect of a leaky throttle valve on the safety of a locomotive. Brabbits v. Chicago, etc., R. Co., 38 Wis. 289.

Mail Agent on Checking Train. — Detroit, etc., R. Co. v. Van Steinburg, 17 Mich. 99.

Scientist on Motion of Trains. — Murphy v. New York Cent. R. Co., 66 Barb. (N. Y.) 125.

Steam Fitter on Strength of Iron. — The question was whether the iron of which a still was composed was of sufficient strength. The witness was a steam fitter. He had no knowledge of stills, except working with them and fitting them up after they were put up. His opinion was received. Ardesco Oil Co. v. Gilson, 63 Pa. St. 146.

2. Clerk in Iron Foundry. — "A clerk or book-keeper, although he may have been long employed in an iron foundry, and may have seen the business conducted, is not competent to testify as an expert unless he shows by his testimony that he has given the subject of examining and testing iron special attention and study, and has had experience in that art. If it appears that he relies upon the decisions of others, or upon the marks on the iron, he is

not an expert. Accordingly, the testimony of L., in so far as he gives his opinion as to the quality of the iron or testifies as to the customary mode of determining the quality, is excluded." Pope v. Filley, 9 Fed. Rep. 65.

House Painter on Construction of Building. — "A painter, in virtue of the special knowledge and skill acquired in his employment of painting, could learn nothing of the proper mode of framing together materials for the construction of a building. Whatever knowledge he acquires respecting carpenter and joiner work must be gained from mere observation and attention. But any observant man whose attention has been specially directed to buildings in process of erection and erected could have equal means of knowledge and could be equally qualified to give an opinion. But the opinion of a witness is not to be received merely because he has had some experience, or greater opportunity of observation than others, unless the experience relates to matters of skill and science. * * * It is true the witness in question could tell whether a joint was a close or an open one. And any observant person without special instruction or skill could do as much. But it is apparent that to admit as an expert every person who had availed himself of an opportunity to observe a structure, and who had acquired a knowledge as to the closeness of the joints, would overturn entirely the rule respecting expert testimony." Kilbourne v. Jennings, 38 Iowa 533.

3. Rule Permitting Testimony Concerning Another Branch Criticised. — Dr. George M. Beard, "The Scientific Study of Human Testimony," 13 Popular Science Monthly 328. The author says: "Expertness in one branch of science not only does not qualify, but in various ways may disqualify, one to be an expert in another branch. That skill in mathematics unfits one for the successful study of various other specialties, was pointed out long ago, both by Abercrombie and Hamilton; but the antagonism of specialties may be traced, under recent experience, yet more minutely, for it is found that eminence in physics, or chemistry, or astronomy, may thoroughly unfit one for the study of physiology; and within a few years some of the greatest blunders recorded in the history of delusions have been made by naturalists, chemists, physicists, jurists, and astronomers of unquestioned honesty, real genius, and deserved eminence, making, or attempting to make, discoveries in the new and almost unexplored realm of cerebro-physiology — experiments with living human beings. The worst blunders in the world are scientific blunders — the unconscious slips of justly eminent men, who do not know that their very eminence in one sphere forbids them to undertake another."

defined standard by which to measure the qualifications of an expert,¹ and it is largely in the discretion of the trial judge to determine them.²

VI. THE VARIOUS KINDS OF EXPERTS — 1. Abstracters. — The testimony of this class of witnesses has, not as a rule, been accepted as expert evidence for the purposes for which it was offered. Thus abstracters and examiners of titles were not allowed to testify that the title to certain property was defective.³ So a title examiner was not allowed to state his opinion as to whether a certain conveyance of real estate covered, on its face, the premises in controversy.⁴ Nor is the opinion of such a witness competent evidence of the location of boundaries in a case of conflicting and doubtful lines.⁵

2. Accountants. — An accountant who has examined certain books and schedules which have been introduced in evidence may state the results of his computations therefrom not involving mere inferences.⁶ Expert accountants may also testify as to the value of a bookkeeper's services.⁷

3. Actuaries. — An experienced actuary who has made a computation thereon may testify as to the time of expiration of a certain policy of life insurance in accordance with the provisions of a statute.⁸ An actuary may also testify as to a person's probable duration of life⁹ and as to the value of annuities.¹⁰

4. Agriculturalists. — This subject is discussed in a later portion of the article.¹¹

5. Architects, Carpenters, and Builders — a. WHEN COMPETENT — (1) Generally. — Architects and builders are persons engaged in the business of planning, constructing, remodeling, and adapting buildings and other structures ;

1. No Well-defined Standard of Qualifications. — *West Chicago St. R. Co. v. Fishman*, 169 Ill. 196; *Kelley v. Richardson*, 69 Mich. 430; *Struthers v. Philadelphia, etc., R. Co.*, 174 Pa. St. 291.

"Beyond these every-day matters, known to all men, are things which most, if not all, persons can become qualified to judge by more or less opportunities of observation, local or habitual, but which require no peculiar intelligence. Then there are branches of business or occupations where some intelligence is requisite for judgment, but opportunities and habits of observation must be combined with some practical experience. This seems to be the beginning or lower grade of what may be properly termed 'experts,' a word meaning only the acquisition of certain habits of judgment based on experience or special observation. And the scale rises as the qualifications become nicer and require greater capacity or knowledge and experience, until it reaches scientific observers and practitioners in arts and sciences requiring peculiar and thorough special training." *Kelley v. Richardson*, 69 Mich. 430.

2. Discretion of Trial Judge — Connecticut. — *Tyler v. Todd*, 36 Conn. 218.

Indiana. — *Forgey v. Cambridge City First Nat. Bank*, 66 Ind. 123.

Iowa. — *State v. Cole*, 63 Iowa 695.

Massachusetts. — *Lincoln v. Barre*, 5 Cush. (Mass.) 590.

New York. — *Nelson v. Sun Mut. Ins. Co.*, 71 N. Y. 453.

Pennsylvania. — *Com. v. Gibbons*, 3 Pa. Super. Ct. Rep. 408.

Texas. — *Heacock v. State*, 13 Tex. App. 97.

"There must be always a preliminary inquiry, by the court, as to the fact of the wit-

ness's science and skill, and his capacity to form an opinion upon the subject-matter; and this must often depend upon circumstances of so peculiar a nature and character that it is difficult to lay down any general rule to guide the decision of the judge in such a case." *Lincoln v. Barre*, 5 Cush. (Mass.) 590.

3. Abstracters of Titles. — *Evans v. Gerry*, 174 Ill. 595, the court saying: "A number of attorneys and examiners of real estate titles were offered by appellee to show the title to appellant's property was defective. This was improper. The sufficiency of any title to real estate property is a question of law, and not of fact to be proven by the opinions of witnesses. Where, on a bill for specific performance, the defendant alleges defective title to plaintiff's property, it is a question for the trial court, upon a hearing, to determine from the terms of the contract, and also as a question of law, whether such title is sufficient."

4. Norment v. Fastnacht, 1 MacArthur (D. C.) 515, where the court observed that "experts cannot be called to give their opinions on a subject of this character."

5. St. Louis Public Schools v. Risley, 40 Mo. 356.

6. Accountants. — *Jordan v. Osgood*, 109 Mass. 457, 12 Am. Rep. 731.

7. Shattuck v. Train, 116 Mass. 296; *Scott v. Lilienthal*, 9 Bosw. (N. Y.) 224.

8. Actuaries. — *Greenfield v. Massachusetts Mut. L. Ins. Co.*, 47 N. Y. 430.

9. Rowley v. London, etc., R. Co., L. R. 8 Exch. 221.

10. Rowley v. London, etc., R. Co., L. R. 8 Exch. 221; *Heathcote v. Paignon*, 2 Bro. C. C. 167. Compare *Ex p. Thistlewood*, 19 Ves. Jr. 236.

11. See infra, this section, *Farmers and Stock Raisers*.

and if their experience and observation are sufficient, they are qualified to testify as experts.¹

Effect of Vibrations. — Hence they may give their opinions as experts regarding the effect on a building of vibrations caused by machinery.²

Effect of Heat. — Builders are competent to express opinions as to the effect of heat on mortar and brick in walls of burned buildings.³

Character of Work. — An architect may say whether work on a building complies with the contract,⁴ and a cabinet maker whether work in his line was well done.⁵ So the opinion of a carpenter and joiner regarding the safety and excellence of a turntable was admitted;⁶ and likewise the opinion of a carpenter, skilled in wood construction, as to the character of work and material in certain cross-arms in telephone poles.⁷

Removing Debris, Etc. — Architects have been permitted to give an opinion as to the length of time required for the removal of *débris* preparatory to rebuilding⁸ and as to the speed with which brick walls may be safely constructed.⁹

What Is a Brick House. — A builder's opinion is admissible as to whether a certain structure would be called a brick house.¹⁰

Identity of Materials. — And skilled woodworkers may say whether two pieces of wood are parts of the same timber.¹¹

(2) *As to Value and Cost of Building.* — Architects and builders are competent witnesses as to the value, in their opinion, of a building,¹² and also as to the cost of construction¹³ and reconstruction,¹⁴ especially if they have seen the plans.¹⁵ In an action by the owner of residence property for damages on

1. **Architects, Carpenters, and Builders.** — *Turner v. Haar*, 114 Mo. 335; *Bombrake v. Board of Com'rs, etc.*, 141 Ind., *citing* 7 AM. AND ENG. ENCYC. OF LAW (1st ed.) 490-516.

2. 'What effect the vibrations caused by running the machinery on the third floor may have had in weakening the building and rendering it insecure and dangerous was certainly a subject beyond the general knowledge of mankind and a proper one for opinion evidence.' *Turner v. Haar*, 114 Mo. 345.

3. *Dixon v. Wachenheimer*, 9 Ohio Cir. Ct. Rep. 401, 6 Ohio Cir. Dec. 380.

4. **Whether Work Complies with Contract.** — *Tucker v. Williams*, 2 Hilt. (N. Y.) 562.

5. *Ward v. Kilpatrick*, 85 N. Y. 413, 39 Am. Rep. 674.

6. *Fitts v. Cream City R. Co.*, 59 Wis. 323.

7. *Line v. Mason*, 67 Mo. App. 279.

8. 'It is claimed that the referee erred in overruling the objections to the question asked the witness F., as follows: 'How long, in your opinion, would it have taken to remove the debris, to permit the rebuilding to commence?' The witness was an architect, and had sworn that he had a practical personal experience in removing debris of buildings destroyed by fire; had himself had *débris* removed, and had seen it removed by others. We think that he was shown competent to answer the question.' *Chamberlain v. Dunlop*, (Supreme Ct.) 8 N. Y. Supp. 125.

9. **Speed of Construction.** — 'It is claimed that the referee erred in overruling the objections to the question asked the witness F., 'Whether it would have been safe to run up the brick walls in six weeks.' F. was an architect, and had testified that he had experience in erecting a large number of buildings, and had been in the habit of observing the length of time required to procure materials and to do the work. We think that he was shown compe-

tent to answer the question.' *Chamberlain v. Dunlop*, (Supreme Ct.) 8 N. Y. Supp. 125.

10. *Mead v. North-Western Ins. Co.*, 7 N. Y. 530, 3 Bennett's Fire Ins. Cas. 483.

11. *Com. v. Choate*, 105 Mass. 451.

12. **Opinions as to Value.** — *Tebbetts v. Haskins*, 16 Me. 283; *Hills v. Home Ins. Co.*, 129 Mass. 345; *Woodruff v. Imperial F. Ins. Co.*, 83 N. Y. 133. The court in the first case said: 'In particular branches of trade or manufacture, we hold that the opinions of persons skilled in these respective matters should be received, as well as to the value as the fidelity and excellence of the work. They are all open to cross-examination, and the reasons of their opinion may be required. If opposing testimony be introduced, it is the office of the jury at last to judge which of them is entitled to most weight. We consider that there was no error in the judge in admitting the testimony of the master builders as to their opinion and estimate of the probable expense of erecting the house as erected by the plaintiff. For it all resulted in helping the jury to determine how much he deserved to receive.'

13. **Cost of Construction.** — *Woodruff v. Imperial F. Ins. Co.*, 83 N. Y. 133; *Joske v. Pleasants*, 15 Tex. Civ. App. 433.

14. **Cost of Reconstruction.** — *Cleveland, etc., R. Co. v. McKelvey*, 12 Ohio Cir. Ct. Rep. 426, 5 Ohio Cir. Dec. 561.

15. *Joske v. Pleasants*, 15 Tex. Civ. App. 433; *Cleveland, etc., R. Co. v. McKelvey*, 12 Ohio Cir. Ct. Rep. 426, 5 Ohio Cir. Dec. 561. In the former case the court observed: 'In the third assignment it is claimed that it was error to permit the witness Alvord to testify, over objection of defendants, that in his opinion or judgment it would cost about \$42,000 to erect the building, the objection being that the testimony was merely

account of a nuisance, an architect familiar with the neighborhood was held to have been properly asked if the nuisance depreciated the value of houses therein; ¹ and probable depreciation of burned buildings during the time they had stood after the fire is admissible as a circumstance to be considered in fixing their actual cost. ²

(3) *As to Durability — Strength of Walls.* — A builder may give his expert opinion as to whether the walls of a building were sufficient to sustain it. ³

Strength of Floor. — Builders have been held competent to give an opinion as to whether the floor and joists of a grand stand in a park were sufficiently strong to endure the strain which they were intended to bear. ⁴

Strength of Timbers. — The effect of a knot or cross-grain upon the strength of a piece of timber, ⁵ the character and strength of hemlock as a scaffolding material, ⁶ the strength, toughness, and durability of certain anchoring strips, ⁷ and the length of time bridge timbers have been decayed, ⁸ are all proper subjects of expert testimony by carpenters and builders.

Safety of Elevator. — A carpenter was held to have been properly permitted to answer questions concerning the safety of an elevator, ⁹ and one who had some knowledge of and experience with elevators was allowed to testify that a certain device employed in a particular elevator was not as good as others in common use, though the witness had never used it. ¹⁰

b. WHEN INCOMPETENT. — The opinion of an architect is, of course, inadmissible where the question is not one of science or skill, ¹¹ as, for example, whether in a murder case a fatal blow could have been struck by one of the parties whose relative positions are stated, ¹² or whether glass placed in a sidewalk to admit light to the area below is unsafe on account of a smooth or slippery surface. ¹³ So in an action on a building contract an architect's answer to the question whether extra work which delayed the building was of such a character as to render completion in time impossible was held to have been properly excluded. ¹⁴ And carpenters are not competent as experts to say

the opinion of the witness, and he should have been required to have given the figures, instead of his opinion. The witness was a contractor and builder, and as such had special knowledge as to the cost of constructing buildings, and, having seen the plans and specifications, could, as an expert, testify what would have been the actual cost of its construction."

1. *Gauntlett v. Whitworth*, 2 C. & K. 720, 61 E. C. L. 720.

2. *Cleveland, etc., R. Co. v. McKelvey*, 12 Ohio Cir. Ct. Rep. 426, 5 Ohio Cir. Dec. 561.

3. *Durability of Structures, etc.* — *Continental Ins. Co. v. Pruitt*, 65 Tex. 125, the court saying: "The witness Ellis was shown to be a builder and contractor of about twelve years' experience, who had erected buildings, public and private, of like and greater dimensions. He was shown to be familiar with the construction and dimensions of the wall and other parts of the building insured by the policy sued upon, and with the material used, and we see no reason to doubt his competency to give an opinion as an expert, and especially so when the facts are stated on which the opinion is based. 1 Greenl. Ev. 440. Persons so skilled and informed have knowledge not possessed by those who have had no experience in the business which makes knowledge a necessity. Such persons may be said to be 'persons instructed by experience,' and their evidence admissible, its weight to be determined by the jury."

4. *Fox v. Buffalo Park*, 21 N. Y. App. Div.

331. See *Harley v. Buffalo Car Mfg. Co.*, 142 N. Y. 31; *Schneider v. Second Ave. R. Co.*, 133 N. Y. 583."

5. *Boettger v. Scherpe, etc.*, *Architectural Iron Co.*, 124 Mo. 87.

6. *Kuhn v. Delaware, etc., R. Co.*, 92 Hun (N. Y.) 74.

7. *Gerbig v. New York, etc., R. Co.*, 75 Hun (N. Y.) 605.

8. *Washington, etc., Turnpike Co. v. Case*, 80 Md. 36.

9. *McGonigle v. Kane*, 20 Colo. 292.

10. *Hall v. Murdock*, 114 Mich. 233.

11. *Chicago v. McGiven*, 78 Ill. 347; *People v. Rector*, 19 Wend. (N. Y.) 569.

12. *Matters of Common Knowledge Inadmissible.* — *People v. Rector*, 19 Wend. (N. Y.) 569.

13. *Safety of Sidewalk.* — "The question whether the glass was unsafe, by reason of the too great smoothness or slipperiness of its surface, was not a question of science or skill. The decision of that question required no special knowledge, and it was easily determinable by the jury, upon a sufficient description of facts pertaining to the glass, and the use of it in a sidewalk, being given by witnesses. We do not perceive why mere proof of the naked facts could not enable the jury themselves to draw the inference whether the glass was safe or unsafe." *Chicago v. McGiven*, 78 Ill. 347.

14. *Campbell v. Russell*, 139 Mass. 278.

But the testimony of contractors and builders is admissible to prove the nonexistence of

whether stone or wood is the proper material for a bridge.¹

Witness Must Know the Facts. — An architect or builder cannot be permitted to give his opinion on any subject, such as the effect which vibrations have on a building, until he has first been put in possession of all the facts.² A mere examination of a building which contains heavy machinery is insufficient to qualify a builder and contractor, without experience in the construction of such buildings, to state his opinion whether the one in question is properly constructed.³

6. Army Officers. — An army officer is a competent witness as to military usages.⁴

7. Attorneys at Law — Foreign Laws. — Attorneys and jurists familiar with a foreign system of jurisprudence are competent witnesses concerning the substance of such portions thereof as correspond to the common or unwritten element of the English law.⁵ They may also testify as to judicial usage and

a custom that the employment of an architect to make plans and designs for a building included employment to superintend its construction. *Wilson v. Bauman*, 80 Ill. 493, wherein the court said: "We are unable to perceive upon what principle the court excluded the evidence offered by the defendant to show there was no such custom. The witnesses Otis, Gregsten, and Maclin had been largely engaged in building and contracting in Chicago, and if there was such a custom they must have known it. It could not be wholly confined to architects, but must, if it existed, be just as well known to builders and contractors, without whom there could be no opportunity for the existence of the custom. The concurrence of the builder or contractor was just as essential as that of the architects. It was not to be settled by special skill or science, but by a knowledge of what the architects did under a particular form of employment, and anybody who had any experience in the matter was competent to testify."

1. *Brown v. Mohawk, etc., R. Co.*, 1 How. App. Cas. (N. Y.) 52.

2. "In this case, however, the evidence was worthless and improperly admitted, for the reason that the witnesses were not put in possession of all the facts necessary to enable them to form an intelligent opinion. The answer of one of the witnesses, 'if the vibration was great enough it would throw the building down,' forcibly illustrates the importance of the rule that requires an opinion of a witness to be predicated upon all the facts which may influence it. The question here was whether this building was reasonably safe under ordinary circumstances and conditions for the uses to which it was applied. Vibrations, such as the evidence tended to prove to have resulted from running this machinery, may and doubtless would have been more or less injurious to the most substantial building without causing the least insecurity; while if the vibration 'had been great enough it would have thrown the building down' however securely constructed. This evidence, instead of enlightening, was calculated to confuse and mislead the jury. The effort seems to have been to supply a proof of facts by use of opinion evidence, instead of proving the facts and giving the jury the benefit of the opinion of witnesses on the facts as proved." *Turner v. Haar*, 114 Mo. 335.

3. *Huber v. Jackson, etc., Co.*, 1 Marv. (Del.) 374.

4. **Army Officers.** — *Bradley v. Arthur*, 4 B. & C. 292, 10 E. C. L. 340.

5. **Attorneys at Law** — *United States*. — *Ennis v. Smith*, 14 How. (U. S.) 400; *Pierce v. Indseth*, 106 U. S. 546; *Robinson v. Clifford*, 2 Wash. (U. S.) 1.

Alabama. — *Inge v. Murphy*, 10 Ala. 885; *Walker v. Forbes*, 31 Ala. 9.

Arkansas. — *Barkman v. Hopkins*, 11 Ark. 157; *McNeill v. Arnold*, 17 Ark. 154.

California. — *McFadden v. Mitchell*, 61 Cal. 148.

Connecticut. — *Dyer v. Smith*, 12 Conn. 384.

Illinois. — *McDeed v. McDeed*, 67 Ill. 545; *Hoes v. Van Alstyne*, 20 Ill. 201.

Iowa. — *Greasons v. Davis*, 9 Iowa 219; *Crafts v. Clark*, 38 Iowa 237.

Kentucky. — *Tyler v. Trabue*, 8 B. Mon. (Ky.) 306.

Louisiana. — *Isabella v. Pecot*, 2 La. Ann. 387; *Layton v. Chalon*, 4 La. Ann. 318.

Maryland. — *Consolidated Real Estate, etc., Ins. Co. v. Cashow*, 41 Md. 59; *Wilson v. Carson*, 12 Md. 54; *Gardner v. Lewis*, 7 Gill (Md.) 377.

Massachusetts. — *Mowry v. Chase*, 100 Mass. 79; *M'Rae v. Mattoon*, 13 Pick. (Mass.) 53; *Bowditch v. Solytk*, 99 Mass. 136.

Nebraska. — *Barber v. Hildebrand*, 42 Neb. 400.

New Hampshire. — *Watson v. Walker*, 23 N. H. 471; *Emery v. Berry*, 28 N. H. 473.

New Jersey. — *Title Guarantee, etc., Co. v. Trenton Potteries Co.*, 56 N. J. Eq. 441.

New York. — *Kenny v. Clarkson*, 1 Johns. (N. Y.) 385, 3 Am. Dec. 336; *Brush v. Wilkins*, 4 Johns. Ch. (N. Y.) 506; *Matter of Roberts*, 5 Paige (N. Y.) 446.

North Carolina. — *Temple v. Pasquotank County*, 111 N. Car. 36; *Hooper v. Moore*, 5 Jones L. (50 N. Car.) 130.

Oregon. — *Code*, § 717, construed in *State v. Moy Looke*, 7 Oregon 54.

Pennsylvania. — *Dougherty v. Snyder*, 15 S. & R. (Pa.) 84, 16 Am. Dec. 520. Compare *Bolton v. Gallagher*, 170 Pa. St. 84.

Rhode Island. — *Barrows v. Downs*, 9 R. I. 449, 11 Am. Rep. 283.

Texas. — *Bryant v. Kelton*, 1 Tex. 434.

Vermont. — *Woodbridge v. Austin*, 2 Tyler (Vt.) 364, 4 Am. Dec. 740.

practice, in a foreign¹ and even the domestic jurisdiction.² But in *Connecticut* it was held that the construction of a statute of that state could not be shown by the testimony of a local lawyer as to the practice under it.³

8. Bankers. — One who is a bank officer, and engaged in banking, is a competent witness as to the genuineness of a bank bill⁴ or a treasury note.⁵ Indeed, authority is not wanting that others than bankers, and any witness familiar with banknotes, may give opinions as to whether or not they are counterfeit.⁶ It has also been held that a witness need not be an expert in banking in order to testify regarding the usages thereof.⁷

9. Blacksmiths. — Certain horseshoes having been exhibited on the trial, the opinion of a blacksmith was admitted as to whether they had been prepared for summer or for winter use.⁸

10. Botanists and Gardeners. — A botanist⁹ and also a gardener¹⁰ may testify as to the damage to vegetation caused by quick ovens of brick kilns. A gardener may also state his opinion as to whether certain land requires drainage in order to fit it for cultivation.¹¹ So a landscape gardener familiar with the land in question may state for what it is most suitable.¹² But of course an expert gardener's testimony is admissible only where relevant, and hence in a controversy over the use of guano the witness cannot be asked regarding his knowledge of the use of that and other fertilizers, the latter not being in issue.¹³

11. Brakemen. — This question is treated elsewhere in this article.¹⁴

12. Brickmakers. — The proper way of placing tile in a kiln for burning and the effect of placing it flatwise instead of upon end are permissible subjects of opinion evidence on the part of a brick and tile maker.¹⁵

13. Brokers. — A stockbroker may testify as to the course of business of bankers in the city where he lives,¹⁶ and also as to the market value of shares of stock.¹⁷

14. Carpenters. — Reference is here made to another part of this article,

1. *Mowry v. Chase*, 100 Mass. 79.

2. *Clussman v. Merkel*, 3 Bosw. (N. Y.) 402, the court saying: "When the services actually performed and the circumstances under which they were performed have been shown, the proper proof of their value is obvious. It is by the evidence of those acquainted with such services, and having knowledge of their value, or of the usual and customary charges, where they are not fixed by law."

3. In *Gaylor's Appeal*, 43 Conn. 82, the appellant offered on the trial to prove by an attorney and counsellor at law the practice and usage regarding the execution of wills, with respect to the witnesses thereto signing their names in the presence of each other, for the purpose of showing what the law was, but the court rejected the testimony. The appellate court said: "The evidence was offered as bearing upon a question of law, and not upon any question of fact which the jury were to pass upon. The construction of the statute was a matter for the court, and not for the jury. In construing the statute the judge might, had he chosen to do so, have called to his aid the wisdom and experience of eminent counsel, but he was not bound to do it, and his refusal to do so is not erroneous."

4. *Bankers as Expert Witnesses.* — *May v. Dorsett*, 30 Ga. 116; *Hess v. State*, 5 Ohio 5, 22 Am. Dec. 767; *State v. Hooper*, 2 Bailey L. (S. Car.) 37.

5. *Atwood v. Cornwall*, 28 Mich. 336, 15 Am. Rep. 219.

6. *Counterfeiting May Be Proved by Opinion of*

Experts. — *Watson v. Cresap*, 1 B. Mon. (Ky.) 195; *State v. Cheek*, 13 Ired. L. (35 N. Car.) 114; *State v. Harris*, 5 Ired. L. (27 N. Car.) 287.

7. *Bank Usages.* — *Griffin v. Rice*, 1 Hilt. (N. Y.) 184.

8. *Blacksmiths.* — *Evarts v. Middlebury*, 53 Vt. 626.

9. *Botanists and Gardeners.* — *Salvin v. North Brancepeth Coal Co.*, L. R. 9 Ch. 705.

10. *Vandine v. Burpee*, 13 Met. (Mass.) 288, 46 Am. Dec. 733.

11. *Buffum v. Harris*, 5 R. I. 243.

12. *Chandler v. Jamaica Pond Aqueduct Corp.*, 125 Mass. 544.

13. *Young v. O'Neal*, 57 Ala. 566.

14. See *infra*, this title, *The Various Subjects of Expert Testimony — Railroading.*

15. *Brickmakers.* — *Wiggins v. Wallace*, 19 Barb. (N. Y.) 338. The court said: "It is said that the justice must be the judge whether the witness is competent to testify as an expert; so he must; and yet if he misjudges, it is as much an error as if he misjudges on any other question. It was not a question of discretion for the justice, where his judgment is conclusive."

16. *Brokers.* — *Adams v. Peters*, 2 C. & K. 723, 61 E. C. L. 723.

17. *Jonau v. Ferrand*, 3 Rob. (La.) 364, holding also that such a witness could not be compelled to disclose the names of purchasers from him. See also *Moffit v. Hereford*, 132 Mo. 520, citing 7 AM. AND ENG. ENCYC. OF LAW (1st ed.), 490-494.

where this point is treated.¹

15. Chemists—*a. IN GENERAL* — **Definition.** — A chemist is one whose legitimate profession is to inquire into the nature and properties of matter and of a combination or union between the elements of which different substances are composed.²

Basis of Opinion. — Such a person is usually an expert, and his opinions may be admissible though based entirely upon experiments in his laboratory,³ though unless reinforced by practical experience they must sometimes be received with caution.⁴

Constituents of Compounds. — A chemist is logically the most competent witness regarding the constituents of compounds,⁵ and his opinion is admissible though not conclusive as to the fitness of guano as a fertilizer.⁶

Explosions. — The opinion of a chemist has been received as to the liability of a camphene lamp to explode, although he has never experimented with lamps or camphene.⁷ One who had made experiments as to the explosive character of dusts was held incompetent to testify as an expert thereon because of his want of experience with dust of this kind outside of his laboratory.⁸

Cleansing Silver Plate. — A chemist was held incompetent to testify as to the effect of the use of gasoline in cleansing in the process of silver plating, when he had already stated that he had never seen gasoline so used, and that for the same purpose he had always used, and always seen used, concentrated lye.⁹

Effect of Gases and Scums. — A chemist's opinion is admissible as to the effect on land of gases and noxious scums discharged from a copper mine.¹⁰

Fermentation. — A professor of chemistry is competent to testify as to whether lager beer is a fermented liquor, though he has had no practical experience concerning fermentation.¹¹

Blood Stains. — A chemist, judging from an examination of a blood stain, may testify as to the probable direction from which the blood came.¹²

Evaporation of Spirits. — Questions involving the operation of a chemical cause require the testimony of a chemist, as whether goods were damaged by the evaporation of spirits.¹³

1. See *supra*, this section, *Architects, Carpenters, and Builders*.

2. **Chemists.** — Hogeboom, J., in *Hartung v. People*, 4 Park. Cr. Rep. (N. Y. Supreme Ct.) 319.

3. **Basis of Opinion.** — *Merkle v. State*, 37 Ala. 139; *Shufeldt v. Searing*, 59 Ill. App. 341; *Bierce v. Stocking*, 11 Gray (Mass.) 174. *Compare Williams v. Taunton*, 125 Mass. 34.

4. *Shufeldt v. Searing*, 59 Ill. App. 341. *Compare Fraim v. National F. Ins. Co.*, 170 Pa. St. 151.

5. **Constituents of Compounds.** — *Allen v. Hunter*, 6 McLean (U. S.) 303.

6. **Guano.** — In *Wilcox v. Hall*, 53 Ga. 635.

7. **Qualifications of Witness.** — *Bierce v. Stocking*, 11 Gray (Mass.) 174. In this case the witness testified on preliminary examination "that he graduated at Middletown College, where he studied chemistry under Professor John Johnson, whom he considered one of the best authorities in the country in chemistry; that he was and had been for five years a teacher of chemistry, natural philosophy, botany, and geology in Wilbraham Academy; that he had daily recitations in chemistry; had experimented with gases and used apparatus; used Johnson's Elements as a class book in teaching; had never experimented with lamps or seen this before; never made or used camphene, but knew how it was made; had never given any particular attention to this subject

of fluid or camphene lamps except that he had used a common fluid hand lamp; but that he was familiar with gases." He further testified "that in his opinion the samples shown him would be liable to explode, and that he did not think the lamp safer for the chamber, and did not think it would prevent explosion."

8. *Shufeldt v. Searing*, 59 Ill. App. 341.

9. *Fraim v. National F. Ins. Co.*, 170 Pa. St. 151.

10. *Lincoln v. Taunton Copper Mfg. Co.*, 9 Allen (Mass.) 181.

11. *Merkle v. State*, 37 Ala. 139.

12. *Com. v. Sturivant*, 117 Mass. 122, 19 Am. Rep. 401. *Compare People v. Fernandez*, 35 N. Y. 49.

13. *Turner v. The Ship Black Warrior*, 1 McAll. (U. S.) 181, where it was observed: "A second ground of defense has been taken in the argument of counsel, no foundation for which is laid by any averment in the answer. That ground is that there was an evaporation of the spirits, a chemical cause, the work of natural laws, which produced the damage, and is a cause excepted against in the bill of lading. We have seen that the onus of proof on this point is with the carrier. It is not until he has established the fact that the necessity of proving negligence is imposed upon the opposite party. In this case no attempt has been made to prove the probability of evaporation. The question is a scientific one; and

b. POISONS. — The opinion of a chemist, though not a physician, is admissible as to the effect of strychnine¹ or arsenic² on the human system, and also as to the effect of Paris green in causing paralysis and cutaneous diseases affecting the exposed parts of those employed in a manufactory of that article, the witness himself being also employed there.³ A chemist who has made a post-mortem examination may give an opinion as to whether a physician can, from such an examination of the exterior surface and the indications of inflammation which he there discovers, determine with any degree of certainty the precise period of time when such inflammation was caused.⁴

16. Civil Engineers. — This branch of the subject is treated elsewhere in this article.⁵

17. Clergymen — Marriage. — The testimony of clergymen is sometimes admissible as to legal usages concerning which they have had experience. Thus a Roman Catholic bishop was permitted to testify concerning the matrimonial law of Rome.⁶ So a priest familiar with the marriage laws and usages of a foreign jurisdiction may be permitted to prove them by his own evidence.⁷ A minister familiar with the marriage formulas of another state and with the book wherein they are prescribed may, as a witness, identify such book.⁸ Where the pastor of a church testified that he was the custodian of church records of marriages and births in a certain foreign locality he was permitted to give extracts therefrom in evidence on a question of identity.⁹

Insanity. — A Roman Catholic priest whose preparatory studies had fitted him to pass upon the mental conditions of persons was permitted to state his opinion as to the sanity of a testatrix.¹⁰

Meaning of Certain Phrases. — An Episcopalian bishop is competent to give in evidence definitions of the terms "parish" and "record" as employed within that communion.¹¹

18. Conductors. — See a succeeding subdivision for a treatment of this topic.¹²

19. Daguerreotypists. — Reference is here made to another part of this article for a treatment of this matter.¹³

20. Engineers — a. CIVIL ENGINEERS — (1) *Overflow of Water — Harbors.* — The opinion of an engineer is admissible as to whether a bank which had been erected for the purpose of preventing the overflow of the sea had caused the obstruction of a harbor,¹⁴ and it is error to reject the opinion of an engineer as to the liability of a city to inundation as well as to injury to a harbor by the removal of the sand along the shore.¹⁵

Overflow of Streams. — It is admissible to show by the opinion of an expert that the overflow of a stream of water was the result of natural causes and not of the construction of an embankment.¹⁶ So it is proper to ask a civil engineer who had made a survey and map of the ground how much more land would be overflowed at a given height of water.¹⁷

if the intention of the party had been to rely upon it, he should have procured the testimony of experts in relation to it."

1. Effect of Strychnine. — *State v. Cook*, 17 Kan. 392. But compare *State v. Bowman*, 78 N. Car. 509.

2. Effect of Arsenic. — *Hartung v. People*, 4 Park. Cr. Rep. (N. Y. Supreme Ct.) 319.

3. Effect of Paris Green. — *Fox v. Peninsular White Lead, etc., Works*, 92 Mich. 243.

4. Whether Post-mortem Examination Would Enable Professional to Determine When Inflammation Supervened. — *Hartung v. People*, 4 Park. Cr. Rep. (N. Y. Supreme Ct.) 319.

5. See *infra*, this section, *Engineers; Surveyors*.

6. Clergymen. — *Sussex Peerage*, 11 Cl. & F. 85.

7. *Bird v. Com.*, 21 Gratt. (Va.) 800.

8. *People v. McQuaid*, 85 Mich. 123.

9. *American L. Ins., etc., Co. v. Rosenagle* 77 Pa. St. 507.

10. *Toomes's Estate*, 54 Cal. 509, 35 Am. Rep. 83.

11. *Bird v. St. Mark's Church*, 62 Iowa 567.

12. See *infra*, this title, *The Various Subjects of Expert Testimony — Railroadings*.

13. See *infra*, this section, *Painters and Photographers*.

14. Civil Engineers. — *Folkes v. Chadd*, 3 Doug. 157, 26 E. C. L. 63.

15. *Clason v. Milwaukee*, 30 Wis. 316.

16. *Ohio, etc., R. Co. v. Webb*, 142 Ill. 404; *Ohio, etc., R. Co. v. Schmidt*, 47 Ill. App. 383.

17. *Phillips v. Terry*, 3 Abb. App. Dec. (N. Y.) 607.

Cause of Overflow. — An engineer who has located a certain railroad and made a topographical survey of the surrounding country may testify that the railway embankment might cause the water to overflow a certain plantation.¹

(2) *Diversion of Water.* — A civil engineer has been held competent to express his opinion as to the cause of the diversion and drying up of a stream of water, where the hypothetical question put to him assumed the facts in evidence as to the drying up of the stream, the method of constructing an aqueduct across it, and the temporary expedients adopted to keep out the water.² But where the expert's opinion was asked, not as to the cause of the diversion of a stream, but merely as to whether it could be withdrawn by means of pumps, the answer was held to have been properly excluded.³

(3) *Scouring of River.* — An engineer of skill and experience who had studied a river and tested its flow at the points of alleged obstruction and injury by an embankment was held competent to give an opinion as to the possible causes of such injury.⁴

(4) *Backwater.* — A civil engineer's opinion is admissible as to whether backwater is occasioned by a milldam so as to affect the operation of the mill, there having been also a landslide which narrowed the channel of the stream.⁵

(5) *Fountains and Drains.* — Where civil engineers had taken the comparative levels of a fountain and of certain drains in the same lot and had examined the character of the intervening soil, they were allowed to give their opinions to the effect that the fountain was not injured by the drains.⁶ So whether a railroad is properly constructed so as to provide outlets to drain surface water from adjacent lands is a proper subject of expert testimony by a civil engineer.⁷

(6) *Bridges — Cost.* — A civil engineer who has had experience in making plans and estimates for the building of bridges and has superintended their construction may testify as an expert with regard to the probable cost thereof, although he has had no experience as a practical bridge-builder.⁸

Durability. — So an engineer who is practiced in judging of the soundness of timbers may give his opinion as to the safety of a staging erected in a specified manner,⁹ as to dry rot in a bridge,¹⁰ and as to the length of time during which the sleepers of a bridge had been decayed.¹¹

Destruction. — But even an expert is not competent to testify as to the cause of the falling of a bridge that it was caused by the water and ice raising the bents, whereby the stringers were displaced.¹² Engineers who examined the

1. St. Louis, etc., R. Co. v. Lyman, 57 Ark. 512.

2. Covert v. Brooklyn, 6 N. Y. App. Div. 73.

3. Van Wycklen v. Brooklyn, 118 N. Y. 424.

4. Moyer v. New York Cent., etc., R. Co., 98 N. Y. 645, wherein the court said: "We do not think the inquiry was speculative in an objectionable sense, for the witness, as an expert, and speaking upon a question of science, might very well be asked, in presence of a given effect, of what causes it either was or might be the resultant. * * * It assumed a hypothesis the truth or falsity of which was left open to the jury; and then asked, not what caused the injury, but what were all the adequate causes which might have been its origin, leaving the jury to determine among them."

5. Ball v. Hardesty, 38 Kan. 540; Grigsby v. Clear Lake Water Works Co., 40 Cal. 396.

6. Buffum v. Harris, 5 R. I. 243, the court saying: "Their business, in superintending the construction of milldams and other guards against the flow of water, as sworn to by one of them, makes them practically acquainted

with the relative capacity of our different common soils to resist the percolation of water; and that, too, without claiming for them any high degree of scientific attainment with regard to the nature of soils or the laws which regulate the flow or action of water."

7. Baltimore, etc., R. Co. v. Hackett, 87 Md. 224.

8. Bryan v. Branford, 50 Conn. 246.

9. Callan v. Bull, 113 Cal. 593; Prendible v. Connecticut River Mfg. Co., 160 Mass. 131; Stanwick v. Butler-Ryan Co., 93 Wis. 430.

10. Blank v. Livonia Tp., 79 Mich. 1.

11. Indianapolis v. Scott, 72 Ind. 196.

12. Hughes v. Muscatine County, 44 Iowa 672, the court saying: "It appears to us that this is not a matter of which experts should be permitted to testify. It would follow, as a natural consequence, that if the ice was raised by the water, and the bents were so constructed that they rested upon the ice, or, rather, the ice could not rise without raising the bents, the bridge would be elevated by the ice. The effect of the force of the water was well understood by the jury and could have

bridge immediately after an accident were allowed to give their opinions that if it had been kept in repair it would have borne the weight placed upon it.¹

(7) *Railway Crossings*. — A civil engineer may give an opinion as to whether a railway crossing is properly constructed.²

b. ELECTRICAL ENGINEERS. — An electrical engineer is competent to show why certain contrivances made an unsafe support for an electric lamp,³ but the general manager of an electric railway was not allowed to express his opinion as to the liability of flywheels to explode.⁴

c. HYDRAULIC ENGINEERS. — A hydraulic engineer who has constructed waterworks and sewers is competent to give an opinion as to whether it is proper construction, under the circumstances, to leave the end of the connecting drum in the cellar open and unprotected against the influx of sewage.⁵

d. MECHANICAL ENGINEERS. — A mechanical engineer may testify to the strength of grindstones, the safe rate of speed at which they may be run,⁶ as to the safety of an electric-lamp support,⁷ as to the character of the strain upon the steam fitting of a cable-power house,⁸ as to whether corrosion of a boiler existed on a certain day, and as to the least time during which it existed.⁹ A stationary engineer is not *per se* competent to answer questions pertaining to the management of a locomotive.¹⁰ But it has been held that a locomotive engineer is *prima facie* competent to give an opinion as to the speed of engines and trains.¹¹ It is not permissible for an engineer to say whether a contract for the construction of a steamboat requires the contractor

been determined without the aid of experts. They should have had the facts as to the construction of the bridge, the character of the ice, the rise of the water, etc., presented in evidence, and then have been permitted to find the effects produced by the physical conditions found by them to have had existence. They required no opinion of experts to enable them to determine whether water and ice, under given conditions, would or would not raise the bents of the bridge."

1. Bonebrake *v.* Huntington County, 141 Ind. 62.

2. St. Louis, etc., R. Co. *v.* Johnston, 78 Tex. 536.

3. *Electrical Engineers*. — Excelsior Electric Co. *v.* Sweet, 57 N. J. L. 230, where the court said: "For the twelve years he had been engaged in the business of electrician it was the only business he had followed. By his practical experience the witness had become familiar with the construction, practical operation, and details of the working and management of electrical apparatus. The witness described the manner in which the lamp was suspended and the appliances which were used for that purpose. He was permitted, under objection, to describe the imperfections in the rope, pulley, and wires, and explain why their use made an unsafe support for the lamp, and to express an opinion on these subjects."

4. Piehl *v.* Albany R. Co., 30 N. Y. App. Div. 166, the court saying: "The plaintiff called the general manager of the defendant and asked him: 'Are the flywheels liable to explode notwithstanding the greatest exercise of care?' He answered that he did not consider himself entirely competent to answer the question. He was then examined at length as to his competency, from which it appeared that while he had devoted much attention to the operation of electric railroads, he had not given attention to the liability of flywheels to

explode. The court sustained the objection to his testimony upon the ground of his incompetency. We do not think this was error."

5. *Hydraulic Engineers*. — "The witness was admitted to be an expert of large experience in the construction of sewers and waterworks, and he must be presumed to have known whether gates, flaps, or other appliances could be used to prevent the influx of water from a drain into a cellar, and if they could, whether they would work satisfactorily, and whether it would be easy or difficult to put them in. His study and experience may be presumed to have also taught him the probability or improbability that, from sewers constructed as those in that neighborhood were, water would set back into house drains during a flood. We are of opinion that these are not matters of common knowledge, and that the opinion of an intelligent expert may have been valuable at the trial upon the question what precautions were reasonably necessary on the part of the plaintiff to prevent a flow of water from the drain into his cellar." Stead *v.* Worcester, 150 Mass. 241.

6. *Mechanical Engineers*. — Helfenstein *v.* Medart, 136 Mo. 595.

7. Excelsior Electric Co. *v.* Sweet, 57 N. J. L. 224.

8. Pollock *v.* Pennsylvania Iron Works Co., 13 Misc Rep. (N. Y. C. Pl.) 104. In this case the witness was president of a company which manufactured steam fittings.

9. Egan *v.* Dry Dock, etc., R. Co., 12 N. Y. App. Div. 556.

10. Williams *v.* Louisville, etc., R. Co., (Ky. 1898) 45 S. W. Rep. 71.

11. Brown *v.* Rosedale St. R. Co. (Tex. App. 1890), 15 S. W. Rep. 120, citing 7 AM. AND ENG. ENCYC. OF LAW (1st. ed.) 509. The court in this case made a similar ruling as to a fireman, a switchman, and a foreman of yard engines.

to provide clutch couplings, nor whether the contractee should have continued to use the engine after discovering certain defects.¹

21. Ethnologists. — Ethnologists and persons who have made a special study of race characteristics are competent to give in evidence their opinions as to the race of a certain person, whether Aryan or African.²

22. Examiners of Title. — This phase of the subject has received attention in a former part of this article.³

23. Farmers and Stock Raisers — Cost of Clearing Land. — A farmer is competent to express his opinion as to the cost of clearing land.⁴

Necessity of Drainage. — And also as to the necessity of draining lands in order to make them tillable.⁵

Use of Guano. — And as to the proper method of using guano.⁶

Crops. — A farmer may give in evidence his opinion as to the yield of a certain piece of ground⁷ and as to what proportion of a crop has been destroyed by cattle.⁸

Adulteration of Milk. — Farmers and dairymen are competent to say whether in their opinion milk has been mixed with water.⁹

Overflow of Land. — A farmer was held competent to express his opinion as to the effect of a railway bridge and embankment in causing overflows upon his farm.¹⁰

Checking Prairie Fire. — And also as to the width of a strip of plowing neces-

1. *Clark v. Detroit Locomotive Works*, 32 Mich. 348.

2. **Ethnologists** — *Georgia*. — *White v. Clements*, 39 Ga. 242, the court saying: "An expert is one who by his habits of life and business has a peculiar skill in forming an opinion on the subject-matter in dispute, and, without doubt, a physician who has studied the science of ethnology is better prepared than ordinary men to judge of the race of one presented for examination. And we think the court did right in permitting the doctor to give his opinion as an expert. What it was worth was for the jury. Dependent on his intelligence and character, and the nature of the case, etc., we would think it worth very little in a doubtful case, as whether one had one-eighth or little less or more of a particular blood. All of the testimony in this case was very inconclusive. In ordinary parlance, one is called a person of color who has any visible admixture of negro blood, and it does not appear but that this was all any of the witnesses meant. The law under which it is claimed White was ineligible did not disqualify one unless he had one-eighth or more negro blood. The whole court is of the opinion that there ought to be a new trial, because of the error of the court in admitting the statement of the register, and in admitting the copy application for insurance."

Indiana. — *Nave v. Williams*, 22 Ind. 368.

North Carolina. — *State v. Jacobs*, 6 Jones L. (51 N. Car.) 284.

3. See *supra*, this section, *Abstracters*.

4. **Farmers and Stock Raisers.** — *Barnum v. Bridges*, 81 Cal. 604. The court said: "It is further urged that the court below committed error in allowing the witness Mr. D. to answer this question: 'In your judgment, what would it cost an acre to clear this land off, take the timber off, stumps and roots, and put it in a condition to run a plow through?' the objection being that the witness was not an expert in clearing this kind of land. While the wit-

ness may never have actually cleared any land just like that in dispute here, yet his testimony shows that he had an ordinary knowledge, as 'a farmer and logger,' of land and its qualities; and the court, being possessed of the extent of his knowledge upon the general subject of the qualities of various kinds of lands, was in a position fairly to estimate the weight which should be given to his evidence, and should not have excluded it altogether."

5. *Buffum v. Harris*, 5 R. I. 243.

6. *Young v. O'Neal*, 57 Ala. 566. Compare, as to suitability of guano, *Wilcox v. Hall*, 53 Ga. 635.

7. **Yield per Acre.** — *Townsend v. Bonwill*, 5 Harr. (Del.) 474; *Isaacs v. McLean*, 106 Mich. 79; *Phillips v. Terry*, 3 Abb. App. Dec. (N. Y.) 607; *Harpending v. Shoemaker*, 37 Barb. (N. Y.) 270; *Sickles v. Gould*, 51 How. Pr. (N. Y. County Ct.) 22.

"There was high water over about ten acres when the grass was about a foot high and had just begun to head out. He was asked by his counsel: 'Taking that hay as it stood then, what would it yield to the acre?' This was objected to on the ground that it called for the opinion of the witness. I think it was competent to ascertain the fact sought by this inquiry through the opinion of a witness. A person conversant with the growth of grass, and accustomed to compare its appearance in different stages of such growth with its ultimate yield to the acre, may well be said to have such knowledge of that subject as to make him competent to testify how much, in his opinion, a given piece examined by him will yield per acre." *Phillips v. Terry*, 3 Abb. App. Dec. (N. Y.) 607.

8. *Seamans v. Smith*, 46 Barb. (N. Y.) 320.

9. *Lane v. Wilcox*, 55 Barb. (N. Y.) 615.

10. *St. Louis, etc., R. Co. v. Bradley*, 54 Fed. Rep. 630; *Ethridge v. San Antonio, etc., R. Co.*, (Tex. Civ. App. 1897) 39 S. W. Rep. 204. See also *Porter v. Pequonnock Mfg. Co.*, 17 Conn. 249.

sary to stop a fire burning on stubble land.¹

Burning Fallow. — But it has been held error to receive the opinions of farmers as to the proper time for burning fallow where, all the circumstances being narrated, the jurors were able to draw an intelligent conclusion therefrom.²

24. Farriers. — See a preceding subdivision of this article referred to in the note below.³

25. Gardeners. — This question has already been discussed in this article.⁴

26. Gas and Steam Fitters. — A Gas Fitter may testify whether gas meters are usually classified as gas fixtures, where the controversy is over a contract to furnish the latter.⁵ So a gas fitter may state how much time will be required to perform a certain piece of work in his line.⁶

A Steam Fitter may give his opinion as to the strength of iron.⁷ Such witnesses may also give their opinions as to the cause of an explosion of a steam pipe connected with an engine, though they may have had but a limited experience in running engines.⁸

27. Geologists. — Persons possessing a knowledge of geological formations may be allowed to express their opinions as to the probable existence of coal in a certain locality.⁹ But the opinion of a geological expert, that valuable stone exists beneath the surface of certain land whose market value is in controversy, is not admissible where such opinion has not been sufficiently circulated to affect the popular estimate of land values.¹⁰

28. Graziers. — This class of witnesses has already been adverted to in this article.¹¹

29. Harbormasters. — See a succeeding subdivision of this article.¹²

30. Ichthyologists. — Persons who have studied the habits of certain species of fish may testify as to whether such fish could ascend a certain stream in its natural state.¹³

31. Lawyers. — See, for a treatment of this question, a preceding part of this article.¹⁴

32. Liverymen. — A treatment of this class of witnesses will be found in a later part of this article.¹⁵

33. Lumbermen. — A lumber dealer and sawmill owner was allowed to

1. *Krippner v. Biebl*, 28 Minn. 139.

2. *Ferguson v. Hubbell*, 97 N. Y. 517, 49 Am. Rep. 544; *Fraser v. Tupper*, 29 Vt. 409. *Contra*, *Wells v. Eastman*, 61 N. H. 507. In the case first cited the court said: "Here the subject of inquiry related to the common elements of fire, and wind, and dry wood, and brush, and timber, with which every man has some acquaintance; and whether, under all the circumstances, it was a safe, prudent, or proper act to set a fire, a jury with the common experience which, if not all men, most men have, would be sufficiently competent to form an opinion. This is not a case where it was impossible to place the facts before the jury. The character of the wind, the condition of the soil as to being dry or not, the character of the brush and timber, the nature of the ground, the distance, exposure, everything could be proved so that the jury would have substantially as correct knowledge in reference to it as the witnesses; if not as correct, they could acquire knowledge sufficiently correct to enable them to discharge their duty as jurors."

3. See *supra*, this section, *Blacksmiths*.

4. See *supra*, this section, *Botanists and Gardeners*.

5. *Gas Fitters.* — *Downs v. Sprague*, 1 Abb. App. Dec. (N. Y.) 550.

6. *Swain v. Naglee*, 17 Cal. 416.

7. *Steam Fitters.* — *Ardesco Oil Co. v. Gilson*, 63 Pa. St. 146.

8. *Webster Mfg. Co. v. Mulvanny*, 168 Ill. 311, the court saying: "There is also complaint made by appellant as to the act of the trial court in permitting steam fitters who had some experience in running engines, but not to any great extent, to give their opinions as to the cause of this explosion, they having been present at the time the injury occurred. The value of this testimony and the weight which should be attached to it were questions entirely for the jury, and it was not error for the trial court to admit the same."

9. *Geologists.* — See *Stambaugh v. Smith*, 23 Ohio St. 584. Compare, as to testimony of a surveyor with some practical geological knowledge, *Clark v. Willett*, 35 Cal. 534.

10. *Roussain v. Norton*, 53 Minn. 560.

11. See *supra*, this section, *Farmers and Stock Raisers*.

12. See *infra*, this title, *The Various Subjects of Expert Testimony—Nautical and Marine Subjects*.

13. *Cottrill v. Myrick*, 12 Me. 230.

14. See *supra*, this section, *Attorneys at Law*.

15. See *infra*, this section, *Veterinary Surgeons and Horsemen*.

express his opinion upon the quality of certain lumber.¹ So the proper method of floating logs in a certain stream and through a bulkhead,² the degree of safety with which a raft was moored,³ and the quantity of logs which a certain force could have prepared in a day⁴ have all been treated as proper subjects of expert testimony by lumbermen. But it has been held error to receive an opinion as to the proper method of piling lumber with reference to its tendency to fall, this being a subject which the jurors were competent to judge without expert assistance.⁵

34. Machinists — a. MERITS, DEFECTS, AND CONDITION OF MACHINERY — Cotton Gin. — In an action involving a contract which required that a certain cotton gin should be "equal in all respects to the best saw gin then in use," a witness familiar with such machines and who had seen the one in controversy was allowed to give in evidence his opinion as to its merits.⁶

Spring Needle versus Latch Needle. — So a witness was permitted to say that in his opinion the spring needle could not displace the latch needle, his qualifications being shown not from any knowledge of the former but from an exhibition of the latter.⁷

Derrick. — The capacity of a machine of a peculiar sort for lifting and loading is a permissible subject of expert evidence.⁸

Ice Tongs. — As is also the proper manner of constructing ice tongs.⁹

Elevator Devices. — That a certain "spring safety device" for elevators is not as good as others, may be shown by a witness who has some knowledge of such device.¹⁰

Construction. — And generally the question whether machinery has been properly constructed is one upon which machinists may give their opinions.¹¹

1. **Lumbermen.** — *Moore v. Lea*, 32 Ala. 375.

2. *Dean v. McLean*, 48 Vt. 412, 21 Am. Rep. 130.

In this case the court said: "The running of the logs in that stream, and through that bulkhead, was not a matter of common knowledge, nor of adequate common judgment upon the facts shown by the other evidence. The experience and observation of the plaintiff gave him the grounds and faculty of an opinion peculiar to himself, and not common to men who had no such experience or observation. In a substantial sense he may be regarded as an expert, having peculiar knowledge and skill, which renders his opinion worthy of consideration as the ground of judgment and opinion in others who have not such knowledge and skill."

3. *Hayward v. Knapp*, 23 Minn. 430.

4. *Salvo v. Duncan*, 49 Wis. 151.

5. *Baldwin v. St. Louis, etc., R. Co.*, 68 Iowa 37.

6. **Machinists — Cotton Gin.** — *Scattergood v. Wood*, 79 N. Y. 263, 35 Am. Rep. 515, the court saying: "To determine this question, special knowledge was necessary, and this could be best acquired by experience in the use of that and other machines made for a like purpose. Indeed it is doubtful whether any other person could answer it. The invention or a machine made under it could be described, and its operation, as it affected the quantity and quality of the substance with which it was fed, stated to the referee; and all this was done, but it was also proper to take the opinion of competent persons as to its practical working, and its comparative value. * * * The question raised by the warranty could hardly be answered except by the direct opinion of those who, possessing this superior knowledge

and experience, had seen the machines in operation, or knew the merits of machines constructed under the plaintiff's patent and others then in use."

7. **Spring Needle — Latch Needle.** — *James v. Hodsden*, 47 Vt. 127.

8. **Capacity of Derrick.** — *Bemis v. Central Vermont R. Co.*, 58 Vt. 636. The court said: "It was not like the ordinary derrick used in heavy stone lifting, having rope or cable guys in all directions from the top of the mast. It had but two guys, and these were wood. It was plain to see how to use it, but to judge of its strength and capacity would require experience in its use, and mechanical familiarity with the strength of such machinery and with the strain upon its different parts when used to its capacity."

9. **Construction of Ice Tongs.** — *Neubauer v. Northern Pac. R. Co.*, 60 Minn. 130.

10. **Devices for Elevators.** — *Hall v. Murdock*, 114 Mich. 233.

11. **Proper Construction of Machinery.** — *Sheldon v. Booth*, 50 Iowa 209; *Chalmers v. Whitmore Mfg. Co.*, 164 Mass. 532; *Curtis v. Gano*, 26 N. Y. 426; *Cole v. Clarke*, 3 Wis. 323.

In *Chandler v. Thompson*, 30 Fed. Rep. 38, the court said: "In this case the jury on the trial might have been able to decide that the sawmill would not exert the full capacity of its power and do good work, from the facts stated by the witnesses that the saw was warped, and the frame of the machinery was out of plumb, and was operated by persons who had little knowledge and skill in such business; but they would not have been able to determine from such facts the questions arising out of the express warranty as to the exact horse power of the engine furnished by the plaintiffs. In

Whether steel is the proper material for a bolt,¹ whether a defective weld of iron could have been discovered,² or a crack in a casting ascertained by a described method,³ may also be shown by such witnesses.

The Cost of Construction is also a proper subject of expert evidence, and a witness may say whether his own or a rival fruit dryer would be cheaper, though he does not know the latter's exact cost.⁴

Capacity. — A witness familiar with sawmills and their construction may testify as to the capacity of a sawmill.⁵

Quality and Adaptability. — Machinists and brass finishers have been allowed to state that the quality and adaptability of certain brass couplings could not be tested without close inspection.⁶

Dangers. — It is usually proper to receive opinions that particular machinery is dangerous.⁷ But where the facts are such that the jury is able to form its own opinion therefrom, evidence regarding the safety of a certain arrangement of machinery is inadmissible.⁸ So it is not proper for experts to say whether a keyway in a revolving shaft enhances its ordinary dangers,⁹ nor whether the projection of a shaft into a room is more dangerous with a rough than with a smooth surface.¹⁰

Cause of Breakage. — A machinist who had inspected the fragments was allowed to give his opinion as to why an emery stone had broken.¹¹

6. OPERATION OF MACHINERY. — Expert machinists may testify that a certain machine has not been handled properly and skilfully,¹² and may express opinions regarding the comparative safety of operating a bolting cloth with or without a carriage attachment.¹³

Voting Machine. — But a witness was not allowed to say whether marks upon ballots before him were such as a voting machine of a particular pattern would make.¹⁴

alleged compliance with the terms of their engagement, and the reasonable and proper management covenanted by the defendants; and these were some of the material questions in issue to be determined by the jury. A steam sawmill is certainly a kind of machinery that requires peculiar knowledge and skill in its erection and operation, in order to exert and exercise the full capacity of its power."

1. *Chalmers v. Whitmore Mfg. Co.*, 164 Mass. 532.

2. *St. Louis, etc., R. Co. v. Farr*, 56 Fed. Rep. 994, the court saying: "The jury cannot be presumed to have been machinists or blacksmiths. We cannot suppose that they were familiar with the process of swaging, or its effect upon the appearance of an iron rod defectively welded. This was not a matter of common knowledge. It seems plain that the jury would not have been as competent as this experienced machinist to decide whether or not this defect could have been seen before the break, if they had examined the broken staff."

3. *Pacheco v. Judson Mfg. Co.*, 113 Cal. 541.

4. **Cost of Construction.** — *Hunt Bros. Fruit Packing Co. v. Cassidy*, 53 Fed. Rep. 257.

5. **Capacity of Sawmill.** — *Burns v. Welch*, 8 Yerg. (Tenn.) 117.

6. **Quality and Adaptability.** — *Jupitz v. People*, 34 Ill. 516.

7. **Dangerous Nature of Machinery.** — *New York Biscuit Co. v. Rouss*, 74 Fed. Rep. 608; *Pullman's Palace-Car Co. v. Harkins*, 55 Fed. Rep. 932.

8. *Freeberg v. St. Paul Plow-Works*, 48 Minn. 99, in which case the court said: "In our opinion, this was not a case that required

any special expert or mechanical knowledge to solve the question propounded. The facts, when placed before the jury, were of such a nature that juries and men of ordinary intelligence generally would be just as competent to form opinions from them and draw inferences from them as to whether the arrangement was reasonably safe or not as the witnesses, and therefore the opinions of experts on the subject were not admissible. These experts were permitted to testify fully as to the frequency of belts running off, the degree of probability of their catching on the protruding nuts and bolts of the coupling, its effect on the belts, how the danger of their catching might be avoided, etc. This was all proper, but when all these facts were presented and explained to the jury it was for them, and not the witnesses, to determine whether the arrangement was dangerous or not."

9. *Connelly v. Hamilton Woolen Co.*, 163 Mass. 156.

10. *Kauffman v. Maier*, 94 Cal. 269.

11. **Cause of Breakage of Machinery.** — *Camp Point Mfg. Co. v. Ballou*, 71 Ill. 417.

12. **Operation of Machinery.** — *Galveston Rope, etc., Co. v. Burkett*, 2 Tex. Civ. App. 308. The court said: "There was no error in allowing the plaintiff to testify that the machine was not handled properly and skilfully by Miss M. when plaintiff was hurt. The witness showed that she was qualified to speak as an expert, and explained the manner in which the work should have been done."

13. *Olmscheid v. Nelson-Tenney Lumber Co.*, 66 Minn. 61.

14. *Convery v. Conger*, 53 N. J. L. 468.

Oscillation. — Where one of the issues was whether the defendant had properly inspected a shaft, it was held error to exclude an answer to the question whether one standing on the floor could observe any oscillation.¹

Effect on Floor. — Experts in the use of a machine called a "shaper" were allowed to state whether in their opinion a hard-wood floor when laid in front of a shaper becomes slippery by use and whether a soft-wood floor does not.²

35. Manufacturers. — Manufacturers have been held competent as experts to give their opinions as to the liability of wool waste to ignite under certain conditions.³ One who had carried on a fulling-mill and two carding machines for many years, and who had used spouts for the purpose of propelling machinery, was allowed to testify as an expert concerning the proper place to take the water for the wheels of a shingle machine and of a corn cracker.⁴

36. Masons. — The opinions of masons are admissible respecting the sufficiency of walls to resist pressure to which they are subjected,⁵ the length of time required for walls to dry so as to render a house habitable,⁶ the effect of water in disintegrating mortar in the walls,⁷ the amount of sand used with a cask of lime in making mortar,⁸ whether water flowing from the inside could wash down a wall,⁹ and whether an arch would have fallen if the mortar had been dry and supports called for by the plans had been constructed.¹⁰

37. Microscopists. — See a preceding part of this article.¹¹

38. Midwives and Nurses. — An experienced midwife and nurse may give her opinion as to whether the birth of a child is premature,¹² but such an opinion cannot be based upon minutes of testimony taken by counsel but differing from the testimony as actually given at the trial.¹³ The evidence of a midwife has been received upon the question whether one was *virgo intacta*.¹⁴

39. Millers and Millwrights — Capacity of Mill. — A miller's opinion of the quantity of grain which a mill is capable of grinding is admissible.¹⁵

Condition of Mill. — Whether certain repairs and additions are necessary to

1. *Ouillette v. Overman Wheel Co.*, 162 Mass. 305, wherein the court said: "It does not appear very clearly what the answer would have been, but it is fairly to be inferred, we think, that it would have been to the effect that any oscillation could have been seen by an experienced person in that position; and assuming that the first question was objectionable in point of form, we think that the last should have been admitted. The subject was not one within the common experience of men. The jury could not tell whether an oscillation in a shaft of the size of this and as far above the floor, and with two heavy pulleys on it revolving at the rate of two hundred and fifty revolutions a minute, could be seen by an experienced person from the floor. Only a person of skill in the business, or familiar with the running of such machinery, would know."

2. *Weber Wagon Co. v. Kehl*, 139 Ill. 644.

3. *Manufacturers — Wool Waste.* — *Whitney v. Chicago, etc., R. Co.*, 27 Wis. 344.

4. *Hammond v. Woodman*, 41 Me. 207, 66 Am. Dec. 219.

5. *Masons.* — *Snedd v. Libera*, 65 Minn. 337.

6. *Smith v. Gugerty*, 4 Barb. (N. Y.) 614.

7. *Underwood v. Waldren*, 33 Mich. 232.

8. *Miller v. Shay*, 142 Mass. 598. The court said: "The defendant also offered the evidence of experts to show how much sand is used with a cask of lime in making such mortar as the defendant used with sand furnished by the plaintiff, no actual count being made or kept by the defendant otherwise." If

the sand was all used in making mortar, and if the mortar was all of the same or a similar quality, and the witnesses had examined the mortar, we see no objection to admitting this testimony, provided the experts could testify that the quantity of sand could be determined in this manner."

9. *Montgomery v. Gilmer*, 33 Ala. 116, 70 Am. Dec. 562.

10. *Tremblay v. Mapes-Reeve Constr. Co.*, 169 Mass. 284, in which case the court said: "The arch which fell was of stone, with a curved front. It had been built a little more than two days, and there was testimony that this was not sufficient time for the mortar to harden, especially as it had rained most of the time. The brick backing had not been put in, nor had the stone been anchored or fastened to the floor of the building. There was a door a little to one side, the arch over which had not been built, and according to the testimony of an expert the absence of this lateral support probably permitted the pier on which the arch in question stood to give a little when the prop was knocked out."

11. See *supra*, this section, *Chemists*.

12. *Midwives and Nurses.* — *Mason v. Fuller*, 45 Vt. 29.

13. *Thayer v. Davis*, 38 Vt. 163.

14. *Welde v. Welde*, 2 Lee Ecc. 578.

15. *Millers — Capacity of Mill.* — *Read v. Barker*, 30 N. J. L. 378, 32 N. J. L. 477, holding also that opinions were admissible as to the accuracy of a certain method of weighing and measuring grain, followed in the mill.

place a mill in the condition required by a contract, is a proper subject of expert testimony by a millwright.¹

Milldams.—A millwright was allowed to testify that if a certain dam were a foot lower the mill could not grind in the same way.² Such a witness may also give his opinion as to the effect of constructing one part of a dam lower down the stream than the other.³ So a miller's opinion that a certain dam backed the water up so as to affect the operation of a mill above it was received.⁴ A millwright was allowed to state the effect upon water in a factory flume of opening and shutting the gates of a shingle machine and a corn cracker.⁵

As to Flour and Wheat.—The quality and component parts of flour are proper subjects of expert testimony by millers.⁶ But it was held that a question as to the effect of impaired bolting cloths upon the quality and value of the flour produced in the mill during the plaintiff's lease was too broad in scope.⁷ A miller may, from the odor thereof, identify wheat alleged to have been stolen.⁸

Skillfulness.—The skill of a millwright,⁹ the quality of work done on a mill,¹⁰ and the feasibility of placing a guard around a certain gearing¹¹ are proper subjects of evidence by experts in milling and mill construction.

When Incompetent.—A witness is not qualified by the mere fact that he is a millwright and a tender of mills to give his opinion of the course of anchor ice in a channel.¹² Nor may a millwright testify as to the value of a mill which he has never seen.¹³

40. Miners — Condition of Mines.—Miners may state in evidence what caused the cracking or settling of the walls of a mine,¹⁴ and whether it is safe to have only a narrow space between tramcars and the mine walls.¹⁵ And it is permissible to show by experts that there is no method known to miners by which

1. **Millwright — Repairs to Mill.**—Taylor v. French Lumbering Co., 47 Iowa 662. Compare Cooke v. England, 27 Md. 14.

2. **Milldam.**—Detweiler v. Groff, 10 Pa. St. 376.

3. Woods v. Allen, 18 N. H. 28.

4. Ball v. Hardesty, 38 Kan. 540.

5. Hammond v. Woodman, 41 Me. 177, 66 Am. Dec. 219.

6. Davis v. Mills, 163 Mass. 481.

7. **Question Too Broad.**—Cooke v. England, 27 Md. 14. In this case the witness was asked what, in his judgment as an experienced miller, was the effect upon the quality and value per barrel of the flour manufactured in the mill during the plaintiff's lease, while the bolting cloths were in the impaired and worn-out condition as described by him, and because of want of the necessary repairs to that part of the machinery of the mill. The court said: "The witness examined the cloths at one point of time during the lease, and could only speak of the difference in value between flour manufactured then through them and flour run through cloths in the condition in which they should be, leaving it to the jury to apply his answer, upon the question of damages, to the state of facts arising in the case, and to be proved by other witnesses. The question, as propounded, took too broad a scope, extending over the entire lease, and in this respect it was erroneous."

8. **Identification of Wheat.**—Walker v. State, 58 Ala. 393.

9. **Skill of Millwright.**—Doster v. Brown, 25 Ga. 24, the court saying: "The only objection made to the admissibility of the evidence of Samuel D. Echols was that he was not an expert. There was no question asked him as to the particular work done. He testified that

the plaintiff was no millwright, and that his opinion was founded on work done by him for both the witness and the defendant. He had owned mills twenty-five or thirty years, and had work done on them. In the case of *Malton v. Nesbit*, 1 C. & P. 70, 11 E. C. L. 318, which was an action of negligently steering a ship, whereby she was wrecked, nautical men were called and allowed to give their opinion whether upon the facts in proof there was negligence. They were not steersmen. I see no reason why a millowner of twenty-five or thirty years' experience may not give his opinion in a case like this. An expert is nothing more than a man of experience in the particular business to which the inquiry relates."

10. **Quality of Work Done on Mill.**—Walker v. Fields, 28 Ga. 237, holding that while a millwright might, a miller could not, give such testimony.

11. *Peterson v. Johnson-Wentworth Co.*, 70 Minn. 538.

12. Woods v. Allen, 18 N. H. 28.

13. *Westlake v. St. Lawrence County Mut. Ins. Co.*, 14 Barb. (N. Y.) 206, the court saying: "The witness, though a millwright, had never seen or been within fifty miles of the mill in question. He admitted that he could not make a close estimate of the cost of the mill, from the testimony of Leonard, without seeing the mill or a drawing of it; and that it was very hard to estimate the cost without seeing or knowing just what the work was. Still he thought he could come within five or ten per cent of the cost, if he had a right view of the mill. The opinion, therefore, was little, if anything, more than a guess."

14. **Miners — As to Condition of Mines.**—Clark v. Willett, 35 Cal. 534.

15. *McNamara v. Logan*, 100 Ala. 187.

the danger from falling stones can be entirely obviated.¹ But the question whether a stope in a mine is a safe place for men to work is not one for expert opinion.²

Timbering Mines. — A miner's evidence is admissible as to the proper method of timbering a drift³ and also a shaft⁴ in a mine.

Blasting Powder — Competency of Superintendent — Effect of Diversion of Water. — Miners have also been allowed to give their opinions concerning the safety of a particular brand of blasting powder,⁵ the competency of a mine superintendent,⁶ and whether a certain mine could be operated if water were diverted therefrom.⁷

41. Ministers. — See a prior subsection of this article.⁸

42. Nurserymen. — A nurseryman may testify as to the value of fruit trees in the neighborhood notwithstanding he may never have seen the particular trees in question.⁹

43. Painters and Photographers. — A painter may testify as to the market value of certain paintings.¹⁰ Photographers may give their opinions as to whether certain photographs are well executed,¹¹ whether or not good results have been obtained according to a certain process,¹² and the number of

1. "Evidence was offered from these expert witnesses to show that there is no method known to miners whereby the danger arising from falling stones, occasioned by the settling of the roof above, can be entirely obviated, but the court refused to admit it, and in this we think there was error." *Acme Coal Co. v. Kusnir*, 71 Ill. App. 446.

2. *Smuggler Union Min. Co. v. Broderick*, (Colo. 1897) 53 Pac. Rep. 169. Compare *Colorado Midland R. Co. v. O'Brien*, 16 Colo. 219.

3. **Timbering Drift.** — *Grant v. Varney*, 21 Colo. 334. The court said: "Witnesses for the plaintiff were permitted, over defendants' objection, to state, in substance, what was the proper method of timbering a drift run in such ground as the evidence shows this one penetrated. Counsel for defendants now say that such questions permitted the witnesses to state what the jury were, as a matter of fact, to find from the evidence, and that the opinions of the witnesses were not admissible. The witnesses were not allowed to state whether or not this drift, with the timbers fifteen or sixteen feet from the breast, was safe. They spoke only as to the proper way to timber it. We think there was no error in this."

4. **Timbering Shaft.** — *Monahan v. Kansas City Clay, etc., Co.*, 58 Mo. App. 68.

5. *Sowden v. Idaho Quartz Min. Co.*, 55 Cal. 443.

6. *Buckalew v. Tennessee Coal, etc., R. Co.*, 112 Ala. 146.

7. *Bennett v. Morris*, (Cal. 1894) 37 Pac. Rep. 929.

8. See *supra*, this section, *Clergymen*.

9. *Whitbeck v. New York Cent. R. Co.*, 36 Barb. (N. Y.) 644.

10. **Painters.** — *Houston, etc., R. Co. v. Burke*, 55 Tex. 323, 40 Am. Rep. 808.

11. **Photographers.** — *Barnes v. Ingalls*, 39 Ala. 193, where it was observed: "The witness Parlow was by occupation an ambrotypist and daguerreotypist. His vocation, as he states, and as we judicially know (*Salomon v. State*, 28 Ala. 88), is intimately connected with that of the photographic painter. The two processes, sometimes followed as separate pursuits, sometimes jointly prosecuted by the

same individual, are frequently, if not usually, carried on in the same establishment, as branches of the same business, and made to co-operate as mutual auxiliaries in the production of a joint result. This witness had been employed in at least one gallery where photographic paintings, as well as ambrotypes, were executed, and had thus enjoyed peculiar opportunities for seeing such work performed, and for examining paintings of that description. Not only so, but he had at times practiced, to some limited extent, the art of painting photographic likenesses, though not such as plaintiff professed to take; the difference being, as we infer, that the plaintiff painted large portraits, while the pictures which the witness had painted were of a smaller size. Moreover, he professed to know something about the business of photographic painting, and of the value of that kind of work. Under these circumstances the court did not err in permitting him to testify that the pictures of the plaintiff which he had seen were well executed." *Citing Tullis v. Kidd*, 12 Ala. 648; *Dixon v. Barclay*, 22 Ala. 370; *McCreary v. Turk*, 29 Ala. 244; *Montgomery v. Gilmer*, 33 Ala. 116, 70 Am. Dec. 562; *Sikes v. Paine*, 10 Ired. L. (32 N. Car.) 280, 51 Am. Dec. 389; *Buffum v. Harris*, 5 R. I. 243; *Haskins v. Hamilton Mut. Ins. Co.*, 5 Gray (Mass.) 432; 1 Greenl. Ev., § 440.

12. "The witness was properly qualified as an expert. He had made a special study in regard to the method of obtaining reproductions. Whether the artist, in applying his skill to the chalk plate in that process by the use of lines alone, skilfully reproduced the photograph from which he worked was a question that became material upon the issue raised. If the work was done with reasonably good skill, the result would be called good; and the defendant had a right to introduce the testimony of competent experts upon the question. It in no way infringed upon the allegation in the writ that the cut grossly misrepresented the plaintiff's real features. It had reference to the care, skilfulness, and artistic science involved in reproducing a given photograph by the chalk-plate process in a particular case." *Marston v. Dingley*, 88 Me. 546.

photographs of fair quality which an artist could produce in a month.¹ So photographers who have made also a special study of handwriting may testify as to the genuineness of signatures.² But a photographer will not be allowed to state his opinion as to whether or not a certain kind of photograph is obscene.³

44. Pavers. — The number of bricks in a pavement may be computed by allowing a certain number to the square yard, according to the usage of pavers as proved by one who follows that trade.⁴

45. Physicians and Surgeons — *a. ABORTION AND MISCARRIAGE* — (1) *General Rule.* — A physician's opinion is competent evidence that an abortion has been accomplished⁵ and as to whether the means employed were mechanical⁶ or the administering of drugs.⁷

(2) *By Mechanical Means.* — If the former course has been followed, the witness may state that the wounds, judging from their character and situation, were such as might have been self-inflicted,⁸ and that certain instruments are adapted to produce abortion.⁹

(3) *By Use of Materia Medica.* — Physicians may say whether a specified quantity of a drug, administered at a certain time, would produce abortion,¹⁰ and whether abortion or miscarriage, caused by the use of *materia medica*, might not have occurred without leaving, after a time, any trace of its occurrence.¹¹

Miscarriage. — A physician's opinion is receivable in evidence concerning the cause of a miscarriage, whether it be injuries,¹² exposure,¹³ accident, such as falling from a sleigh¹⁴ or being thrown from a wagon,¹⁵ or whether the result was produced by some inherent physical difficulty.¹⁶

b. CAUSE OF DEATH — (1) *General Rule.* — Physicians may give their opinions of the cause of death, such opinions being based upon knowledge derived as attending physicians, or from examinations, or from hypothetical statements.¹⁷

1. Barnes *v.* Ingalls, 39 Ala. 193.

2. Marcy *v.* Barnes, 16 Gray (Mass.) 161, 77 Am. Dec. 405; Bacon *v.* Williams, 13 Gray (Mass.) 525.

3. People *v.* Muller, 96 N. Y. 408, 48 Am. Rep. 635.

4. Pavers. — Pittsburgh *v.* O'Neill, 1 Pa. St. 342.

5. Opinion of Physician as to Abortion Admissible. — State *v.* Lee, 65 Conn. 265, 48 Am. St. Rep. 202; Hauk *v.* State, 148 Ind. 238; State *v.* Smith, 32 Me. 369, 54 Am. Dec. 578; Com. *v.* Thompson, 159 Mass. 56; State *v.* Wood, 53 N. H. 484; State *v.* Glass, 5 Oregon 73.

6. Means Employed. — State *v.* Lee, 65 Conn. 265, 48 Am. St. Rep. 202; Hauk *v.* State, 148 Ind. 238; Com. *v.* Thompson, 159 Mass. 56; State *v.* Wood, 53 N. H. 484.

7. Bathrick *v.* Detroit Post, etc., Co., 50 Mich. 629; State *v.* Wood, 53 N. H. 484; Reg. *v.* Stitt, 30 U. C. C. P. 30.

8. Whether Self-inflicted. — State *v.* Lee, 65 Conn. 265, 48 Am. St. Rep. 202; Com. *v.* Leach, 156 Mass. 99.

9. Com. *v.* Brown, 121 Mass. 69.

10. By Use of Drugs. — Williams *v.* State, (Tex. App. 1892) 19 S. W. Rep. 897.

11. Bathrick *v.* Detroit Post, etc., Co., 50 Mich. 629.

12. Miscarriage. — Howland *v.* Oakland Consol. St. R. Co., 110 Cal. 513; McKeon *v.* Chicago, etc., R. Co., 94 Wis. 477.

13. Medical experts who had heard the testimony were allowed to give their opinions as to whether a miscarriage was caused by injuries and exposure which a woman suffered

by being ejected from a car, when not sufficiently clad. McKeon *v.* Chicago, etc., R. Co., 94 Wis. 477.

14. A physician is competent as an expert to answer the following question: "If a woman fall from a sleigh some three or four days prior to the birth of a child, and from the effects of it felt pain in the back and side, and had continued to have pains from that time, what effect would that be likely to have upon the birth, or would it have any effect, in your judgment?" State *v.* Ginger, 80 Iowa 574.

15. The following question is proper: "If a woman was with child, and met with an accident so that she was thrown over the footboard of a wagon by a runaway horse, thrown to the ground on her stomach or side, went home and soon after went to bed, and if she was confined to the bed for ten or twelve days, and if at the end of that time she suffered a miscarriage, would the facts if true be an adequate cause for a miscarriage?" Benjamin *v.* Holyoke St. R. Co., 160 Mass. 3.

16. Hauk *v.* State, 148 Ind. 238.

17. Opinion as to Cause of Death Competent — United States. — Manufacturers' Accident Indemnity Co. *v.* Dorgan, 58 Fed. Rep. 945.

Alabama. — Mitchell *v.* State, 58 Ala. 417; Bostic *v.* State, 94 Ala. 45; Simon *v.* State, 108 Ala. 27.

Arkansas. — Ebos *v.* State, 34 Ark. 520; Polk *v.* State, 36 Ark. 117.

Florida. — Newton *v.* State, 21 Fla. 53.

Iowa. — State *v.* Tippet, 94 Iowa 646.

Louisiana. — State *v.* Baptiste, 26 La. Ann. 134.

(2) *Several Concurrent Causes.* — The rule applies where there are several concurrent causes from which death might have resulted,¹ and the witness may testify that one operated to the exclusion of another, as that the proximate cause was a wound and not diarrhoea² or a surgical operation,³ or that death came from bruises and laceration and not from dislocation of the neck,⁴ or from drowning and not from suffocation.⁵

(3) *Isolated Causes* — **Drowning.** — Physicians who have examined the body may, from the indications and conditions found, or from hearing the evidence in the case, say in answer to hypothetical questions whether death was caused by drowning⁶ and what symptoms would indicate that form of death⁷ to the exclusion of another cause.⁸

Poison. — A physician was allowed to give his opinion that the deceased died from the effects of poison, although his conclusion was based in part upon information that there was arsenic in the dead person's house.⁹

Clot of Blood. — A physician's opinion was received as to whether a certain clot of blood produced by injuries could have existed for a specified time without causing death.¹⁰

Maine. — *State v. Smith*, 32 Me. 369, 54 Am. Dec. 578; *State v. Pike*, 65 Me. 111.

Michigan. — *People v. Hare*, 57 Mich. 505; *People v. Foley*, 64 Mich. 148.

Mississippi. — *Pitts v. State*, 43 Miss. 472.

New York. — *Erickson v. Smith*, 2 Abb. App. Dec. (N. Y.) 64.

North Carolina. — *State v. Bowman*, 78 N. Car. 509.

Pennsylvania. — *Com. v. Crossmire*, 156 Pa. St. 304.

South Carolina. — *State v. Bradley*, 34 S. Car. 136.

Texas. — *Shelton v. State*, 34 Tex. 662; *Powell v. State*, 13 Tex. App. 244; *Hunter v. State*, 30 Tex. App. 314.

Virginia. — *Livingston v. Com.*, 14 Gratt. (Va.) 592.

Washington. — *Ilwaco R., etc., Co. v. Hedrick*, 1 Wash. 446.

Wisconsin. — *Boyle v. State*, 61 Wis. 440.

1. **Several Concurrent Causes.** — *Shelton v. State*, 34 Tex. 662; *Powell v. State*, 13 Tex. App. 244; *Hunter v. State*, 30 Tex. App. 314.

2. **Wound on Leg Proximate Cause, and Not Diarrhoea.** — In *Powell v. State*, 13 Tex. App. 254, physicians who examined the wound and attended the patient until his death were allowed to testify that the patient "died from the wound inflicted on his leg, the diarrhoea, the swelling of and pain in the bowels, all combined; but that the wound caused all these things."

3. **Death Caused by Gunshot Wounds and Not by Operation.** — A physician who performed an operation upon the deceased may give his opinion that death was the result of gunshot wounds, and not of the operation. *Hunter v. State*, 30 Tex. App. 314.

4. **Bruises and Laceration and Not Dislocation of Neck.** — A physician who examined the dead body the day after death, and found the body and legs badly lacerated and bruised, and the neck broken, was allowed to express his opinion that, independently of the dislocation of the neck, the other injuries were sufficient to have caused the death, also that such dislocation of the neck preceded death. *Shelton v. State*, 34 Tex. 662.

5. **Drowning and Not Suffocation.** — In *Erick-*

son v. Smith, 2 Abb. App. Dec. (N. Y.) 64, the deceased was a passenger on board a steamboat when the boiler exploded. In her terror, she ran away from her companions, and her dead body was afterwards found in the river. The defense was that she was not injured by the explosion, but madly rushed overboard, and was drowned. A physician who had been present at the coroner's inquest was permitted to give his opinion that the deceased died from drowning, and to answer the question what would be the indications if a person were suffocated, and afterwards fell or was thrown overboard.

6. **Manufacturers' Accident Indemnity Co. v. Dorgan**, 58 Fed. Rep. 945; *State v. Baptiste*, 26 La. Ann. 134; *People v. Hare*, 57 Mich. 505; *Erickson v. Smith*, 2 Abb. App. Dec. (N. Y.) 64.

7. **Falling and Being Stunned in Shallow Water.** — A physician was allowed to answer the following question: "Supposing a person to have fallen and been stunned in shallow water, where he made very little struggle, state whether what you found to be the condition of the lungs would be what would be expected where a man came to his death in that manner." *Manufacturers' Accident Indemnity Co. v. Dorgan*, 58 Fed. Rep. 945.

8. *Erickson v. Smith*, 2 Abb. App. Dec. (N. Y.) 64.

9. **Poison.** — In *Mitchell v. State*, 58 Ala. 417, the attending physician gave his opinion that "the deceased was poisoned by arsenic and died from the effects of the same," although he also testified that he would not have come to the conclusion that the symptoms of the sickness and the death of deceased were caused by poison by arsenic if he had not heard that there was arsenic in the house. The latter statement was viewed as affecting the weight, but not the admissibility, of the opinion.

10. **Clot of Blood.** — In *State v. Pike*, 65 Me. 111, the physician who made the post-mortem examination was asked "whether such a wound as they found might have been produced by coming in contact with a body of hard material, where there were no sharp angles or points; whether it might have been

Blow. — The opinions of physicians are admissible to the effect that death was caused by a blow.¹

Suffocation. — Physicians were allowed to testify in response to a hypothetical question that death resulted from suffocation, aided by extensive injury to the brain, and that they knew of no disease which would produce death with those symptoms.²

Stillborn Child. — Whether a stillborn child would have been born alive if medical assistance had been received in time is a proper subject of expert evidence where the testimony shows that the mother suffered more physical pain, mental anxiety, and alarm on account of her condition than would have resulted had a physician been present.³

c. DISEASE — (1) *Etiology or Cause.* — Physicians are of course competent to give their opinions in evidence as to the etiology or cause of disease,⁴ as that malaria was brought on by stagnant water,⁵ or what was responsible for tumors of the brain⁶ or a contagious disease.⁷

(2) *Duration.* — Physicians may testify, from present symptoms, how long disease had existed.⁸

(3) *Curability.* — So a physician may give his opinion as to whether or not the disease from which a patient is suffering is curable.⁹

(4) *Exposure to Contagious Diseases.* — In an action for false imprisonment under a statute which conferred the power to quarantine only where the subject had been actually exposed to a contagious disease, it was held error to reject the opinion of medical experts as to whether the plaintiff had been so exposed.¹⁰

d. EFFECT OF DRUGS. — Physicians may give their opinion as to the effect on one of a certain quantity of a particular drug.¹¹

produced by a hard substance padded, like a sofa; whether the clot of blood which they found could have existed twelve hours without causing death; and whether the appearance of the extravasated blood in the neck was an indication of mechanical violence or disease."

1. Whether Death Caused by Blow. — *Bostic v. State*, 94 Ala. 45; *Ebos v. State*, 34 Ark. 520.

2. Suffocation. — *People v. Foley*, 64 Mich. 148.

3. Western Union Tel. Co. v. Cooper, 71 Tex. 507.

4. Cause of Disease. — *Eufaula v. Simmons*, 86 Ala. 515; *Louisville, etc., R. Co. v. Shires*, 108 Ill. 617; *Hardiman v. Brown*, 162 Mass. 585; *Matterson v. New York Cent. R. Co.*, 35 N. Y. 487, 91 Am. Dec. 67; *Jones v. Utica, etc., R. Co.*, 40 Hun (N. Y.) 349; *Kliegel v. Aitken*, 94 Wis. 432.

5. Stagnant Water. — In *Eufaula v. Simmons*, 86 Ala. 515, an attending physician was allowed to testify "that the overflow of rain-water upon her lot tended to produce sickness there; that several members of her family had been sick with malarial troubles since moving on said lot, and that they had never had such sickness while residing in another portion of the city."

6. Tumors of the Brain. — *Hardiman v. Brown*, 162 Mass. 585.

7. Contagious Disease. — In an action for damages for exposing one negligently to a contagious disease physicians were allowed to give opinions, upon a hypothetical statement of facts, as to when and where the plaintiff contracted the disease. *Kliegel v. Aitken*, 94 Wis. 432.

8. Duration of Disease. — *Washington v. Cole*, 6 Ala. 212; *Bennett v. Fail*, 26 Ala. 605; *Eckles v. Bates*, 26 Ala. 655; *Tatum v. Mohr*, 21 Ark. 349, *Lush v. McDaniel*, 13 Ired. L. (35 N. Car.) 485, 57 Am. Dec. 566; *Jones v. White*, 11 Humph. (Tenn.) 268; *Knox v. Wheelock*, 56 Vt. 191, in which latter case a physician who had examined a patient at widely separated intervals was held competent as an expert to give his opinion that the symptoms complained of on the former occasion were inconsistent with those complained of on the latter.

9. Whether or Not Disease Curable. — *New York Electric Equipment Co. v. Blair*, 79 Fed. Rep. 896; *Matteson v. New York Cent. R. Co.*, 35 N. Y. 487, 91 Am. Dec. 67.

10. Right of Quarantine. — *Smith v. Emery*, 11 N. Y. App. Div. 10.

11. Effect of Drugs. — *Hoard v. Peck*, 56 Barb. (N. Y.) 202; *Mutual L. Ins. Co. v. Tillman*, 84 Tex. 31; *State v. Perry*, 41 W. Va. 641; *Cooper v. State*, 23 Tex. 331. See also *Hall v. Rankin*, 87 Iowa 263, citing 7 AM. AND ENG. ENCYC. OF LAW (1st ed.), 514, where the question asked of two physicians was as to the probable effect upon a horse of a certain quantity of carbolic acid.

Illustration — Hallucination from Effect of Drugs. — In the *West Virginia* case just cited it was held error to exclude the opinion of a physician in response to the following question: "Supposing chloroform, or chloroform and ether mixed, sufficient to procure unconsciousness, to have been administered to a female patient, and on coming to she has charged the physician administering it with having outraged her person; state from your experience and your knowledge as a physician

e. HEALTH. — A physician who had testified as to the disease from which a woman was suffering was allowed to give his opinion as to the proportion of such patients who recover; ¹ and he may also give his opinion as to the effect of a nervous shock or the result of an accident on the patient's physical and mental condition.²

f. INJURIES AND WOUNDS — (1) *Cause and Effect* — **General Rule.** — Physicians are allowed to give their opinion as experts concerning the cause of certain injuries and wounds ³ where the hypothetical statements calling for an opinion are within the probable or possible range of the evidence,⁴ or where the question calls for an opinion as to whether certain alleged causes would produce the resulting conditions.⁵ But the question must not call for a speculative opinion,⁶ and the witness will not, as a rule, be allowed to state what in his opinion was the probable cause of a particular wound.⁷

Concussion. — Physicians may give their opinions as to whether certain injuries might have resulted from an alleged concussion by being thrown from a car⁸ or a carriage⁹ by collision of two trains¹⁰ or by being hurled violently forward by the sudden stoppage of a car.¹¹

whether such a statement might or might not be the result of hallucination."

1. *Cole v. Lake Shore, etc., R. Co.*, 95 Mich. 77.

2. *Bliss v. New York Cent., etc., R. Co.*, 160 Mass. 447.

3. **Opinions of Cause of Wounds or Injuries Admissible** — *Alabama.* — *Patterson v. South, etc., Alabama R. Co.*, 89 Ala. 318.

Illinois. — *Chatsworth v. Rowe*, 166 Ill. 114.

Indiana. — *Pennsylvania Co. v. Frund*, 4 Ind. App. 469.

Iowa. — *State v. Cross*, 68 Iowa 180; *State v. Rainsbarger*, 74 Iowa 196.

Maryland. — *Williams v. State*, 64 Md. 384. *Massachusetts.* — *Flaherty v. Powers*, 167 Mass. 61.

Michigan. — *People v. Hare*, 57 Mich. 505; *Jones v. Portland*, 88 Mich. 598; *Fuller v. Jackson*, 92 Mich. 197; *Lacas v. Detroit City R. Co.*, 92 Mich. 412; *Olson v. Manistique*, 110 Mich. 556.

Minnesota. — *Donnelly v. St. Paul City R. Co.*, 70 Minn. 278.

Nebraska. — *Omaha, etc., R. Co. v. Brady*, 39 Neb. 27; *Chicago, etc., R. Co. v. Archer*, 46 Neb. 907.

New York. — *Filer v. New York Cent. R. Co.*, 49 N. Y. 42; *Wendell v. Troy*, 39 Barb. (N. Y.) 329; *Friess v. New York Cent., etc., R. Co.*, 67 Hun (N. Y.) 205; *Cole v. Fall Brook Coal Co.*, 87 Hun (N. Y.) 584; *Quinn v. O'Keeffe*, 9 N. Y. App. Div. 68; *Hurley v. New York, etc., Brewing Co.*, 13 N. Y. App. Div. 167; *Haviland v. Manhattan R. Co.*, (Supreme Ct.) 15 N. Y. Supp. 898; *Griffith v. Utica, etc., R. Co.*, (Supreme Ct.) 17 N. Y. Supp. 692; *McDonald v. New York, etc., R. Co.*, 13 N. Y. Misc. Rep. (Buffalo Super. Ct.) 651; *Hunter v. Third Ave. R. Co.*, 20 Misc. Rep. (N. Y. City Ct.) 432.

Texas. — *Texas Cent. R. Co. v. Burnett*, 80 Tex. 536.

Washington. — *Robinson v. Marino*, 3 Wash. 454, 28 Am. St. Rep. 50.

Wisconsin. — *Smalley v. Appleton*, 75 Wis. 18; *Block v. Milwaukee St. R. Co.*, 89 Wis. 371, 46 Am. St. Rep. 849; *Tebo v. Augusta*, 99 Wis. 405.

4. *Quinn v. O'Keeffe*, 9 N. Y. App. Div. 68.

5. *People v. Hare*, 57 Mich. 505; *Jones v. Portland*, 88 Mich. 598; *Lacas v. Detroit City R. Co.*, 92 Mich. 412.

6. *Steagald v. State*, 24 Tex. App. 207; *Smalley v. Appleton*, 75 Wis. 18.

7. *State v. Rainsbarger*, 74 Iowa 196; *People v. Hare*, 57 Mich. 505.

8. **Concussion.** — *Filer v. New York Cent. R. Co.*, 49 N. Y. 42; *Lacas v. Detroit City R. Co.*, 92 Mich. 412. In the case first cited a physician was held competent to answer the following question: "Assuming that in November, 1864, while attempting to alight from the cars, she was thrown down and dragged upon her back for a number of feet until she became insensible, and from that time until this time there was pain in this part, and no intervening cause that you have knowledge of, what, in your opinion, was the cause of this poas abscess?"

9. *Quinn v. O'Keeffe*, 9 N. Y. App. Div. 68.

10. **Train Collisions.** — *McDonald v. New York, etc., R. Co.*, 13 N. Y. Misc. Rep. (Buffalo Super. Ct.) 651; *Texas Cent. R. Co. v. Burnett*, 80 Tex. 536. In the *New York* case cited a physician was allowed to answer the following question: "If her health, her general health, so far was good before this accident, if she had been thrown forward in the car and struck with force enough so as to occasion considerable pain across her chest, and then thrown back so as to strike her back on the arm of the seat and occasion some considerable pain and some lumps upon her spine, would you say that did or did not tend to occasion this nervous condition?"

11. *Griffith v. Utica, etc., R. Co.*, (Supreme Ct.) 17 N. Y. Supp. 692, where a physician was permitted to answer the question: "Would people falling upon her [the plaintiff], as she has described upon the witness stand, be sufficient to cause this shock?" by saying: "No, I don't think it would. I think it was the jar that did it — the falling suddenly." The witness had been extensively examined in chief, and a protracted cross-examination had taken place, on the subject of the plaintiff's injuries, the nature, character, and extent thereof; and it appeared that the witness was familiar with the circumstances attending the injuries. The

Electricity. — It is competent for a physician to give his opinion that injuries might have been caused by contact with a wire charged with electricity.¹

Inflamed Eye — Caustic Soda. — A physician may give his opinion that the inflammation of an eye might have been caused by caustic soda.²

Fright. — So a physician's opinion was received as to whether fright caused by being put off a train would produce heart disease in a young child.³

Effect. — Physicians are competent to give their opinions, based upon an ascertained condition of bad health or disease, as to whether such condition might be the result of certain previous wounds or injuries.⁴

(2) **Infliction — Instrument of Infliction.** — A physician is competent to give his opinion as to the character of instrument by which certain wounds or injuries were inflicted — whether a club,⁵ knife,⁶ chair,⁷ blunt instrument,⁸ crowbar or adze,⁹ musket,¹⁰ razor,¹¹ a hard substance padded like a sofa,¹² or by gunshot.¹³

question in effect called for the expression of opinion as to whether "people falling upon her would cause the shock" which had been referred to in the antecedent testimony of the expert.

1. *Block v. Milwaukee St. R. Co.*, 89 Wis. 371, 46 Am. St. Rep. 849.

2. *Flaherty v. Powers*, 167 Mass. 61, where a physician was asked, in substance, if an eye was inflamed violently for two weeks, and caustic soda had got into it two months before, and there never had been any trouble with the eye up to that time, what he would say was the cause.

3. *Illinois Cent. R. Co. v. Latimer*, 128 Ill. 163.

4. *Indiana*. — *Louisville, etc., R. Co. v. Holsapple*, 12 Ind. App. 301.

Iowa. — *McDonald v. Illinois Cent. R. Co.*, 88 Iowa 345.

Kentucky. — *Louisville, etc., R. Co. v. Braymer*, (Ky. 1897) 39 S. W. Rep. 24.

Missouri. — *Seckinger v. Philibert, etc., Mfg. Co.*, 129 Mo. 590.

New York. — *Turner v. Newburgh*, 109 N. Y. 301; *Stouter v. Manhattan R. Co.*, 127 N. Y. 661; *Hurley v. New York, etc., Brewing Co.*, 13 N. Y. App. Div. 167; *O'Neil v. Dry Dock, etc., R. Co.*, 59 N. Y. Super Ct. 123.

5. **Injuries by Means of Club.** — *State v. Seymour*, 94 Iowa 699; *Waite v. State*, 13 Tex. App. 169; *Carthaus v. State*, 78 Wis. 560. In the last case a physician was allowed to answer the question: "In your opinion, could this injury have been caused by a blow struck by a club, for instance the small end of a base ball club, about eighteen inches long, in the hands of some person?"

6. **Injuries with a Knife.** — *Batten v. State*, 80 Ind. 394; *State v. Morphy*, 33 Iowa 270, 11 Am. Rep. 122; *State v. Clark*, 12 Ired. L. (34 N. Car.) 151; *State v. Chee Gong*, 17 Oregon 635; *Mendum v. Com.*, 6 Rand. (Va.) 704.

Self-inflicted. — But a physician has been held incompetent as an expert to express an opinion as to whether under a given state of facts it would have been probable or possible for a certain person to have inflicted the wound from which he died by falling upon his own knife, as being a matter upon which the jurors were as competent to form an opinion as an expert. *State v. Bradley*, 34 S. Car. 136.

7. *State v. Porter*, 34 Iowa 131.

8. *Smith v. Chicago, etc., R. Co.*, 119 Mo. 246.

9. **Adze or Crowbar.** — *Davis v. State*, 38 Md. 35. The question was: "State to the jury what kind of an instrument could, in your opinion, have inflicted the wounds found on the head of the deceased." The court observed: "It is contended that the question involves a mere possibility and not a rational probability as to the nature of the weapon used. We do not think, however, it is liable to any such objection. The witness had examined the wounds on the head of the deceased, and the sink or bin in which the body was found; and had examined also the iron crowbar and adze, both of which were found in or about the mill. The fair import and meaning of the question, under such circumstances, was to ascertain from the witness the nature and character of the instrument by which the wounds were, in his judgment, inflicted. The answer clearly shows the witness so understood it, for he says the wounds might have been inflicted by a crowbar or an adze, and in support of this opinion he further states that, assuming the blow to have been given from a certain direction, he found the crowbar fitted the depression in the skull."

10. *Gardiner v. People*, 6 Park. Cr. Rep. (N. Y. Supreme Ct.) 155.

11. *State v. Knight*, 43 Me. 11.

12. *State v. Pike*, 65 Me. 111.

13. **Gunshot.** — *Rash v. State*, 61 Ala. 89; *Prince v. State*, 100 Ala. 144, 46 Am. St. Rep. 28; *People v. Wong Chuey*, 117 Cal. 624; *State v. Cross*, 68 Iowa 180.

Whether Wound Inflicted with Hand over Muzzle. — "The evidence shows that the ball which killed Dr. McK. must have passed through the defendant's hand. He testified that his hand was tightly clasped over the muzzle. Such fact, if it existed, tended to corroborate the defendant's testimony that there was a struggle between him and the deceased over the possession of the revolver. But the wound was a small and clean one, and medical experts were permitted to testify that if the defendant's hand had been pressed tightly over the muzzle the explosion would have torn and lacerated the hand. It is insisted that this was not a subject for medical expert testimony; but in our opinion it was. The profession certainly has occasion to treat gunshot wounds, and must be presumed to know the difference in the appearance of a wound made by a ball and powder and of one made by a ball alone." *State v. Cross*, 68 Iowa 193.

A physician may also testify as to the size of the bullet inflicting a wound,¹ and as to whether the wound might have been made by some mechanical instrument.² But a mere observer of gunshot wounds, who had neither practiced nor studied medicine or surgery, was not allowed to give his opinion as to whether a certain wound had been made by a gunshot or a sharp instrument.³

Amount of Force Used. — A physician may give his opinion as to the amount of force necessary to inflict certain injuries.⁴

Time of Infliction. — It is competent for a physician to say upon a given statement of facts whether or not certain wounds or injuries were inflicted during life.⁵

Direction of Blow. — A physician may give his opinion as to the direction from which the blow causing the wounds or injuries came.⁶

Position of Body or of Assailant. — There are some authorities which hold that under no circumstances will expert evidence be admitted as to the position of the body at the time when the wound or injury was inflicted, nor as to the position of the person inflicting it, these being considered subjects upon which the jurors are competent to form independent opinions.⁷ But there are other cases in which the opinions of experts have been received in respect to such matters,⁸ as whether a gunshot was fired close at hand or from a distance,⁹ how far the muzzle was from the body of the wounded man,¹⁰ and whether at a given distance the assailant would necessarily have been stained with blood.¹¹

(3) *Permanence, etc.* — **In General.** — A physician may give his opinion as to the permanence of certain injuries.¹² But such opinions must not be specula-

1. **Size of Bullet.** — *People v. Wong Chuey*, 117 Cal. 624. In this case the attending surgeon had examined the gunshot wound which caused the death, and similar wounds upon other occasions, and taken bullets therefrom. He testified that in his opinion the wound was inflicted by a forty-one or forty-four calibre bullet, and the Supreme Court pronounced this admissible.

2. *People v. Willson*, 109 N. Y. 345.

3. *Caleb v. State*, 39 Miss. 721.

4. *Kennedy v. People*, 39 N. Y. 245; *People v. Fish*, 125 N. Y. 147. In the latter case a physician who had examined the wound was allowed to answer the question: "Taking this instrument as it is now, how much force would be necessary to drive it through the tissues you have described, and into the vertebrae?" The court observed: "The amount of force necessary to drive such a blunt instrument through the tissues, muscles, arteries, windpipe, and into the vertebrae is not a matter of common knowledge. But physicians and surgeons who have dissected and cut into the human body are better able to tell the resisting force of those parts than other people, and are, therefore, experts who are competent to give opinions on the subject."

5. **Time of Infliction of Wound.** — *People v. Hare*, 57 Mich. 505; *Linsday v. People*, 63 N. Y. 143; *People v. Willson*, 109 N. Y. 345; *State v. Harris*, 63 N. Car. 1; *State v. Clark*, 15 S. Car. 493; *Shelton v. State*, 34 Tex. 662.

6. **Direction from Which Blow Came.** — *Hopt v. Utah*, 120 U. S. 430; *Territory v. Egan*, 3 Dakota 119; *Kennedy v. People*, 39 N. Y. 245; *Johnson v. Steam Gauge, etc., Co.*, 146 N. Y. 152; *Perkins v. State*, 5 Ohio Cir. Ct. Rep. 597, 3 Ohio Cir. Dec. 292. But compare *McKee v. State*, 82 Ala. 32; *People v. Westlake*, 62 Cal. 303.

7. **Position of Body or of Assailant.** — *Brown v. State*, 55 Ark. 593; *People v. Smith*, 93 Cal.

445; *People v. Lemperle*, 94 Cal. 45; *People v. Hill*, 116 Cal. 562; *Dillard v. State*, 58 Miss. 368; *Kennedy v. People*, 39 N. Y. 245; *Perkins v. State*, 5 Ohio Cir. Ct. Rep. 597, 3 Ohio Cir. Dec. 292; *Cooper v. State*, 23 Tex. 331; *Thompson v. State*, 30 Tex. App. 325; *Williams v. State*, 30 Tex. App. 429.

8. *Bram v. U. S.*, 168 U. S. 532; *People v. Hawes*, 98 Cal. 648; *State v. Asbell*, 57 Kan. 398; *State v. Keene*, 100 N. Car. 509; *Com. v. Lenox*, 3 Brews. (Pa.) 249; *Preeper v. Reg.*, 15 Can. Sup. Ct. Rep. 401.

9. **Whether Near or from a Distance.** — *State v. Asbell*, 57 Kan. 408.

10. **Distance from Body.** — *Preeper v. Reg.*, 15 Can. Sup. Ct. Rep. 401.

11. "An objection to a question asked of a medical witness, whether, in his opinion, a man standing at the hip of a recumbent person and striking blows on that person's head and forehead with an axe would necessarily be spattered with, or covered with, some of the blood, was also properly overruled. We think the assumed facts recited in the question were warranted by the proof in the case, and that the evidence sought to be elicited from the witness was of a character justifying an expression of opinion by the witness, the jury after all being at liberty to give to the evidence such weight as in their judgment it was entitled to. *Hopt v. Utah*, 120 U. S. 430." *Bram v. U. S.*, 168 U. S. 569.

12. **Opinion as to Permanence of Injury** — *United States v. Cunningham v. New York Cent., etc., R. Co.*, 49 Fed. Rep. 439; *Reed v. Pennsylvania R. Co.*, 56 Fed. Rep. 184.

California. — *Healy v. Visalia, etc., R. Co.*, 101 Cal. 585.

Illinois. — *Springfield Consol. R. Co. v. Welsch*, 155 Ill. 511; *Peoria, etc., R. Co. v. Berry*, 17 Ill. App. 47.

Indiana. — *Noblesville, etc., Gravel Road Co. v. Gause*, 76 Ind. 142; *Louisville, etc., R.*

tive or conjectural, nor can such witnesses testify as to what is merely possible.¹ Within the foregoing rule, a physician is competent to give his opinion as to the natural and probable result of the disease² and the probability³ or the reasonable certainty of recovery.⁴ But it has been held

Co. v. Lucas, 119 Ind. 583; Louisville, etc., R. Co. v. Holsapple, 12 Ind. App. 301.

Iowa. — Erickson v. Barber, 83 Iowa 367; State v. Woodward, 84 Iowa 172.

Kansas. — Atchison, etc., R. Co. v. Frazier, 27 Kan. 463.

Massachusetts. — Rowell v. Lowell, 11 Gray (Mass.) 420.

Michigan. — Longworthy v. Green Tp., 88 Mich. 207; Holman v. Union St. R. Co., 114 Mich. 208.

Minnesota. — Kelly v. Erie Tel., etc., Co., 34 Minn. 321; Peterson v. Chicago, etc., R. Co., 38 Minn. 511; Brazil v. Peterson, 44 Minn. 212.

Missouri. — Barr v. Kansas City, 121 Mo. 22.

Nebraska. — Chicago, etc., R. Co. v. Archer, 46 Neb. 907.

New Jersey. — Consolidated Traction Co. v. Lambertson, 59 N. J. L. 297.

New York. — Bucl v. New York Cent. R. Co., 31 N. Y. 314, 88 Am. Dec. 271; Filer v. New York Cent. R. Co., 49 N. Y. 42; Strohm v. New York, etc., R. Co., 96 N. Y. 305; Turner v. Newburgh, 109 N. Y. 301; Griswold v. New York Cent., etc., R. Co., 115 N. Y. 61, 12 Am. St. Rep. 775; McClain v. Brooklyn City R. Co., 116 N. Y. 459; Alberti v. New York, etc., R. Co., 118 N. Y. 77; Sciolina v. Erie Preserving Co., 151 N. Y. 50, 7 N. Y. App. Div. 392; Lincoln v. Saratoga, etc., R. Co., 23 Wend. (N. Y.) 425; Tozer v. New York Cent., etc., R. Co., 38 Hun (N. Y.) 100; Jones v. Utica, etc., R. Co., 40 Hun (N. Y.) 349; Magee v. Troy, 48 Hun (N. Y.) 383; Saltzman v. Brooklyn City R. Co., 73 Hun (N. Y.) 567; King v. Second Ave. R. Co., 75 Hun (N. Y.) 17; Reynolds v. Niagara Falls, 81 Hun (N. Y.) 353; Clegg v. Metropolitan St. R. Co., 1 N. Y. App. Div. 207; Penny v. Rochester R. Co., 7 N. Y. App. Div. 595; Loudoun v. Eighth Ave. R. Co., 16 N. Y. App. Div. 152; Blate v. Third Ave. R. Co., 16 N. Y. App. Div. 287; Cass v. Third Ave. R. Co., 20 N. Y. App. Div. 591; Macer v. Third Ave. R. Co., 47 N. Y. Super. Ct. 461; Atkins v. Manhattan R. Co., 57 Hun (N. Y.) 102; Forde v. Nichols, (C. Pl.) 12 N. Y. Supp. 922; De Soucey v. Manhattan R. Co., (C. Pl.) 15 N. Y. Supp. 108; Rhines v. Royalton, (Supreme Ct.) 15 N. Y. Supp. 944; Coyne v. Manhattan R. Co., (Supreme Ct.) 16 N. Y. Supp. 686; Schuler v. Third Ave. R. Co., 1 Misc. Rep. (N. Y. C. Pl.) 351; Eifinger v. Brooklyn Heights R. Co., 13 N. Y. Misc. Rep. (Brooklyn City Ct.) 389; Swenson v. Brooklyn Heights R. Co., 15 N. Y. Misc. Rep. (Brooklyn City Ct.) 69; Brown v. Third Ave. R. Co., 19 Misc. Rep. (N. Y. Supreme Ct.) 504; Maher v. New York Cent., etc., R. Co., 20 N. Y. App. Div. 161.

Ohio. — New York, etc., R. Co. v. Ellis, 13 Ohio Cir. Ct. Rep. 704, 6 Ohio Cir. Dec. 304.

Pennsylvania. — Wilt v. Vickers, 8 Watts (Pa.) 227; McCue v. Knoxville, 146 Pa. St. 580.

Texas. — Gulf, etc., R. Co. v. Harriett, 80 Tex. 73; Sabine, etc., R. Co. v. Ewing, 7 Tex. Civ. App. 8.

Washington. — Mitchell v. Tacoma R., etc., Co., 13 Wash. 560.

Wisconsin. — Rhinehart v. Whitehead, 64

Wis. 42; Spear v. Hiles, 67 Wis. 350; Montgomery v. Scott, 34 Wis. 338; Abbot v. Dwinell, 74 Wis. 514; Block v. Milwaukee St. R. Co., 89 Wis. 371, 46 Am. St. Rep. 849; Nichols v. Brabazon, 94 Wis. 549; Crites v. New Richmond, 98 Wis. 55; Curran v. A. H. Strange Co., 98 Wis. 598.

1. Must Not Be Speculative. — Filer v. New York Cent. R. Co., 49 N. Y. 42; Strohm v. New York, etc., R. Co., 96 N. Y. 305; Tozer v. New York Cent., etc., R. Co., 105 N. Y. 617; Turner v. Newburgh, 109 N. Y. 301; Griswold v. New York Cent., etc., R. Co., 115 N. Y. 61, 12 Am. St. Rep. 775; McClain v. Brooklyn City R. Co., 116 N. Y. 459; Albert v. New York, etc., R. Co., 118 N. Y. 77; Lincoln v. Saratoga, etc., R. Co., 23 Wend. (N. Y.) 425; Greene v. Linton, 7 N. Y. Misc. Rep. (Brooklyn City Ct.) 272; Clegg v. Metropolitan St. R. Co., 1 N. Y. App. Div. 207; Collins v. Janesville, 99 Wis. 464; Block v. Milwaukee St. R. Co., 89 Wis. 371, 46 Am. St. Rep. 849.

2. Alberti v. New York, etc., R. Co., 118 N. Y. 77; Jones v. Utica, etc., R. Co., 40 Hun (N. Y.) 349; Loudoun v. Eighth Ave. R. Co., 16 N. Y. App. Div. 152.

3. Probability of Recovery. — Peterson v. Chicago, etc., R. Co., 38 Minn. 511. The court said: "Another objection made to one of these questions, embodying a statement of plaintiff's assumed symptoms and condition, is that, instead of asking the witness whether in his opinion the plaintiff would recover, he was asked: 'What in your judgment is the probability of his recovery?' The point of the objection is that it called for an answer purely speculative in its character. While we have no disposition to extend the scope of this kind of evidence beyond the limits of established rules, yet we do not see that this question is obnoxious to the objection made. In view of the nature of the subject-matter of the inquiry, it amounted to nothing more than asking the witness his professional opinion whether she would recover. This was not an event the occurrence of which could be stated with absolute certainty. It was wholly a question of probabilities, and all that any honest witness, however skilful, could say would be that recovery was either probable or improbable. * * * Had the question been put in the form suggested by counsel as the correct one, and had the witness answered, as he did in this case, that the probability was that she would never recover, it would hardly be claimed that the answer would be incompetent. And certainly the question need not be more positive than is required of the answer. See Filer v. New York Cent. R. Co., 49 N. Y. 42; Matteson v. New York Cent. R. Co., 62 Barb. (N. Y.) 364; Macer v. Third Ave. R. Co., 47 N. Y. Super. Ct. 461. The case of Strohm v. New York, etc., R. Co., 96 N. Y. 305, cited by appellant, although perhaps an extreme case, and decided by a divided court, does not go so far as to exclude a question like this."

4. Block v. Milwaukee St. R. Co., 89 Wis. 371, 46 Am. St. Rep. 849.

improper for a physician to give his opinion as to what is likely to follow¹ or what sometimes results,² and such an opinion was held incompetent where the witness declined to say that certain results would follow with reasonable certainty.³ A nonexpert should not be allowed to testify as to the permanence of injuries.⁴

Illustrations. — Physicians have been allowed to give their opinions as to the probable consequences of bites on the hand⁵ and of injuries inflicted upon various parts of the body,⁶ the permanence of nervous conditions,⁷ of injuries to the limbs,⁸ thickening of the pleura,⁹ and injuries from concussion of the spine.¹⁰

Recurrence. — It is permissible to receive the opinion of an expert that from present indications it is probable that certain wounds will break out again.¹¹

Shamming Injuries. — It is proper for a physician to give his opinion as to whether or not the symptoms of which one complains are feigned,¹² but not to

1. *Strohm v. New York, etc., R. Co.*, 96 N. Y. 305; *Tozer v. New York Cent., etc., R. Co.*, 105 N. Y. 617, 659, 38 Hun (N. Y.) 100; *Atkins v. Manhattan R. Co.*, 57 Hun (N. Y.) 102.

2. *Blate v. Third Ave. R. Co.*, 16 N. Y. App. Div. 287. The court said: "The doctor was then allowed to testify, against the objection and exception of the defendant, that this condition sometimes ensues in impotency. This testimony was of the vaguest character. It was not even an opinion of the physician as to the future condition of the plaintiff, or what would likely or even possibly happen to him as the result of the injury. He was called to testify as to what sometimes happens as the consequence of such a condition of things, and that testimony was allowed to go to the jury under a complaint which alleged the permanency of the injury, and where the jury were instructed to allow damages for the injury that would follow from the condition in the future."

3. "Again, a medical witness for the plaintiff was permitted to testify as to the 'probable' future 'result' of her injury, but the witness declined to say that such result would ensue with 'reasonable certainty,' on the contrary, he confessed that 'there was a certain amount of uncertainty about it.' The evidence was incompetent." *De Soucey v. Manhattan R. Co.*, (C. Pl.) 15 N. Y. Supp. 108. Compare *Collins v. Janesville*, 99 Wis. 464.

4. *Pfau v. Alteria*, 23 Misc. Rep. (N. Y. Supreme Ct.) 693.

5. *Rhinehart v. Whitehead*, 64 Wis. 42.

6. *Jones v. Utica, etc., R. Co.*, 40 Hun (N. Y.) 349; *Erickson v. Barber*, 83 Iowa 367.

7. *McClain v. Brooklyn City R. Co.*, 116 N. Y. 459; *Spear v. Hiles*, 67 Wis. 350.

8. *Brazil v. Peterson*, 44 Minn. 212; *Reynolds v. Niagara Falls*, 81 Hun (N. Y.) 353; *Rhines v. Royalton*, (Supreme Ct.) 15 N. Y. Supp. 944.

9. *Eifinger v. Brooklyn Heights R. Co.*, 13 N. Y. Misc. Rep. (Brooklyn City Ct.) 389.

10. *Magee v. Troy*, 48 Hun (N. Y.) 383.

11. **Probability of Recurrence.** — *Filer v. New York Cent. R. Co.*, 49 N. Y. 42; *Penny v. Rochester R. Co.*, 7 N. Y. App. Div. 595; *Gulf, etc., R. Co. v. Harriett*, 80 Tex. 73.

From Having Once Broken Out. — "The plaintiff's mother testified that since the wound had apparently healed, it had broken out and discharged blood and matter; that the wound was very tender; that she called no physician,

but cared for it herself. Dr. R. testified as to the cause of its breaking out, and that, from the fact that the wound had once broken out, it was liable to do so again. He was then asked: 'Q. What do you say as to whether that result is probable and likely to occur?' To this question the defendant's counsel objected as altogether too speculative, and not within the rule. The objection was overruled, and defendant excepted. 'A. I hardly know how to answer that question; still, as I said before, it might occur.' He had previously testified to this without objection. No objection was made as to want of knowledge by the witness of the facts, or that the form of the question should have been hypothetical. The question was proper as calling for what was probable and likely to occur." *Penny v. Rochester R. Co.*, 7 N. Y. App. Div. 602.

Cicatricial Skin. — A physician was permitted to testify as follows: "I have recently examined said Harriett. I examined him last on the 17th of March, 1889, and I formed an opinion as to whether the injuries received by him are permanent or not. On this point there can be no doubt that he is permanently and seriously injured, and this is my positive opinion. The scars upon his legs are very extensive. Cicatrices never become developed in true skin, nor have they the vitality of the older structures. The greater the scar, the less its power will usually be. Cicatricial covering, if subjected to pressure, or even to moderate blows or stretching, is disposed to break down. The scars on Mr. H.'s limbs are apt to cause him no end of trouble in the future. If his health should deteriorate, or he should become weakened by any fever or exhaustive disease or old age, the cicatrices would have a tendency to break down and form indolent ulcers. Even a slight blow might start an ulceration which would probably take weeks to heal. Such ulceration might be of a more or less serious character. It might be sufficient to confine him to his room or even to his bed, or it might do no more than produce annoyance or inconvenience." *Gulf, etc., R. Co. v. Harriett*, 80 Tex. 73.

12. Whether or Not Symptoms Are Feigned. — *Cole v. Lake Shore, etc., R. Co.*, 95 Mich. 77; *Harrold v. Winona, etc., R. Co.*, 47 Minn. 17; *Brown v. Third Ave. R. Co.*, 19 Misc. Rep. (N. Y. Supreme Ct.) 504; *Missouri, etc., R. Co. v. Wright*, (Tex. Civ. App. 1898) 47 S. W. Rep.

testify that a person is a malingerer.¹

g. *INSANITY* — (1) *Prevailing Rule*. — The rule obtaining in most jurisdictions is that a general practitioner of medicine is a competent witness concerning insanity and that a special study of that subject is not required.² Such a witness may state whether in his opinion a certain person had the "usual and ordinary capacity for the transaction of the business of life,"³ or whether he could comprehend his moral obligations⁴ and his matrimonial duties.⁵ A physician may also give his opinions as to the mental condition of a woman after childbirth.⁶

(2) *Testamentary Capacity*. — But it has been held that such testimony is not admissible as to whether a certain person has a disposing mind and memory and is capable of making a will, though it may be received as to the degree of intelligence possessed by him.⁷ In any event a nonexpert witness cannot give his opinion as to the sanity of a testator without testifying to facts forming the basis of such opinion.⁸

(3) *Minority Rule*. — In some jurisdictions the expert witness regarding insanity must be a specialist in that subject⁹ or at least the attending physician of the alleged insane patient.¹⁰

56; Austin, etc., R. Co. v. McElmurry, (Tex. Civ. App. 1895) 33 S. W. Rep. 249; Quaipe v. Chicago, etc., R. Co., 48 Wis. 513, 33 Am. Rep. 821.

1. Brown v. Third Ave. R. Co., 19 Misc. Rep. (N. Y. Supreme Ct.) 504.

2. *General Practitioner Competent as to Insanity* — *United States*. — Davis v. U. S., 165 U. S. 373; U. S. v. McGlue, 1 Curt. (U. S.) 1; Hoge v. Fisher, 1 Pet. (C. C.) 163.

Alabama. — McAllister v. State, 17 Ala. 434, 52 Am. Dec. 180.

California. — People v. Worthington, 105 Cal. 166; Matter of Mullin, 110 Cal. 252.

Colorado. — Jordan v. People, 19 Colo. 417.

Connecticut. — Barber's Appeal, 63 Conn. 393.

Delaware. — State v. Windsor, 5 Harr. (Del.) 512.

Georgia. — Potts v. House, 6 Ga. 324, 50 Am. Dec. 329; Taylor v. State, 83 Ga. 647.

Illinois. — Schneider v. Manning, 121 Ill. 376.

Indiana. — Guetig v. State, 66 Ind. 94, 32 Am. Rep. 99.

Iowa. — State v. Felter, 25 Iowa 67; Bever v. Spangler, 93 Iowa 576; Matter of Fenton, 97 Iowa 192.

Kentucky. — Montgomery v. Com., 88 Ky. 509; Massie v. Com., (Ky. 1894) 24 S. W. Rep. 611; Phelps v. Com., (Ky. 1895) 32 S. W. Rep. 470.

Maine. — St. George v. Biddeford, 76 Me. 593.

Maryland. — Crockett v. Davis, 81 Md. 134.

Michigan. — Fraser v. Jennison, 42 Mich. 206; Rivard v. Rivard, 109 Mich. 98.

Missouri. — State v. Meyers, 99 Mo. 107; State v. Welsor, 117 Mo. 570.

New York. — People v. Schuyler, 106 N. Y. 298; People v. Barber, 115 N. Y. 475; People v. Hoch, 150 N. Y. 291; People v. Conroy, 153 N. Y. 174; People v. Montgomery, 13 Abb. Pr. N. S. (N. Y. Oyer & T. Ct.) 207.

North Carolina. — State v. Matthews, 66 N. Car. 106.

Pennsylvania. — Landis v. Landis, 1 Grant's Cas. (Pa.) 248; Pidcock v. Potter, 68 Pa. St. 342, 8 Am. Rep. 181; Com. v. Buccieri, 153 Pa. St. 535.

South Carolina. — Price v. Richmond, etc., R. Co., 38 S. Car. 199.

South Dakota. — State v. Leehman, 2 S. Dak. 171.

Texas. — Pigg v. State, 43 Tex. 108.

Vermont. — Fairchild v. Bascomb, 35 Vt. 398; Melendy v. Spaulding, 54 Vt. 517; Foster v. Dickerson, 64 Vt. 233.

3. Poole v. Dean, 152 Mass. 589.

4. Rivard v. Rivard, 109 Mich. 98.

5. St. George v. Biddeford, 76 Me. 593.

6. State v. Matthews, 66 N. Car. 106. The question proposed was whether, "from his experience and knowledge of females in three or four days after the delivery of a child, under the circumstances as detailed by the evidence, the prisoner was in a condition or frame of mind to give an intelligent answer, or know what she was talking about." The appellate court held that this question was proper.

7. White v. Bailey, 10 Mich. 155; Kempsey v. McGinniss, 21 Mich. 123; Matter of Arnold, 14 Hun (N. Y.) 525; Gibson v. Gibson, 9 Yerg. (Tenn.) 329; Fairchild v. Bascomb, 35 Vt. 398.

8. *Nonexperts*. — Lamb v. Lippincott, (Mich. 1898) 73 N. W. Rep. 887; Lamb v. Lynch, (Neb. 1898) 76 N. W. Rep. 428; Roush v. Wensel, 15 Ohio Cir. Ct. Rep. 133; *In re McCabe*, 70 Vt. 155.

9. *Minority Rule*. — *Must Be Specialist*. — Russell v. State, 53 Miss. 367; Reed v. State, 62 Miss. 405, the court saying: "It was not competent for the physician introduced as an expert, who knew nothing of the appellant, but was present and heard all the evidence at the trial, to express his opinion on the question propounded to him as to the sanity or insanity of the appellant, for the reason that it was not shown that the witness was an expert on that subject." Russell v. State, 53 Miss. 367; 3 Greenl. Ev., § 5. It appears from the record that he was a graduate in medicine and a practicing physician, but not that he was conversant with insanity in any of its various forms, or that he had ever had the care and superintendence of insane persons, or that he had ever made the subject of mental disease a study."

10. *Must Be Attending Physician*. — Hall v. Perry, 87 Me. 569, 47 Am. St. Rep. 352. *Com-*

h. MALPRACTICE. — A physician or surgeon may give an opinion as to whether or not another physician has attended skilfully or properly a particular case,¹ or whether an amputation has been skilfully performed.²

i. PREMATURE BIRTH, ETC. — Physicians³ and midwives⁴ may give in evidence their opinions as to whether a certain infant was prematurely born, and a physician may testify as to the age of a child.⁵

j. PROXIMATE CAUSE. — What is the proximate cause of an injury is ordinarily a question for the jury, and not a subject for expert opinion evidence,⁶ but the opinion of experts has been received in some instances,⁷ as where a physician was allowed to give his opinion that death was due to pneumonia caused by an assault,⁸ or to gunshot wounds and not to a surgical operation.⁹

k. RAPE — Penetration. — It is proper for physicians to give their opinions as to whether penetration has occurred so as to constitute rape.¹⁰

Pregnancy from Rape. — Also whether pregnancy is likely to occur as a result of rape.¹¹

Violent Connection. — But it is not proper for a medical expert to say whether certain inflammation was produced by having violent connection,¹² nor whether a man could have had carnal connection with a certain woman without resort to extraordinary physical violence,¹³ as the jurors are equally able to form an opinion on these questions after they are in possession of the facts.

Manner and Resistance. — So a medical expert is not competent to give his opinion as to whether a rape could have been committed in the manner described, nor whether a woman would swoon or be nerved with more than usual strength.¹⁴

l. SEXUAL INTERCOURSE. — Physicians may, from the knowledge which they possess of the human system, give their opinions as to whether sexual intercourse might have taken place in the manner and under the circumstances described by a witness.¹⁵

pare Hutchins v. Ford, 82 Me. 363; *Fayette v. Chesterville*, 77 Me. 28, 52 Am. Rep. 741; *Heald v. Thing*, 45 Me. 392; *Com. v. Rogers*, 7 Met. (Mass.) 500, 41 Am. Dec. 458; *Baxter v. Abbott*, 7 Gray (Mass.) 71; *Com. v. Rich*, 14 Gray (Mass.) 335; *Hastings v. Rider*, 99 Mass. 622; *Poole v. Dean*, 152 Mass. 589 (by an expert on insanity).

1. Malpractice — Illinois. — *Hoener v. Koch*, 84 Ill. 408.

Indiana. — *Jones v. Angell*, 95 Ind. 376.

Massachusetts. — *Barber v. Merriam*, 11 Allen (Mass.) 322; *Twombly v. Leach*, 11 Cush. (Mass.) 397.

Michigan. — *Mayo v. Wright*, 63 Mich. 32.

Oregon. — *Heath v. Glisan*, 3 Oregon 64.

Pennsylvania. — *Mertz v. Detweiler*, 8 W. & S. (Pa.) 376.

Wisconsin. — *Wright v. Hardy*, 22 Wis. 348.

2. Tullis v. Rankin, 6 N. Dak. 44; *Olmsted v. Gere*, 100 Pa. St. 127; *Wright v. Hardy*, 22 Wis. 348.

3. Young v. Makepeace, 103 Mass. 50; *Thayer v. Davis*, 38 Vt. 163.

4. Thayer v. Davis, 38 Vt. 163; *Mason v. Fuller*, 45 Vt. 29. See *supra*, this section, *Midwives and Nurses*.

5. People v. Johnson, 70 Ill. App. 634; *State v. Smith*, Phil. L. (61 N. Car.) 302.

6. General Rule as to Proximate Cause. — *Milwaukee*, etc., R. Co. v. *Kellogg*, 94 U. S. 469; *Ford v. Illinois Refrigerating Constr. Co.*, 40 Ill. App. 222.

7. State v. Chiles, 44 S. Car. 338; *Hunter v. State*, 30 Tex. App. 314; *Bowen v. Huntington*, 35 W. Va. 682; *Vosburg v. Putney*, 86 Wis. 278.

8. Pneumonia. — *State v. Chiles*, 44 S. Car. 338.

9. Surgical Operation. — *Hunter v. State*, 30 Tex. App. 314.

10. Rape. — *State v. Smith*, Phil. L. (61 N. Car.) 302; *Hardtke v. State*, 67 Wis. 552; *Proper v. State*, 85 Wis. 615.

11. State v. Knapp, 45 N. H. 148; *Young v. Johnson*, 123 N. Y. 226.

12. "It was for the jury to determine whether the inflammation which the witness testified to was the result of a rape or of some other cause; and the extent to which expert testimony affecting that question could properly be resorted to would be to show what effects upon the sexual organs of the female might result had she been ravished." *Noonan v. State*, 55 Wis. 258.

13. Whether Physical Violence Required. — *Woodin v. People*, 1 Park. Cr. Rep. (N. Y. Supreme Ct.) 464.

14. Cook v. State, 24 N. J. L. 843.

15. Sexual Intercourse. — *McMurrin v. Rigby*, 80 Iowa 322; *People v. Clark*, 33 Mich. 112; *State v. Perry*, 41 W. Va. 641, citing 7 AM. AND ENG. ENCYC. OF LAW (1st ed.) 494. In the latter case the question was: "If a female was sitting in a rocking chair [then before the jury] in the manner described by the words 'pulled down in the chair,' and a man weighing two hundred and thirty pounds, with one leg amputated just below the knee, and was thereby incapacitated from kneeling, could he get into position in front of the young woman sitting in the rocking chair in such manner as to violate her person?" The court said: "The objection to this question is that it comes

m. SUFFERING AND PAIN.—These are not proper subjects of expert testimony where there are on the patient's part clear manifestations of their existence.¹

Amputation.—But a medical expert may state whether a patient whose limbs have been amputated suffers pain appearing to come from the lost members.²

Asphyxiation.—So a physician was allowed to testify of one who died from asphyxiation that the decedent underwent a period of conscious pain and suffering before death.³

Personal injuries.—The physician of one who sued to recover damages for personal injuries was allowed to state whether in his opinion the plaintiff still suffered pain.⁴

And a Nonexpert may testify that one who had just been injured appeared to be suffering pain.⁵

46. Pilots.—See a succeeding subdivision of this article.⁶

47. Priests.—See a preceding subdivision of this article.⁷

48. Shipmasters and Shipwrights.—See a succeeding subdivision of this article.⁸

49. Subscribing Witnesses.—As it is the duty of subscribing witnesses to inspect and determine the testator's capacity, before attesting the will,⁹ they are permitted to testify as to the general opinion which they formed of the soundness of the testator's mind without stating facts upon which it is based.¹⁰

within the rule expressed in *Overby v. Chesapeake, etc.*, R. Co., 37 W. Va. 524, to wit: 'When the inquiry relates to a subject which does not require peculiar habits of study in order to enable a man to understand it, the opinion of skilled witnesses is not admissible.' The prisoner testifies that he had a wooden leg, which rendered it impossible for him to kneel; and hence it was impossible for him to commit the offense. The witness Dr. S. testified that he had attended to and was acquainted with the prisoner's leg. He was also a physician, fully acquainted with the construction, organism, and anatomy of the human system, male and female. Of such had been his peculiar habits of study. The prisoner might have exhibited to the jury his wooden leg and the manner in which it was fastened to the stump, and thus convinced them of the impossibility to get into position to perpetrate the wrong charged; but even in such case it would have been proper to supplement such practical exhibition with the testimony of witnesses who had made the human system, including its joints and organs, a subject of peculiar study, such as the jury would be unable to give in the short time allowed them in the examination of the evidence, and thus assist them in arriving at a just conclusion."

1. Suffering and Pain.—*Chicago, etc.*, R. Co. *v. Martin*, 112 Ill. 16.

2. Pain in Imaginary Parts.—*Hickenbottom v. Delaware, etc.*, R. Co., 122 N. Y. 91. The question was: "In your opinion as a medical man, following such an accident as here described, and an amputation, does it follow that the patient experiences the pain of an imaginary hand and lower part of the arm?"

3. Finnegan v. Fall River Gas Works Co., 159 Mass. 311.

4. Holman v. Union St. R. Co., 114 Mich. 208.

5. Hall v. Austin, (Minn. 1898) 75 N. W. Rep. 1121.

6. See infra, this title, *The Various Subjects of Expert Testimony—Nautical and Marine Subjects*.

7. See supra, this section, *Clergymen*.

8. See infra, this title, *The Various Subjects of Expert Testimony—Nautical and Marine Subjects*.

9. Subscribing Witnesses.—*Potts v. House*, 6 Ga. 324, 50 Am. Dec. 329; *Poole v. Richardson*, 3 Mass. 330; *Clary v. Clary*, 2 Ired. L. (24 N. Car. 78; *Heyward v. Hazard*, 1 Bay (S. Car.) 335. Compare *Runyan v. Price*, 15 Ohio St. 1, 86 Am. Dec. 459.

10. Georgia.—*Potts v. House*, 6 Ga. 324, 50 Am. Dec. 329; *Scott v. McKee*, (Ga. 1898) 31 S. E. Rep. 183.

Maine.—*Cilley v. Cilley*, 34 Me. 162; *Robinson v. Adams*, 62 Me. 369.

Maryland.—*Williams v. Lee*, 47 Md. 321.

Massachusetts.—*Poole v. Richardson*, 3 Mass. 330; *Needham v. Ide*, 5 Pick. (Mass.) 510; *Chase v. Lincoln*, 3 Mass. 236; *Williams v. Spencer*, 150 Mass. 346, 15 Am. St. Rep. 206; *Melanefy v. Morrison*, 152 Mass. 473.

New Hampshire.—*Boardman v. Woodman*, 47 N. H. 120; *Hardy v. Merrill*, 56 N. H. 227, 22 Am. Rep. 441.

New York.—*Dewitt v. Barley*, 9 N. Y. 371; *Holcomb v. Holcomb*, 95 N. Y. 316; *Matter of Folts*, 71 Hun (N. Y.) 492; *Matter of Potter*, 17 N. Y. App. Div. 267.

North Carolina.—*Clary v. Clary*, 2 Ired. L. (24 N. Car.) 78.

Pennsylvania.—*Rambler v. Tryon*, 7 S. & R. (Pa.) 90, 10 Am. Dec. 444; *Wogan v. Small*, 11 S. & R. (Pa.) 141; *Logan v. McGinnis*, 12 Pa. St. 27; *Titlow v. Titlow*, 54 Pa. St. 216, 93 Am. Dec. 691.

South Carolina.—*Heyward v. Hazard*, 1 Bay (S. Car.) 335; *Kaufman v. Caughman*, 49 S. Car. 159.

Tennessee.—*Gibson v. Gibson*, 9 Yerg. (Tenn.) 329; *Van Huss v. Rainbolt*, 2 Coldw. (Tenn.) 139.

But in *New Jersey* the mere fact of one hav-

50. Surveyors — Location of Survey — Construction — By Whose Survey. — The opinions of surveyors are admissible as regards the location of a particular survey,¹ but not as to the construction of a survey as returned.² Whether a certain line was marked by the United States surveyors may be shown by one familiar with such marks.³

Monuments and Boundaries. — Opinions of surveyors are admissible as to whether stone piles, trees, and other objects were intended as monuments of boundaries.⁴ So a surveyor may testify that section corners located by him are the same as those located by the government survey,⁵ that a certain corner is the true quarter-section corner,⁶ and that certain posts form the true boundary line.⁷ But he is incompetent to state where the highest part of a hill is.⁸

Safety of Roads. — A surveyor is not competent merely as such to testify as to the safety and convenience of a road.⁹

Basis of Opinion. — A surveyor who testifies that he does not know the location of a certain corner cannot properly be asked if he has not an opinion concerning it, founded on a former survey.¹⁰

51. Tailors. — Where a coat from which a purse is alleged to have been cut is taken at once to a tailor to be repaired, the tailor may state whether such an object could have been taken out through the aperture then existing.¹¹

52. Tanners. — The owner of a tanyard who has long been engaged in the tanning business may testify as to the falsity of a representation concerning

ing affixed his signature to a will as a subscribing witness does not entitle his opinion as to the competency of the testator to any more weight than that of any one else who may be called upon to testify. *Turner v. Cheesman*, 15 N. J. Eq. 243; *Garrison v. Garrison*, 15 N. J. Eq. 266; *Boylan v. Meeker*, 15 N. J. Eq. 310.

Statement of Rule. — "It has also been insisted that there is a difference between the attesting witnesses to an instrument and other witnesses, as to their competency to express an opinion upon the capacity of the maker. Wherever such a difference has been intimated, it seems confined to cases of wills, in which it is said that 'the testator is intrusted to the care of the attesting witnesses; that it is their business to inspect and judge of the testator's sanity before they attest; that in other cases witnesses are passive, here they are active, and principal parties to the transaction.' Now we can readily conceive why *prima facie* it shall be presumed that witnesses thus engaged are more observant than others on whom the duty of observation has not been thrown." *Clary v. Clary*, 2 Ired. L. (24 N. Car.) 78.

1. General Rule as to Surveyors — Alabama. — *Brantly v. Swift*, 24 Ala. 390; *Shook v. Pate*, 50 Ala. 91, in which case the court said: "A surveyor is an expert, and he may state the facts on which he bases his opinion that a line run or surveyed by himself has been correctly done. He may state that he 'found the corner stake' of a public survey, and 'the bearing points, and the marked trees along a line' of such survey. These are facts which are competent and relevant when the fact to be proven is the accuracy of a boundary line of adjacent tracts of lands. See *Nolin v. Parmer*, 21 Ala. 66."

Iowa. — *Messer v. Reginnitter*, 32 Iowa 312.

Massachusetts. — *Davis v. Mason*, 4 Pick. (Mass.) 156; *Knox v. Clark*, 123 Mass. 216.

Michigan. — *Hockmoth v. Des Grand Champs*, 71 Mich. 520; *Jones v. Lee*, 77 Mich. 35.

North Carolina. — *Stevens v. West*, 6 Jones L. (51 N. Car.) 49; *Clegg v. Fields*, 7 Jones L. (52 N. Car.) 37, 75 Am. Dec. 450.

Pennsylvania. — *Forbes v. Caruthers*, 3 Yeates (Pa.) 527; *Farr v. Swan*, 2 Pa. St. 245; *Northumberland Coal Co. v. Clement*, 95 Pa. St. 126; *Jackson v. Lambert*, 121 Pa. St. 182; *Higgins v. Sharon*, 5 Pa. Super. Ct. Rep. 92.

Texas. — *Randall v. Gill*, 77 Tex. 351.

Wisconsin. — *Toomey v. Kay*, 62 Wis. 104.

2. District of Columbia. — *Norment v. Fastnacht*, 1 MacArthur (D. C.) 515.

Michigan. — *Twogood v. Hoyt*, 42 Mich. 609; *Jones v. Lee*, 77 Mich. 35.

Missouri. — *Blumenthal v. Roll*, 24 Mo. 113; *Whittelsey v. Kellogg*, 28 Mo. 404; *Schultz v. Lindell*, 30 Mo. 310.

Pennsylvania. — *Ormsby v. Ihmsen*, 34 Pa. St. 462; *Northumberland Coal Co. v. Clement*, 95 Pa. St. 126.

Texas. — *Reast v. Donald*, 84 Tex. 648.

West Virginia. — *Randolph v. Adams*, 2 W. Va. 519.

3. Brantly v. Swift, 24 Ala. 390.

4. Davis v. Mason, 4 Pick. (Mass.) 156; *Knox v. Clark*, 123 Mass. 216; *Clegg v. Fields*, 7 Jones L. (52 N. Car.) 37, 75 Am. Dec. 450; *Forbes v. Caruthers*, 3 Yeates (Pa.) 527; *Northumberland Coal Co. v. Clement*, 95 Pa. St. 126; *Jackson v. Lambert*, 121 Pa. St. 182.

5. Hockmoth v. Des Grand Champs, 71 Mich. 520.

6. Toomey v. Kay, 62 Wis. 104.

7. La Rue v. Smith, 153 N. Y. 428

8. Hovey v. Sawyer, 5 Allen (Mass.) 554.

9. Safety of Road. — *Lincoln v. Barre*, 5 Cush. (Mass.) 590.

10. Basis of Opinion. — *Stevens v. West*, 6 Jones L. (51 N. Car.) 49.

11. Tailors. — *People v. Morrigan*, 29 Mich. 4.

the durability of leather tanned in a certain way, notwithstanding the witness himself is not a practical tanner.¹ So a witness who has been long engaged in the tanning trade may testify as to the cause of a certain injury to hides, though he has abandoned such trade.²

53. Undertakers. — Undertakers are not competent witnesses concerning the length of time after death when *rigor mortis* may be expected to set in.³

54. Underwriters. — See a succeeding subdivision of this article.⁴

55. Veterinary Surgeons and Horsemen. (See also *supra*, this section, *Physicians and Surgeons.*) — *a.* COMPETENCY. — Veterinary surgeons⁵ and even those not dignified by that title, but instructed in animal pathology by study and experience,⁶ may testify concerning diseases and injuries of animals.

b. ETIOLOGY. — Such witnesses have been allowed to testify as to the causes of animal maladies, as that injuries to mules were due to a certain cause,⁷ that a horse died from colic brought on by excessive eating while overheated,⁸ and that a mare had been ruined by service *per rectum*.⁹

Overdriving as a Cause. — A liveryman who had handled horses all his life was allowed to testify that overdriving was the cause of certain maladies of horses.¹⁰ But the opinion of a witness, offered for the purpose of showing that certain horses had died, not from overdriving but from an excessive dose of medicine, was rejected where his qualifications consisted in the superintendence of a livery stable for less than three years.¹¹ So an empiricist who has treated but

1. **Tanners.** — *Nelson v. Wood*, 62 Ala. 175.

2. *Bearss v. Copley*, 10 N. Y. 93.

3. **Undertakers.** — *Com. v. Farrell*, 187 Pa. St. 408, the court saying: "The question about the length of time after death when *rigor mortis* may be expected to set in was a question for expert medical testimony. Long experience and observation might stand in lieu of the study of books and qualify one to speak as an expert upon this subject, but the witness called as an expert upon this question had no medical knowledge, had read nothing on the subject, and had no experience except as an undertaker's assistant in preparing dead bodies for burial. His attention as an undertaker does not seem to have been specially directed to this question, and he frankly stated that he was not an expert upon the particular subject."

4. See *infra*, this title, *The Various Subjects of Expert Testimony — Insurance.*

5. **Veterinary Surgeons.** — *Grayson v. Lynch*, 163 U. S. 468; *Pinney v. Cahill*, 48 Mich. 584; *Riley v. Sparks*, 52 Mo. App. 572; *People v. Theobald*, 92 Hun (N. Y.) 182; *Coyle v. Baum*, 3 Okla. 695; *Moore v. Haviland*, 61 Vt. 58. See also *supra*, this section, *Physicians and Surgeons.*

6. *House v. Fort*, 4 Blackf. (Ind.) 293; *Missouri Pac. R. Co. v. Finley*, 38 Kan. 550; *Rouse v. Youard*, 1 Kan. App. 270; *Peer v. Ryan*, 54 Mich. 224; *People v. Bane*, 88 Mich. 453; *Rogers v. Ferris*, 107 Mich. 126; *Lewis v. Bell*, 109 Mich. 189; *Johnson v. Moffett*, 19 Mo. App. 159; *Slater v. Wilcox*, 57 Barb. (N. Y.) 604; *Nations v. Love*, (Tex. Civ. App. 1894) 26 S. W. Rep. 232; *Vates v. Cornelius*, 59 Wis. 615.

7. **Cause of Injuries.** — Witnesses engaged in shipping mules, who knew their habits and disposition and the causes likely to lead to their injury while on board cars, and who saw these mules when they were unloaded, were allowed to give opinions as to the cause of the

injuries of the mules in question. *Schaeffer v. Philadelphia, etc., R. Co.*, 168 Pa. St. 209, 47 Am. St. Rep. 884.

8. **Colic.** — *Pinney v. Cahill*, 48 Mich. 584.

9. **Service Per Rectum.** — *Peer v. Ryan*, 54 Mich. 224.

10. **Overdriving.** — *Johnson v. Moffett*, 19 Mo. App. 159. The witness testified that the tallo in the inside of one of the horses was melted from being overdriven and that the other had the "thumps."

In *Moulton v. Scruton*, 39 Me. 287, the witness was asked whether he did not know that other horses which had been hard driven and then exposed were often found to appear to be in the same condition as the horse under consideration was when he saw her. The court said: "The question proposed to the witness Dennett was properly excluded. It referred to matters in no wise connected with the issue then before the court. Dennett does not appear to have been an expert. If the question had been answered in the affirmative by the witness, it does not appear that all the horses observed by him might not have been unsound. To render the evidence of any practicable value, even by way of comparison, the character and condition of each horse, the manner in which it had been driven and the degree of exposure to which it had been subjected must have been inquired into, thus raising many distinct collateral issues, none of which could the party be supposed to be in a condition to meet, besides thereby protracting the trial indefinitely. Such testimony is inadmissible." *Citing* 1 Greenl. Ev. §§ 52, 448; *Collins v. Dorchester*, 6 Cush. (Mass.) 396; *Aldrich v. Pelham*, 1 Gray (Mass.) 510.

11. **Cause of Death.** — *Lewis v. Bell*, 109 Mich. 189. The witness testified that he had "watched the symptoms of horses." The court said: "This expression, whatever it may mean, did not show sufficient knowledge to render his opinion of any value."

not studied horse diseases is not qualified to state whether certain wounds were sufficient to produce death.¹

Character of Malady. — Such a witness, when sufficiently qualified, has been permitted to express an opinion concerning the character of animal diseases,² as that a cow was suffering from horn distemper,³ and that a horse was foundered,⁴ or had blind staggers,⁵ or could, under specified conditions, be afflicted with lung fever or pleurisy.⁶ But witnesses whose knowledge was chiefly theoretical were not allowed to give opinions concerning Texas fever,⁷ and a nonexpert was not permitted to state indications that a horse was afflicted with the heaves.⁸

c. OPERATION AND EFFECT OF DISEASE. — Experts have been allowed to testify as to the time within which spavin would appear after being contracted,⁹ as to whether a horse afflicted with loin distemper could live through a breeding season,¹⁰ as to the duration of a disease of a horse's eye,¹¹ and as to the permanence of certain injury to a horse.¹²

Possibility of Horse Biting Tongue. — A veterinary surgeon may give his opinion as to the possibility of a horse biting the tongue.¹³

Nonexperts on Animal Maladies. — Nonexperts are not competent witnesses to

1. *Harris v. Panama R. Co.*, 3 Bosw. (N. Y.) 7.

2. *Pierson v. Hoag*, 47 Barb. (N. Y.) 243, the court saying: "The question to the medical witness was clearly proper. He had already stated that he had read various standard authors on the subject of diseases, and had given his own opinion in respect to the character of the disease of which the animal died. Certainly it was proper, at that stage of the inquiry, to ask the witness for his best medical opinion, according to the best authority."

3. **Horn Distemper.** — *Slater v. Wilcox*, 57 Barb. (N. Y.) 604, where the witness was experienced with and had treated animals.

4. **Whether Horse Was Foundered.** — *Vates v. Cornelius*, 59 Wis. 615. The witness had handled horses for many years, treated them for diseases, and was acquainted with the horse in question.

5. **Blind Staggers.** — *People v. Bane*, 88 Mich. 453, where the witness was a man of considerable experience with horses, and was familiar with the symptoms of blind staggers.

6. **Lung Fever.** — The question was: "If a mule of the age of five or six or even seven years, which had been penned up for several days, say at least five days, and which is in good flesh, is fat, is in such physical condition and spirits and liveliness that it requires two men to catch and hold her, that she is haltered and brought out, showing good spirits, and there is no physical indication in any way of any affliction of any kind, and is led away from the stable showing high spirits, whether or not an animal at that time, under those conditions, could be afflicted with lung fever or pleurisy?" *Riley v. Sparks*, 52 Mo. App. 572.

7. **Texas Fever.** — One whose knowledge was derived from reading about Texas fever and from hearing evidence on this subject given in court is not competent as expert to give his opinion. *Missouri Pac. R. Co. v. Finley*, 38 Kan. 550.

Persons who had assisted veterinarians in the treatment of stock and had read extensively from books and papers treating on diseases of stock, but who, the court said, "were not persons educated or skilled as veterinary

surgeons, who had made diseases of cattle a study, and could point out and describe the chief characteristics or symptoms that would distinguish the disease of Texas, splenic, or Spanish fever from murrain or any other disease," were held incompetent to give their opinions as to whether certain cattle were infected with Texas fever. *Rouse v. Youard*, 1 Kan. App. 276.

8. **Heaves.** — *Spear v. Richardson*, 34 N. H. 428.

9. **Spavin.** — One who was experienced with horses both on a farm and as a blacksmith, and had read some on the disease of spavin, was allowed as an expert to give his opinion that he did not think such a spavin would appear within a week after it had been contracted. *Rogers v. Ferris*, 107 Mich. 126.

10. **Loin Distemper.** — One who was acquainted from observation and experience with the disease known as "loin distemper," had read standard scientific works on veterinary surgery, and knew the horse in question, was competent as an expert to give his opinion that: "From my observation, experience, and knowledge regarding loin distemper I will state that it would be impossible for a horse to go through the breeding season of 1890 with the loin distemper, and then breed through the season of 1891. A horse with the disease could not go through one season of breeding with it." *Nations v. Love*, (Tex. Civ. App. 1894) 26 S. W. Rep. 232.

11. **Disease of the Eyes.** — One who stated that he was not a farrier, but that he professed to understand when he tested a horse whether his eyes were good or not, though there might be diseases of the eyes of horses with which he was unacquainted, was permitted to give his opinion that the disease of the eye in question had been of long standing. *House v. Fort*, 4 Blackf. (Ind.) 293.

12. **Permanence of Injuries.** — *Coyle v. Baum*, 3 Okla. 695.

13. In *People v. Theobald*, 92 Hun (N. Y.) 182, the question was: "If the tongue was in the position which defendant testified it was, would it be possible for the horse to bite it off?"

the symptoms and appearance of cattle which died from lack of feed,¹ nor to the soundness of horses² unless the testimony relates to physical appearance,³ nor to the general effect of hard driving.⁴

56. Well Diggers.—The opinion of a well digger is admissible as to the amount of subsoil necessary to afford a dam against a fountain.⁵ And such a witness may also testify whether certain wells diverted water from a stream, causing it to dry up.⁶

VII. THE VARIOUS SUBJECTS OF EXPERT TESTIMONY—1. Introductory—a. MATTERS OF COMMON EXPERIENCE INADMISSIBLE.—One of the cardinal rules governing the admission of opinion evidence is that it must, usually, not alone be given by an expert, but must also be of such a character as not to fall within the range of common experience and observation, and therefore not to be intelligible to jurors without the aid of opinion.⁷

1. Nonexperts on Animal Maladies.—*Stonam v. Waldo*, 17 Mo. 498.

2. *Spear v. Richardson*, 34 N. H. 428.

3. *Willis v. Quimby*, 31 N. H. 485.

4. *Moulton v. Scruton*, 39 Me. 287.

5. Well Diggers.—*Buffum v. Harris*, 5 R. I. 243.

6. *Van Wycklen v. Brooklyn*, 41 Hun (N. Y.) 418, the court saying: "One Andrews, whose occupation was making and drilling wells, and who constructed the wells in question for the defendant, was examined as a witness. He was asked whether it was possible that the wells should take any water out of Spring creek. This was objected to by the plaintiff as opinionative. The objection was sustained, and the defendant excepted. We think this ruling was erroneous. The question whether the wells diverted water from the stream was one as to which expert testimony was admissible. *Moyer v. New York Cent., etc., R. Co.*, 98 N. Y. 645; *Com. v. Choate*, 105 Mass. 451; *Buffum v. Harris*, 5 R. I. 243. The abstraction of the water by the wells was not a fact patent to the senses, though the drying up of the stream was. This may have occurred from several causes. The question, to some degree, involved professional or scientific knowledge. As to such matters the opinions of experts are competent. The plaintiff, to sustain the objection, insists that the witness was not shown to be competent as an expert. But the objection was not placed on that ground. If it had been, the defendant might have gone further and shown that the witness was qualified, and we are further of opinion that the witness had already shown sufficient experience to qualify him to give an opinion."

7. Rule as to Matters of Common Experience—United States.—*Milwaukee, etc., R. Co. v. Kellogg*, 94 U. S. 469; *Schmieder v. Barney*, 113 U. S. 645; *Chandler v. Thompson*, 30 Fed. Rep. 38.

Arkansas.—*St. Louis, etc., R. Co. v. Yarrow*, 56 Ark. 612.

California.—*Fogel v. San Francisco, etc., R. Co.*, (Cal. 1895) 42 Pac. Rep. 565; *Sappenfield v. Main St., etc., R. Co.*, 91 Cal. 48; *Kauffman v. Maier*, 94 Cal. 269.

Illinois.—*Linn v. Sigsbee*, 67 Ill. 75; *Chicago v. McGiven*, 78 Ill. 347; *Pennsylvania Co. v. Conlan*, 101 Ill. 93; *Wight Fire Proofing Co. v. Poczekai*, 130 Ill. 139; *Illinois Cent. R. Co. v. People*, 143 Ill. 434.

Indiana.—*Toledo, etc., R. Co. v. Jackson*,

5 Ind. App. 547. See also *Bonebrake v. Board of Com'rs, etc.*, 141 Ind. 64.

Iowa.—*Parkhurst v. Masteller*, 57 Iowa 474; *Stafford v. Oskaloosa*, 64 Iowa 251.

Kansas.—*Monroe v. Lattin*, 25 Kan. 351; *Kansas Pac. R. Co. v. Peavey*, 29 Kan. 169. 44 Am. Rep. 630; *St. Louis, etc., R. Co. v. Ritz*, 33 Kan. 404.

Maine.—*State v. Watson*, 65 Me. 74; *Mayhew v. Sullivan Min. Co.*, 76 Me. 100.

Maryland.—*Baltimore, etc., Turnpike Road Co. v. Leonhardt*, 66 Md. 70; *Stumore v. Shaw*, 68 Md. 11, 6 Am. St. Rep. 412; *Baltimore, etc., Turnpike Road Co. v. State*, 71 Md. 573.

Massachusetts.—*New England Glass Co. v. Lovell*, 7 Cush. (Mass.) 319; *Perkins v. Augusta Ins., etc., Co.*, 10 Gray (Mass.) 312, 71 Am. Dec. 654; *Hovey v. Sawyer*, 5 Allen (Mass.) 554; *White v. Ballou*, 8 Allen (Mass.) 408; *Gilbert v. Guild*, 144 Mass. 601.

Minnesota.—*State v. Sorenson*, 32 Minn. 118; *Bergquist v. Chandler Iron Co.*, 49 Minn. 511.

Mississippi.—*Dillard v. State*, 58 Miss. 368.

Missouri.—*Hurt v. St. Louis, etc., R. Co.*, 94 Mo. 255, 4 Am. St. Rep. 374; *Naughton v. Stagg*, 4 Mo. App. 271; *Gavisk v. Pacific R. Co.*, 49 Mo. 274; *Kent v. Miltenberger*, 15 Mo. App. 480.

New Hampshire.—*Concord R. Co. v. Greely*, 23 N. H. 237.

New Jersey.—*Cook v. State*, 24 N. J. L. 843.

New York.—*Clark v. Fisher*, 1 Paige (N. Y.) 171, 19 Am. Dec. 402; *Amadon v. Ingersoll*, 34 Hun (N. Y.) 132; *People v. Muller*, 96 N. Y. 408, 48 Am. Rep. 635; *Ferguson v. Hubbell*, 97 N. Y. 507, 49 Am. Rep. 544; *Van Wycklen v. Brooklyn*, 118 N. Y. 424; *O'Neil v. Dry Dock, etc., R. Co.*, 129 N. Y. 125, 26 Am. St. Rep. 512.

North Carolina.—*De Berry v. Carolina Cent. R. Co.*, 100 N. Car. 310.

Ohio.—*Baltimore, etc., R. Co. v. Schultz*, 43 Ohio St. 270; *Seville v. State*, 49 Ohio St. 117.

Oregon.—*State v. Anderson*, 10 Oregon 448.

Pennsylvania.—*Franklin F. Ins. Co. v. Gruver*, 100 Pa. St. 266; *Graham v. Penn. R. Co.*, 139 Pa. St. 160, citing 7 AM. AND ENG. ENCYC. OF LAW (1st ed.) 493.

Tennessee.—*Nashville, etc., R. Co. v. Carroll*, 6 Heisk. (Tenn.) 347.

Vermont.—*Stowe v. Bishop*, 58 Vt. 498, 56 Am. Rep. 569; *Bemis v. Central Vermont R. Co.*, 58 Vt. 636.

6. OPINIONS BASED ON TESTIMONY OF OTHERS — (1) Experts — General Rule. — While there is some early authority to the contrary,¹ it seems now to be settled that experts may give in evidence opinions based on the testimony of other witnesses.²

Opinion Based on Evidence of Other Witnesses. — Thus an expert's opinion of the value of attorney's services, based on evidence of other witnesses at the trial, is admissible.³ So a medical expert may be asked whether the facts proved at the trial establish insanity on the part of the accused.⁴ An expert witness may testify as to the value of property which he knows only from the descriptions of other witnesses.⁵ It has also been held that an expert may state whether, judging from the evidence, a collision in controversy could have been avoided by proper care.⁶ But such a witness was not allowed to say from the evidence whether or not the conduct of the captain was correct.⁷

Hypothetical State of Facts. — Of course the expert may give his opinion based upon a hypothetical or assumed state of facts.⁸

When Based upon Counsel's Minutes of Testimony Taken by Him. — But an expert's opinion is not admissible when based merely upon minutes of the testimony taken by counsel, and not upon the testimony as actually introduced.⁹

Opinion on Merits of Case. — And while scientific men as witnesses may base their opinions upon the facts proved at the trial, they may not go farther and give their opinions on the merits of the case.¹⁰

(2) Nonexperts. — Whatever doubt may have existed as to the admissibility of expert opinion based upon the testimony of others, there seems to be none on the proposition that a nonexpert cannot so base his opinion, but must testify to facts within his own knowledge.¹¹ Thus a nonexpert cannot give

West Virginia. — *Welch v. Franklin Ins. Co.*, 23 W. Va. 288; *Overby v. Chesapeake, etc.*, R. Co., 37 W. Va. 524; *State v. Musgrave*, 43 W. Va. 690, *citing* 7 AM. AND ENG. ENCYC. OF LAW (1st ed.) 493. See also *State v. Perry*, 41 W. Va. 641, *citing* 7 AM. AND ENG. ENCYC. OF LAW (1st ed.) 494.

Wisconsin. — *Veerhusen v. Chicago, etc.*, R. Co., 53 Wis. 689.

1. Opinions of Experts Based on Testimony of Others. — *The Clement*, 2 Curt. (U. S.) 363; *Scott v. Lillenthal*, 9 Bosw. (N. Y.) 224; *Rex v. Wright, R. & R. C. C.* 339; *Westlake v. St. Lawrence County Mut. Ins. Co.*, 14 Barb. (N. Y.) 206.

2. Covey v. Campbell, 52 Ind. 157; *Com. v. Rogers*, 7 Met. (Mass.) 500, 41 Am. Dec. 458; *Whiton v. Snyder*, 88 N. Y. 299; *Garfield v. Kirk*, 65 Barb. (N. Y.) 464; *Beekman v. Platner*, 15 Barb. (N. Y.) 550; *Sikes v. Paine*, 10 Ired. L. (32 N. Car.) 280, 51 Am. Dec. 389; *Rex v. Searle*, 1 M. & Rob. 75.

3. Garfield v. Kirk, 65 Barb. (N. Y.) 464; *Beekman v. Platner*, 15 Barb. (N. Y.) 550; *Covey v. Campbell*, 52 Ind. 157.

4. Rex v. Searle, 1 M. & Rob. 75; *Com. v. Rogers*, 7 Met. (Mass.) 500, 41 Am. Dec. 458.

5. Whiton v. Snyder, 88 N. Y. 299 [*overruling* *Westlake v. St. Lawrence County Mut. Ins. Co.*, 14 Barb. (N. Y.) 206]; *Hanover Water Co. v. Ashland Iron Co.*, 84 Pa. St. 279; *Phoenix Ins. Co. v. Copeland*, 86 Ala. 551.

6. Fenwick v. Bell, 1 C. & K. 312, 47 E. C. L. 312.

7. Sills v. Brown, 9 C. & P. 601, 38 E. C. L. 245.

8. U. S. v. McGlue, 1 Curt. (U. S.) 1. See also *State v. Musgrave*, 43 W. Va. 672; *Huber v. Beck*, 6 Ind. App. 484, *citing* 7 AM. AND ENG.

ENCYC. OF LAW (1st ed.) 512. See also the title EXPERT WITNESSES, 8 ENCYC. OF PL. AND PR. 743.

9. Thayer v. Davis, 38 Vt. 163.

10. Jameson v. Drinkald, 12 Moo. 148, 22 E. C. L. 442.

11. Opinion of Nonexpert Based on Testimony of Others — Connecticut. — *Sytleman v. Beckwith*, 43 Conn. 9, the court saying: "To render opinions of common witnesses admissible it is indispensable that the opinions be founded on their own personal observation, and not on the testimony of others or on any hypothetical statement of facts as is permitted in the case of experts. In some of the cases it is held that the opinion can only be received in connection with facts stated by the witness. In other cases this is not required; as, for instance, in questions respecting the identity of persons. A witness well acquainted with another usually identifies him without conscious mental effort in the way of comparison or inference. In the absence of striking peculiarities of form or feature the identification may be, and often is, by the mere expression of countenance, which cannot be described. And the witness may be correct in his opinion, and yet be unable to give a single feature, or the color of the hair or the eyes, or any particulars as to the dress. In such cases the distinction between opinion and fact is so very nice that it might perhaps have been as well to consider such identification as a fact, like any other direct perception of the senses."

Georgia. — *Hook v. Stovall*, 30 Ga. 418.

Illinois. — *Pittard v. Foster*, 12 Ill. App. 132.

Indiana. — *Doe v. Reagan*, 5 Blackf. (Ind.) 217.

his opinion upon a hypothetical question or the evidence of others as to the sanity of a certain person.¹ So the evidence of nonexperts as to one's testamentary capacity must be based upon their own observation, and not upon that of others.²

2. The Subjects Classified and Considered — a. ANIMALS — Cattle. — A stockman's opinion is admissible in evidence as to the age,³ weight,⁴ and condition⁵ of cattle, the number of cattle of a particular brand on a certain range,⁶ and the effect of a stampede on the general appearance and market value of fat stock.⁷

Hogs. — One who has been in the habit of shipping hogs in cars for many years is competent to state that hogs of a certain number and weight could not be safely shipped in one car in hot weather.⁸

Horses. — That certain obstructions are likely to frighten horses of ordinary gentleness,⁹ and that a horse which had not run away for a year and a half would require no more care than formerly,¹⁰ are proper subjects of expert testimony. Witnesses need not be veterinarians in order that their opinions may be admissible in evidence regarding the diseases of horses and other domestic animals.¹¹

The Value of Animals is also a proper subject of expert opinion evidence.¹²

b. DAMAGES — Qualifications of Witnesses. — Witnesses offering their opinions of the amount of damages in a given case must usually possess the same qualifications as those testifying to value.¹³

Basis of Opinion. — On damages, as on other subjects of expert opinion evidence, the opinions of witnesses must not be speculative or conjectural, but must be based upon facts and conditions existing and proved.¹⁴ Thus in an

Massachusetts. — Compare *Rider v. Ocean Ins. Co.*, 20 Pick. (Mass.) 259.

Missouri. — *Appleby v. Brock*, 76 Mo. 314.

New Hampshire. — See *Beard v. Kirk*, 11 N. H. 367.

New York. — *People v. Bodine*, 1 Den. (N. Y.) 281; *Paige v. Hazard*, 5 Hill (N. Y.) 603; *Clapp v. Fullerton*, 34 N. Y. 190, 90 Am. Dec. 681; *Bell v. McMaster*, 29 Hun (N. Y.) 272; *Hewlett v. Wood*, 55 N. Y. 634.

Oregon. — *Zachary v. Swanger*, 1 Oregon 92.

Pennsylvania. — *Rouch v. Zehring*, 59 Pa. St. 74.

1. *Doe v. Reagan*, 5 Blackf. (Ind.) 217; *Pittard v. Foster*, 12 Ill. App. 132.

2. *Clapp v. Fullerton*, 34 N. Y. 190, 90 Am. Dec. 681; *Hewlett v. Wood*, 55 N. Y. 634; *Bell v. McMaster*, 29 Hun (N. Y.) 272; *Appleby v. Brock*, 76 Mo. 314.

3. **Age of Cattle.** — *Moreland v. Mitchell County*, 40 Iowa 394; *Clague v. Hodgson*, 16 Minn. 329.

4. **Weight of Cattle.** — *Carpenter v. Wait*, 11 Cush. (Mass.) 257; *Filley v. Billings*, 26 Neb. 537; *Baltimore, etc., R. Co. v. Thompson*, 10 Md. 76.

5. **Condition of Cattle.** — *Baltimore, etc., R. Co. v. Thompson*, 10 Md. 76.

6. **Number.** — *Albright v. Corley*, 40 Tex. 105, where the court said: "The third exception to the evidence of witnesses, 'as to the number of stock in the range, when they or either of them had never been specially charged with said stock, nor had any other means of making an estimate than was afforded them by passing through the range in quest of other stock,' presents no ground for reversal. It was the best evidence in reach of defendant; the witnesses had peculiar and abundant

opportunities to form an opinion, and their estimates went to the jury for what they might be worth, being open to contradiction or rebutting testimony, if in the power of plaintiff to produce it."

7. *Cooke v. Kansas City, etc., R. Co.*, 57 Mo. App. 471.

8. *Wabash, etc., R. Co. v. Pratt*, 15 Ill. App. 177.

9. *Moreland v. Mitchell County*, 40 Iowa 394.

10. *Donnelly v. Fitch*, 136 Mass. 558.

11. **Diseases of Animals.** — *Pearson v. Zehr*, 138 Ill. 48.

"A liberal rule must be applied in regard to evidence as to diseases in animals, as it is rare that persons are found who make the treatment of diseases in domestic animals a distinct profession, or attain to great skill or science therein. The best skill and science that can be expected — all that can be practically admitted in such cases — will be the evidence of persons who have had much experience, and have been for years made acquainted with such diseases, and with their treatment. They may give their opinions upon such experience, and on statements of fact upon which their opinions are based, as some evidence to be considered and weighed." *Slater v. Wilcox*, 57 Barb. (N. Y.) 604.

12. See *infra*, this section, *Value*.

13. See *infra*, this section, *Value*; and see *Fox v. Chicago, etc., Rapid Transit R. Co.*, 68 Ill. App. 417; *Brennan v. Corsicana Cotton-Oil Co.*, (Tex. Civ. App. 1898) 44 S. W. Rep. 588.

14. **Basis of Opinion.** — *McGean v. Manhattan R. Co.*, 117 N. Y. 219; *Roberts v. New York El. R. Co.*, 128 N. Y. 455; *Doyle v. Manhattan R. Co.*, 128 N. Y. 488; *Gray v. Manhattan R.*

action of tort the plaintiff cannot answer naked questions as to the amount of damages sustained by him.¹

Opinion as to Value Both Before and After Injury. — In some jurisdictions the witness must give his opinion as to the value of the property both before and after the injury suffered, leaving the jury to make the deduction.² In others witnesses may state their opinions generally as to the amount of damages.³

Opening Streets. — The qualifications for testifying to the measure of damages for opening a street include personal knowledge of the property and its value at the time.⁴

Damages by Pipe Line. — Witnesses living near certain land, knowing its value,

Co., 128 N. Y. 499; *Kernochan v. New York El. R. Co.*, 128 N. Y. 559; *Jefferson v. New York El. R. Co.*, 132 N. Y. 483; *Sixth Ave. R. Co. v. Metropolitan El. R. Co.*, 138 N. Y. 548; *Schmidt v. New York El. R. Co.*, 2 N. Y. App. Div. 481; *Gallagher v. Kingston Water Co.*, 25 N. Y. App. Div. 82; *McGay v. Manhattan El. R. Co.*, (C. Pl.) 16 N. Y. Supp. 155; *Wallach v. Manhattan El. R. Co.*, (C. Pl.) 16 N. Y. Supp. 156; *Delafield v. Manhattan El. R. Co.*, (C. Pl.) 16 N. Y. Supp. 157; *Blumenthal v. New York El. R. Co.*, 60 N. Y. Super. Ct. 95; *Sydam v. New York El. R. Co.*, (Supreme Ct.) 19 N. Y. Supp. 49; *Silcocks v. New York El. R. Co.*, (C. Pl.) 19 N. Y. Supp. 476; *Belch v. Missouri Pac. R. Co.*, 18 Mo. App. 80.

"In this class of cases it is quite improper to permit expert witnesses to speculate as to the facts and then base a speculative opinion upon the facts. Such witnesses may give opinions as to the present or past value of property based upon facts which they have observed, and they may give opinions on other matters which are the proper subject of expert evidence, based upon facts known to them, or proved by competent evidence." *Doyle v. Manhattan R. Co.*, 128 N. Y. 488.

1. *Ferguson v. Tobey*, 1 Wash. Ter. 275; *Upcher v. Oberlender*, 50 Kan. 315.

2. *Georgia*. — *Selma, etc., R. Co. v. Keith*, 53 Ga. 178.

Illinois. — *Ottawa Gas-Light, etc., Co. v. Graham*, 35 Ill. 346; *Cooper v. Randall*, 59 Ill. 317; *Keithsburg, etc., R. Co. v. Henry*, 79 Ill. 299; *Lovell v. Sny Island Levee Drainage Dist.*, 159 Ill. 188; *Chicago, etc., R. Co. v. Howell*, 65 Ill. App. 373; *Fox v. Chicago, etc., Rapid Transit R. Co.*, 68 Ill. App. 417.

Indiana. — *Ferguson v. Stafford*, 33 Ind. 162; *Ohio Valley R., etc., Co. v. Kerth*, 130 Ind. 314; *Sunnyside Coal, etc., Co. v. Reitz*, 14 Ind. App. 478.

Iowa. — *Smalley v. Iowa Pac. R. Co.*, 36 Iowa 571; *Lewis v. Burlington Ins. Co.*, 71 Iowa 97; *Knapp, etc., Co. v. Barnard*, 78 Iowa 347; *Pingry v. Cherokee, etc., R. Co.*, 78 Iowa 438; *Hartley v. Keokuk, etc., R. Co.*, 85 Iowa 455; *Brownell v. Chapman*, 84 Iowa 504, 35 Am. St. Rep. 326.

Kansas. — *Wichita, etc., R. Co. v. Kuhn*, 38 Kan. 675; *Leroy, etc., R. Co. v. Ross*, 40 Kan. 598; *Ottawa, etc., R. Co. v. Fisher*, 42 Kan. 675; *Chicago, etc., R. Co. v. Muller*, 45 Kan. 85; *Chicago, etc., R. Co. v. Easley*, 46 Kan. 337; *Sherman Center Town Co. v. Leonard*, 46 Kan. 354; *Achison, etc., R. Co. v. Wilkinson*, 55 Kan. 83.

Nebraska. — *Burlington, etc., R. Co. v.*

White, 28 Neb. 166; *Jameson v. Kent*, 42 Neb. 412.

New Mexico. — *New Mexican R. Co. v. Hendricks*, 6 N. Mex. 611.

Texas. — *Houston, etc., R. Co. v. Knapp*, 51 Tex. 592; *Gainesville, etc., R. Co. v. Hall*, 78 Tex. 169, 22 Am. St. Rep. 42.

3. *Maine*. — *Haskell v. Mitchell*, 53 Me. 468, 89 Am. Dec. 711; *Whiteley v. China*, 61 Me. 199; *Snow v. Boston, etc., R. Co.*, 65 Me. 230.

Massachusetts. — *Shaw v. Charlestown*, 2 Gray (Mass.) 107; *West Newbury v. Chase*, 5 Gray (Mass.) 421; *Shattuck v. Stoneham Branch R. Co.*, 6 Allen (Mass.) 115; *Swan v. Middlesex County*, 101 Mass. 173; *Sexton v. North Bridgewater*, 116 Mass. 200; *Shea v. Hudson*, 165 Mass. 43.

Minnesota. — *Simmons v. St. Paul, etc., R. Co.*, 18 Minn. 184; *Covill v. St. Paul, etc., R. Co.*, 19 Minn. 283; *Curtis v. St. Paul, etc., R. Co.*, 20 Minn. 28.

Missouri. — *Mississippi River Bridge Co. v. Ring*, 58 Mo. 491; *Springfield, etc., R. Co. v. Calkins*, 90 Mo. 538. *Contra*, *Missouri Fire Clay Works v. Ellison*, 30 Mo. App. 67; *Watkins v. St. Louis, etc., R. Co.*, 44 Mo. App. 245.

Montana. — *Gallatin Canal Co. v. Lay*, 10 Mont. 528.

New York. — *Rochester, etc., R. Co. v. Budlong*, 10 How. Pr. (N. Y. Supreme Ct.) 289; *Rogers v. Anson*, 42 Hun (N. Y.) 436.

Oklahoma. — *Diebold Safe, etc., Co. v. Holt*, 4 Okla. 479.

Oregon. — *Blagen v. Thompson*, 23 Oregon 239.

Pennsylvania. — *Schuylkill Nav. Co. v. Thoburn*, 7 S. & R. (Pa.) 411; *Watson v. Pittsburgh, etc., R. Co.*, 37 Pa. St. 469; *East Pennsylvania R. Co. v. Hottenstine*, 47 Pa. St. 28; *White Deer Creek Imp. Co. v. Sassaman*, 67 Pa. St. 415; *Curtin v. Nittany Valley R. Co.*, 135 Pa. St. 20; *Gallagher v. Kemmerer*, 144 Pa. St. 509, 27 Am. St. Rep. 673; *Beck v. Pennsylvania, etc., R. Co.*, 148 Pa. St. 271, 33 Am. St. Rep. 822; *Michael v. Crescent Pipe Line Co.*, 159 Pa. St. 99; *Mewes v. Crescent Pipe Line Co.*, 170 Pa. St. 364; *Pennock v. Crescent Pipe Line Co.*, 170 Pa. St. 372; *Galbraith v. Philadelphia Co.*, 2 Pa. Super. Ct. Rep. 359.

Washington. — *Seattle, etc., R. Co. v. Gilchrist*, 4 Wash. 509.

West Virginia. — *Hargreaves v. Kimberly*, 26 W. Va. 787, 53 Am. Rep. 121.

Wisconsin. — *Snyder v. Western Union R. Co.*, 25 Wis. 60; *Churchill v. Price*, 44 Wis. 540.

4. *Grier v. Homestead*, 6 Pa. Super. Ct. Rep. 542.

and familiar with the operation of a pipe line thereon, may testify as to the damages caused by such operation.¹

In Texas nonexperts may testify to the value of property in an action for damages for its complete destruction, and not merely for depreciation in value.²

c. **INSURANCE** — (1) *Materiality of Nondisclosure* — (a) **In General.** — Whether experts in insurance matters will be allowed to give their opinions as to the materiality of certain facts not disclosed by underwriters generally, in determining the amount of premium which would have been charged on a risk, is a subject on which there is generally supposed to be great conflict of opinion, especially in *England*.³

Upon Nature of Inquiry. — On this as on other subjects opinions are admissible only when given by properly qualified persons, if the jury would not be able to come to an intelligent conclusion without such opinion, and therefore it must depend on the nature of the inquiry, and it cannot be said, in general, that expert opinions are inadmissible.⁴

(b) **Exemplification of Rule — Probable Attack on Fort or Factory.** — An insurance broker's opinion as to whether certain letters indicating an apprehension of military attack on an insured fort or factory should have been shown to the underwriter is not proper evidence.⁵

Hostile Fleet About Coast. — So although the fact that there were rumors of a hostile fleet on the coast, known to the insured, is one material to the risk and should have been disclosed, it is not one upon which underwriters may give opinions.⁶ But an insurance expert may testify as to whether in the judgment of underwriters generally the disclosure of particular facts would affect the premium charged.⁷

Withholding Letter. — That the withholding of a letter to the insured's agent, instructing him to postpone effecting insurance on a ship until a considerable time after its arrival, is material to the risk, is a proper subject of opinion evidence by an underwriter.⁸

Misdescription of Occupancy. — The description of a house as occupied by a caretaker, when it was really occupied by a carpenter who carried on his trade therein, is material to the risk, and an expert may testify as to the effect thereof on underwriters.⁹

Misstatement of Occupation. — So the materiality of describing as a farmer one

1. Galbraith v. Philadelphia Co., 5 Pa. Super. Ct. Rep. 178.

2. Galveston, etc., R. Co. v. Serafina, (Tex. Civ. App. 1898) 45 S. W. Rep. 614.

3. **Materiality of Facts Not Disclosed — Insurance.** — Carter v. Boehm, 1 Smith L. Cas. (8th Am. ed.) 550; Taylor on Evidence, § 1420; 1 Arnould on Marine Insurance (5th ed.) 579; 2 Duer on Insurance 682, 5 Am. L. Rev. 573. But for an elucidation of this seeming conflict, see Quin v. National Assur. Co., 1 Jones & C. 316.

4. Hartford Protection Ins. Co. v. Harmer, 2 Ohio St. 452. See also Rickards v. Murdock, 10 B. & C. 527, 21 E. C. L. 123; Leitch v. Atlantic Mut. Ins. Co., 66 N. Y. 100.

5. Carter v. Boehm, 3 Burr. 1905.

6. Durrell v. Bederley, 1 Holt 283, 3 E. C. L. 118. The court said: "I am of opinion, though I received it with reserve, that the evidence of the underwriters who were called to give their opinion of the materiality of the rumors, and of the effect they would have had upon the premium, is not admissible evidence. * * * It is the province of a jury, and not of individual underwriters, to decide what facts ought to be communicated. It is not a

question of science, in which scientific men will mostly think alike, but a question of opinion, liable to be governed by fancy, and in which the diversity might be endless." In reference to this case, Joy, C. B., in Quin v. National Assur. Co., 1 Jones & C. 316, says: "And now what was the purpose for which the witnesses in Durrell v. Bederley were called? Best, Serjeant, proposed to call some underwriters to prove that if the rumors stated had been communicated to them, they would not have engaged in the risk. It was not to prove what underwriters in general would have done, or what was the usage; but what they (the witnesses) themselves would have done. Chief Justice Gibbs says rightly that was matter of fancy, in which diversity might be endless; and he does not say underwriters generally, but the underwriters; that is, those that were called for the purpose mentioned by Serjeant Best."

7. Berthon v. Loughman, 2 Stark. 258, 3 E. C. L. 400.

8. Rickards v. Murdock, 10 B. & C. 527, 21 E. C. L. 123.

9. Quin v. National Assur. Co., 1 Jones & C. 316.

whose real occupation was that of a slave catcher was held to be a proper subject of expert evidence.¹

Illicit Trade. — Presidents of insurance companies have been permitted to testify that in their opinion the fact of a vessel's having been captured and condemned for engaging in illicit trade should have been communicated.²

Ship Aground. — The materiality of the fact that a ship, when insured, was aground at a time when it was likely to be injured by the ice was deemed a proper subject of expert evidence.³

When Not a Subject for Experts. — But the materiality of the nondisclosure of a previous fire at the insured premises⁴ or of pending litigation concerning it⁵ is not a proper subject for experts.

(2) *Increase of Risk* — (a) *Generally.* — As the determination of this question often depends largely upon skill and experience, and is not a subject upon which jurors can usually draw intelligent conclusions from the facts,⁶ the opinions of experts are generally admissible thereon; as, for example, whether an unusual place of stowing a cargo of gold increased the risk.⁷

(b) *Change of Use and Occupation.* — Experts have been allowed to testify as to the increase of risk from the use of the insured building as a saloon instead of a paint shop,⁸ as a livery barn instead of a tavern barn,⁹ or as a canning factory¹⁰ or a building in which to operate a hay press¹¹ instead of an ordinary barn. But they have been forbidden to state whether it would increase the risk to change the use of a building from a general store lighted by kerosene lamps to a variety theatre lighted by electricity,¹² or to increase the number of stoves in operation in a building.¹³

Vacancy. — While there is some authority to the contrary,¹⁴ it is now the prevailing rule that the effect of nonoccupancy on the risk is not a proper subject of expert opinion.¹⁵

1. *Hartman v. Keystone Ins. Co.*, 21 Pa. St. 466.

2. *Marshall v. Union Ins. Co.*, 2 Wash. (U. S.) 357.

3. *Hawes v. New England Mut. Marine Ins. Co.*, 2 Curt. (U. S.) 229. The court said: "This has been a very vexed question both in the United States and in England; but I consider the better opinion to be that the evidence is admissible. I do not allow you to ask the witness what he himself, as an underwriter, would have done; but whether, from his knowledge of the business, he is able to state that the facts in question would or would not have an influence with underwriters generally in determining the amount of the premium. If his knowledge and skill in this particular business does enable him to state this, I think it is legal evidence. * * * Here the inquiry is, in substance, whether the market price of insurance is affected by particular facts. If the witness, being conversant with the business, has gained in the course of his employment a knowledge of the practical effect of these facts, or similar facts, upon premiums, he may inform the jury what it is. If he has not such knowledge he is not allowed to conjecture. He must speak from knowledge of the influence actually exercised by that or similar facts, in the course of business."

4. *Nondisclosure of Previous Fire.* — *Hartford Protection Ins. Co. v. Harmer*, 2 Ohio St. 458, where the court said: "There was nothing in the question raised here requiring either science or skill to determine. The effect that a previous fire might have upon the safety of the building thereafter could be as well understood

by one man as another. Every man of sense would know that it would depend entirely upon the cause of the fire. If the building had been fired by an undiscovered incendiary, it might be reasonably inferred that the motive which prompted the act might lead to a repetition of the attempt; but if it had been ignited by a stroke of lightning, or a spark from a burning building, or any other temporary or accidental cause, which no longer continued, nobody in his senses would suppose the building in greater peril from the fact in the future. The jury were entirely competent to draw their own conclusions, and the evidence was therefore inadmissible and properly rejected."

5. *Pending Litigation.* — *Hill v. Lafayette Ins. Co.*, 2 Mich. 481.

6. *Increase of Risk.* — *Kern v. South St. Louis Mut. Ins. Co.*, 40 Mo. 19.

7. *Leitch v. Atlantic Mut. Ins. Co.*, 66 N. Y. 100.

8. *Mitchell v. Home Ins. Co.*, 32 Iowa 421.

9. *Hobby v. Dana*, 17 Barb. (N. Y.) 111.

10. *Traders' Ins. Co. v. Catlin*, 163 Ill. 256.

11. *Russell v. Cedar Rapids Ins. Co.*, 78 Iowa 216.

12. *Hahn v. Guardian Assur. Co.*, 23 Oregon 576, 37 Am. St. Rep. 709.

13. *Schmidt v. Peoria M. & F. Ins. Co.*, 41 Ill. 295.

14. *Cornish v. Farm Bldgs. F. Ins. Co.*, 74 N. Y. 295.

15. *Effect of Nonoccupancy.* — *Joyce v. Maine Ins. Co.*, 45 Me. 168, 71 Am. Dec. 536; *Cannell v. Phoenix Ins. Co.*, 59 Me. 582; *Thayer v. Providence Washington Ins. Co.*, 70 Me. 531; *White v. Phoenix Ins. Co.*, 83 Me. 279;

(c) **Alterations and Additions.** — It has been held that experts could not say what was the increase of risk during the alteration of a building¹ or by the erection of an adjacent building² or a wooden frame over a boiler on the outside of a building;³ though opinions have been received as to the effect on the risk of an addition to the building and the arrangement of machinery therein,⁴ and a fireman was permitted to testify as to the increased risk from adding a story to the building.⁵

(3) **Interpretation of Policy.** — The meaning of a clause in an insurance policy, or of a book issued by the insurer in connection with a certain form of policy, is not a proper subject of expert evidence.⁶

d. **NAUTICAL AND MARINE SUBJECTS** — (1) **Seaworthiness.** — The opinions of experts are admissible as to seaworthiness.⁷ One who is experienced in the navigation of cotton boats may say whether such boats, when freighted, usually leak and require the daily use of the pumps to keep them free from water, the controversy involving the meaning of the words "tight and sound" as used in a marine insurance policy covering such boat.⁸ The certificate of a marine surveyor and inspector, made in the course of his business, is competent evidence of the seaworthiness of a vessel at that time, if supported by his oath that he examined the vessel and that he has no doubt that the facts stated in it are true, although he has no independent recollection of those facts.⁹ The master has been permitted to answer the question, "What caused the vessel to leak?"¹⁰

Floating Docks. — But nautical men who are neither shipwrights nor builders are not competent to say whether the loss of a floating dock was caused by defects therein.¹¹

A **Shipwright** who had been employed to repair a certain vessel was held competent to answer the question whether, in his opinion, judging from the condition of the timbers when he saw them, it would be possible for a man

Mulry v. Mohawk Valley Ins. Co., 5 Gray (Mass.) 541, 66 Am. Dec. 380; Luce v. Dorchester Mut. F. Ins. Co., 105 Mass. 297, 7 Am. Rep. 522; Lyman v. State Mut. F. Ins. Co., 14 Allen (Mass.) 329; Liverpool, etc., Ins. Co. v. McGuire, 52 Miss. 127; Kirby v. Phoenix Ins. Co., 9 Lea (Tenn.) 142.

1. **Alterations and Additions.** — Lyman v. State Mut. F. Ins. Co., 14 Allen (Mass.) 329.

2. Franklin F. Ins. Co. v. Gruver, 100 Pa. St. 266.

3. Jefferson Ins. Co. v. Cotheal, 7 Wend. (N. Y.) 72.

4. Kern v. South St. Louis Mut. Ins. Co., 40 Mo. 19.

5. Schenck v. Mercer County Mut. F. Ins. Co., 24 N. J. L. 447.

6. **Interpretation of Policy.** — Fuller v. Metropolitan L. Ins. Co., 70 Conn. 647.

7. **Opinion as to Seaworthiness Admissible** — England. — Beckwith v. Sydebotham, 1 Campb. 116; Thornton v. Royal Exch. Assur. Co., 1 Peake N. P. (ed. 1795) 25.

United States. — Union Ins. Co. v. Smith, 124 U. S. 405; Tidmarsh v. Washington F. & M. Ins. Co., 4 Mason (U. S.) 439.

New York. — Patchin v. Astor Mut. Ins. Co., 13 N. Y. 268; Baird v. Daly, 68 N. Y. 547. Pennsylvania. — Reed v. Dick, 8 Watts (Pa.) 479.

In Baird v. Daly, 68 N. Y. 547, the court said: "It was competent for the defendant, and he should have been permitted, to show by the witness Hayes that the scow was unseaworthy, that is, unfitted and unsafe for the

service in which she was engaged, and unsafe to be taken in tow. The jury were nonexperts, and with every fact which would enable a skilled man to determine the question of seaworthiness it by no means follows that they would make the proper inference and arrive at a correct conclusion. The witness should have been permitted to answer the question put upon this subject." Citing Moore v. Westervelt, 27 N. Y. 234.

8. Western Ins. Co. v. Tobin, 32 Ohio St. 77.

9. Perkins v. Augusta Ins., etc., Co., 10 Gray (Mass.) 312, 71 Am. Dec. 654.

10. Parsons v. Manufacturers' Ins. Co., 16 Gray (Mass.) 463. The court said: "The question to the master, 'What caused the vessel to leak?' if it involved a matter of opinion, was yet proper, because his nautical experience made his opinion on such a subject competent evidence. But the answer would rather imply that it was understood and answered as a question of fact, whether the water came in at the bows or the stern."

11. Marcy v. Sun Ins. Co., 11 La. Ann. 748, the court saying: "On the second branch of the bill of exception we observe that it does not appear that Captain Swain and Robertson were shipwrights, or had any experience in building docks. Their opinion upon the evidence was properly excluded. Indeed, in the conflict of testimony in this case, a decision of the question by the experts whether or not the loss was occasioned by the defects in the dock insured would have been, if credited by the jury, a decision of the case itself."

to have taken off a piece of the "thick streak," and replaced it with new, fifteen months before, without discovering that the timber under it was decayed.¹

(2) *Management of Craft*—(a) *Sailing Usages*.—The testimony of nautical experts is admissible as to general usage regulating a disputed point in navigation not covered by the law or rules of admiralty.² But they will not be allowed to testify that a rule recognized by the general maritime law does not exist in a particular locality.³ A harbor-master, though not skilled in the science of navigation and not a practical sailor, may describe how the plaintiff managed his vessel in sailing in and out of the harbor.⁴

(b) *Efficiency of Crew*.—The testimony of nonexperts as to the sufficiency of the crew is sometimes admissible,⁵ but this is more commonly to be determined by nautical testimony.⁶

(c) *Pilotage*.—A pilot may give an opinion as to whether it was proper to allow one "who was not a pilot, but a mere steersman," to take charge of the boat at the time and place of the accident.⁷

(d) *Towing*.—Parties familiar with towboats are competent to testify as to the proper time and mode of changing the fastenings of such boats and to give their opinions as to whether it is safe and prudent to stop them while the sea is running.⁸ So tugboatmen may say whether it was good seamanship for a tug, disabled while towing vessels, to pass two ports before putting in,⁹ or whether it was safe to tug three boats abreast while towing on wide water with a high wind.¹⁰ An expert may be asked whether the tug captain's handling of a vessel in tow indicates him to be skilful.¹¹

1. *Cook v. Castner*, 9 Cush. (Mass.) 266.

2. *Sailing Usages and Customs*.—The "City of Washington," 92 U. S. 31; *The Alaska*, 33 Fed. Rep. 107. But see *The Clement*, 2 Curt. (U. S.) 363.

3. *The Clement*, 2 Curt. (U. S.) 363.

4. *Ward v. Salisbury*, 12 Ill. 369.

5. *Efficiency of Crew*.—*McCreary v. Turk*, 29 Ala. 244, the court saying: "Upon such a question as the sufficiency of the number of the officers and hands on a steamboat at a particular time to run her on a particular river, the judgment of ordinary persons, having an opportunity of personal observation, and of forming a correct opinion, and testifying to the facts derived from that observation, is admissible."

6. "What is a competent crew for the voyage? at what time such crew should be on board? what is proper pilot ground? what is the course and usage of trade in relation to the master and crew being on board when the ship breaks ground for the voyage? are questions of fact, dependent upon nautical testimony, and are incapable of being solved by a court, without assuming to itself the province of a jury, and judicially relying on its own skill in maritime affairs." Story, J., in *McLanahan v. Universal Ins. Co.*, 1 Pct. (U. S.) 184.

7. *Pilotage*.—*Hill v. Sturgeon*, 28 Mo. 323. See also, as to the competency of a pilot, *Baltimore Elevator Co. v. Neal*, 65 Md. 438; *The "City of Washington"*, 92 U. S. 31.

8. *Towing*.—*Delaware, etc., Steam Towboat Co. v. Starrs*, 69 Pa. St. 36. In this case the court said: "The question in the case now before us related to the proper mode and time of changing the fastening of boats in a tow, when for any reason it became necessary. It cannot be said that those frequently on board of such boats, while being towed, and inter-

ested either as captains or owners, have not experience in such matters, though it may not be equal to those engaged on board the tugs. Men who follow the water for a living are generally, I think, close observers, and this results from the monotony of their employment in general. Whenever anything unusual occurs they take accurate notice of it. Captains of boats in a tow stand at their helms all day, or lounge about the deck, with nothing to do or think about; hence they are likely to be keen observers of all the circumstances occurring in the course of a trip. Such men form their opinions from facts within their own experience, and not from theory or abstract reasoning. They come, therefore, even more properly within the definition of experts than men of mere science. We think the three witnesses produced fall properly within the category, and that there was no error in allowing their opinions to go to the jury for what they were worth."

9. *Tugboatmen*.—*Union Ins. Co. v. Smith*, 124 U. S. 405.

10. *Transportation Line v. Hope*, 95 U. S. 297. In this case it was sought to recover damages for the loss of a barge which was being towed from Jersey City to New Haven through Long Island Sound. The witness testified that for many years he had been the captain of a tugboat, and was familiar with the making up of tows; that he was a pilot, and had towed vessels on Long Island Sound, although he was not familiar with the sound, but that he was familiar with the waters of Chesapeake Bay.

11. *Baltimore Elevator Co. v. Neal*, 65 Md. 438. Here the court said: "In the case of *Malton v. Nesbit*, 1 C. & P. 70, 11 E. C. L. 318, before Lord Chief Justice Abbott, it was held that you might call experienced nautical men, and ask them whether, in their judgment particular facts which had been

(e) **Collisions.**—Nautical experts have been held competent in cases of collision to give their opinions, after examining the craft, as to the direction from which the colliding force came.¹ They may likewise as to whether in their judgment the collision could have been avoided.² But a witness may not answer that a collision would not have occurred had one boat been carrying a proper light, though he may testify that the light was insufficient.³ An expert may answer the question how far a light at the cabin window of one of the colliding boats could be seen from the pilot house of the other.⁴

(f) **As to Necessity of Jettison.**—A captain of experience is competent to express an opinion as to whether "it was necessary to throw off the grain from bow bin in order to save the boat and cargo."⁵

(g) **Mooring and Anchoring.**—On the question of negligence in mooring a vessel the shipkeeper's opinion as to the sufficiency of its fastenings is admissible.⁶ So in determining the adequacy of a chain cable the fact may be shown that the crew joined with the master in pronouncing a particular link to be sound.⁷ Whether a raft was moored at a safe place is a proper subject of expert opinion by lumbermen,⁸ and experts may testify as to the good seamanship of leaving a barge moored when the tide is falling.⁹

(h) **Miscellaneous Matters.**—The opinions of experienced navigators are receivable as to the effect produced upon a ship laden with grain, by rolling in heavy seas.¹⁰ So in an action on a marine policy an assessor was permitted to find, from the testimony of experts, that the opening of the garboard seam of the vessel was attributable to the working of the stem.¹¹ It is error to exclude a question put to an expert as to whether the boat settled more than it ought to or than is usual, it being claimed that the length of the shaft settled the boat by the stern and caused the journal to heat and bind.¹²

(i) **As to Waves.**—Experienced river navigators who knew both boats were allowed to testify as to the probable effect on one boat of the waves or swells

proved amounted to gross negligence in the captain of a vessel or not. And so in the case of *Fenwick v. Bell*, 1 C. & K. 312 47 E. C. L. 312, in an action for running down the plaintiff's ship, it was held that a nautical witness might be asked whether, having heard the evidence, and admitting the facts to be true, he was of opinion that the collision could have been avoided by proper care on the part of the defendant's servants. 1 Greenl. Ev., § 440. The principle of those cases would seem to be quite applicable here."

1. **Collisions.**—*Steamboat Clipper v. Logan*, 18 Ohio 375.

2. *Zugasti v. Lamer*, Moo. P. C. 331; *Jameison v. Drinkald*, 12 Moo. 148, 22 E. C. L. 442; *Fenwick v. Bell*, 1 C. & K. 312, 47 E. C. L. 312; *Carpenter v. Eastern Transp. Co.*, 71 N. Y. 574; *Spickerman v. Clark*, 9 Hun (N. Y.) 133.

3. *Weaver v. Alabama Coal Min. Co.*, 35 Ala. 176.

4. *Case v. Perew*, 46 Hun (N. Y.) 57.

5. **Jettison.**—*Price v. Hartshorn*, 44 N. Y. 94, 4 Am. Rep. 645. Compare *Reed v. Dick*, 8 Watts (Pa.) 479.

6. **Mooring and Anchoring.**—*Moore v. Westervelt*, 9 Bosw. (N. Y.) 558.

7. *Reed v. Dick*, 8 Watts (Pa.) 479, the court, per Gibson, C. J., saying: "Now as the proximate cause of the loss, in the case at bar, was the parting of a cable, its actual sufficiency for ordinary purposes, without regard to the master's knowledge of its condition, was the point on which the cause turned; and the objection to the opinion of the crew in consultation with him was not for its supposed incom-

petence in the abstract, but for the want of an attestation of it by the oaths of those who had expressed it. I remember not what, or whether any, has been given for the admissibility of such evidence in cases of jettison; but it seems to be admissible, on general principles, as part of the *res gesta*. Seamen are expert in nautical affairs, and their judgment, in matters of opinion, touching the working and preservation of a ship, may be as satisfactorily attested by their acts, when impelled by motives of duty and self-preservation, as if it were given under the sanction of oath. It was remarked by Mr. Justice Story in *Tidmarsh v. Washington Ins. Co.*, 4 Mason (U. S.) 439, that the standard of seaworthiness is arbitrary and dependent on the opinions of nautical men; and certainly their opinions cannot be better manifested by their oaths than they are by their acts, which go to make up the usages of the port. Besides, when the rejected evidence was proposed, no other proof had been given of the supposed flaw in the cable than that a mark had been put upon a link in it by a hand who had left the vessel; and surely to the judgment of that hand, thus indicated, might be opposed the declared judgment of the crew."

8. *Hayward v. Knapp*, 23 Minn. 430.

9. *Leary v. Woodruff*, 19 Alb. L. J. 337.

10. *Walsh v. Washington Marine Ins. Co.*, 32 N. Y. 427.

11. *Paddock v. Commercial Ins. Co.*, 104 Mass. 521.

12. *Clark v. Detroit Locomotive Works*, 32 Mich. 348.

caused by another.¹ One who had been a sailor for eleven years, and was familiar with the body of water in question, and at the time of the storm lived but two miles distant, was held competent as an expert to answer the question, "With a wind like that, what would have been the size of the waves in that immediate vicinity?"² But on the question whether a certain disabled ship could have put into port, it was held improper to ask the witness, though familiar with the particular waters navigated, what ports therein could have been entered.³ In a controversy over the proper management of a ship the question cannot be asked as to what should have been done by the persons in charge, unless a clear state of facts is presented upon which to base an opinion;⁴ nor may an expert boatman be interrogated as to whether, in his opinion, the plaintiff in any way omitted or neglected to do anything which he might have done to save his boat after it struck.⁵

(3) *Cargo — Capacity of Ship.* — The opinion of the shipmaster⁶ and of other experts⁷ is admissible as to the amount of cargo with which a vessel may be safely laden, and evidence has likewise been received as to the safety of carrying cotton on the deck.⁸

Stowage. — One who had been a seafaring man for forty years, had been in the habit of carrying marble, and was familiar with the proper mode of stowing it in vessels, was rightly permitted to give his opinion as to whether the marble in question had been properly stowed.⁹ Underwriters have been permitted to testify that an unusual method of stowage is a fact material to the risk.¹⁰

Matters of Common Experience. — But in an action for the loss of glassware, by reason of negligent stowage, an opinion is not admissible as to whether such cargo, if stowed in the hold, would have been broken or washed therefrom, although the witness was familiar with the waters where the loss occurred, as the answer involved not expert knowledge, but common experience.¹¹

(4) *Wrecks.* — A wrecker of experience may testify that a certain wrecked

1. *Effect of Waves and Swells.* — *Western Ins. Co. v. Tobin*, 32 Ohio St. 77.

2. *Ilfrey v. Sabine*, etc., R. Co., 76 Tex. 63.

3. *Dolz v. Morris*, 10 Hun (N. Y.) 201.

4. *Guterman v. Liverpool*, etc., Steamship Co., 83 N. Y. 358.

5. *Carpenter v. Eastern Transp. Co.*, 71 N. Y. 574. In this case the following question was asked of a witness: "Did Mr. C., in your opinion as a canal boatman, in any way omit or neglect to do anything which he might have done to save his boat?" The court said: "This question was clearly improper. An expert may be asked whether certain acts which are proven are seamanlike and proper under a given state of circumstances; but he cannot be allowed to express an opinion as to what was or was not done as matter of fact. The question, when put in a different form, was afterwards fully answered. When asked whether he knew of anything that plaintiff might have done to save his boat after it struck, the question was allowed and answered."

6. *Amount of Cargo.* — *Weston v. Foster*, 2 Curt. (U. S.) 119.

7. *Ogden v. Parsons*, 23 How. (U. S.) 167, the court saying: "What was 'a full cargo' under all the circumstances, and whether the ship could have been loaded to a greater depth than eighteen feet ten inches with safety to the lives of the passengers was a question which could be solved only by experienced

shipmasters. Where experts are introduced to testify as to opinions on matters peculiar to their art or trade, there is usually some conflict in their testimony. What was a full cargo for this ship to carry with safety was not a fact which could be settled by any rule of law or mathematical computation, and the court must necessarily rely upon the opinions of those who have experience, skill, and judgment in such matters."

8. *Lapham v. Atlas Ins. Co.*, 24 Pick. (Mass.) 1.

9. *Stowing Marble.* — *Price v. Powell*, 3 N. Y. 322.

10. *Stowing Gold Coin.* — *Leitch v. Atlantic Mut. Ins. Co.* 66 N. Y. 100, where certain gold coin covered by a policy of marine insurance was stowed not in its usual place in or under the captain's cabin, but in the "run" under the cargo and ballast.

11. *New England Glass Co. v. Lovell*, 7 Cush. (Mass.) 319, the court saying: "In the present case this court are of opinion, with the judge who tried the cause, that these questions were not proper for the opinions of the witnesses, they were inferences to be drawn from facts within common experience, not depending on peculiar experience, especially such as the witness said he possessed. We think the same rule applies to the rejection of the opinions of the other witnesses, as stated in the answers given in their depositions, which were objected to, and rejected by the court."

vessel cannot be raised without expending more than its value.¹ But he cannot say from the testimony of other witnesses what the damages would be from the sinking of a boat,² nor can the value of the sunken craft be shown by comparing it with that of other vessels.³

c. RAILROADING — (1) *Permanent Way* — *Rails*. — A witness who had been president of and engaged in building street railroads was held competent to give an opinion as to whether certain rails were properly laid.⁴

Inclosing Tracks. — So a station agent may say whether it would interfere with the shipping public at a certain place, in respect to proper space and accommodations, if the tracks had been inclosed.⁵

Crossties. — Railroad men are competent witnesses as to the quality of crossties.⁶

Roadbed in General. — An engineer may give an opinion as to whether a railroad is safe or defective, a statement as to its supposed condition having first been made.⁷

Culverts. — A railroad contractor was permitted to testify that he thought a certain culvert sufficient to carry off a rise of the stream,⁸ and such a witness was allowed, after stating the manner in which a culvert was constructed, to give his opinion that the construction was not proper.⁹

Crossings. — But it is not proper for an expert to give an opinion as to the safety of a crossing, as the jury is competent to determine that after the facts have been received in evidence.¹⁰ A civil engineer may give an opinion that a certain crossing was not constructed as is usual on railways properly built and maintained.¹¹

Cattle Guards. — It is not permissible to prove by the opinions of experts whether or not it would be dangerous to maintain a cattle guard at a particular place, as the jury is able to draw a correct conclusion on such a question from the facts.¹²

1. *Wrecks*. — *Blanchard v. New Jersey Steamboat Co.*, 59 N. Y. 292, *affirming* 67 Barb. (N. Y.) 101, 3 Thomp. & C. (N. Y.) 771. See also *Steamboat Clipper v. Logan*, 18 Ohio 375.

2. *Paige v. Hazard*, 5 Hill (N. Y.) 603; *Sills v. Brown*, 9 C. & P. 601, 38 E. C. L. 245. *Compare* *People v. Rector*, 19 Wend. (N. Y.) 569; *Norman v. Wells*, 17 Wend. (N. Y.) 136. But in *Sikes v. Paine*, 10 Ired. L. (32 N. Car.) 280, 51 Am. Dec. 389, persons familiar with vessels were allowed to give their opinions, based upon other evidence, as to the difference in value between a vessel as actually repaired and as it would have been if repaired according to contract.

3. *Blanchard v. New Jersey Steamboat Co.*, 59 N. Y. 292.

4. *Railroads* — *Matters Relating to Permanent Way*. — *Carpenter v. Central Park, etc.*, R. Co., 11 Abb. Pr. N. S. (N. Y. C. Pl.) 416, 4 Daly (N. Y.) 550.

5. *Robinson v. St. Louis, etc.*, R. Co., 21 Mo. App. 141.

6. *Jeffersonville R. Co. v. Lanham*, 27 Ind. 171.

7. *Colorado Midland R. Co. v. O'Brien*, 16 Colo. 219.

8. *Emery v. Raleigh, etc.*, R. Co., 102 N. Car. 209 11 Am. St. Rep. 727.

9. *Bonner v. Mayfield*, 82 Tex. 234.

10. *Atchison, etc.*, R. Co. *v. Henry*, 57 Kan. 154.

11. *Civil Engineers*. — *St. Louis, etc.*, R. Co. *v. Johnston*, 78 Tex. 536, wherein the court said. "The witnesses qualified as experts.

The fact that the crossing was not constructed as railroad crossings usually are was not conclusive proof either that it was safe or defective, but in connection with the other testimony in the case tended to show the latter. W. was a civil engineer, and had acted as such in the construction of the railroad upon which the accident occurred. He was competent to testify to his opinion as to whether the crossing was properly constructed or not."

12. *Chicago, etc.*, R. Co. *v. Modesitt*, 124 Ind. 212; *Pennsylvania Co. v. Mitchell*, 124 Ind. 473; *Pennsylvania Co. v. Lindley*, 2 Ind. App. 111; *Cleveland, etc.*, R. Co. *v. De Bolt*, 10 Ind. App. 174; *New York, etc.*, R. Co. *v. Zumbaugh*, 12 Ind. App. 272; *Chicago, etc.*, R. Co. *v. Clonch*, 2 Kan. App. 728. In the last case cited it was said: "It is not apparent why these witnesses could not have testified as to the manner of the construction of cattle guards, the location of the tracks, the uses made of them, and stated any other fact which would tend to show that a cattle guard across or under the tracks in the station grounds or switch yards, or at the particular place in question, would be dangerous to employees of the railway company, and the jury, upon such testimony, would have been able to draw reasonably correct conclusions with reference thereto without the aid of the opinions of the witnesses. 'If the relation of facts and their probable results can be determined without special skill or study, the facts themselves must be given, and the jury left to draw conclusions or inferences.'"

Platform. — So an architect was held incompetent to give his opinion as to whether a certain platform was a safe place for passengers to land.¹

(2) *Rolling Stock and Appliances* — **Kind of Train.** — The question whether a certain train is a regular passenger train is not a proper subject of expert evidence, since it requires no previous training or experience to determine it.²

Fitness of Cars. — But one who has had much experience in shipping stock is competent to give an opinion as to whether the bars in a certain car are sufficient for the purpose of shipping horses.³

Freight-car Appliances. — Experts were not allowed to say whether a flying switch on a freight car could be safely constructed without certain appliances like handles, grab irons, or ladders.⁴

Absence of Guard Chains. — A railway conductor was held incompetent to give an opinion as to whether an accident would have happened if guard chains had been provided for the car in question.⁵

Double Deadwoods. — It is proper to receive the testimony of experts regarding the advantage of constructing cars with double deadwoods.⁶

Car Couplings. — A brakeman cognizant of the facts may show by his testimony wherein a car coupling is defective and unsafe, and wherein it differs from others used by the same company.⁷

Block Signals. — Whether certain block signals used on a trolley line were such as to insure reasonable safety to its employees was held not to be a proper subject of expert testimony.⁸

Necessity of Signals. — An expert may give an opinion as to whether the safety of those traveling on a certain street required that the cars should

1. *Graham v. Pennsylvania Co.*, 139 Pa. St. 161. The court said: "In the present case, the alleged dangerous place was a raised part of the platform, or broad step, four feet wide and nine inches high. It came clearly within the range of ordinary experience. The briefest statement would convey a perfect comprehension of the place, and every jurymen who ever got in or out of a car, or went up or down a flight of steps, was as capable of judging of the alleged danger as the witnesses who gave their opinions."

2. *Matters Connected with Rolling Stock and Appliances.* — *Illinois Cent. R. Co. v. People*, 143 Ill. 434.

3. *Betts v. Chicago, etc., R. Co.*, 92 Iowa 343. The court said: "One of the plaintiffs, after stating that he was familiar with the shipping of stock in stock cars, that he had been shipping about nine years, and had experience as to what cars would hold stock and those that would not, was asked: 'State whether or not the bars in that car were sufficient and suitable to hold horses.' * * * But the character of a car that will meet the requirements for shipping stock is to be known from experience or observation as to what will meet the test. To reach such a conclusion, one should have knowledge of the usual habits of stock when confined in cars, and what kind of cars have, and have not, proved sufficient for such purposes."

4. *Donner v. Delaware, etc., Canal Co.*, 164 Pa. St. 33, where the court said: "If this common freight car had been a complicated and intricate piece of machinery, the necessity of the case might have justified calling for the opinion of experts; but the freight car and its appliances were about as simple as the ordinary farm wagon. Plaintiff alleged it was

defective, because there was nothing to lay hold of when he had drawn the coupling pin. Clearly the opinion of a witness as to whether this was or was not a defect was not the opinion of an expert, but of a man of ordinary intelligence and observation. The jury still have some duties to perform; inferences drawn from the ordinary affairs of life ought not to be drawn for them and turned over under oath from the witness stand."

5. *Bixby v. Montpelier, etc., R. Co.*, 49 Vt. 123.

6. *Baldwin v. Chicago, etc., R. Co.*, 50 Iowa 680, the court saying: "Two witnesses on the part of the defendant gave evidence as to the construction of the cars, and it is not claimed they were not competent as experts. They were asked by counsel for defendant what advantage double deadwoods afforded to cars; what effect if any, they would have in protecting the cars from being driven together in the course of transportation, whether, with a higher degree of caution, cars so equipped could be coupled with safety. Upon the grounds of incompetency and irrelevancy, objections to these questions were sustained. * * * The construction of cars, the mode and manner of operating them and the effect of a particular thing on their safety and usefulness is a habit, study, or science. We feel satisfied that the ordinary juror would not know the effect of these double deadwoods, or whether they possessed any advantages or disadvantages over others. We, therefore, think the court erred in excluding the evidence sought to be introduced."

7. *Baltimore, etc., R. Co. v. Elliott*, 9 App. Cas. (D. C.) 341.

8. *Bergen County Traction Co. v. Bliss* (N. J. 1898) 41 Atl. Rep. 837.

move only on the signal of the flagmen.¹

(3) *Operation of Railways* — (a) *Sufficiency and Capacity of Train Crew.* — An engineer and conductor may give an opinion as to whether one brakeman is sufficient to control, by hand brakes only, the speed of a train similar to the one of which he had charge.² It was held in *Texas* that an expert witness might testify as to the competency of an engineer by stating that he was careless and unskilful,³ but in *Iowa* opinions as to one's ability to perform the duties of baggageman and express messenger were held properly excluded.⁴ An expert was allowed to testify as to the meaning of the phrase, "necessary signals and switchmen," used in a contract between two railroad companies,⁵ but it was held error to permit the manager of a street railway company to express in evidence his opinion concerning the competency of a motorman whose negligence was the alleged cause of the injury sued for.⁶

(b) *Proper Stations of Trainmen — Brakemen — Rear of Train.* — One who had been in the employ of a railroad company in different capacities, from brakeman to conductor of a passenger train, is competent to give his opinion as to whether, with a train of a certain size, running at a specified speed, with only two brakemen allowed on the train, it is prudent for both to be in a passenger car at the rear of the train.⁷

On Side of Car. — Witnesses familiar with the duties of brakemen are competent to say that the proper place for a brakeman is not on the edge of the car, with feet hanging over the sides, but at the brakes or centreboard.⁸

When "Riding" a Car. — Brakemen are competent to give their opinions as to their own proper stations when "riding" a car.⁹

Switchmen. — Opinions are inadmissible to show that it was not necessary for a switchman to have been at the place where he received certain injuries, or to have passed along the track.¹⁰

Street-car Drivers are competent to give opinions as to their own proper stations when operating a street car.¹¹

(c) *Performance of Duties by Train Crew — Brakemen — Coupling Cars.* — A witness may not testify that it was unnecessary and especially dangerous to couple cars in a certain manner,¹² nor that if the drawheads on the cars had been in good order an injury to the brakeman would not have occurred.¹³ But experienced brakemen were allowed to give their opinions as to the safety of coupling one car to another where the pin was so bent that it could not be taken out and the coupling would have to be made with the link fast in the

1. *Jackson v. Grand Ave. R. Co.*, 118 Mo. 199.

2. *Train Hands — Sufficiency and Capacity.* — *Union Pac. R. Co. v. Novak*, 61 Fed. Rep. 573. The court said: "Under the pleadings and the evidence in this case it was competent for each party to give testimony as to whether or not the employment of only one brakeman was sufficient to check or control the speed of the train by means of the hand brakes upon the cars. This question, to be properly answered, required some skill and knowledge upon the part of the witnesses as to the character and locality of the brakes, and as to the number of brakemen required to manage the same, which could not fairly be said was within the experience and knowledge of men who had never been engaged in running and managing a train of cars."

3. *Terrell v. Russell*, 16 Tex. Civ. App. 573.

4. *Moore v. Chicago, etc., R. Co.*, 65 Iowa 505.

5. *Louisville, etc., R. Co. v. Illinois Cent. R. Co.*, 174 Ill. 448.

6. *Langston v. Southern Electric R. Co. (Mo. 1898)* 48 S. W. Rep. 835.

7. *Brakeman's Station.* — *Cincinnati, etc., R. Co. v. Smith*, 22 Ohio St. 227.

8. *Schlaff v. Louisville, etc., R. Co.*, 100 Ala. 377.

9. *Reifsnnyder v. Chicago, etc., R. Co.*, 90 Iowa 76.

10. *Switchmen.* — *Pennsylvania Co. v. Conlan*, 101 Ill. 93. *Compare Chicago, etc., R. Co. v. Harrington*, 77 Ill. App. 502.

11. *Street-car Drivers.* — *Czewezka v. Benton-Bellefontaine R. Co.*, 121 Mo. 201.

12. *Performance of Duties by Train Hands.* — *Atchison, etc., R. Co. v. Myers*, 63 Fed. Rep. 793.

13. *Gulf, etc., R. Co. v. Colbert (Tex. Civ. App. 1895)* 31 S. W. Rep. 332. The question and answer were as follows: "If the drawheads on the two cars coupled by plaintiff in which he was injured had been of uniform height and in good order, would he not have coupled the cars without injury to himself? Answer: If said cars were uniform in height, and in good order, I think plaintiff would not have incurred said injuries."

drawhead of the standing car.¹ Whether a brakeman would have been thrown from a car had he been grasping the brakes and exercising due care is not a proper subject of expert testimony,² nor is an opinion admissible as to whether a motorman showed good judgment in releasing a brake and sending a car forward after it had struck and injured a child.³ But an expert was allowed to testify as to the dangers attendant upon running a train backward.⁴

Tightening Plug under Engine. — But even an experienced engineer was not permitted to say whether, in his opinion, it was careless to go beneath an engine, from which hot water and steam were escaping, for the purpose of tightening a plug.⁵

Whistling. — So the propriety of sounding a whistle at a certain time is not a permissible subject of expert testimony.⁶

Performance of Whole Duty. — An engineer and a fireman were allowed to say whether, in their opinions, all possible precautions were taken to prevent a collision with stray animals on the track;⁷ but there is authority opposed to this.⁸

Loading and Unloading Cars. — Where the question was whether the defendant was guilty of negligence in loading rails on a car in a certain manner, he was allowed to prove by experts that a rail placed upon the car in the manner described would not fall.⁹ So experts have been permitted to give opinions as to the proper method of unloading timber.¹⁰

Operating Gates. — It has been held that experts cannot testify as to whether certain railroad gates could be operated in a safe manner and with safety to the operator, as "this question was for the jury, and the plaintiff was not entitled to have it determined for them by experts."¹¹

1. *Goins v. Chicago, etc., R. Co.*, 47 Mo. App. 173, where it was observed: "This testimony was objected to for the alleged reason that this was not a matter for expert evidence; that the condition of the appliances only should be stated, and the jury left to form an opinion as to whether or not such work was hazardous. We think there was no error in the admission of this evidence. Notwithstanding the decisions cited by defendant's counsel, some of which seem to hold the contrary, we are of the opinion that these witnesses were qualified as experts to testify in relation to the matter about which they were questioned. As to experts and expert testimony, when allowed and when denied, there have been various and conflicting rulings, and it would be entirely useless and unprofitable to attempt an intelligent discussion of them."

2. *Gavisk v. Pacific R. Co.*, 49 Mo. 274.

3. *Woekner v. Erie Electric Motor Co.*, 187 Pa. St. 206.

4. **Running Backward.** — *Cooper v. Central R. Co.*, 44 Iowa 134. See also *Kuhns v. Wisconsin, etc., R. Co.*, 70 Iowa 561.

5. **Going under an Engine.** — *Louisville, etc., R. Co. v. Berry*, 9 Ind. App. 65, where the court said: "The contention is that as the work, which necessity required should be done, was highly dangerous, the manner in which it was done became important; that the hazard and want of care involved in the method adopted by the deceased were not matters of common knowledge, and hence the necessity for expert and opinion evidence. It is no unusual procedure for an expert witness to state his opinion as to whether or not certain conduct was proper or improper, skillful, or unskillful. And it is sometimes proper for

a nonexpert witness to give his opinion based upon his personal observation and experience as to the effect of certain conditions and facts. *Clinton v. Howard*, 42 Conn. 294; *Bennett v. Meehan*, 83 Ind. 566, 43 Am. Rep. 78. The questions the jury were required to determine, under the issues of this case, were whether or not the appellant had been guilty of negligence, and whether the deceased was free from contributory negligence. Negligence is the absence or want of that degree of care that an ordinarily prudent person would exercise under given conditions. The jury is selected from the body of the community and is generally composed of men of varied vocations and experiences. It is assumed that they know more of the common affairs of life, and can draw wiser and safer conclusions than can any one man. Hence, ordinarily, negligence is peculiarly a question for the jury. All of the facts of this case were susceptible of being placed before the jury (the different methods of doing the work and the means used), and from them the jury was as much, or more, capable of determining whether the deceased was careless as was the expert witness."

6. **Sounding Whistle.** — *Hill v. Portland, etc., R. Co.*, 55 Me. 438, 92 Am. Dec. 601.

7. **Precautions to Prevent Collision.** — *Little Rock, etc., R. Co. v. Shoecraft*, 56 Ark. 465.

8. *Fogel v. San Francisco, etc., R. Co.* (Cal. 1895) 42 Pac. Rep. 565.

9. **Loading Cars.** — *McCray v. Galveston, etc., R. Co.*, 89 Tex. 168.

10. **Unloading Cars.** — *Cleveland, etc., R. Co. v. Hall*, 70 Ill. App. 429.

11. **Gates at Railroad Track.** — *Flanagan v. New York, etc., R. Co.*, 83 Hun (N. Y.) 522.

(d) **Management of Trains** — *aa. CAUSE OF ACCIDENT — Derailment of Car.* — A machinist experienced in the operation and running of cars and engines may give an opinion as to the cause of the derailment of a car.¹ So an expert in the science of mechanics was allowed to testify as to the cause of cars being derailed on the inner side of a curve.²

Broken Rails. — But one who had visited "dozens of railroad accidents" and had examined them for newspaper reports was nevertheless not allowed to give an opinion as to the cause of the breaking of a particular rail where the question was whether the rail was defective or had been maliciously cut by some unknown person.³

bb. SPARKS FROM ENGINE. — The opinions of railway men are admissible as to the distance at which fire could be communicated from an engine.⁴

Whether Emitted from Certain Spark Arresters. — A locomotive engineer is competent to give his opinion as to whether it was possible for cinders exhibited in evidence to have passed through a certain spark arrester.⁵

cc. SPEED OF TRAINS — Estimating Speed by Time and Distance. — The authorities are not entirely agreed in framing a rule regarding the qualifications which a witness must possess in order to judge of the speed of trains by the time and distance of their movement. According to some decisions the witness ought to be one accustomed to observe moving objects and to mark their rate of speed,⁶ and should even be possessed of some skill in this regard,⁷ while his testimony should disclose, at least approximately, the real rate of speed.⁸

1. **Derailment of Cars.** — *Seaver v. Boston, etc., R. Co., 14 Gray (Mass.) 466.*

2. *Murphy v. New York Cent. R. Co., 66 Barb. (N. Y.) 125.* The court said: "It was not objected that it was a question to which opinions were not competent. On the contrary, the objection assumes their competency, but insists that a person acquainted with railroad mechanics could alone speak. Is it true that railroad engineers or constructors only could give an opinion in answer to the question? It seems to me not. It called for the application of the principles of that branch of natural philosophy or of practical mechanics which apply to bodies moving on curved lines. This motion is not peculiar to railroads, although it is found more frequently applied, and upon a larger scale, upon railroads than in other structures."

3. *Hoyt v. Long Island R. Co., 57 N. Y. 678.*

4. **Sparks.** — *Davidson v. St. Paul, etc., R. Co., 34 Minn. 51; Jamison v. New York, etc., R. Co., 11 N. Y. App. Div. 50.*

5. *Brush v. Long Island R. Co., 10 N. Y. App. Div. 535. Compare Frace v. New York, etc., R. Co., 68 Hun (N. Y.) 325.*

6. **Estimating Speed of Trains by Time and Distance** — *Indiana.* — *Louisville, etc., R. Co. v. Jones, 108 Ind. 551; Evansville, etc., R. Co. v. Crist, 116 Ind. 446, 9 Am. St. Rep. 865; Louisville, etc., Co. v. Hendricks, 128 Ind. 462.*

Iowa. — *Pence v. Chicago, etc., R. Co., 79 Iowa 389.*

Michigan. — *Detroit, etc., R. Co. v. Van Steinburg, 17 Mich. 99; Grand Rapids, etc., R. Co. v. Huntley, 38 Mich. 537, 31 Am. Rep. 321; Guggenheim v. Lake Shore, etc., R. Co., 66 Mich. 150.*

Missouri. — *Walsh v. Missouri Pac. R. Co., 102 Mo. 582; Gourley v. St. Louis, etc., R. Co., 35 Mo. App. 87.*

New Hampshire. — *Nutter v. Boston, etc., R. Co., 60 N. H. 483.*

New York. — *Northrup v. New York, etc.,*

R. Co., 37 Hun (N. Y.) 295; Francisco v. Troy, etc., R. Co., 78 Hun (N. Y.) 13; Sculley v. New York, etc., R. Co., 80 Hun (N. Y.) 197; Strauss v. Newburgh Electric R. Co., 6 N. Y. App. Div. 264. Compare Salter v. Utica, etc., R. Co., 59 N. Y. 631; Waldele v. New York Cent., etc., R. Co., 4 N. Y. App. Div. 549; Kitay v. Brooklyn, etc., R. Co., 23 N. Y. App. Div. 228.

Texas. — *Brown v. Rosedale St. R. Co. (Tex. App. 1890) 15 S. W. Rep. 120; Campbell v. Warner (Tex. Civ. App. 1894) 24 S. W. Rep. 703.*

Wisconsin. — *Muster v. Chicago, etc. R. Co., 61 Wis. 325, 50 Am. Rep. 141; Hoppe v. Chicago, etc., R. Co., 61 Wis. 357; Ward v. Chicago, etc., R. Co., 85 Wis. 601.*

7. *Francisco v. Troy, etc., R. Co., 78 Hun (N. Y.) 13.*

8. *Detroit, etc., R. Co. v. Van Steinburg, 17 Mich. 99; Grand Rapids, etc., R. Co. v. Huntley, 38 Mich. 537, 31 Am. Rep. 321.* In the case first cited it was said: "The motion of the train was to be compared to the motion of any other moving thing, with a view to obtaining the judgment of the witness as to its velocity. No question of science was involved beyond what would have been had the passing object been a man or a horse. It was not, therefore, a question for experts. Any intelligent man who had been accustomed to observe moving objects would be able to express an opinion of some value upon it the first time he ever saw a train in motion. The opinion might not be so accurate and reliable as that of one who had been accustomed to observe, with timepiece in hand, the motion of an object of such size and momentum; but this would only go to the weight of the testimony, and not to its admissibility. Any man possessing a knowledge of time and of distances would be competent to express an opinion upon the subject."

In *Grand Rapids, etc., R. Co. v. Huntley,*

Applications of Rule.—But in applying the rule the courts have been quite liberal, and the list of those held competent to testify on this subject includes not only section hands¹ and trainmen,² but also one accustomed to observe the speed of horses,³ and a messenger boy who had been in the habit of timing himself while on his rounds.⁴ But where the witness did not see the train, but formed his opinion merely from the force of the blow by which it struck him, the admission of such an opinion was held erroneous.⁵

Liberal Rule.—According to other authorities, almost any competent witness may testify as to the speed of a particular train whose movement he has observed.⁶ And the witness need not have observed from the outside, but may even have been a passenger on the train.⁷ So a nonexpert may state

38 Mich. 537, 31 Am. Rep. 321, the court said: "In this case it may be doubted whether the witnesses were all near enough to observe, and some of them gave no such data as to indicate what the speed was except as to its comparison with ordinary rates. It would be going too far to hold that any increase over ordinary speed was evidence of danger or of negligence. The testimony should at least show approximately what the real rate was, and that it was faster than safety warranted, before the case should be allowed to go to the jury on such a point. The well-known liability of all common observers to be deceived as to the rate of speed of heavy trains renders it necessary to guard as far as possible against vague testimony, which cannot be directly met or corroborated by the proof of persons having actual knowledge on the subject. Testimony of actual speed is tangible, whatever may be the value of the opinions of particular observers; but opinions on relative speed, without some standard of rapidity, are of no value by themselves."

1. Section Hands.—*Campbell v. Warner* (Tex. Civ. App. 1894) 24 S. W. Rep. 703. In this case a witness who was present at the collision, and saw it, and the train moving that caused it, testified: "I have traveled on trains, and have worked on a railroad about eleven months. During part of the time was a section hand, and part of the time was a member of the bridge gang. During this time trains passed me frequently, one or more going by daily, and I think I can judge reasonably well as to the rate of speed at which a train is going. I know the pay train was making faster time than the passenger trains usually make, and in my judgment its speed was from forty to fifty miles an hour."

2. Trainmen.—*Brown v. Rosedale St. R. Co.* (Tex. App. 1890) 15 S. W. Rep. 120, citing 7 AM. AND ENG. ENCYC. OF LAW (1st ed.) 509.

3. One Accustomed to Observe Speed of Horses.—*Strauss v. Newburgh Electric R. Co.*, 6 N. Y. App. Div. 264, 267.

4. Messenger Accustomed to Time Himself in Making His Rounds.—*Penny v. Rochester R. Co.*, 7 N. Y. App. Div. 595. In this case a messenger boy had timed himself while walking, and ascertained that he could walk a mile in fifteen minutes. He saw the car before plaintiff was struck, and it was going fast. "Question: How can you express it in any other way? Answer: It was going twice as fast as I can walk."

5. Force of Blow.—*Northern Pac. R. Co. v. Hayes*, 87 Fed. Rep. 129, the court saying:

"The speed of the train which backed into the yard that night, and which struck the plaintiff, was a material question at issue, and much disputed on the trial. The plaintiff did not see the train at all. He was walking in the same direction ahead of it, and was struck in the back, and thrown, he thinks, twenty or thirty feet; and he says he was never struck by a train before in that way, and had nothing to judge of as to the speed except that one blow. Nevertheless he was allowed, against the defendant's objection, to give his opinion of the speed of the train, which he says was very fast, and, he would judge, between fifteen and twenty miles an hour. We think this was error. He was simply guessing at the distance he was thrown, and from this, and from the force of the blow on his shoulder, he guessed at the speed of the train. It can hardly be assumed that the jury would not be influenced in any degree by such testimony. Indeed, the very fact that it was held competent, and permitted to be given to the jury, would naturally be taken by them as a warrant that some credit might or should be given to an opinion so poorly founded. It is elementary that the admission of illegal evidence over objection necessitates a reversal. *Waldron v. Waldron*, 156 U. S. 361, and cases cited."

6. Nonexpert May Testify as to Speed of Train.—*Arkansas*.—*St. Louis, etc., R. Co. v. Brown*, 62 Ark. 254.

District of Columbia.—*Eckington, etc., R. Co. v. Hunter*, 23 Wash. L. Rep. (D. C.) 401, 6 App. Cas. (D. C.) 287.

Illinois.—*Chicago, etc., R. Co. v. Johnson*, 103 Ill. 512; *Louisville, etc., R. Co. v. Shires*, 108 Ill. 617; *Louisville, etc., Consol. R. Co. v. Gobin*, 52 Ill. App. 565; *Chicago, etc., R. Co. v. Gunderson*, 174 Ill. 495.

Texas.—*Galveston, etc., R. Co. v. Pitts* (Tex. Civ. App. 1897) 42 S. W. Rep. 255.

Utah.—*Chipman v. Union Pac. R. Co.*, 12 Utah 68.

7. Grand Rapids, etc., R. Co. v. Huntley, 38 Mich. 537, 31 Am. Rep. 321; *Northrup v. New York, etc., R. Co.*, 37 Hun (N. Y.) 295. In the case first cited the court said: "In regard to opinions of persons riding in the cars, and not observing from the outside, we are not prepared to say they may not be received, but we think they should be excluded unless the witnesses first show such extended experience and observation as to qualify them for forming such opinions as would be reliable. It is not presumable that ordinary railway travelers usually form such habits."

whether a train¹ or trolley car² was running fast or slowly, though he may be unable to name the rate of speed.³

Estimating Speed by Sound. — One who is accustomed to judge of the speed of trains by sound may give in evidence his opinion based upon such judgment.⁴

Checking Speed. — As a rule a witness, in order to express an opinion receivable in evidence, regarding the distance within which a particular train may be stopped, must have had experience in the running of trains and in checking their speed, and the basic facts of such an opinion are the speed of the train, the grade, condition of the track, and brakes or other means of stoppage.⁵ Upon this subject opinions have been received from conductors both of ordinary trains⁶ and electric cars,⁷ from engineers,⁸ who may also testify by way of illustration as to what was done upon a like occasion,⁹ from firemen,¹⁰

In *Northrup v. New York, etc., R. Co.*, 37 Hun (N. Y.) 295, the opinion of a witness was received, as follows: "I have often rode upon railroad trains; have observed their speed and timed them by my watch and estimated their speed; I don't know as I could accurately judge as to the speed of a train; I think I could come pretty close to it, but I would not be certain."

1. *Illinois Cent. R. Co. v. Ashline*, 171 Ill. 313.

2. *Ehrmann v. Nassau Electric R. Co.*, 23 N. Y. App. Div. 21, the court saying: "The speed of the car was the subject of inquiry, and evidence was given that the car was going fast, subject to exceptions taken to its reception. While this evidence was somewhat indefinite as to the rate of speed at which the car was moving, it was, in its application to the movement of such a car, a relative expression of the view of the witnesses who had seen cars of that character moving in the streets of the city; and common observation is such that, comparatively speaking, it is not difficult to conclude whether a trolley car is running fast or slow, although the difficulty would be greater in stating the rate of speed it is making. The view taken of this evidence is that there was no error in its reception." *Citing Northrup v. New York, etc., R. Co.*, 37 Hun (N. Y.) 295; *Scully v. New York, etc., R. Co.*, 80 Hun (N. Y.) 197.

3. "One witness testified that the train was running 'fast,' and it is claimed that the court erred in refusing to exclude the answer. The fact that a witness might not be able to testify how fast or how slow a train was running should not preclude him from testifying whether the train was running fast or slow. While such evidence would be competent, what weight should be attached to it would be for the jury." *Illinois Cent. R. Co. v. Ashline*, 171 Ill. 313.

In *Galveston, etc., R. Co. v. Davis* (Tex. Civ. App. 1898) 45 S. W. Rep. 956, a conductor was allowed to testify that his engineer "would pull a train down hill just as fast as he could turn a wheel."

4. **Estimating Speed of Trains by Sound.** — *Missouri Pac. R. Co. v. Hildebrand*, 52 Kan. 284, where it was said: "The first matter alleged as error is in permitting O. H., who was in the section house a little distance north of the tracks, and who did not see the train at the time, but who heard the rattle and escape of steam from the engine, to testify as to the rate

of speed at which it was going, and that it was going pretty fast. He stated that he was accustomed to seeing and hearing trains pass by, and could tell by the sound. We think there was no error in this ruling."

5. **Checking Speed of Train** — *Alabama*. — *Mobile, etc., R. Co. v. Blakely*, 59 Ala. 471.

California. — *Howland v. Oakland Consol. St. R. Co.*, 110 Cal. 513.

Georgia. — *Augusta, etc., R. Co. v. Dorsey*, 68 Ga. 228; *Atlanta, etc., Air-Line R. Co. v. Gravitt*, 93 Ga. 369.

Iowa. — *Grimmell v. Chicago, etc., R. Co.*, 73 Iowa 93.

Massachusetts. — *Freeman v. Travelers' Ins. Co.*, 144 Mass. 572.

Michigan. — *Detroit, etc., R. Co. v. Van Steenburg*, 17 Mich. 99; *Frost v. Milwaukee, etc., R. Co.*, 96 Mich. 470.

Minnesota. — *Watson v. Minneapolis St. R. Co.*, 53 Minn. 551.

Missouri. — *Maher v. Atlantic, etc., R. Co.*, 64 Mo. 267; *Schlereth v. Missouri Pac. R. Co.*, 115 Mo. 87; *Eckert v. St. Louis, etc., R. Co.*, 13 Mo. App. 352; *Gourley v. St. Louis, etc., R. Co.*, 35 Mo. App. 87; *Igo v. Chicago, etc., R. Co.*, 38 Mo. App. 377; *Mammerberg v. Metropolitan St. R. Co.*, 62 Mo. App. 563.

New York. — *Pender v. Brooklyn City R. Co.*, 84 Hun (N. Y.) 460; *Mott v. Hudson River R. Co.*, 8 Bosw. (N. Y.) 345; *Barry v. Second Ave. R. Co.*, 1 Misc. Rep. (N. Y. C. Pl.) 502; *Tholen v. Brooklyn City R. Co.*, 10 N. Y. Misc. Rep. (Brooklyn City Ct.) 283.

South Carolina. — *Harmon v. Columbia, etc., R. Co.*, 32 S. Car. 127, 17 Am. St. Rep. 843.

Texas. — *International, etc., R. Co. v. Kuehn*, 2 Tex. Civ. App. 210.

Utah. — *Riley v. Salt Lake Rapid Transit Co.*, 10 Utah 428.

Wisconsin. — *Dugan v. Chicago, etc., R. Co.*, 85 Wis. 609.

6. **Conductors.** — *Mobile, etc., R. Co. v. Blakely*, 59 Ala. 471; *Freeman v. Travelers' Ins. Co.*, 144 Mass. 572.

7. *Watson v. Minneapolis St. R. Co.*, 53 Minn. 551.

8. **Engineers.** — *Augusta, etc., R. Co. v. Dorsey*, 68 Ga. 228; *Maher v. Atlantic, etc., R. Co.*, 64 Mo. 267; *Bellefontaine, etc., R. Co. v. Bailey*, 11 Ohio St. 333.

9. *Augusta, etc., R. Co. v. Dorsey*, 68 Ga. 228.

10. **Firemen.** — *Grimmell v. Chicago, etc., R. Co.*, 73 Iowa 93.

mail agents,¹ locomotive builders,² manufacturers of railway supplies,³ motor-men,⁴ and master mechanics,⁵ but not from section hands.⁶ A locomotive engineer, who had frequently ridden upon trolley cars, and had studied electricity, was allowed to say as a witness whether such a car could be stopped more easily by the application of sand than without it.⁷

f. VALUE—(1) *Generally*.—When value is capable of specific proof opinions are not admissible respecting it.⁸

Market Value.—“The market value of anything is the highest price it will bring for any and all uses,”⁹ and when property has a market value witnesses may testify thereto as to a fact known and proved.¹⁰ But where no such value exists, the opinions of witnesses are admitted.¹¹

Qualifications of Witnesses.—While witnesses may not be required to be experts in the strict and severe sense of the term in order to give opinions on value,¹² and while there is no inflexible rule defining how much a witness must know in order to be so qualified,¹³ yet it must be made to appear that he has had and utilized means for forming an intelligent opinion superior to those of the jurors, derived from a knowledge of the character of property in controversy.¹⁴

1. **Mail Agents May Testify.**—Detroit, etc., R. Co. v. Van Steinburg, 17 Mich. 99.

2. **Locomotive Builders.**—Eckert v. St. Louis, etc., R. Co., 13 Mo. App. 352.

3. **Manufacturers of Railway Supplies.**—Mott v. Hudson River R. Co., 8 Bosw. (N. Y.) 345.

4. **Motormen.**—Tholen v. Brooklyn City R. Co., 10 N. Y. Misc. Rep. (Brooklyn City Ct.) 283.

5. **Master Mechanics.**—Barry v. Second Ave. R. Co., 1 Misc. Rep. (N. Y. C. Pl.) 502.

6. **Section Hands.**—Gourley v. St. Louis, etc., R. Co., 35 Mo. App. 87.

7. Maxwell v. Wilmington City R. Co., 1 Marv. (Del.) 199.

8. **Questions of Value.**—Patten's Case, 15 Ct. of Cl. 288; Paige v. Hazard, 5 Hill (N. Y.) 603; Teerpenning v. Corn Exch. Ins. Co., 43 N. Y. 279.

9. **Market Value.**—Lowe v. Omaha, 33 Neb. 594.

10. *United States.*—Alfonso v. U. S., 2 Story (U. S.) 421.

Minnesota.—Hoxsie v. Empire Lumber Co., 41 Minn. 548; McLennan v. Minneapolis, etc., Elevator Co., 57 Minn. 317.

New York.—Durst v. Burton, 47 N. Y. 167; Cahen v. Platt, 69 N. Y. 348.

South Dakota.—Gleckler v. Slavens, 5 S. Dak. 364.

Texas.—Missouri Pac. R. Co. v. Fagan, 72 Tex. 130, 13 Am. St. Rep. 776; Texas, etc., R. Co. v. Donovan, 86 Tex. 378; Missouri, etc., R. Co. v. Woods, (Tex. Civ. App. 1895) 31 S. W. Rep. 237; Gulf, etc., R. Co. v. Hughes, (Tex. Civ. App. 1895) 31 S. W. Rep. 411.

“In the first place, the market value is necessarily a matter of opinion, as well as of fact, or rather of opinion gathered from facts.

* * * The market price or value, therefore, must in most cases, if not in all, be a matter of fact mixed up with opinion, for it must necessarily include a general price or value in the market, deducible from various averages and approximations, and the different qualities of the same class of goods. In the next place, the knowledge of the market price being thus, at least in part, a matter of skill, judgment, and opinion, it is in no just sense mere hearsay, but it is in the nature of the evidence of

experts.” Alfonso v. U. S., 2 Story (U. S.) 421.

11. *United States.*—Montana R. Co. v. Warren, 137 U. S. 348.

Florida.—Sullivan v. Lear, 23 Fla. 463, 11 Am. St. Rep. 388.

Illinois.—Illinois, etc., R. Co. v. Van Horn, 18 Ill. 257.

Iowa.—Lanning v. Chicago, etc., R. Co., 68 Iowa 502.

Kansas.—Atchison, etc., R. Co. v. Stanford, 12 Kan. 354, 15 Am. Rep. 362; St. Louis, etc., R. Co. v. Chapman, 38 Kan. 307, 5 Am. St. Rep. 744.

Minnesota.—Burger v. Northern Pac. R. Co., 22 Minn. 343.

Missouri.—Kansas City, etc., R. Co. v. Dawley, 50 Mo. App. 480.

Texas.—International, etc., R. Co. v. Seagrigh, 8 Tex. Civ. App. 593.

Washington.—Seattle, etc., R. Co. v. Gilchrist, 4 Wash. 509.

12. **Qualification of Witness.**—St. Louis, etc., R. Co. v. Edwards, 78 Fed. Rep. 745; Santa Ana v. Harlin, 99 Cal. 538; Dalzell v. Davenport, 12 Iowa 437; Wyman v. Lexington, etc., R. Co., 13 Met. (Mass.) 316.

13. *United States.*—Stillwell, etc., Mfg. Co. v. Phelps, 130 U. S. 520; Montana R. Co. v. Warren, 137 U. S. 348.

Massachusetts.—Whitney v. Boston, 98 Mass. 312; Lawrence v. Boston, 119 Mass. 126; Chandler v. Jamaica Pond Aqueduct Corp., 125 Mass. 544.

Minnesota.—Russell v. Hayden, 40 Minn. 88; Papooshek v. Winona, etc., R. Co., 44 Minn. 195; Smith v. Library Board, 58 Minn. 110, citing 7 AM. AND ENG. ENCYC. OF LAW (1st ed.) 512.

Nebraska.—Chicago, etc., R. Co. v. Shafer, 49 Neb. 25.

New York.—Teerpenning v. Corn Exch. Ins. Co., 43 N. Y. 279; Bedell v. Long Island R. Co., 44 N. Y. 367, 4 Am. Rep. 688; Chamberov v. Cagney, 35 N. Y. Super. Ct. 474.

14. **General Rule as to Qualifications.**—*United States.*—Montana R. Co. v. Warren, 137 U. S. 348; Nelson v. Killingley First Nat. Bank, 69 Fed. Rep. 798; St. Louis, etc., R. Co. v. Edwards, 78 Fed. Rep. 745.

It is not, as a rule, necessary that the witness should have seen the subject-matter in order to give an opinion as to its value.¹

In *Indiana*,² and, it seems, also in *Texas*,³ not only experts but nonexperts who are familiar with the extent and character of the subject-matter are competent witnesses as to value.

(2) *The Subject Matter* — (a) *Personalty* — *aa. ANIMALS* — **Cattle**. — Farmers, cattle dealers and stock raisers may give their opinions of the value of cattle in the neighborhood, basing them upon general observation and experience.⁴ It has been held that the value of a cow is not a subject of expert evidence at all, and that any competent witness may testify thereto.⁵

California — *San Diego Land, etc., Co. v. Neale*, 78 Cal. 63; *Santa Ana v. Harlin*, 99 Cal. 538.

Colorado. — *Thatcher v. Kaucher*, 2 Colo. 698.

Florida. — *Sullivan v. Lear*, 23 Fla. 463, 11 Am. St. Rep. 388.

Georgia. — *Central R. Co. v. Wolff*, 74 Ga. 664.

Illinois. — *Cooper v. Randall*, 59 Ill. 317; *Hough v. Cook*, 69 Ill. 581.

Iowa. — *Dalzell v. Davenport*, 12 Iowa 437; *Anson v. Dwight*, 18 Iowa 241; *Crawford v. Wolf*, 29 Iowa 567; *Haight v. Kimbark*, 51 Iowa 13.

Kansas. — *Sexton v. Lamb*, 27 Kan. 426.

Maine. — *Tebbetts v. Haskins*, 16 Me. 283; *Washington Ice, etc., Co. v. Webster*, 68 Me. 449.

Massachusetts. — *Wyman v. Lexington, etc., R. Co.*, 13 Met. (Mass.) 316; *Shaw v. Charlestown*, 2 Gray (Mass.) 107; *Dickenson v. Fitchburg*, 13 Gray (Mass.) 546; *Swan v. Middlesex County*, 101 Mass. 173; *Edmands v. Boston*, 108 Mass. 535; *Cobb v. Boston*, 109 Mass. 438; *Lawrence v. Boston*, 119 Mass. 126; *Chandler v. Jamaica Pond Aqueduct Corp.*, 125 Mass. 544.

Michigan. — *Continental Ins. Co. v. Horton*, 28 Mich. 173; *Printz v. People*, 42 Mich. 144, 36 Am. Rep. 437; *Richardson v. McGoldrick*, 43 Mich. 476; *Keables v. Christie*, 47 Mich. 594; *Kelley v. Richardson*, 69 Mich. 430.

Minnesota. — *Burger v. Northern Pac. R. Co.*, 22 Minn. 343; *Papooshek v. Winona, etc., R. Co.*, 44 Minn. 195.

Mississippi. — *Whitfield v. Whitfield*, 40 Miss. 352; *Cooper v. State*, 53 Miss. 393.

Missouri. — *Cantling v. Hannibal, etc., R. Co.*, 54 Mo. 385, 14 Am. Rep. 476.

Nebraska. — *Chicago, etc., R. Co. v. Shafer*, 49 Neb. 25.

New Jersey. — *Laing v. United New Jersey R., etc., Co.*, 54 N. J. L. 576, 33 Am. St. Rep. 682.

New York. — *Lincoln v. Saratoga, etc., R. Co.*, 23 Wend. (N. Y.) 425.

Oregon. — *Oregon Pottery Co. v. Kern*, 30 Oregon 328.

Pennsylvania. — *Whitesell v. Crane*, 8 W. & S. (Pa.) 369; *McGill v. Rowand*, 3 Pa. St. 451, 45 Am. Dec. 654; *Mish v. Wood*, 34 Pa. St. 451.

Rhode Island. — *Buffum v. New York, etc., R. Co.*, 4 R. I. 221; *Forbes v. Howard*, 4 R. I. 366; *Brown v. Providence, etc., R. Co.*, 12 R. I. 238.

In *St. Louis, etc., R. Co. v. Edwards*, 78 Fed. Rep. 745, it was observed: "In many cases

witnesses are allowed to testify to their opinions, not because they are experts in the technical sense of that term, but because they have special knowledge of the particular facts in the case, which the jurors have not."

In *Laing v. United New Jersey R., etc., Co.*, 54 N. J. L. 576, 33 Am. St. Rep. 682, the court said: "But it is urged by counsel for the plaintiff in error that in other states a more liberal rule is applied respecting the opinions of witnesses as to the value of real estate under which the estimates of any persons who are acquainted with the property, its location and surroundings, are admissible evidence. The cases cited do not support this contention, and if they did they should not be followed. The worthlessness of such testimony is hardly a stronger reason for its rejection than the practically limitless amount of it that might be produced."

1. *Alabama*. — *Phoenix Ins. Co. v. Copeland*, 86 Ala. 551.

Massachusetts. — *Miller v. Smith*, 112 Mass. 470; *Beecher v. Denniston*, 13 Gray (Mass.) 354.

New York. — *Whitbeck v. New York Cent., etc., R. Co.*, 36 Barb. (N. Y.) 644; *Orr v. New York*, 64 Barb. (N. Y.) 106; *Whiton v. Snyder*, 88 N. Y. 299.

Pennsylvania. — *Mish v. Wood*, 34 Pa. St. 451; *Hanover Water Co. v. Ashland Iron Co.*, 84 Pa. St. 279.

2. *Evansville, etc., R. Co. v. Fittig*, 130 Ind. 61; *Hire v. Kniseley*, 130 Ind. 295; *Goodwine v. Evans*, 134 Ind. 262; *Chicago, etc., R. Co. v. Burden*, 14 Ind. App. 512. *Compare Ohio Valley R., etc., Co. v. Kerth*, 130 Ind. 314.

3. *Haas v. Choussard*, 17 Tex. 588.

4. **Cattle** — *Alabama*. — *Western R. Co. v. Lazarus*, 88 Ala. 453; *Alabama G. S. R. Co. v. Moody*, 92 Ala. 279.

Kansas. — *Missouri Pac. R. Co. v. Shumaker*, 46 Kan. 769.

Michigan. — *Denton v. Smith*, 61 Mich. 431; *Gilbert v. Kennedy*, 22 Mich. 117.

Missouri. — *Fry v. Estes*, 52 Mo. App. 1.

Montana. — *Emerson v. Bigler*, (Mont. 1898) 53 Pac. Rep. 621.

New York. — *Smith v. Wilcox*, 4 Hun (N. Y.) 411.

South Dakota. — *Johnson v. Gilmore*, 6 S. Dak. 276.

Wisconsin. — *Plunkett v. Minneapolis, etc., R. Co.*, 79 Wis. 222.

5. **Nonexpert Testimony Admissible**. — "Several witnesses swore to the value of the cow, without stating her color, size, age, breed, or other peculiarities. This was quite consistent with the universal practice of courts, so far as

Dogs. — Witnesses who have bought or sold dogs are competent to give an opinion as to the value of a particular dog.¹ Farmers knowing the usefulness of shepherd dogs in guarding stock have been allowed to give their opinions as to the value of such a dog.² But before opinions are admissible as to the value of a dog it must be shown that the animal in question is a marketable commodity.³

Horses. — Farmers, dealers in horses, and liverymen who know the value of horses generally may testify thereto.⁴ A witness to the value of horses need not have seen the horse in question,⁵ and there is authority for the proposition that the witness need not show special knowledge of the value of horses.⁶

our experience enables us to judge, and it was for the defendant, if it was deemed important, to have inquired as to these particulars. Every one is presumed to have some idea of the value of property which is in almost universal use, and it is not necessary to show that a witness is a drover or a butcher, before he is allowed to give an opinion of the value of a cow. If it were a steam engine, or a diamond ring, it might be different." Ohio, etc., R. Co. v. Irvin, 27 Ill. 178.

In Gulf, etc., R. Co. v. Wedel, (Tex. Civ. App. 1897) 42 S. W. Rep. 1030, an action for the value of a heifer killed by a train, it was held that information as to the value of such cattle, obtained by plaintiff from competent parties in another state, was admissible.

1. **Dogs.** — Anson v. Dwight, 18 Iowa 241; Cantling v. Hannibal, etc., R. Co., 54 Mo. 385, 14 Am. Rep. 476.

2. Bowers v. Horen, 93 Mich. 420, 32 Am. St. Rep. 513.

3. "Dogs, in general, as is well known, have no fixed or general market value. If there is any particular breed or class of dogs which is generally or usually sold in market and have established some fixed or general market value, I do not see why opinions of witnesses are not as competent to fix the value of such breed or class as that of any other marketable property. Opinions as to the value of property, to be competent, must relate to some standard or marketable value. Opinions as to value founded upon the mere taste or fancy of the owner or the witness are not competent. And for this reason, opinions in regard to the value of dogs which have no standard or marketable value are necessarily fanciful, depending upon the fancy or predilection of the witness, and are not competent. In order to render opinions as to the value of a dog competent, it should first be shown that the dog in question is a marketable animal, either belonging to some peculiar breed, or possessing some peculiar qualities which make him an animal usually vendible, at some proximately regular price. Nothing of the kind was shown here. It was shown that he was a trained farm dog, and it was offered to be shown that the witness, who was the plaintiff himself, was acquainted with the value of such dogs, and had seen them bought and sold. This fell far short of offering to prove that the dog was a marketable animal or had any market value which the witness was acquainted with. I am of the opinion, therefore that the evidence was properly excluded." Brown v. Hoburger, 52 Barb. (N. Y.) 15. See also Smith v. Griswold, 15 Hun (N. Y.) 273.

In Dunlap v. Snyder, 17 Barb. (N. Y.) 561, it was even held that the jurors were competent judges of the value of a dog and that expert evidence pertaining thereto was not admissible.

4. **Horses** — Alabama. — East Tennessee, etc., R. Co. v. Watson, 90 Ala. 41.

Illinois. — Chicago, etc., R. Co. v. Kendall, 49 Ill. App. 398.

Iowa. — Gere v. Council Bluffs Ins. Co., 67 Iowa 272; Humphrey v. Young, 92 Iowa 126; Leek v. Chesley, 98 Iowa 593.

Kansas. — Reed v. New, 35 Kan. 727; Atchison, etc., R. Co. v. Bartlett, 2 Kan. App. 167.

Michigan. — Browne v. Moore, 32 Mich. 254.

Illustrations — Thoroughbred Stallion. — "The witnesses showed that they were engaged in farming generally and stock raising, but were not able to speak with much confidence as to the breed of the horse in question. But they showed that they were acquainted with the horse and claimed to know his value. We are by no means certain that a farmer engaged in raising horses for the market, and directly interested in stallions, may not exercise about as accurate a judgment as any one in regard to the value of a stallion with which he is acquainted; but whether this be so or not, it appears reasonably clear to us that he cannot be deemed wholly incompetent." Gere v. Council Bluffs Ins. Co., 67 Iowa 272.

Colts. — In Atchison, etc., R. Co. v. Bartlett, 2 Kan. App. 167, witness who had dealt in horses for a number of years, but did not know the market price of colts of that age at a neighboring city, and had not purchased colts of that age for several years, was held competent to give an opinion. Atchison, etc., R. Co., v. Bartlett, 2 Kan. App. 167.

Pacing Horse. — "He did not have a very clear idea of the market value of such horses. But he was a farmer, had been accustomed to raising, handling, buying, and selling horses, and knew something of the value of such horses in northwestern Iowa. We are of the opinion that, although the highest degree of competency was not shown, his knowledge was sufficient to authorize the admission of his testimony. The value of horses of the class of that in question is not as fixed and capable of being determined with accuracy as the value of other and cheaper horses, suitable only for ordinary purposes, nor is it so likely to depend on local demand." Leek v. Chesley, 98 Iowa 593.

5. Toledo, etc., R. Co. v. Smith, 25 Ind. 288.
6. Lundberg v. Mackenheuser, 4 Ill. App. 603.

Purchasers of horses engaged in business in which they use a certain kind of horses may give opinions as to the value of such horses.¹ Farmers who know the particular horses and the character of work done by them are competent to give opinions as to the value of the use of such horses.²

Mules. — Witnesses who were merely accustomed to handle mules, and who had bought some, were held incompetent to give opinions as to the value of such animals.³

Poultry. — A witness whose knowledge of the value of poultry is derived from quotations issued by commission men is competent to testify thereon.⁴

Swine. — Experienced breeders may testify as to the value of blooded Poland-China swine.⁵

bb. ANNUITIES. — The value of annuities has been allowed to be proved by actuaries.⁶

cc. BOTTLES. — One who had been in the bottling business for thirty years and knew the market value of supplies handled by the trade was held competent to testify to the value of bottles which formed the subject of an action for conversion.⁷

dd. CLOTHING. — A manufacturer of and dealer in clothing is a competent witness to the value of cloth and other materials used in the manufacture of clothing;⁸ and as every one is supposed to know the value of wearing apparel in common use, it is not necessary to call an expert to prove such value.⁹

ee. CROPS. — Where there is no market value for crops at a particular place, the opinions of qualified persons may be admitted.¹⁰

Grass and Hay. — Stock raisers,¹¹ farmers,¹² and dealers in hay¹³ have been allowed to give their opinions as to the value of grass or hay.

Cornstalks. — But a witness who lived eight or nine miles from the place in question, though he knew the value of cornstalks in his own neighborhood, was not allowed to give an opinion as to their value at the former place.¹⁴

1. *Mason v. Partrick*, 100 Mich. 577.

2. *Kennett v. Fickel*, 41 Kan. 211.

3. **Mules.** — *Haight v. Kimbark*, 51 Iowa 13.

4. **Poultry.** — *Texas Cent. R. Co. v. Fisher*, (Tex. Civ. App. 1898) 43 S. W. Rep. 584.

5. **Swine.** — *Lachner v. Adams Express Co.*, 72 Mo. App. 13.

6. **Annuities.** — *Ex p. Thistlewood*, 19 Ves. Jr. 236; *Heathcote v. Paignon*, 2 Bro. C. C. 167.

7. **Bottles.** — *Vandercook v. O'Connor*, (Mass. 1899) 52 N. E. Rep. 444, the court, *per* Holmes, J., saying: "Another exception, also not much pressed, was taken to the admission of the testimony of the same witness to the market value of these bottles at the time of the conditional sale in Holyoke. He had been in the bottling business over thirty years, and in Holyoke eleven years, and he testified that he knew the market value of bottlers' supplies in Holyoke at this time. He bought these very bottles with his own name blown in them, and previously, it would seem often, had bought bottles with other men's names blown in them. If we assume what is not expressly stated, and take it that we have all the evidence of the witness's experience before us, we cannot say that it shows that the judge exercised his discretion wrongly in admitting the evidence."

8. **Clothing.** — *Browning v. Long Island R. Co.*, 2 Daly (N. Y.) 117.

9. *Parmelee v. Raymond*, 43 Ill. App. 609; *State v. Finch*, 70 Iowa 316, 59 Am. Rep. 443.

In the latter case a nonexpert was allowed to testify to the value of a sealskin overcoat though he had never bought or sold one

10. **Crops.** — *Atchison, etc., R. Co. v. Stanford*, 12 Kan. 354, 15 Am. Rep. 362; *Burger v. Northern Pac. R. Co.*, 22 Minn. 343; *International, etc., R. Co. v. Searight*, 8 Tex. Civ. App. 593. See also *Huber v. Beck*, 6 Ind. App. 484, *citing* 7 AM. AND ENG. ENCYC. OF LAW (1st ed.) 512.

"But was the witness incompetent? Simply not knowing of any sales of corn may not have rendered the witness wholly incompetent. There may have been no sales in that region. There may have been no market value for corn there. If so, then some other criterion of value must be adopted. It is not necessary in any case that there should be an actual market value for an article, in order to entitle the owner thereof to a recovery for its destruction." *Atchison, etc., R. Co. v. Stanford*, 12 Kan. 380, 15 Am. Rep. 362.

11. *International, etc., R. Co. v. Searight*, 8 Tex. Civ. App. 593.

12. *Chicago, etc., R. Co. v. Larsen*, 19 Colo. 71; *Townsend v. Brundage*, 6 Thomp. & C. (N. Y.) 527.

13. *Burger v. Northern Pac. R. Co.*, 22 Minn. 343.

14. *Raridan v. Central Iowa R. Co.*, 69 Iowa 527. But in *Foster v. Ward*, 75 Ind. 594, a witness residing twelve miles distant was held competent to give an opinion as to the value of corn in the shock.

ff. FOREIGN MONEY. — The value of foreign money may be shown by witnesses familiar therewith.¹

gg. FURNITURE — Ornamental. — Wood carvers are competent to give opinions as to the value of a set of furniture of unique design and richly carved.²

Saloon Fixtures. — One engaged in the saloon business who had purchased saloon fixtures and was acquainted with their values was allowed to testify thereto.³

Second-hand Furniture. — Dealers in second-hand furniture may give opinions regarding its value.⁴

Household Furniture. — Householders are presumed to be competent to testify to the value of such ordinary household furniture as they are accustomed to buy.⁵

Stoves. — A witness familiar with the value of stoves in general and with that of the one in controversy may give in evidence his opinion thereon.⁶

Clocks. — A dealer in clocks may state his opinion as to the value of a clock in controversy, though he has never seen it and though the inquiry be not confined to market value.⁷

hh. GUNS. — Gunsmiths,⁸ and manufacturers of guns,⁹ may give opinions as to the value of such weapons.

ii. ICE. — The opinion of a witness has been received as to the value of ice.¹⁰

jj. JEWELRY. — Witnesses having knowledge of the value of jewelry are competent to testify thereto, but the mere fact of having purchased jewelry is no proof of qualification.¹¹

kk. LEASEHOLD. — Where, by the terms of the lease, the property was not to be occupied for any other purpose than lodge rooms, witnesses who knew what localities were most desirable in which to establish halls to rent to lodges were allowed to give opinions as to the value of such a lease.¹²

ll. LOCOMOTIVES. — An attorney who, though not an expert in the manufacture and use of locomotives, had made some investigations and inquiries for the purpose of determining the value of the locomotive in question, and had

1. Foreign Money. — *Comstock v. Smith*, 20 Mich. 338; *Kermott v. Ayer*, 11 Mich. 181.

2. Furniture. — *Ruppel v. Adrian Furniture Mfg. Co.*, 96 Mich. 455. The court said: "A witness called by plaintiff was asked how much it would cost to replace the set, or make another just like it. Plaintiff was an expert wood carver. The set had been the first constructed after a unique design invented by plaintiff. It was richly carved. It could not be said to have had an ascertained market value. The witness had himself worked upon the set ten and one-half months, and had testified that he knew how much time plaintiff had spent upon it. Other testimony had been given by experts of its value. Such opinions were, at best, but estimates. It was competent, in connection with such testimony, to show the actual cost of construction. Property is often the subject of legal valuation concerning which no proof of value in the market can be given, because it is not brought into the course of trade, and it is incapable of any estimate in that mode. The value in such case is to be ascertained from such elements of value as are attainable."

3. *Connelly v. Edgerton*, 22 Neb. 82.

4. *Walker v. Bernstein*, 43 Ill. App. 568; *Phillips v. McNab*, 16 Daly (N. Y.) 150.

5. *Tubbs v. Garrison*, 68 Iowa 44; *Thomason v. Capital Ins. Co.*, 92 Iowa 72; *Erickson v. Drazkowski*, 94 Mich. 551; *Bowne v. Hartford*

F. Ins. Co., 46 Mo. App. 473; *Willison v. Smith*, 60 Mo. App. 469; *Omaha Auction, etc., Co. v. Rogers*, 35 Neb. 61; *Rademacher v. Greenwich Ins. Co.*, 75 Hun (N. Y.) 83.

6. *Smith v. Hill*, 22 Barb. (N. Y.) 656.

7. *Whiton v. Snyder*, 88 N. Y. 299.

8. *Guns.* — *Cooper v. State*, 53 Miss. 393.

9. *Beecher v. Denniston*, 13 Gray (Mass.) 354.

10. *Ice.* — *Washington Ice Co. v. Webster*, 68 Me. 449.

11. *Jewelry.* — *Central R. Co. v. Wolff*, 74 Ga. 664; *Gregory v. Fichtner*, 27 Abb. N. Cas. (N. Y. C. Pl.) 86, 21 Civ. Pro. Rep. (N. Y.) 1, in which case the court said "But as a condition of the admissibility of her opinion it was necessary to show that she was competent to form an opinion; in other words, that she was an expert on the value of jewelry. That a witness cannot testify as an expert unless he be an expert is elementary law and familiar practice. 7 AM. AND ENG. ENCYC. OF LAW, 514. Yet here, without any evidence whatever of her qualification to speak as to the value of the jewelry, the plaintiff was allowed to state the value as \$1,857. True, she had said that she bought the jewelry, but she did not give the price, and the mere fact of the purchase was no proof of her acquaintance with the value."

12. *Leasehold.* — *Boteler v. Philadelphia, etc., Terminal R. Co.*, 164 Pa. St. 397.

formed an opinion as to its value, was permitted to testify thereto.¹

mm. LUMBER. — Dealers in lumber are competent to give opinions as to the value of that commodity in their neighborhood,² and carpenters may testify as to the value of lumber in a particular house.³ Workmen in a sawmill, acquainted with the price charged for lumber at the mill, are competent to give an opinion as to its value.⁴

nn. MACHINERY. — Dealers in machinery,⁵ mechanical engineers,⁶ and salesmen are competent to give opinions as to value of machinery.⁷

Farm Machinery. — So farmers may testify as to value of farm machinery.⁸

Nonexperts. — And it seems that an ordinary witness who has examined the charred remains of burned farm machinery may state that in his opinion it is worthless.⁹

Cost of Replacement. — Evidence regarding the cost of replacing farm implements that have been used furnishes no measure of their value.¹⁰

Mill Machinery. — Nonexperts may testify as to the value of mill machinery of which they have some knowledge.¹¹

oo. MERCHANDISE. — Merchants are competent to testify as to the value of mercantile goods,¹² even though they are without special qualifications.¹³

A Clerk who had been employed in selling certain goods was permitted to give an opinion as to their value.¹⁴

Purchasers of Goods who have previously taken an invoice of the goods and subsequently sold them are competent to give opinions as to their value.¹⁵

Manufacturers of clothing are competent to give their opinions as to the value of cloth and other materials.¹⁶

pp. MINING CLAIMS. — Witnesses who knew the property and its surroundings and many of whom have dealt in mining claims may give opinions respecting the value thereof.¹⁷

qq. MUNICIPAL BONDS. — A banker engaged in buying and selling municipal

1. **Locomotives.** — *Lamoille Valley R. Co. v. Bixby*, 57 Vt. 548.

2. **Lumber.** — *U. S. v. Baxter*, 46 Fed. Rep. 350; *Lawton v. Chase*, 108 Mass. 238; *Gregory v. McDowell*, 8 Wend. (N. Y.) 435.

Value at a Particular Place. — "Now it might not have been improper to receive evidence of the value of shingles at other places in the neighborhood of the place of delivery; but it was admissible only for the purpose of showing what the true value was at that place. But where the evidence is clear and explicit as to the value of the article at the place of delivery, such value must control, no matter what the value is at other places." *Gregory v. McDowell*, 8 Wend. (N. Y.) 435.

3. *Simmons v. Carrier*, 68 Mo. 416; *Shepard v. Ashley*, 10 Allen (Mass.) 542.

4. *Skeels v. Starrett*, 57 Mich. 350.

5. **Machinery.** — *Fox v. Cox*, 20 Ind. App. 61; *Haskins v. Hamilton Mut. Ins. Co.*, 5 Gray (Mass.) 432.

6. *Orr v. New York*, 64 Barb. (N. Y.) 106.

7. *Johnston Harvester Co. v. Clark*, 31 Minn. 165.

8. *Fry v. Estes*, 52 Mo. App. 1; *Robinson v. Peru Plow, etc., Co.*, 1 Okla. 140.

9. "Expert testimony was admitted, over the objection of the defendant, as to the value of the property destroyed. A witness named Dow stated what he observed of the ruins after the fire, and from that observation gave his opinion as to the value of certain farm machinery which had been so burned as to be worthless. It is insisted this testimony was incompetent. We do not think so. It may

have been of but little weight, but that was for the jury." *Chicago, etc., R. Co. v. Glenny*, 175 Ill. 238, *affirming* 70 Ill. App. 510. It does not appear from the opinion that the witness had any special knowledge regarding the value of this class of property.

10. *Matter of Slade*, 122 Cal. 434.

11. *Fox v. Cox*, 20 Ind. App. 61.

12. **Merchandise.** — *Buckley v. U. S.*, 4 How. (U. S.) 251; *Smith v. Jensen*, 13 Colo. 213; *Allen v. Kirk*, 81 Iowa 658; *Graves v. Merchants*, etc., Ins. Co., 82 Iowa 637, 31 Am. St. Rep. 507; *Continental Ins. Co. v. Horton*, 28 Mich. 173; *Enos v. St. Paul F. & M. Ins. Co.*, 4 S. Dak. 639, 46 Am. St. Rep. 796.

13. *Enos v. St. Paul F. & M. Ins. Co.*, 4 S. Dak. 639, 46 Am. St. Rep. 796.

14. "This witness was called to testify to the value of the goods; and on cross-examination it appeared that he based his estimates on price lists. Precisely what these are does not distinctly appear from the bill of exceptions, but we suppose the witness referred to such market lists as dealers are governed by in their transactions. There is nothing in the record to indicate that the knowledge of the witness was not ample, and as he was a clerk employed in selling the goods for some time before S. made his levy, some knowledge of current rates in the business may fairly be presumed." *Sirrine v. Briggs*, 31 Mich. 443.

15. *Walker v. Collins*, 50 Fed. Rep. 737.

16. *Browning v. Long Island R. Co.*, 2 Daly (N. Y.) 117.

17. **Mining Claim.** — *Montana R. Co. v. Warren*, 137 U. S. 348.

bonds, who has thus had a general knowledge of the value of such securities, may testify thereto, even though he has never dealt in and has no special knowledge as to the particular bonds in question.¹

rr. MUSEUM. — A witness who had been connected with museums and had purchased curios and animals for several of them is competent to give an opinion as to the value of that class of property.²

ss. NEGOTIABLE PAPER. — Witnesses have been allowed to testify as to the value of railroad bonds,³ but not as to the value of mere individual promissory notes.⁴

tt. PAINTING. — An artist is competent to give an opinion as to the value of a painting.⁵

uu. PATENTS — For Stoves. — Witnesses who have had experience in the manufacture and sale of stoves may give their opinions as to the value of a certain patent for stoves.⁶

Stock Cars. — A witness who had taken out many inventions for stock cars, was familiar with the devices upon such cars, and had been connected with stock-car companies in various capacities, is competent to give an opinion as to the value of the privilege of constructing a so-called "hood door" and tilting troughs.⁷

vv. PIANO. — A pianist may usually express an opinion as to the value of a piano.⁸

ww. RAILWAY RIGHTS — Use of Road. — The opinions of witnesses acquainted with the business of a particular road and the expense of operating it have been received as to the value of the use of the road.⁹

Reversion of Roadbed. — But experts were not allowed to give opinions as to the value of the reversion of the bed of a railroad, as a matter on which the witnesses could have no experience, the value depending on the length of continuance of the easement.¹⁰

xx. SAILING CRAFT — Ships. — A shipbroker and shipowner who knew the condition of a certain ship from the books published in reference to the standing of all ships, giving their descriptions, and used by underwriters and merchants, is competent to give an opinion as to the value of such vessel.¹¹

Scows. — A witness who has no knowledge of the value of scows except what is derived from hearing others discuss the prices thereof, is not competent to testify to such value.¹²

1. *Municipal Bonds.* — *Murray v. Norwood*, 77 Wis. 405.

2. *Richter v. Harper*, 95 Mich. 221.

3. *Railroad Bonds.* — *Smith v. Frost*, 42 N. Y. Super Ct. 87.

4. *Anderson v. Grand Forks First Nat. Bank*, 6 N. Dak. 497.

5. *Pictures.* — *Houston, etc., R. Co. v. Burke*, 55 Tex. 323, 40 Am. Rep. 808.

6. *Patents.* — *Cortland Howe Ventilating Stove Co. v. Howe*, 92 Hun (N. Y.) 113.

7. *Burton v. Burton Stock Car Co.*, 171 Mass. 437.

8. *Pianos.* — *Fredericks v. Sault*, 19 Ind. App. 604; *Daly v. W. W. Kimball Co.*, 67 Iowa 132.

9. *Use of Railroad.* — *Sturgis v. Knapp*, 33 Vt. 486. *Contra*, *The Land-Grant Railroad Case*, 15 Ct. of Cl. 126.

10. *Reversion of Roadbed.* — *Boston, etc., R. Corp. v. Old Colony, etc., R. Corp.*, 3 Allen (Mass.) 142.

11. *Vessels.* — *Slocovich v. Orient Mut. Ins. Co.*, 108 N. Y. 56, in which case the court said: "It was not a sufficient objection to the competency of this witness that he had no personal knowledge of the ship. An expert is qualified

to give evidence as to things which he has never seen. He may base an opinion upon facts proved by other witnesses, or upon facts assumed and embraced within the case. Questions may be put to him assuming the facts upon which he is asked to base his judgment and express an opinion. In this case the question put to the witness might have assumed the age, tonnage, character, condition, and quality of the vessel, and he could have been asked to give an opinion as to her value based upon such facts; or the facts relating to the vessel appearing in the books and records which he referred to, and which were also proved upon the trial, might have been assumed in the question put to the witness and he asked to give an opinion as to her value based upon them. The plaintiff was not asked to pursue this course in putting his question, and there was no objection that the witness did not have sufficient facts before him upon which to base his opinion as to the value of the ship."

12. *Oregon Pottery Co. v. Kern*, 30 Oregon 328. The court said: "It is true he says his attention had been called to scows used on the river, and that he had heard men accustomed

13. STOCK OF CORPORATION. — An experienced stockbroker was held competent to give an opinion as to the value of stock which was not listed and of which only two sales had been made.¹ And a dealer in stocks during a certain year was permitted to testify as to the value of the shares in controversy on a particular day of that year, without showing that he dealt on that day.²

(b) **Realty** — *aa.* GENERAL RULE AS TO QUALIFICATIONS. — As a rule a witness may give in evidence an opinion as to the value of real estate based upon an acquaintance either with the property in question or with other property of like general character and location.³ Such opinion need not be fortified by

to buying, owning, and handling such property discuss their value; but this is not sufficient to render him competent to give an opinion of the value of the particular scow in question. Its value depends upon its intrinsic properties and the state of the market, and it nowhere appears that the witness had any knowledge whatever upon either of these questions."

1. **Corporate Stock.** — *Moffitt v. Hereford*, 132 Mo. 513, citing 7 AM. AND ENG. ENCYC. OF LAW (1st ed.) 490-494, where the court said: "But it seems to me to be evident that a stockbroker, who makes a business of calculating the value of the stock of all kinds of corporations, must acquire from experience a knowledge of the effect certain conditions will have upon the value which is not possessed by inexperienced persons. The opinion of this witness is only evidence of value, to be weighed with the other evidence in the case. * * * The opinion can only have weight according to the superiority of the knowledge the witness possessed of the subject-matter over that of the judge."

2. *Noonan v. Hsley*, 22 Wis. 27.

3. **Real Estate — Basis of Opinion** — *Alabama.* — *Hudson v. State*, 61 Ala. 333.

California. — *Central Pac. R. Co. v. Pearson*, 35 Cal. 247; *Reed v. Drais*, 67 Cal. 491; *Spring Valley Water Works v. Drinkhouse*, 92 Cal. 528; *Santa Ana v. Harlin*, 99 Cal. 538.

Florida. — *Orange Belt R. Co. v. Craver*, 32 Fla. 28.

Illinois. — *Cooper v. Randall*, 59 Ill. 317; *Hough v. Cook*, 69 Ill. 581; *Culbertson, etc., Packing, etc., Co. v. Chicago*, 111 Ill. 651; *Chicago, etc., R. Co. v. Blake*, 116 Ill. 163; *Lovell v. Sny Island Levee Drainage Dist.*, 159 Ill. 188; *Sanitary Dist. v. Loughran*, 160 Ill. 362; *Illinois Cent. R. Co. v. Chicago*, 169 Ill. 329; *Fox v. Chicago, etc., Rapid Transit R. Co.*, 68 Ill. App. 417.

Iowa. — *Haight v. Kimbark*, 51 Iowa 13; *Cherokee v. Sioux City, etc., Town Lot, etc., Co.*, 52 Iowa 279; *Pingery v. Cherokee, etc., R. Co.*, 78 Iowa 438; *Hartley v. Keokuk, etc., R. Co.*, 85 Iowa 455.

Kansas. — *Kansas Cent. R. Co. v. Allen*, 24 Kan. 33; *Leavenworth, etc., R. Co. v. Paul*, 28 Kan. 816; *St. Louis, etc., R. Co. v. Chapman*, 38 Kan. 307, 5 Am. St. Rep. 744; *Kansas City, etc., R. Co. v. Ehret*, 41 Kan. 22; *Chicago, etc., R. Co. v. Cosper*, 42 Kan. 561.

Maryland. — *Moale v. Baltimore*, 5 Md. 314, 61 Am. Dec. 276.

Massachusetts. — *Brainard v. Boston, etc., R. Co.*, 12 Gray (Mass.) 407; *West Newbury v. Chase*, 5 Gray (Mass.) 421; *Dickenson v. Fitchburg*, 13 Gray (Mass.) 546; *Shaw v.*

Charlestown, 2 Gray (Mass.) 107; *Fowler v. Middlesex County*, 6 Allen (Mass.) 92; *Whitney v. Boston*, 98 Mass. 312; *Edmonds v. Boston*, 108 Mass. 535; *Bristol County Sav. Bank v. Keavy*, 128 Mass. 298; *Sawyer v. Boston*, 144 Mass. 470; *Greenfield First Nat. Bank v. Coffin*, 162 Mass. 180; *Amory v. Melrose*, 162 Mass. 556; *Lyman v. Boston*, 164 Mass. 99; *Pierce v. Boston*, 164 Mass. 92; *Teale v. Boston*, 165 Mass. 88.

Michigan. — *Wallace v. Finch*, 24 Mich. 255; *Kost v. Bender*, 25 Mich. 515; *Greeley v. Stilson*, 27 Mich. 153; *Stone v. Covell*, 29 Mich. 359; *Page v. Wells*, 37 Mich. 415; *Huff v. Hall*, 56 Mich. 456.

Minnesota. — *Simmons v. St. Paul, etc., R. Co.*, 18 Minn. 184; *Lehmick v. St. Paul, etc., R. Co.*, 19 Minn. 464; *Northwestern Fuel Co. v. Mahler*, 36 Minn. 166; *Emmons v. Minneapolis, etc., R. Co.*, 41 Minn. 133; *Papoosek v. Winona, etc., R. Co.*, 44 Minn. 195; *Minnesota Belt Line R., etc., Co. v. Gluek*, 45 Minn. 463.

Missouri. — *Thomas v. Mallinckrodt*, 43 Mo. 58; *Tate v. Missouri, etc., R. Co.*, 64 Mo. 149; *Springfield, etc., R. Co. v. Calkins*, 90 Mo. 538; *Ragan v. Kansas City, etc., R. Co.*, 111 Mo. 456; *Mantz v. Maguire*, 52 Mo. App. 136; *Kansas City Suburban Belt R. Co. v. Norcross*, 137 Mo. 415.

New Jersey. — *Laing v. United New Jersey R., etc., Co.*, 54 N. J. L. 576, 33 Am. St. Rep. 682.

New York. — *Clark v. Baird*, 9 N. Y. 183; *Robertson v. Knapp*, 35 N. Y. 91; *Teerpennin v. Corn Exch. Ins. Co.*, 43 N. Y. 279; *Bedell v. Long Island R. Co.*, 44 N. Y. 367, 4 Am. Rep. 688; *Hewlett v. Saratoga Carlsbad Spring Co.*, 84 Hun (N. Y.) 248; *Chambovet v. Cagney*, 35 N. Y. Super. Ct. 474.

North Carolina. — *Morrison v. Watson*, 101 N. Car. 332.

Pennsylvania. — *Kellogg v. Krauser*, 14 S. & R. (Pa.) 137, 16 Am. Dec. 480; *Pennsylvania, etc., R., etc., Co. v. Bunnell*, 81 Pa. St. 414; *Pittsburgh, etc., R. Co. v. Patterson*, 107 Pa. St. 461; *Pittsburgh, etc., R. Co. v. Vance*, 115 Pa. St. 325; *Pennsylvania Schuylkill Valley R. Co. v. Cleary*, 125 Pa. St. 442, 11 Am. St. Rep. 913; *Schuylkill River East Side R. Co. v. Stocker*, 128 Pa. St. 233; *Gorgas v. Philadelphia, etc., R. Co.*, 144 Pa. St. 1; *Miller v. Windsor Water Co.*, 148 Pa. St. 429; *Jones v. Erie, etc., R. Co.*, 151 Pa. St. 30; *McElheny v. McKeesport, etc., Bridge Co.*, 153 Pa. St. 108; *Spring City Gas Light Co. v. Pennsylvania Schuylkill Valley R. Co.*, 167 Pa. St. 6; *Lee v. Springfield Water Co.*, 176 Pa. St. 223; *Galbraith v. Philadelphia Co.*, 2 Pa. Super. Ct. Rep. 359.

Wisconsin. — *Erd v. Chicago, etc., R. Co.*,

knowledge of actual sales in the vicinity,¹ nor, of course, by actual purchases thereof on the part of the witness,² nor by knowledge of sales anywhere of precisely such tracts.³ Moreover, the opinion may be based upon the value of the property at a previous, if not too remote, period.⁴ And witnesses have even been permitted to testify regarding land values when their knowledge related to lands not in the immediate vicinity.⁵

The **Indiana Rule** does not even require that the witness demonstrate his knowledge of the market value of the land.⁶

bb. PARTICULAR KINDS OF REAL PROPERTY — (*aa*) *Bridges*. — The contracting agent of a bridge-building company may state in evidence his opinion of the value of the superstructure of a bridge.⁷

(*bb*) *City Property*. — A witness familiar with the value of particular kinds of city property, such as a real estate broker,⁸ speculator in lots,⁹ or clerk in a real estate office,¹⁰ may give his opinion thereof in evidence.

(*cc*) *Farm Lands*. — The best witnesses concerning the value of this class of property are, of course, farmers, and their opinions thereon are admissible whenever they show the means of knowledge.¹¹

41 Wis. 65; *Watson v. Milwaukee, etc., R. Co.*, 57 Wis. 332; *Washburn v. Milwaukee, etc., R. Co.*, 59 Wis. 364; *Moore v. Chicago, etc., R. Co.*, 78 Wis. 120.

Illustrations. — The value of real estate is to be ascertained from the opinions of those who profess to be familiar with the subject of inquiry, and whose business has afforded them an opportunity of acquiring information, and of judging accurately on such questions. *Green v. Chicago*, 97 Ill. 370.

"Persons who are familiar with the land, and have an opinion of its value, are competent to express that opinion." *Johnson v. Freeport, etc., R. Co.*, 111 Ill. 413. See also *Pike v. Chicago*, 155 Ill. 656.

Witnesses acquainted with the value of land in the vicinity are competent. *Illinois Cent. R. Co. v. Chicago*, 169 Ill. 329.

"It has become pretty generally established that a witness who testifies that he is acquainted with the values of real estate in the locality may give his opinion as to the value of any particular tract." *Leavenworth, etc., R. Co. v. Paul*, 28 Kan. 816.

The value of land in controversy may be proved by the testimony of witnesses personally acquainted with the subject, and sufficiently familiar with it to give an opinion. *Fowler v. Middlesex County*, 6 Allen (Mass.) 92.

"Although it is competent to offer evidence of the opinions and judgment of witnesses on such a subject [value of lands and buildings], nevertheless it is always necessary to lay a foundation for this species of proof, by first showing that the witnesses have had the means to form an intelligent opinion, derived from an adequate knowledge of the nature and kind of property in controversy, and of its value." *Whitney v. Boston*, 98 Mass. 312.

"The value of a house or a piece of ground is a subject upon which all persons familiar with the property who have formed an opinion are competent to speak. The value of their opinions will depend on the extent of their familiarity with surrounding property, and the prices asked and paid for it, but this is for the jury to determine." *Jones v. Eric, etc.* *R. Co.*, 151 Pa. St. 30.

1. Knowledge of Actual Sales. — *Davis v.*

Northwestern El. R. Co., 170 Ill. 595; *Chicago, etc., R. Co. v. Blake*, 116 Ill. 163; *Kansas City, etc., R. Co. v. Ehret*, 41 Kan. 22; *Mantz v. Maguire*, 52 Mo. App. 136. But see *Galbraith v. Philadelphia Co.*, 2 Pa. Super. Ct. Rep. 359.

In *Chicago, etc., R. Co. v. Blake*, 116 Ill. 163, the court said: "The uses and capabilities of a particular property; the prices at which like property in the neighborhood is held or offered; knowledge or observation of the growth and development of towns and cities; a general knowledge of trade and business, and of the commercial advantages or prospects of the place where the property is situated, are all matters more or less taken into account by the intelligent witness in forming his opinion as to the value of a particular piece of property."

2. *Whitman v. Boston, etc., R. Co.* *v. Allen* (Mass.) 313; *Lehmick v. St. Paul, etc., R. Co.*, 19 Minn. 464; *Hanover Water Co. v. Ashland Iron Co.*, 84 Pa. St. 279. But see *contra Greenfield First Nat. Bank v. Coffin*, 162 Mass. 180.

3. *Frankfort, etc., R. Co. v. Windsor*, 51 Ind. 238.

4. *Cobb v. Boston*, 109 Mass. 438; *Abell v. Munson*, 18 Mich. 306, 100 Am. Dec. 165.

5. *Amory v. Melrose*, 162 Mass. 556; *Stone v. Covell*, 29 Mich. 359; *Gorgas v. Philadelphia, etc., R. Co.*, 144 Pa. St. 1.

6. *Ferguson v. Stafford*, 33 Ind. 162; *Evansville, etc., R. Co. v. Fettig*, 130 Ind. 61; *Hire v. Kniseley*, 130 Ind. 295; *Goodwine v. Evans*, 134 Ind. 262. *Compare Ohio Valley R., etc., Co. v. Kerth*, 130 Ind. 314.

7. Bridges. — *Mifflin Bridge Co. v. Juniata County*, 144 Pa. St. 365.

8. City Property. — *Bristol County Sav. Bank v. Keavy*, 128 Mass. 298; *Taft v. Com.*, 158 Mass. 526; *Amory v. Melrose*, 162 Mass. 556; *Pierce v. Boston*, 164 Mass. 92; *Lyman v. Boston*, 164 Mass. 99; *Ragan v. Kansas City, etc., R. Co.*, 111 Mo. 456; *Mantz v. Maguire*, 52 Mo. App. 136; *Colton v. New York El. R. Co.* 31 Abb. N. Cas. (N. Y. C. Pl.) 269, 7 Misc. Rep. (N. Y.) 626; *Schuylkill River East Side R. Co. v. Stocker*, 128 Pa. St. 233.

9. *Jarvis v. Furman*, 25 Hun (N. Y.) 391.

10. *Teele v. Boston*, 165 Mass. 88.

11. Farm Lands — *Alabama*. — *Hudson v. State*, 61 Ala. 333.

(dd) *Houses and Buildings.* — Carpenters,¹ builders,² masons,³ and real estate dealers⁴ may testify as to the value of a house, basing their opinions either on personal acquaintance⁵ or on description.⁶ Witnesses familiar with a certain building and with the cost of constructing it may testify as to its value.⁷ But a witness is not competent to give his opinion concerning the value of certain burned buildings, when he neither examined them before the fire nor knows what ones were burned.⁸

(ee) *Irrigation Reservoir.* — The president of a waterworks company was allowed to give an opinion as to the value of certain lands for use as an irrigation reservoir, they being peculiarly fitted therefor.⁹

(ff) *Mill Property.* — An opinion as to the value of certain mill property was received from one who had assisted in appraising it and had some knowledge of the sale of such property in the neighborhood.¹⁰ And persons acquainted therewith may testify as to the value of water power for mill purposes.¹¹

(gg) *Mineral Lands.* — The owners of mineral lands,¹² as well as a witness

Florida. — Orange Belt R. Co. v. Craver, 32 Fla. 28.

Georgia. — Selma, etc., R. Co. v. Keith, 53 Ga. 178.

Illinois. — Hayes v. Ottawa, etc., R. Co., 54 Ill. 373; Galena, etc., R. Co. v. Haslam, 73 Ill. 494; Keithsburg, etc., R. Co. v. Henry, 79 Ill. 290.

Iowa. — Pingery v. Cherokee, etc., R. Co., 78 Iowa 438; Hartley v. Keokuk, etc., R. Co., 85 Iowa 455.

Kansas. — St. Louis, etc., R. Co. v. Chapman, 38 Kan. 307, 5 Am. St. Rep. 744; Kansas City, etc., R. Co. v. Ehret, 41 Kan. 22; Chicago, etc., R. Co. v. Cosper, 42 Kan. 561; Ottawa, etc., R. Co. v. Fisher, 42 Kan. 675.

Massachusetts. — Russell v. Horn Pond Branch R. Corp., 4 Gray (Mass.) 607; West Newbury v. Chase, 5 Gray (Mass.) 421; Brainard v. Boston, etc., R. Co., 12 Gray (Mass.) 407.

Michigan. — Wallace v. Finch, 24 Mich. 255; Stone v. Covell, 29 Mich. 359.

Minnesota. — Simmons v. St. Paul, etc., R. Co., 18 Minn. 184; Lehmicke v. St. Paul, etc., R. Co., 19 Minn. 464.

Missouri. — Thomas v. Mallinckrodt, 43 Mo. 58; Tate v. Missouri, etc., R. Co., 64 Mo. 149.

Nebraska. — Chicago, etc., R. Co. v. Shafer, 49 Neb. 25; Chicago, etc., R. Co. v. Buel, (Neb. 1898) 76 N. W. Rep. 571.

New Jersey. — Pennsylvania, etc., R. Co. v. Root, 53 N. J. L. 253.

New York. — Clark v. Baird, 9 N. Y. 183; Robertson v. Knapp, 35 N. Y. 91.

Pennsylvania. — Pennsylvania, etc., R., etc., Co. v. Bunnell, 81 Pa. St. 414; Pittsburgh, etc. R. Co. v. Patterson, 107 Pa. St. 461; Pittsburgh, etc., R. Co. v. Vance, 115 Pa. St. 325; Curtin v. Nittany Valley R. Co., 135 Pa. St. 20; Gorgas v. Philadelphia, etc., R. Co., 144 Pa. St. 1; Michael v. Crescent Pipe Line Co., 159 Pa. St. 99; Pennock v. Crescent Pipe Line Co., 170 Pa. St. 372; Mewes v. Crescent Pipe Line Co., 170 Pa. St. 364.

Wisconsin. — Milwaukee, etc., R. Co. v. Eble, 4 Chand. (Wis.) 72; Erd v. Chicago, etc., R. Co., 41 Wis. 65; Snyder v. Western Union R. Co., 25 Wis. 60.

1. *Houses.* — Hough v. Cook, 69 Ill. 581; Lewis v. Burlington Ins. Co., 80 Iowa 259; Hills v. Home Ins. Co., 129 Mass. 345; Bedell

v. Long Island R. Co., 44 N. Y. 367, 4 Am. Rep. 688; Woodruff v. Imperial F. Ins. Co., 83 N. Y. 133.

2. Tebbetts v. Haskins, 16 Me. 283; Hills v. Home Ins. Co., 129 Mass. 345; Woodruff v. Imperial F. Ins. Co., 83 N. Y. 133.

3. Lewis v. Burlington Ins. Co., 80 Iowa 259.

4. Woodruff v. Imperial F. Ins. Co., 83 N. Y. 133.

5. Hough v. Cook, 69 Ill. 581; Bedell v. Long Island R. Co., 44 N. Y. 367, 4 Am. Rep. 688.

6. Phoenix Ins. Co. v. Copeland, 86 Ala. 551.

7. Matthews v. Missouri Pac. R. Co., 142 Mo. 645.

8. Houston, etc., R. Co. v. Smith, (Tex. Civ. App. 1898) 46 S. W. Rep. 1046, the court saying: "The witness, R. J. Thacker, was allowed to give his opinion as to the value of the land both before and after the fire. His answers, perhaps, showed sufficient familiarity with real estate in the vicinity of that of plaintiff to qualify him to testify as to such value without reference to improvements. His opinion, however, did not stop at that, but went to the difference between the value of this place with its improvements before the fire and its value after the fire. He stated that he had never examined the improvements before the fire, but had simply stopped and rested at plaintiff's house frequently. He did not know what buildings were burned and what ones were left standing. He did not directly state that he knew the value of the premises either before or after the fire, but gave his supposition as to value. We think that a better qualification than this should have been required. The witness should have been required either to state that he possessed such information as to enable him to give an opinion, or to state facts from which the court could see that he was qualified." Citing Southern Pac. R. Co. v. Maddox, 75 Tex. 300.

9. *Irrigation Reservoir.* — Spring Valley Water Works v. Drinkhouse, 92 Cal. 528.

10. *Mill Property.* — Lee v. Springfield Water Co., 176 Pa. St. 223.

11. Read v. Barker, 30 N. J. L. 378, 32 N. J. L. 477.

12. *Mineral Lands.* — Blake v. Griswold, 103 N. Y. 429.

whose knowledge was derived from description,¹ were permitted to give opinions of the value of such lands.

(hh) *Orchards*. — Farmers² and nurserymen³ are competent witnesses as to the value of an orchard.

(ii) *Reversion of Public Easement* — Opinions of real-estate dealers concerning the value of an estate subject to a public easement were excluded as purely speculative, the witnesses not showing knowledge of sales of such property.⁴

(jj) *Seaside Resort*. — Witnesses who had dealt in property used as summer resorts, but had no knowledge of such property in the neighborhood of that in controversy, were not allowed to state their opinions as to property having a distinctive value as a seaside summer resort.⁵ Neither are farmers competent witnesses concerning the value of such property.⁶

(kk) *Tavern Stand*. — The opinions of witnesses acquainted therewith are admissible as to the value of a tavern stand.⁷

(ll) *Water Power*. — The opinions of millers and millwrights are admissible as to the value of water power for milling purposes,⁸ and the opinion of a witness was received as to the value of such power for manufacturing purposes.⁹

(mm) *Water Flowage*. — A witness was allowed to testify as to the value of a flow of water used in raising cranberries, though he had never personally experimented with that industry.¹⁰

(nn) *Wharfage*. — In the absence of a market value, the opinions of qualified witnesses are received as to the value of the franchise and use of a wharf.¹¹

(e) *Services* — aa. GENERAL RULE AS TO COMPETENCY. — Witnesses are competent to give opinions as to the value of particular services where it is made to appear that they have knowledge of the services in controversy and of the

1. *Hanover Water Co. v. Ashland Iron Co.*, 84 Pa. St. 279.

2. *Orchards*. — *Chicago, etc., R. Co. v. Mouriquand*, 45 Kan. 170; *Latham v. Brown*, 48 Kan. 190; *Missouri Pac. R. Co. v. Haynes*, 1 Kan. App. 586.

3. *Whitbeck v. New York Cent. R. Co.*, 36 Barb. (N. Y.) 644.

4. *Reversion of Public Easement*. — *Boston, etc., R. Co. v. Old Colony, etc., R. Corp.*, 3 Allen (Mass.) 142; *Laing v. United New Jersey R., etc., Co.*, 54 N. J. L. 576, 33 Am. St. Rep. 682.

5. *Seaside Resort*. — *Huntington v. Attrill*, 118 N. Y. 365.

6. *Brown v. Providence, etc., R. Co.*, 12 R. I. 238.

7. *Tavern*. — *Clark v. Baird*, 9 N. Y. 183. The court, in overruling an exception for the admission of such testimony, said: "One of the alleged fraudulent representations which formed the subject of the action was that the tavern stand extended to the race and trees, the plaintiff claiming that it did not, in fact, extend so far. The witness has, in substance, stated the value of the stand, including all the land it was represented to include, and also in contrast with that statement, and as bearing upon the question of damages, has further stated the value of the stand, excluding that part which, as the plaintiff contended, did not pass by the defendant's conveyance to the plaintiff, by reason of his want of title. The objection does not point to any special incompetency in the witness, as, for instance, that he did not appear to have a sufficient acquaintance with the property to speak understandingly as to its value, but is put upon the broad ground that a witness cannot speak directly upon the question of the money value of

property. The evidence was pointed solely to the question of damages, and the objection was undoubtedly understood by the court to relate to the competency of opinion upon the question of value."

8. *Water Power*. — *Read v. Barker*, 30 N. J. L. 378, 32 N. J. L. 477.

9. *Lowell v. Middlesex County*, 146 Mass. 403.

10. *Warren v. Spencer Water Co.*, 143 Mass. 155. In this case the petitioner introduced E. H. H., a farmer, who testified that he had not been particularly interested in cranberry cultivation; that he knew of a cranberry meadow; that he was connected with a company interested in cranberry meadows; that he had once seen the petitioner's meadow two or three weeks before the trial; and that he knew nothing about the flow of water from a certain pond, the taking of which was assigned as a ground for damages. On cross-examination the witness testified that he was not engaged in the cranberry business, but thought he knew something about cranberry culture; that he was conversant with a cranberry bog adjoining his land, which had been cultivated; that he never owned a cranberry bog himself, and had never made any experiments in the raising of cranberries or in the flow of water over cranberries, but had seen them made by others. The court said: "Although the qualification of the witness to testify to an opinion appear to have been slight, we do not think the admission of his testimony calls for a new trial. Much must be left to the discretion of the presiding judge in determining the qualification of witnesses in such cases."

11. *Wharfage*. — *Sullivan v. Lear*, 23 Fla. 403, 11 Am. St. Rep. 388.

usual compensation paid for such services at the time and place where rendered.¹

bb. PROVING VALUE OF DIFFERENT KINDS OF SERVICE — (aa) Authorship. — An author is competent to give an opinion as to the value of his time and labor expended on a literary production.²

(bb) Bookkeeping. — An expert accountant may give an opinion as to what would be a fair compensation for keeping the books of a certain line of business,³ and one accustomed to employ accountants may testify as to the value of such services.⁴

(cc) Carpenter Work. — Carpenters are competent to give their opinions as to the value of the class of labor performed by them.⁵

(dd) Domestic Service. — Employers of domestic labor may testify as to its value in the locality.⁶ The value of a housekeeper's labor may be proved by one in that occupation⁷ or by one in the employment business.⁸ Housekeepers may likewise give their opinions of the value of board and lodging.⁹

(ee) Farm Work. — Witnesses employing farm labor or possessing an acquaintance with the general value thereof may give opinions thereon.¹⁰

(ff) Legal Services. — Attorneys at law who show a general knowledge of the charges for legal services in the particular locality and an acquaintance with the services rendered in the particular instance are competent to give opinions as to the value of such services.¹¹ A layman is not generally a competent witness as to the value of such services,¹² but a lawyer may testify though not in active practice at the time¹³ The opinion may be based on personal

1. Value of Particular Services — General Rule

— *Alabama.* — Parker v. Parker, 33 Ala. 459.

Illinois. — Louisville, etc., R. Co. v. Cox, 30 Ill. App. 380.

Indiana. — Johnson v. Thompson, 72 Ind. 167; Bowen v. Bowen, 74 Ind. 470.

Iowa. — Clark v. Ellsworth, 104 Iowa 442.

Nevada. — Alt v. California Fig Syrup Co., 19 Nev. 118.

Pennsylvania. — Potts v. Aechternacht, 93 Pa. St. 138.

Texas. — Ft. Worth Compress Co. v. Chicago, etc., R. Co., (Tex. Civ. App. 1898) 45 S. W. Rep. 967.

2. Authorship.

— Babcock v. Raymond, 2 Hilt. (N. Y.) 61.

3. Bookkeeping.

— Shattuck v. Train, 116 Mass. 296.

4. Kipp v. Scott, (Supreme Ct.) 16 N. Y. Supp. 948.

5. Carpenter Work.

— Crawford v. Wolf, 29 Iowa 557; Tebbetts v. Haskins, 16 Me. 283; Kelly v. Rowane, 33 Mo. App. 440.

6. Domestic Labor.

— Carter v. Carter, 36 Mich. 207.

7. Nelson v. Masterton, 2 Ind. App. 524; Heffron v. Brown, 155 Ill. 322.

8. Heffron v. Brown, 155 Ill. 322.

9. Hook v. Kenyon, 55 Hun (N. Y.) 598; Maughan v. Burns, 64 Vt. 316.

10. Farm Labor.

— Johnson v. Thompson, 72 Ind. 167; Bowen v. Bowen, 74 Ind. 470; Ritter v. Daniels, 47 Mich. 617; McLamb v. Wilmington, etc., R. Co., 122 N. Car. 862.

11. Legal Services — United States.

— Head v. Hargrave, 105 U. S. 45.

Colorado. — Bachman v. O'Reilly, 14 Colo. 433.

Illinois. — Jevne v. Osgood, 57 Ill. 340; Haish v. Payson, 107 Ill. 365.

Indiana. — Covey v. Campbell, 52 Ind. 157.

Iowa. — Clark v. Ellsworth, 104 Iowa 442.

Kansas. — Anthony v. Stinson, 4 Kan. 211; Ottawa University v. Parkinson, 14 Kan. 159.

Michigan. — Kelley v. Richardson, 69 Mich. 430; Turnbull v. Richardson, 69 Mich. 400; Chamberlain v. Rodgers, 79 Mich. 219.

Minnesota. — Allis v. Day, 14 Minn. 516.

Mississippi. — New Orleans, etc., R. Co. v. Allbritton, 38 Miss. 242.

Missouri. — Brown v. Huffard, 69 Mo. 305.

New York. — Beekman v. Platner, 15 Barb. (N. Y.) 550; Harnett v. Garvey, 66 N. Y. 641; Bramble v. Hunt, 68 Hun (N. Y.) 204; Clusman v. Merkel, 3 Bosw. (N. Y.) 402.

Ohio. — Williams v. Brown, 28 Ohio St. 547.

Pennsylvania. — Thompson v. Boyle, 85 Pa. St. 477.

South Dakota. — Frye v. Ferguson, 6 S. Dak. 392.

12. Hart v. Vidal, 6 Cal. 56; Fry v. Estes, 52 Mo. App. 1.

13. Blizzard v. Applegate, 61 Ind. 368.

In *Hand v. Church*, 39 Hun (N. Y.) 303, the witness was a lawyer, but not in active practice. The court said: "The competency of the witness did not necessarily depend upon his being a lawyer, but upon the fact whether he had been so instructed by experience as to have peculiar sources of knowledge to guide him upon the subject of the value of these professional services, fitting him to answer with more accuracy than others. *Clark v. Baird*, 9 N. Y. 183; *Pullman v. Corning*, 14 Barb. (N. Y.) 174; 9 N. Y. 93; *Clark v. Bruce*, 12 Hun (N. Y.) 274; *Woodward v. Bugsbee*, 2 Hun (N. Y.) 128. Other persons besides professional men have knowledge of the value of professional services. *Field, J.*, in *Head v. Hargrave*, 105 U. S. 45. We do not see why those who often procure and pay for such services should not acquire by experience considerable knowledge of their value. It may not be perfect, but the courts do not insist

knowledge¹ or on hypothetical statements,² and it is not necessary that a lawyer, in order to be a competent witness, should have experience in the particular class of practice in question.³ Even though the services performed are not all of a strictly professional character, the opinions of lawyers may nevertheless be admissible as to their value.⁴ Cross-examination concerning the professional income of the witness may be forbidden.⁵

Basis of Opinion. — Among the elements upon which the witness to the value of legal services may base his opinion are the character and importance of the cause,⁶ the value of the subject-matter,⁷ and the strength of the opposition.⁸

Effect of Opinion. — The opinions of attorneys as to the value of legal services are, of course, not conclusive, and the jurors are not obliged to accept them.⁹

(gg) *Livery-stable Work.* — A witness having experience in such matters is competent to give an opinion as to the value of certain labor in a livery stable.¹⁰

(hh) *Loan Brokerage.* — Bankers¹¹ and loan brokers¹² are competent to give opinions as to the value of services in procuring a particular loan.

(ii) *Manufacturing.* — A manager of a steam engineering company may give an opinion as to the value of work done in making the steam connections of a certain engine.¹³ And those familiar with the qualifications of a certain manufacturer may testify to the value of his services, though having no personal knowledge of those particular services.¹⁴

upon the highest knowledge as the test of competency. *Hammond v. Varian*, 54 N. Y. 398; *Roberts v. Johnson*, 58 N. Y. 613."

1. *Brown v. Huffard*, 69 Mo. 305; *Garfield v. Kirk*, 65 Barb. (N. Y.) 464.

2. *Central Branch Union Pac. R. Co. v. Nichols*, 24 Kan. 242; *Kelley v. Richardson*, 69 Mich. 430; *Turnbull v. Richardson*, 69 Mich. 400; *Williams v. Brown*, 28 Ohio St. 547.

3. *Bachman v. O'Reilly*, 14 Colo. 433.

4. *Kelley v. Richardson*, 69 Mich. 430.

5. *Harland v. Lillenthal*, 53 N. Y. 438, the court saying: "It was in the discretion of the referee to refuse the question as to the amount of the income of either of the plaintiffs. Upon the question of their capacity to speak as experts as to the value of professional services, this testimony was not so immediate as that it was the right of the defendant to have the answer. The questions put to the witness Simons did not call for testimony either incompetent, irrelevant, or immaterial. It was competent to show by parol how often, in fact, the plaintiffs appeared as attorneys or as associate counsel, in cases in the District Court. It was testimony relevant and material to the issue, as showing their skill and experience, that they were recognized in the same court and in the same case for their services in which they were suing."

6. *Covey v. Campbell*, 52 Ind. 157; *Harland v. Lillenthal*, 53 N. Y. 438; *Garfield v. Kirk*, 65 Barb. (N. Y.) 464.

7. *Garfield v. Kirk*, 65 Barb. (N. Y.) 464.

8. *Aldrich v. Brown*, 103 Mass. 527.

9. **Attorney's Opinion Not Conclusive.** — "Certain lawyers having testified as to the value of the legal services rendered by the plaintiffs, the court instructed the jury that 'Such witnesses are supposed to be better qualified to put a value upon such services than the jury, none of whom may have any personal knowledge of the nature of the business in which they have been performed. Such testimony is the guide of the jury in finding the amount justly due, and in this case you must take the testimony

of these witnesses, and be governed by it, in finding the value of the services rendered by Stinson & Hurd.' We do not so understand the law of jury trials. It is not for the court to instruct the jury as to what part of the testimony before them shall control their verdict, but the jury must weigh all the testimony before them, decide as to its credibility, and as to the weight which should be given to it in making up the verdict. The testimony of experts or professional witnesses is often very important, and justly entitled to great weight in a cause; but it must have its legitimate influence by enlightening, convincing, and governing the judgment of the jury, and must be of such a character as to outweigh, by its intrinsic force and probability, all conflicting testimony. The jury cannot be required by the court to accept, as matters of law, the conclusions of the witnesses instead of their own; and we think the court below erred in this part of its charge." *Anthony v. Stinson*, 4 Kan. 211. See also *Chatfield v. Hewlett*, 2 Dem. (N. Y.) 191; *Dorland's Estate*, 63 Cal. 281; *Olson v. Gjertsen*, 42 Minn. 407.

10. **Livery-stable Labor.** — *Stone v. Tupper*, 58 Vt. 409.

11. **Loan Brokerage.** — *Bagley v. Carthage*, etc., R. Co., 25 N. Y. App. Div. 475.

12. *Carruthers v. Towne*, 86 Iowa 318.

13. **Manufacturing.** — *Muckle v. Rennie* (City Ct.) 16 N. Y. Supp. 208.

14. *Eagle, etc., Mfg. Co. v. Browne*, 58 Ga. 240; *Kent Furniture Mfg. Co. v. Ransom*, 40 Mich. 416. In the case first cited the court said: "What would be a reasonable salary for services performed by the plaintiff in the line of his special business may be shown by witnesses who have employed him or been employed with him, and have seen the results of his skill, and who know his professional standing, although the witnesses are not experts, and although they know nothing of the particular services sued for, except from a general description of the same contained in the interrogatories in answer to which their

(jj) *Medical Services.* — Physicians are competent to give their opinions as to the value of medical services,¹ while an ordinary witness is incompetent.²

Post-mortem Examination. — Physicians may testify as to the value of making a *post-mortem* examination, though ignorant of what others charge for such services.³

(kk) *Nursing.* — Physicians acquainted with the duties of nurses and accustomed to hire them are competent witnesses as to the value of their services.⁴

Nurses may likewise give opinions as to the value of such services,⁵ even when rendered by themselves.⁶

Indiana Rule. — In Indiana no special experience is required in order to qualify the witness, but any one acquainted with the services rendered is competent to give an opinion as to the value of nursing.⁷

(ll) *Real-estate Brokerage.* — The value of the services of a real-estate broker may be shown by those engaged in that line of business and familiar with the worth of such services in the locality.⁸

VIII. NONEXPERT OPINION — 1. General Rule. — The general rule is, as above shown, that the opinions of witnesses are not admissible as testimony. But as an exception to this, besides experts, ordinary witnesses may give their opinions, in connection with the facts upon which they are founded, when the matter to which the testimony relates cannot otherwise be reproduced or made palpable to the jurors, that they may draw correct or intelligent conclusions therefrom.⁹ In such cases the witness testifies as to the present conviction of

evidence is given. That testimony from such sources might be of little weight, would not render it inadmissible, the witnesses giving, with their opinion, the reasons on which it is founded. Such evidence is barely admissible. Doubtless it ought to weigh no great deal with the jury. It goes rather to what the plaintiff is capable of earning, than to what he has actually earned in serving the defendant."

1. Medical Services — *Alabama.* — *Mock v. Kelly*, 3 Ala. 387; *Wood v. Brewer*, 57 Ala. 515.

Indiana. — *Marion County v. Chambers*, 75 Ind. 409.

Kansas. — *Atchison v. Rose*, 43 Kan. 605.

Michigan. — *Thomas v. Caulkett*, 57 Mich. 392, 58 Am. Rep. 369.

Minnesota. — *Elfelt v. Smith*, 1 Minn. 125.

South Carolina. — *Ward v. Ohio River, etc.*, R. Co. (S. Car. 1898) 30 S. E. Rep. 594.

2. *Mock v. Kelly*, 3 Ala. 387; *Wood v. Brewer*, 57 Ala. 515.

3. *Marion County v. Chamber*, 75 Ind. 409. The court said: "The testimony was competent, for the witnesses were shown to be experts, and to possess such knowledge, skill, and acquaintance with the subject under investigation as entitled them to express their opinions to the jury. They may have had some knowledge of the value of such services, without knowing anything at all about what others were charging for like services."

4. *Shafer v. Dean*, 29 Iowa 144; *Reynolds v. Robinson*, 64 N. Y. 589; *Keenan v. Getzinger*, 1 N. Y. App. Div. 172; *Woodward v. Bugsbee*, 2 Hun (N. Y.) 128.

5. *Shafer v. Dean*, 29 Iowa 144; *Wallace v. Schaub*, 81 Md. 594; *Missouri Pac. R. Co. v. Palmer* (Neb. 1898) 76 N. W. Rep. 169.

6. *Missouri Pac. R. Co. v. Palmer* (Neb. 1898) 76 N. W. Rep. 169.

7. *Storms v. Lemon*, 7 Ind. App. 435; *Wahl v. Shoulders*, 14 Ind. App. 665.

8. Real-estate Brokerage. — *Elting v. Sturtevant*, 41 Conn. 176; *Fairchild v. Michigan Cent. R. Co.*, 8 Ill. App. 591; *Glover v. Henderson*, 120 Mo. 367, 41 Am. St. Rep. 695; *Potts v. Aechternacht*, 93 Pa. St. 138. In this last case a real-estate man who had no experience in the sale of collieries, and knew of no sales or commissions paid on sales of collieries, was held incompetent to give an opinion as to the value of commissions on such sales.

9. Opinions of Nonexperts — General Rule — *United States.* — *Hopt v. Utah*, 120 U. S. 430; *Baltimore, etc., R. Co. v. Rambo*, 59 Fed. Rep. 75.

Alabama. — *East Tenn., etc., R. Co. v. Watson*, 90 Ala. 44, *citing* 7 AM. AND ENG. ENCYC. OF LAW (1st ed.) 496.

Arkansas. — *St. Louis, etc., R. Co. v. Yarbrough*, 56 Ark. 612.

California. — *Healy v. Visalia, etc., R. Co.*, 101 Cal. 585.

Connecticut. — *Porter v. Pequonnoc Mfg. Co.*, 17 Conn. 249; *Sytleman v. Beckwith*, 43 Conn. 9; *Ryan v. Bristol*, 63 Conn. 26; *Chamberlain v. Platt*, 68 Conn. 126.

Illinois. — *West Chicago St. R. Co. v. Fishman*, 169 Ill. 196.

Indiana. — *Bennett v. Meehan*, 83 Ind. 566, 43 Am. Rep. 78; *Indiana, etc., R. Co. v. Hale*, 93 Ind. 79; *Carthage Turnpike Co. v. Andrews*, 102 Ind. 138; *Louisville, etc., R. Co. v. Miller*, 141 Ind. 533; *Sievers v. Peters Box, etc., Co.* (Ind. 1898) 50 N. E. Rep. 877.

Iowa. — *Phillips v. Starr*, 26 Iowa 349; *Bills v. Ottumwa*, 35 Iowa 107; *Yahn v. Ottumwa*, 60 Iowa 429.

Kansas. — *State v. Folwell*, 14 Kan. 105; *State v. Baldwin*, 36 Kan. 1; *Atchison, etc., R. Co. v. Miller*, 39 Kan. 419; *Parsons v. Lindsay*, 26 Kan. 426.

Maine. — *Fayette v. Chesterville*, 77 Me. 28, 52 Am. Rep. 741.

his own mind as to an actual fact, though deduced from circumstances which cannot be made palpable to others.¹

2. Basis of Nonexpert Opinion. — As nonexpert witnesses speak from facts within their personal knowledge, they must first state the facts as far as they are able, and disclose what has led to their conclusions, and their means of observation, as a basis of their opinion.² But in some cases, from the nature of things, the basis of fact must be very slight.³ As a rule, the witness is not

Massachusetts. — *Parker v. Boston, etc., Steamboat Co.*, 109 Mass. 449; *Com. v. Sturivant*, 117 Mass. 122, 19 Am. Rep. 401.

Michigan. — *Beaubien v. Cicotte*, 12 Mich. 459.

Missouri. — *Eyeraman v. Sheehan*, 52 Mo. 221; *State v. Buchler*, 103 Mo. 203.

Nebraska. — *Schlencker v. State*, 9 Neb. 241. *New Hampshire.* — *State v. Pike*, 49 N. H. 399, 6 Am. Rep. 533; *Hardy v. Merrill*, 56 N. H. 227, 22 Am. Rep. 441.

New Jersey. — *Matter of Vanauken*, 10 N. J. Eq. 186.

New York. — *New York v. Pentz*, 24 Wend. (N. Y.) 668; *Clark v. Baird*, 9 N. Y. 183; *De Witt v. Barly*, 17 N. Y. 340; *Rochester, etc., R. Co. v. Budlong*, 10 How. Pr. (N. Y. Supreme Ct.) 289.

North Carolina. — *Clary v. Clary*, 2 Ired. L. (24 N. Car.) 78.

Ohio. — *Baltimore, etc., R. Co. v. Schultz*, 43 Ohio St. 270.

Pennsylvania. — *Graham v. Pennsylvania Co.*, 139 Pa. St. 149; *Cookson v. Pittsburg, etc., R. Co.*, 179 Pa. St. 184.

South Carolina. — *Jones v. Fuller*, 19 S. Car. 66, 45 Am. Rep. 761.

Texas. — *International, etc., R. Co. v. Klaus*, 64 Tex. 293; *Gulf, etc., R. Co. v. Hepner*, 83 Tex. 136; *Powers v. State*, 23 Tex. App. 42.

Vermont. — *Lester v. Pittsford*, 7 Vt. 158; *Morse v. Crawford*, 17 Vt. 499; *Cram v. Cram*, 33 Vt. 15; *Bates v. Sharon*, 45 Vt. 474; *Clifford v. Richardson*, 18 Vt. 620; *Cavendish v. Troy*, 41 Vt. 99.

Virginia. — *Tyler v. Sites*, 90 Va. 542, *citing* 7 AM. AND ENG. ENCYC. OF LAW (1st ed.) 493.

West Virginia. — *State v. Musgrave*, 43 W. Va. 672, *citing* 7 AM. AND ENG. ENCYC. OF LAW (1st ed.) 493. See also *State v. Welch*, 36 W. Va. 693, *citing* 7 AM. AND ENG. ENCYC. OF LAW (1st ed.) 502.

Statements of the Rule. — In *St. Louis, etc., R. Co. v. Varborough*, 56 Ark. 612, it was said: "As a nonexpert, in order to make his opinion competent it was essential not only that it should relate to a matter with which he was specially acquainted, but the subject-matter must have been such as could not be otherwise sufficiently described. For if it was practicable for him to detail to the jury the facts within his knowledge as fully and perfectly as he had observed them, then the jury should have been left free to draw their own conclusion, and his opinion was inadmissible."

"Testimony of opinion may be given where from the general and indefinite nature of the inquiry it is not susceptible of direct proof. Thus upon a question of insanity witnesses not professional men may be permitted to give their opinion in connection with the facts observed by them. But this evidence is always

confined to those who have observed the facts, and is never permitted where the opinion of the witness is derived from the representation of others. Upon a question of insanity, for instance, witnesses who have observed the conduct of the patient and been acquainted with his conversation may testify to his acts and sayings, and give the result of the observation." *Lester v. Pittsford*, 7 Vt. 158.

1. *New York v. Pentz*, 24 Wend. (N. Y.) 668; *Clark v. Baird*, 9 N. Y. 183; *Bates v. Sharon*, 45 Vt. 474.

2. **Basis of Opinion** — *United States*, — *Harrison v. Rowan*, 3 Wash. (U. S.) 580.

Alabama. — *Powell v. State*, 25 Ala. 21.

Connecticut. — *Dunham's Appeal*, 27 Conn. 192.

Georgia. — *Potts v. House*, 6 Ga. 324, 50 Am. Dec. 329.

Illinois. — *Roe v. Taylor*, 45 Ill. 485; *American Bible Soc. v. Price*, 115 Ill. 623.

Indiana. — *Goodwin v. State*, 96 Ind. 550; *Carthage Turnpike Co. v. Andrews*, 102 Ind. 138.

Maryland. — *Townshend v. Townshend*, 7 Gill (Md.) 10.

Michigan. — *Beaubien v. Cicotte*, 12 Mich. 459.

Minnesota. — *Matter of Pinney*, 27 Minn. 280.

Missouri. — *State v. Klinger*, 46 Mo. 224; *State v. Erb*, 74 Mo. 199.

Nebraska. — *Schlencker v. State*, 9 Neb. 241. *New Jersey.* — *Matter of Vanauken*, 10 N. J. Eq. 186.

New York. — *Clapp v. Fullerton*, 34 N. Y. 190, 90 Am. Dec. 681.

Ohio. — *Baltimore, etc., R. Co. v. Schultz*, 43 Ohio St. 270.

Pennsylvania. — *Rambler v. Tryon*, 7 S. & R. (Pa.) 90, 10 Am. Dec. 444; *Wilkinson v. Pearson*, 23 Pa. St. 117; *Bricker v. Lightner*, 40 Pa. St. 199; *Dean v. Fuller*, 40 Pa. St. 474; *Titlow v. Titlow*, 54 Pa. St. 216, 93 Am. Dec. 691; *Dickinson v. Dickinson*, 61 Pa. St. 401; *Easton First Nat. Bank v. Wirebach*, 106 Pa. St. 37; *Shaver v. McCarthy*, 110 Pa. St. 339.

South Carolina. — *Jones v. Fuller*, 19 S. Car. 66, 45 Am. Rep. 761.

Tennessee. — *Gibson v. Gibson*, 9 Verg. (Tenn.) 329.

Statement of the Rule. — "It is settled law that a nonexpert witness must state the facts upon which he bases his opinion. There must be some facts upon which the opinion can rest, or it must not be expressed; what facts are sufficient to justify the formation and expression of an opinion by a nonexpert witness, it is by no means easy to declare." *Goodwin v. State*, 96 Ind. 557.

3. *Dunham's Appeal* 27 Conn. 192; *Sydlman v. Beckwith*, 43 Conn. 9.

competent, however, to give an opinion on facts testified to by others or on a hypothetical case.¹

3. Subjects of Nonexpert Opinion — *a.* AGE. — A nonexpert may, after stating fully his means of knowledge, give his opinion as to the age of a certain person.²

b. APPEARANCE, CONDUCT, AND Demeanor. — As there are certain indications in the conduct, appearance, and demeanor of another, which cannot be adequately described to the jury, a nonexpert is sometimes permitted to state his opinion based upon such indications.³ Such a witness, thus judging, may state whether a person was intoxicated,⁴ or appeared to be in mental anguish⁵ or angry,⁶ excited or calm,⁷ friendly or hostile,⁸ joyous and hopeful or despondent,⁹ jesting or in earnest,¹⁰ offensive or insulting,¹¹ or "nice looking."¹²

c. FORCE OF CONCUSSION. — In an action to recover for injuries caused by the overturning of a handcar, a passenger who was on the car when the plaintiff received his injuries was allowed to give an opinion as to whether it was possible for a person sitting in the position of the plaintiff to stand the force of the jar and still retain his seat.¹³ But a nonexpert may not state whether a

1. Sydleman *v.* Beckwith, 43 Conn. 9; Hook *v.* Stovall, 30 Ga. 418; Pittard *v.* Foster, 12 Ill. App. 132; Appleby *v.* Brock, 76 Mo. 314; Bell *v.* McMaster, 29 Hun (N. Y.) 272; Zachary *v.* Swanger, 1 Oregon 92; Rouch *v.* Zehring, 59 Pa. St. 74.

2. Age — *Alabama.* — Marshall *v.* State, 49 Ala. 21.

Colorado. — Kansas Pac. R. Co. *v.* Miller, 2 Colo. 442.

Connecticut. — Morse *v.* State, 6 Conn. 9.

Indiana. — Foltz *v.* State, 33 Ind. 215; Benson *v.* McFadden, 50 Ind. 431.

Kansas. — State *v.* Grubb, 55 Kan. 678.

Massachusetts. — Com. *v.* O'Brien, 134 Mass. 198.

Missouri. — Elsner *v.* Supreme Lodge, etc., 98 Mo. 640.

New York. — De Witt *v.* Barly, 17 N. Y. 340.

3. Appearance and Conduct — *Alabama.* — South, etc., Alabama R. Co. *v.* McLendon, 63 Ala. 266; State *v.* Houston, 78 Ala. 576, 56 Am. Rep. 59; Jenkins *v.* State, 82 Ala. 25; Miller *v.* State, 107 Ala. 40.

California. — People *v.* Monteith, 73 Cal. 7.

Illinois. — Aurora *v.* Hillman, 90 Ill. 61; West Chicago St. R. Co. *v.* Fishman, 169 Ill. 196; Girard Coal Co. *v.* Wiggins, 52 Ill. App. 69; Parker *v.* Parker, 52 Ill. App. 333.

Iowa. — Pelamourges *v.* Clark, 9 Iowa 1; State *v.* Huxford, 47 Iowa 16; State *v.* Shelton, 64 Iowa 333.

Kansas. — State *v.* Baldwin, 36 Kan. 1; Topeka *v.* Griffey, 6 Kan. App. 920.

Maine. — Tobin *v.* Shaw, 45 Me. 331, 71 Am. Dec. 547; Stacy *v.* Portland Pub. Co., 68 Me. 279.

Massachusetts. — Culver *v.* Dwight, 6 Gray (Mass.) 444.

Michigan. — Evans *v.* People, 12 Mich. 27; Brownell *v.* People, 38 Mich. 732.

Minnesota. — McKillop *v.* Duluth St. R. Co., 53 Minn. 532.

New Jersey. — Castner *v.* Sliker, 33 N. J. L. 95.

New York. — M'Kee *v.* Nelson, 4 Cow. (N. Y.) 355, 15 Am. Dec. 384; People *v.* Eastwood, 14 N. Y. 562 Blake *v.* People, 73 N. Y. 586.

North Carolina. — Sherrill *v.* Western Union Tel. Co., 117 N. Car. 352.

Oregon. — State *v.* Brown, 28 Oregon 147.

Washington. — State *v.* Dolan, 17 Wash. 499.

4. Intoxication. — People *v.* Monteith, 73 Cal. 7; Aurora *v.* Hillman, 90 Ill. 61; West Chicago St. R. Co. *v.* Fishman, 169 Ill. 196; Girard Coal Co. *v.* Wiggins, 52 Ill. App. 69; Parker *v.* Parker, 52 Ill. App. 333; Stacy *v.* Portland Pub. Co., 68 Me. 279; McKillop *v.* Duluth St. R. Co., 53 Minn. 532; Castner *v.* Sliker, 33 N. J. L. 95; People *v.* Eastwood, 14 N. Y. 562; People *v.* MacLean, (Supreme Ct.) 13 N. Y. Supp. 677; State *v.* Dolan, 17 Wash. 499.

5. Mental Anguish. — Sherrill *v.* Western Union Tel. Co., 117 N. Car. 352.

6. Angry. — Jenkins *v.* State, 82 Ala. 25; Miller *v.* State, 107 Ala. 40; State *v.* Shelton, 64 Iowa 333.

7. Excited, Calm, or Otherwise. — State *v.* Houston, 78 Ala. 576, 56 Am. Rep. 59; West Chicago St. R. Co. *v.* Fishman, 169 Ill. 196; State *v.* Brown, 28 Oregon 147.

8. Friendly or Hostile. — Pelamourges *v.* Clark, 9 Iowa 1; Evans *v.* People, 12 Mich. 27; Blake *v.* People, 73 N. Y. 586; M'Kee *v.* Nelson, 4 Cow. (N. Y.) 355, 15 Am. Dec. 384; State *v.* James, 31 S. Car. 218; Trelawney *v.* Colman, 2 Stark. 191, 3 E. C. L. 372.

9. Joyous, Hopeful, or Despondent. — State *v.* Baldwin, 36 Kan. 1; Tobin *v.* Shaw, 45 Me. 331, 71 Am. Dec. 547; Culver *v.* Dwight, 6 Gray (Mass.) 444; Brownell *v.* People, 38 Mich. 732.

10. Jestng or in Earnest. — Ray *v.* State, 50 Ala. 104; Powers *v.* State, 23 Tex. App. 42.

11. Offensive or Insulting. — Raisler *v.* Springer, 38 Ala. 703, 82 Am. Dec. 736.

12. Childs *v.* Muckler, 105 Iowa 279.

13. Force of Concussion. — Healy *v.* Visalia, etc., R. Co., 101 Cal. 585. The court said: "The border line between fact and opinion is often very indistinct, and the statement of a fact is frequently only an opinion of the witness. Impressions or sensations caused by external objects are not susceptible of exact reproduction or description in words, nor do

sudden jolt of a car was sufficient to cause any trouble to a woman in the early stages of pregnancy.¹

d. HEALTH. — A nonexpert is competent to give his opinion as to the apparent health of a person whom he has had the opportunity to observe, this being a matter open to the senses, but incapable of exact description.² Thus he may testify that a person appeared to be suffering,³ was weak and helpless,⁴ appeared sick,⁵ looked pale,⁶ or paler than usual,⁷ or was declining in health.⁸

e. IDENTITY. — The opinions of nonexperts are admissible to identify a person or thing, where the opinion is derived from knowledge and observation in the given case, and the witness had the means of reaching a correct conclusion.⁹

they affect every individual alike, and the judgment or opinion of the witnesses by whom they have been experienced is the only mode by which they can be presented to a jury. The question asked of the witness in the present case did not call for an opinion from him depending upon facts which he had subsequently learned, but he was asked to describe the effect of the concussion or jar caused by the car leaving the track, as one of the facts out of which the injury had arisen, and which he had personally observed and felt. * * * The strength or force of this concussion was also a fact which it was proper to bring before the jury, and as it was not capable of exact measurement by any recognized standard it was competent for the witness to state its strength or force according to the opinion or judgment which he formed at the time that he felt it. His judgment or opinion of its effect upon an ordinary person would be the most efficient mode of enabling the jury to fully appreciate it and to give to it its proper consideration in determining its influence in producing the injury."

1. *Murray v. Salt Lake City R. Co.*, 16 Utah 356.

2. *Health* — *United States*. — Baltimore, etc., R. Co. *v. Rambo*, 59 Fed. Rep. 75.

Alabama. — *Wilkinson v. Moseley*, 30 Ala. 562; "South, etc., Alabama R. Co. *v. McLendon*, 63 Ala. 266; *Burton v. State*, 107 Ala. 108. *Illinois*. — *Chicago, etc., R. Co. v. George*, 19 Ill. 510, 71 Am. Dec. 239; *West Chicago St. R. Co. v. Fishman*, 169 Ill. 156.

3. *Indiana*. — *Carthage Turnpike Co. v. Andrews*, 102 Ind. 138; *Louisville, etc., R. Co. v. Wood*, 113 Ind. 544.

Maryland. — *Albert v. State*, 66 Md. 325, 59 Am. Rep. 159.

Minnesota. — *Canaday v. Lynch*, 27 Minn. 435; *Tierney v. Minneapolis, etc., R. Co.*, 33 Minn. 311, 53 Am. Rep. 35; *Hall v. Austin*, (Minn. 1898) 75 N. W. Rep. 1121.

New York. — *Cannon v. Brooklyn City R. Co.*, 9 N. Y. Misc. Rep. (Brooklyn City Ct.) 282.

Ohio. — *Shelby v. Claggett*, 46 Ohio St. 549, citing 7 AM. AND ENG. ENCYC. OF LAW (1st ed.) 492; *Monroe v. Wehl*, 2 Ohio Dec. 343; *Lake Shore, etc., R. Co. v. Gaffney*, 9 Ohio Cir. Ct. Rep. 32, 6 Ohio Cir. Dec. 94, citing 7 AM. AND ENG. ENCYC. OF LAW (1st ed.) 492.

Wisconsin. — *Smalley v. Appleton*, 70 Wis. 340; *Bridge v. Oshkosh*, 71 Wis. 363; *Heddles v. Chicago, etc., R. Co.*, 77 Wis. 228, 20 Am. St. Rep. 106.

3. *Appearance of Suffering*. — South, etc., Alabama R. Co. *v. McLendon*, 63 Ala. 266; *West Chicago St. R. Co. v. Fishman*, 169 Ill. 196; *Hall v. Austin*, (Minn. 1898) 75 N. W. Rep. 1121; *Heddles v. Chicago, etc., R. Co.*, 77 Wis. 228, 20 Am. St. Rep. 106.

4. *Weak and Helpless Condition*. — Baltimore, etc., R. Co. *v. Rambo*, 59 Fed. Rep. 75; *West Chicago St. R. Co. v. Fishman*, 169 Ill. 196; *Shelby v. Claggett*, 46 Ohio St. 549; *Lake Shore, etc., R. Co. v. Gaffney*, 9 Ohio Cir. Ct. Rep. 32, 6 Ohio Cir. Dec. 94.

5. *Appearance of Sickness*. — *Wilkinson v. Moseley*, 30 Ala. 562; *Chicago, etc., R. Co. v. George*, 19 Ill. 510, 71 Am. Dec. 239; *Monroe v. Wehl*, 2 Ohio Dec. 343.

6. *Hall v. Austin*, (Minn. 1898) 75 N. W. Rep. 1121.

7. *Burton v. State*, 107 Ala. 108.

8. *Louisville, etc., R. Co. v. Wood*, 113 Ind. 544.

9. *Identity* — *Alabama*. — *Walker v. State* 58 Ala. 393; *Turner v. McFee*, 61 Ala. 468, *Beale v. Posey*, 72 Ala. 323; *James v. State*, 104 Ala. 20.

Georgia. — *Wiggins v. Henson*, 68 Ga. 819. *Kansas*. — *State v. Folwell*, 14 Kan. 105.

Massachusetts. — *Com. v. Pope*, 103 Mass. 440; *Com. v. Williams*, 105 Mass. 62; *Com. v. Sturtivant*, 117 Mass. 122, 19 Am. Rep. 401.

Missouri. — *State v. Babb*, 76 Mo. 501.

New York. — *King v. New York Cent., etc., R. Co.*, 72 N. Y. 607.

North Carolina. — *Beverly v. Williams*, 4 Dev. & B. L. (20 N. Car.) 236; *State v. Reitz*, 83 N. Car. 634; *State v. Morris*, 84 N. Car. 756.

Tennessee. — *Woodward v. State*, 4 Baxt. (Tenn.) 322.

Virginia. — *Hopper v. Com.*, 6 Gratt. (Va.) 684; *Tyler v. Sites*, 90 Va. 539.

West Virginia. — *State v. Harr*, 38 W. Va. 58.

Illustrations — *Persons*. — *Woodward v. State*, 4 Baxt. (Tenn.) 322; *Hopper v. Com.*, 6 Gratt. (Va.) 684; *State v. Harr*, 38 W. Va. 58.

Blood. — *People v. Burgess*, 153 N. Y. 561. See also the title BLOOD STAINS, vol. 4, p. 588.

Piece of Iron. — *King v. New York Cent., etc., R. Co.*, 72 N. Y. 607.

Resemblance to Parent. — But witnesses are not allowed to say that a certain child resembles a certain person whom they know. *Shorten v. Judd*, 56 Kan. 43.

Footprints. — *Com. v. Pope*, 103 Mass. 440; *State v. Morris*, 84 N. Car. 756; *James v. State*, 104 Ala. 20; *State v. Reitz*, 83 N. Car. 634.

Wheat. — *Walker v. State*, 58 Ala. 393.

f. **INSANITY** — **Prevailing Rule.** — Nonexperts may not, as a rule, state their conclusions as to the sanity of an individual,¹ but after describing in detail what seem to them the indications of insanity they may, in most states, express their beliefs in that regard.² In *New York* the witnesses may state whether

Cotton. — *Wiggins v. Henson*, 68 Ga. 819.
Goods. — *State v. Babb*, 76 Mo. 501.
Identifying by Voice. — *Com. v. Williams*, 105 Mass. 62.

Wagon. — *State v. Folwell*, 14 Kan. 105.

1. **Insanity.** — *Armstrong v. State*, 30 Fla. 170; *Lamb v. Lippincott*, (Mich. 1898) 73 N. W. Rep. 887; *Johnson v. Cochrane*, 91 Hun (N. Y.) 163; *In re Christensen*, (Utah 1898) 53 Pac. Rep. 1003; *In re McCabe*, 70 Vt. 155.

2. *United States.* — *Charter Oak L. Ins. Co. v. Rodel*, 95 U. S. 232; *Connecticut Mut. L. Ins. Co. v. Lathrop*, 111 U. S. 612; *Kilgore v. Cross*, 1 Fed. Rep. 578; *Parkhurst v. Hosford*, 21 Fed. Rep. 827; *Mutual L. Ins. Co. v. Leubrie*, 71 Fed. Rep. 843.

Alabama. — *Florey v. Florey*, 24 Ala. 241; *Burney v. Torrey*, 100 Ala. 157, 46 Am. St. Rep. 33; *Bulger v. Ross*, 98 Ala. 273, *citing* 7 AM. AND ENG. ENCYC. OF LAW (1st ed.) 504-505.

Arkansas. — *Kelly v. McGuire*, 15 Ark. 555; *Beller v. Jones*, 22 Ark. 92.

California. — *People v. Sanford*, 43 Cal. 29; *Brooks's Estate*, 54 Cal. 471; *People v. Wreden*, 59 Cal. 392.

Connecticut. — *Shanley's Appeal*, 62 Conn. 325; *Chamberlain v. Platt*, 68 Conn. 126; *Kimberly's Appeal*, 68 Conn. 428.

District of Columbia. — *Taylor v. U. S.*, 23 Wash. L. Rep. (D. C.) 433.

Florida. — *Armstrong v. State*, 30 Fla. 170.

Georgia. — *Foster v. Brooks*, 6 Ga. 287; *Dicken v. Johnson*, 7 Ga. 484; *Berry v. State*, 10 Ga. 511; *Fielder v. Collier*, 13 Ga. 496; *Walker v. Walker*, 14 Ga. 242; *Choice v. State*, 31 Ga. 424; *Dennis v. Weekes*, 51 Ga. 24; *Frizzell v. Reed*, 77 Ga. 724; *Bowden v. Achor*, 95 Ga. 243; *Welch v. Stipe*, 95 Ga. 762.

Illinois. — *Roe v. Taylor*, 45 Ill. 485; *Upstone v. People*, 109 Ill. 169; *American Bible Soc. v. Price*, 115 Ill. 623; *Keithley v. Stafford*, 126 Ill. 507; *Jamison v. People*, 145 Ill. 357; *West Chicago St. R. Co. v. Fishman*, 169 Ill. 196; *Pittard v. Foster*, 12 Ill. App. 132; *Girard Coal Co. v. Wiggins*, 52 Ill. App. 69; *New York, etc., R. Co. v. Luebeck*, 157 Ill. 595.

Indiana. — *Rush v. Megee*, 36 Ind. 69; *Sutherland v. Hankins*, 56 Ind. 343; *State v. Newlin*, 69 Ind. 108; *Ryman v. Crawford*, 86 Ind. 262; *Goodwin v. State*, 96 Ind. 550; *Grubb v. State*, 117 Ind. 277; *Johnson v. Culver*, 116 Ind. 278; *Burkhart v. Gladish*, 123 Ind. 337; *Hamrick v. State*, 134 Ind. 324; *Stumph v. Miller*, 142 Ind. 442; *Rarick v. Ulmer*, 144 Ind. 25; *Mull v. Carr*, 5 Ind. App. 491.

Iowa. — *State v. Winter*, 72 Iowa 627; *State v. McDonough*, 104 Iowa 6.

Kansas. — *Moors v. Sanford*, 2 Kan. App. 243.

Kentucky. — *Hunt v. Hunt*, 3 B. Mon. (Ky.) 575; *Wise v. Foote*, 81 Ky. 10.

Maryland. — *Townshend v. Townshend*, 7 Gill (Md.) 10; *Stewart v. Redditt*, 3 Md. 67; *Dorsey v. Warfield*, 7 Md. 65; *Waters v. Waters*, 35 Md. 531; *Williams v. Lee*, 47 Md. 321; *Chase v. Winans*, 59 Md. 475.

Michigan. — *Beaubien v. Cicotte*, 12 Mich.

459; *Rice v. Rice*, 50 Mich. 448; *People v. Finley*, 38 Mich. 482; *Prentiss v. Bates*, 93 Mich. 234; *O'Connor v. Madison*, 98 Mich. 183; *People v. Borgetto*, 99 Mich. 336; *Lamb v. Lippincott*, (Mich. 1898) 73 N. W. Rep. 887.
Minnesota. — *Matter of Pinney*, 27 Minn. 280; *Woodcock v. Johnson*, 36 Minn. 217.

Mississippi. — *Wood v. State*, 58 Miss. 741.
Missouri. — *Turner v. Kansas City, etc., R. Co.*, 23 Mo. App. 12; *State v. Klinger*, 46 Mo. 224; *Crowe v. Peters*, 63 Mo. 429; *State v. Erb*, 74 Mo. 199; *Appleby v. Brock*, 76 Mo. 314; *State v. Bryant*, 93 Mo. 273.

Montana. — *Territory v. Roberts*, 9 Mont. 12.
Nebraska. — *Schlenker v. State*, 9 Neb. 241; *Polin v. State*, 14 Neb. 540; *Burgo v. State*, 26 Neb. 639; *Shults v. State*, 37 Neb. 481; *Dewey v. Allgire*, 37 Neb. 6, 40 Am. St. Rep. 468; *Pflueger v. State*, 46 Neb. 493; *Hay v. Miller*, 48 Neb. 156; *Hoover v. State*, 48 Neb. 184.

Nevada. — *State v. Lewis*, 20 Nev. 333.

New Hampshire. — *Hardy v. Merrill*, 56 N. H. 227, 22 Am. Rep. 441; *Carpenter v. Hatch*, 64 N. H. 573.

New Jersey. — *Genz v. State*, 58 N. J. L. 482, *citing* 7 AM. AND ENG. ENCYC. OF LAW (1st ed.) 505.

North Carolina. — *Clary v. Clary*, 2 Ired. L. (24 N. Car.) 78; *McDougald v. McLean*, 1 Winst. L. (60 N. Car.) 120; *McLeary v. Norment*, 84 N. Car. 235; *Barker v. Pope*, 91 N. Car. 165; *McRae v. Malloy*, 93 N. Car. 154; *State v. Potts*, 100 N. Car. 457; *Smith v. Smith*, 117 N. Car. 326; *Sherrill v. Western Union Tel. Co.*, 117 N. Car. 352.

Ohio. — *Clark v. State*, 12 Ohio 483, 40 Am. Dec. 481; *Roush v. Wensel*, 15 Ohio Cir. Ct. Rep. 133.

Oregon. — *Farley v. Parker*, 6 Oregon 105, 25 Am. Rep. 504; *State v. Murray*, 11 Oregon 413; *State v. Hansen*, 25 Oregon 391; *State v. Fiester*, 32 Oregon 254.

Pennsylvania. — *Ramblor v. Tyron*, 7 S. & R. (Pa.) 90, 10 Am. Dec. 444; *Wilkinson v. Pearson*, 23 Pa. St. 117; *Pidcock v. Potter*, 68 Pa. St. 342, 8 Am. Rep. 181; *Taylor v. Com.*, 109 Pa. St. 262; *Shaver v. McCarthy*, 110 Pa. St. 339; *Commonwealth Title Ins., etc., Co. v. Gray*, 150 Pa. St. 255.

South Dakota. — *State v. Leehman*, 2 S. Dak. 171.

Tennessee. — *Gibson v. Gibson*, 9 Yerg. (Tenn.) 329; *Puryear v. Reese*, 6 Coldw. (Tenn.) 21; *Dove v. State*, 3 Heisk. (Tenn.) 348.

Texas. — *Thomas v. State*, 40 Tex. 60; *Holcomb v. State*, 41 Tex. 125; *McClackey v. State*, 5 Tex. App. 320; *Webb v. State*, 5 Tex. App. 596; *Campbell v. State*, 10 Tex. App. 560; *Harris v. State*, 18 Tex. App. 287; *Scalf v. Collin County*, 80 Tex. 514.

Vermont. — *Morse v. Crawford*, 17 Vt. 499; *Cram v. Cram*, 33 Vt. 15; *State v. Hayden*, 51 Vt. 296; *Foster v. Dickerson*, 64 Vt. 233; *Chickering v. Brooks*, 61 Vt. 554; *In re McCabe*, 70 Vt. 155.

Virginia. — *Fishburne v. Ferguson*, 84 Va. 87; *Whitelaw v. Sims*, 90 Va. 588.

from such indications the patient impressed them as being rational or irrational.¹ Of course the value of such testimony must depend largely upon the opportunities of the witness for observation.²

Minority Rule.—In *Maine*³ and *Massachusetts*⁴ the opinions of those who are neither experts nor subscribing witnesses are not admissible on the question of insanity.

g. **SPEED.**—Nonexperts may be competent to give their opinions as to whether a body was moving fast or slowly.⁵

h. **STOPPAGE OF TRAIN—CONDITION OF TRACK.**—So a nonexpert may, after detailing the rate of speed and the exertions made to stop a car, give an opinion as to whether the car could have been stopped sooner than it was.⁶

Condition of Track.—In one instance, a non-expert, who was a passenger on the train at the time of the derailment, was permitted to give his opinion that the accident was due to the inferior condition of the ties and the spreading of the track.⁷

i. **TEMPERATURE, ETC.**—Nonexperts may give their impressions as to cold, heat, light, darkness, size, shape, and distance.⁸

j. **TOPOGRAPHY.**—The relative advantage of two points on a grade crossing where one might watch and listen for an approaching train is a proper subject of opinion by nonexperts after describing the place.⁹

IX. COMPENSATION OF EXPERT WITNESSES—1. Introductory.—Among the varied phases of the intricate, not to say confusing, subject of expert and opinion evidence, not the least important, as well to the public and the litigant as to the witness himself, is the amount of compensation which ought to be allowed for such services. Like the ordinary witness,¹⁰ the expert may generally be compelled to testify,¹¹ especially if he is already on the

West Virginia.—*State v. Maier*, 36 W. Va. 757.

1. *Clapp v. Fullerton*, 34 N. Y. 190, 90 Am. Dec. 681; *O'Brien v. People*, 36 N. Y. 276; *Real v. People*, 42 N. Y. 270; *Hewlett v. Wood*, 55 N. Y. 634; *Rider v. Miller*, 86 N. Y. 507; *Matter of Ross*, 87 N. Y. 514; *Holcomb v. Holcomb*, 95 N. Y. 316; *People v. Pakenham*, 115 N. Y. 200; *Paine v. Aldrich*, 133 N. Y. 544; *People v. Taylor*, 138 N. Y. 398; *People v. Strait*, 148 N. Y. 566; *People v. Koerner*, 154 N. Y. 355; *Johnson v. Cochrane*, 91 Hun (N. Y.) 163; *Brady v. Smith*, 8 Misc. Rep. (N. Y. Super. Ct.) 465; *Wyse v. Wyse*, 155 N. Y. 367.

2. *Armstrong v. State*, 30 Fla. 170; *O'Connor v. Madison*, 98 Mich. 183; *People v. Borgetto*, 99 Mich. 336.

3. *Wyman v. Gould*, 47 Me. 159.

4. *Hastings v. Rider*, 99 Mass. 622; *Barker v. Comins*, 110 Mass. 477; *May v. Bradlee*, 127 Mass. 414; *Com. v. Brayman*, 136 Mass. 438; *Cowles v. Merchants*, 140 Mass. 377; *Smith v. Smith*, 157 Mass. 389.

5. *Speed.*—*Eckington, etc., R. Co. v. Hunter*, 6 App. Cas. (D. C.) 287; *Illinois Cent. R. Co. v. Ashline*, 171 Ill. 313; *Louisville, etc., R. Co. v. Jones*, 108 Ind. 551; *Ehrmann v. Nassau Electric R. Co.*, 23 N. Y. App. Div. 21; *Galveston, etc., R. Co. v. Huebner*, (Tex. Civ. App. 1897) 42 S. W. Rep. 1921.

6. *Sears v. Seattle Consol. St. R. Co.*, 6 Wash. 227. The court said: "It is a general rule of evidence that witnesses may not give opinions as to matters of fact which the court or jury are ultimately to determine. But this rule is not without exception. And the exception is not confined to the evidence of experts, who may give opinions on questions requiring

skill, knowledge, or learning, but includes the evidence of common observers who may state the results of their observations in regard to ordinary appearances and conditions of things which cannot be produced to a jury exactly as they were observed by the witness at the time. * * * The witness in this case expressed his opinion as a conclusion of fact based upon the observation made by him, at the time of the accident, as to the rate of speed of the car, and the exertions made by the motorman to stop it; and it seems to us that the testimony is clearly embraced within the rule above stated."

7. *Gulf, etc., R. Co. v. John*, 9 Tex. Civ. App. Rep. 342, citing 7 AM. AND ENG. ENCYC. OF LAW (1st ed.) 496.

8. *Temperature, Light, Darkness, Size, Shape, etc.*—*Bass Furnace Co. v. Glasscock*, 82 Ala. 452; *Healy v. Visalia, etc., R. Co.*, 101 Cal. 585; *Com. v. Sturtivant*, 117 Mass. 122, 19 Am. Rep. 401; *Kelley v. Richardson*, 69 Mich. 430; *Curtis v. Chicago, etc., R. Co.*, 18 Wis. 312.

9. *Topography.*—*Cookson v. Pittsburg, etc., R. Co.*, 179 Pa. St. 184.

10. See the title WITNESSES.

11. *Expert May Be Compelled to Testify.*—*State v. Teipner*, 36 Minn. 535; *People v. Montgomery*, 13 Abb. Pr. N. S. (N. Y. Oyer & T. Ct.) 207; *Summers v. State*, 5 Tex. App. 365, 32 Am. Rep. 573; *Larimer County v. Lee*, 3 Colo. App. 177.

In *England*, however, a distinction is made between the expert and the ordinary witness in this regard. In *Webb v. Page*, 1 C. & K. 23, 47 E. C. L. 23, Maule, J., observed: "There is a distinction between the case of a man who sees a fact and is called to prove it in a court

stand,¹ though he cannot be compelled to make special preparation for the giving of expert testimony.² Indeed, the administration of justice might at times be sorely impeded if the courts were powerless to compel the assistance of experts, and the question, therefore, at once arises as to the mode and measure of their compensation.

2. Taxing Expert Witness Fees as Costs — *a.* IN THE UNITED STATES. — So far as American jurisdictions are concerned it is practically settled that the compensation of experts cannot usually be allowed and taxed as costs in the litigation.³

Thus, in an *Admiralty Case* in the federal court a successful libellant is not entitled to have the expense of procuring experts called in his behalf taxed against the losing party, either as costs or extra allowances.⁴

Statutory Allowance of "Necessary Disbursements." — Even under a statute allowing the successful party "necessary disbursements"⁵ the compensation of expert witnesses, like surveyors,⁶ engineers,⁷ and physicians,⁸ cannot properly be included.

On the Other Hand, in Louisiana a district judge has power not only to determine the compensation of experts but to direct their payment out of the parish treasury.⁹

And in the District of Columbia it was held that by virtue of a statute providing for the payment by the United States of witness fees as costs incident to condemnation of land, allowance might be made for the payment of a reasonable number of experts testifying as to the extent of gold deposits upon the land sought to be condemned.¹⁰

So, under a Recent New York Statute providing that expenses necessarily incurred by the district attorney in criminal proceedings should be a county charge, it was held that the county might be required to pay the fees of experts called by the state in an important prosecution for murder.¹¹

In California also it was intimated that the expense of procuring an expert accountant might be taxed as costs, if he were appointed by the court and under its direction.¹²

of justice, and that of a man who is selected by a party to give his opinion on a matter with which he is peculiarly conversant from the nature of his employment in life. The former is bound, as a matter of public duty, to speak to a fact which happens to have fallen within his knowledge; without such testimony the course of justice must be stopped. The latter is under no such obligation. There is no such necessity for his evidence, and the party who selects him must pay him."

1. *State v. Teipner*, 36 Minn. 335.

2. *Flinn v. Prairie County*, 60 Ark. 204, 46 Am. St. Rep. 168; *People v. Montgomery*, 13 Abb. Pr. N. S. (N. Y. Oyer & T. Ct.) 207; *Summers v. State*, 5 Tex. App. 365, 32 Am. Rep. 573; *Larimer County v. Lee*, 3 Colo. App. 177.

3. **Expert Fees Not Taxable as Costs — Rule in United States.** — *The William Branfoot*, 52 Fed. Rep. 390; *Faulkner v. Hendy*, 79 Cal. 265; *Larimer County v. Lee*, 3 Colo. App. 177; *Mark v. Buffalo*, 87 N. Y. 184, the court saying that if such taxation were allowed, "the precedent would draw after it the expense of every preparation for trial and open the door to a flood of evil;" *Lyon v. Wilkes*, 1 Cow. (N. Y.) 591; *Matter of Bender*, 86 Hun (N. Y.) 570. Compare *Rothery v. New York Rubber Co.*, 90 N. Y. 30; *Haynes v. Mosher*, 15 How. Pr. (N. Y. Supreme Ct.) 216.

4. **Illustration.** — "Libellant excepted to the disallowance by the clerk in his taxation of

costs of seven items, five of them being charges for expert testimony. As to two of these the District Court sustained the clerk upon the ground that the witnesses did not come within the designation of experts, and as to the other three because the compensation of 'experts' called by the party in his own behalf cannot be taxed against the losing party as costs or as extra allowances and disbursements, under the statute. Rev. Stat., §§ 823, 983. We think the court was right, and that as these charges, including expenses and disbursements, were not incurred under any action of the court, but by the party in the preparation and presentation of his own side of the case, the items were properly disallowed." *The William Branfoot*, 52 Fed. Rep. 390.

5. *Mark v. Buffalo*, 87 N. Y. 184; *Rothery v. New York Rubber Co.*, 90 N. Y. 30; *Matter of Bender*, 86 Hun (N. Y.) 570; *Haynes v. Mosher*, 15 How. Pr. (N. Y. Supreme Ct.) 216.

6. *Haynes v. Mosher*, 15 How. Pr. (N. Y. Supreme Ct.) 216.

7. *Mark v. Buffalo*, 87 N. Y. 184; *Rothery v. New York Rubber Co.*, 90 N. Y. 30.

8. *Matter of Bender*, 86 Hun (N. Y.) 570.

9. *State v. Cole*, 33 La. Ann. 1356.

10. *U. S. Rock Creek Park Comr's v. Cooper*, 21 Wash. L. Rep. (D. C.) 182.

11. *People v. Cayuga County*, 22 Misc. Rep. (N. Y. Supreme Ct.) 616.

12. *Faulkner v. Hendy*, 79 Cal. 265. The proposition is negatively stated in the opinion,

b. IN ENGLAND. — Under the English practice provision is regularly made for the payment of expert witnesses in connection with the costs of the litigation, and the master is authorized to allow such compensation as appears to him just and reasonable.¹ A somewhat different rule seems to have obtained formerly, at least in some of the courts; indeed, it seems to be a not uncommon occurrence there for the rulings of the master in rejecting such allowances to be reviewed by the court and the compensation of the experts included.² A similar practice prevails in *Ireland*, and the courts appear to encourage rather than otherwise the making of ample allowances for the payment of experts.³

Illustrations. — Under this practice, in addition to paying the ordinary professional witness the allowance has been made to cover an antiquarian's charges for services for translations of ancient records and documents,⁴ and the pay and traveling expenses of an auctioneer subpoenaed from a distance.⁵

There Are, However, Certain Restrictions upon the Practice. — Thus, witnesses are not allowed compensation for loss of time in attendance upon a cause,⁶ unless possibly in the case of legal and medical experts.⁷ So on a trial for manslaughter it was held that a surgeon called as a witness would be allowed only for his attendance, and not his fee for opening the body by order of the coroner.⁸ And where allowance has been made for affidavits by experts as to the value

the decision being that since there had been no such appointment, and the expert was merely employed by one party for his own benefit, the latter and not his adversary should bear the expense.

It is to be observed that this intimation in the case just cited is in line with certain proposals of reform in this branch of the law. See an address before the Pennsylvania Bar Association on "Proposed Changes in the Law of Expert Testimony," 32 *Am. L. Rev.* 851, wherein the author observes: "A fundamental vice of our present system is its partisan character and tendency. Not only do the public and juries regard the generality of experts, employed as they now are, as mere partisans for the side by which they are called, but many lawyers so treat them, and many experts consent to be so considered and so consider themselves. It ought to be made impossible for any one to entertain or act upon this unfortunate view. Making experts the appointees of the court, and their compensation not only sure but independent of the effect of their testimony, would tend to do so."

1. In England. — *Turnbull v. Janson*, 3 C. P. Div. 264; *Mackley v. Chillingworth*, 2 C. P. Div. 273; *Loneragan v. Royal Exch. Assur.*, 7 Bing. 725, 20 E. C. L. 306; *Smith v. Buller*, L. R. 19 Eq. 473; *In re Working Men's Mut. Soc.*, 21 Ch. Div. 831; *Beaufort v. Ashburnham*, 13 C. B. N. S. 598, 106 E. C. L. 598; *Clark v. Gill*, 1 Kay & J. 19; *Betts v. Clifford*, *Warwick Lent Assizes* 1858; *Turner v. Turner*, 5 Jur. N. S. 839.

A somewhat different rule seems to have obtained formerly, at least in some of the courts. See *Severn v. Olive*, 3 Brod. & B. 72, 7 E. C. L. 353, where it is observed: "The court directed that the prothonotary should review his taxation, on the ground that no allowance ought to be made for the expense of experiments, nor for the time of scientific witnesses, unless they were medical men, such as physicians or surgeons; and referred to the cases of *Moor v. Adam*, 5 M. & S. 156, and

Willis v. Peckham, 1 Brod. & B. 515, 5 E. C. L. 171, as conclusive that compensation for loss of time could not, in this case, be allowed to others."

2. Loneragan v. Royal Exch. Assur., 7 Bing. 725, 20 E. C. L. 306; *Mackley v. Chillingworth*, 2 C. P. Div. 273.

3. Murphy v. Nolan, 7 Ir. Eq. Rep. 498; *Robb v. Connor*, 9 Ir. Eq. Rep. 373.

4. Antiquarian's Charges. — *Beaufort v. Ashburnham*, 13 C. B. N. S. 598, 106 E. C. L. 598, the court saying: "The next complaint was that a sum of £68, 8s. 5d. has been allowed for the expenses of searches for and translations of ancient records and documents in the record office and elsewhere, by Mr. Hewlett. This, it is said, was searching for evidence of the plaintiff's case and ought not to be allowed against the defendant upon a taxation of costs as between party and party. If this had been, as suggested, a charge for searches made to discover evidence to support the plaintiff's case, it would not have been allowed; but it appears that the documents in question were records relating to the manor, the existence of which was well known, and which were necessary and pertinent to the issue to be tried. It was, therefore, an expense that was necessarily and properly incurred, and the master was right in allowing it."

5. Auctioneer's Pay and Expenses. — *In re Working Men's Mut. Soc.*, 21 Ch. Div. 831.

6. Restrictions upon the Practice. — *Moor v. Adam*, 5 M. & S. 156; *Lowry v. Doubleday*, 5 M. & S. 159, note *b*; *Severn v. Olive*, 3 Brod. & B. 72, 7 E. C. L. 353. Compare *Willis v. Peckham*, 1 Brod. & B. 515, 5 E. C. L. 171; *Collins v. Godefroy*, 1 B. & Ad. 950, 20 E. C. L. 514.

7. See this exception to the rule recognized in *Lowry v. Doubleday*, 5 M. & S. 159, note *b*; *Severn v. Olive*, 3 Brod. & B. 72, 7 E. C. L. 353; *Willis v. Peckham*, 1 Brod. & B. 515, 5 E. C. L. 171.

8. Rex v. Taylor, 5 C. & P. 301, 24 E. C. L. 331.

of land, further costs will not be awarded for inspecting, measuring, and valuing the improvements.¹ Where action was brought against a surveyor for negligence in making a valuation it was held that the expense of making a second valuation in order to ascertain the correctness of the first would not be allowed as costs.² It is also an elementary rule that the preliminary expense of qualifying the witness to testify shall not be allowed as costs, and where an accountant spent a large amount of time in examining the defendant's books it was held that the plaintiff was not entitled to costs for this item.³ So an allowance was refused for making experiments by scientific men who were called as witnesses,⁴ and for the time of an expert in making a necessary journey to inspect a building,⁵ and for trips and services by engineers.⁶

3. Liability of Party Calling Witness. — Such being the law as to the compensation of expert witnesses from the costs of litigation, there is a very respectable array of authorities holding that the party calling the witness is liable for his compensation,⁷ and where, as in *England*, the fees are likewise taxed as costs the witness is thus provided with two sources of remuneration.

Loss of Time. — In *England* the witness cannot recover from the litigant compensation for loss of time,⁸ even where an express promise therefor has been made.⁹

Champertous Agreement. — So an agreement between the litigant and the witness that the latter shall be paid a stipulated sum in case the suit results favorably to the former is champertous and void;¹⁰ but the mere fact that an expert witness testified under an agreement with one party, unknown to the other, for a considerable compensation, will not vitiate the verdict.¹¹

In *Massachusetts* it seems that there must be an actual understanding between the witness and the litigant before compensation can be recovered.¹²

And in *Illinois* it is squarely held that there can be no recovery for extra compensation, even in case of an express agreement.¹³

4. General Right of Expert Witness to Demand Extra Compensation — *a.* AT COMMON LAW. — Aside from the English decisions above reviewed and by

1. *Murphy v. Nolan*, 7 Ir. Eq. Rep. 498.

2. *May v. Selby*, 4 M. & G. 142, 43 E. C. L. 81.

3. **Expense of Qualifying the Witness.** — *Nolan v. Copeman*, L. R. 8 Q. B. 84, the court saying: "It would have been a very different question if the whole matter were open, and there were no rule as to these preliminary expenses, and it may well be questioned whether it would not have been better that it should be left to the master's discretion to allow or disallow these expenses, according to circumstances. But there is an inflexible rule that the preliminary expenses of what has been called qualifying the witness to give evidence shall not be allowed. Here the application for inspection was made on behalf of the plaintiff, and under ordinary circumstances the costs of such inspection are not allowed to the successful party; and in what respect did the present order differ from the ordinary order for inspection, except in one immaterial circumstance? The plaintiff desired inspection of the defendant's books, to which he was clearly entitled, but the defendant objected to his books being submitted to a person altogether in the plaintiff's interest, and a species of compromise was come to by which the plaintiff was to have inspection, but by some independent person to be named by the arbitrator; but the inspection was not on that account the less the inspection by or on behalf of the plaintiff; and the same principle applies as if the inspection had been in the ordinary

way by an agent of the plaintiff." See also *Wiltshire v. Marshall*, cited in *Batley v. Kynock*, L. R. 20 Eq. 634. Compare *Hawkins v. Rigby*, 29 L. J. C. P. 228; *Parkinson v. Atkinson*, 31 L. J. C. P. 199; *Nokes v. Gibbon*, 26 L. J. Ch. 208; *Ellington v. Clark*, 58 L. T. N. S. 818; *Moseley v. Victoria Rubber Co.*, 57 L. T. N. S. 142.

4. *Severn v. Olive*, 3 Brod. & B. 72, 7 E. C. L. 353.

5. *Bayley v. Beaumont*, 11 Moo. 497, 22 E. C. L. 423.

6. *Small v. Batho*, 21 L. J. Q. B. 254; *Gravatt v. Attwood*, 21 L. J. Q. B. 215.

7. **Liability of Party Calling the Witness.** — *Webb v. Page*, 1 C. & K. 23, 47 E. C. L. 23; *Chamberlain v. Stoneham*, 24 Q. B. Div. 113; *Hale v. Bates*, El. Bl. & El. 575, 96 E. C. L. 575; *Barrus v. Phaneuf*, 166 Mass. 123; *Harrison v. New Orleans*, 40 La. Ann. 509; *Brown v. Travelers', L., etc., Ins. Co.*, 26 N. Y. App. Div. 544.

8. *Collins v. Godefroy*, 1 B. & Ad. 950, 20 E. C. L. 514.

9. *Willis v. Peckham*, 1 Brod. & B. 515, 5 E. C. L. 171.

10. **Champerty.** — *Pollak v. Gregory*, 9 Bosw. (N. Y.) 116.

11. *People v. Montgomery*, 13 Abb. Pr. N. S. (N. Y. Oyer & T. Ct.) 239.

12. *Barrus v. Phaneuf*, 166 Mass. 123.

13. *Walker v. Cook*, 33 Ill. App. 561, following *Dodge v. Stiles*, 26 Conn. 463.

which the compensation of experts is taxed as costs, it is the prevailing rule that an expert witness cannot, in the absence of a statute, demand extra compensation for his testimony, nor refuse to testify without being paid.¹ This rule has been enacted into a statute in *Indiana*.² There are, however, some earlier decisions holding that such a witness may safely refuse to testify unless paid a reasonable compensation beyond the ordinary witness fee.³

b. **STATUTORY PROVISIONS.** — In a number of the states, however, statutes have been enacted which provide for the payment of additional compensation to expert witnesses.⁴ Where such a statute fixes the amount of compensation the expert is entitled to no more;⁵ and he can avail himself of the benefits of the statute only when testifying in his special line.⁶ Where provision is made for the employment of experts on the approval of a court officer such approval is a condition precedent to compensation;⁷ and where the witness goes upon the stand and is sworn he cannot refuse to answer on the ground that his statutory fees have not been paid.⁸

5. **Amount of Compensation.** — Under the former English rule the rate of allowance to expert witnesses was one guinea a day.⁹ Under the present practice it is left largely to the discretion of the master to make such an allowance as may seem "just and reasonable."¹⁰ In *Mississippi* the statute provides a compensation of ten dollars for a medical witness at a coroner's inquest.¹¹ In *Iowa* the limit is fixed at "four dollars per day."¹² Other statutes fix no exact sum, but provide that the allowance shall be an amount which the court or other authority shall deem just and reasonable. Under such a statute there must be a serious abuse of discretion by the constituted authority before the allowance will be changed on appeal.¹³

EXPIRE — EXPIRATION. (See also the titles **LANDLORD AND TENANT; LEASE.**) — To expire means to emit the last breath; to perish; to cease; to come to an end; to conclude; to terminate.¹⁴ The expiration of a term does

1. **At Common Law — Right to Extra Compensation Denied.** — *Ex p. Dement*, 53 Ala. 389; *Flinn v. Prairie County*, 60 Ark. 204, 46 Am. St. Rep. 168; *Clark County v. Kerstan*, 60 Ark. 508; *Dixon v. People*, 168 Ill. 179, *affirming* 63 Ill. App. 585; *Wright v. People*, 112 Ill. 540; *Smith v. McLaughlin*, 77 Ill. 596; *Summers v. State*, 5 Tex. App. 365, 32 Am. Rep. 573.

2. Rev. Stat. Ind., 1881, § 504.

3. **Extra Compensation Allowed.** — U. S. v. Howe, 12 Cent. L. J. 193; *Matter of Roelker*, 1 Sprague (U. S.) 276; *Buchman v. State*, 59 Ind. 1, 26 Am. Rep. 75; *Dills v. State*, 59 Ind. 15. The rule announced in the two latter decisions has now been abrogated in *Indiana* by statute. Rev. Stat., 1881, § 504.

4. **Extra Compensation Provided by Statute — Iowa.** — Code 1897, § 4661, *construed* in *Snyder v. Iowa City*, 40 Iowa 646.

Louisiana. — Code, § 462, *construed* in *State v. Cole*, 33 La. Ann. 1356.

Massachusetts. — Gen. Stat., c. 115, § 17; Stat. 1860, c. 191, *construed* in *Clark, Petitioner*, 104 Mass. 537. This act relates to criminal cases only.

Minnesota. — Gen. Stat., 1878, c. 70, § 8, *construed* in *State v. Teipner*, 36 Minn. 535; *Le Mere v. McHale*, 30 Minn. 410.

Mississippi. — Code, 1892, § 824, *construed* in *Greene v. Monroe County*, 72 Miss. 306.

North Carolina. — Act of 1870-71, c. 139, § 133, *construed* in *State v. Dollar*, 66 N. Car. 626.

Rhode Island. — Pub. Stat., 1882, c. 257, § 15.

5. *Greene v. Monroe County*, 72 Miss. 306.

6. *Snyder v. Iowa City*, 40 Iowa 646; *Le Mere v. McHale*, 30 Minn. 410, the court saying: "The witnesses in the present case were of this class. They had been employed professionally by plaintiff to attend upon him as physicians. While thus attending upon him, in the ordinary practice of their profession they saw his injuries, and acquired actual personal knowledge of the facts as to their nature and extent. They were called as witnesses to testify as to the physical facts thus falling under their observation. It is true that after testifying to these facts they were asked for and gave their professional opinion in reference to the probable effect upon plaintiff of the injuries, the extent and nature of which had come to their knowledge while attending their patient in the ordinary pursuit of their calling. We are not prepared to say that this might not bring them technically within the letter of the statute, but it certainly did not, under the facts of this case, bring them within its spirit, and furnished no good reason for allowing them extra compensation."

7. *Clark, Petitioner*, 104 Mass. 537.

8. *State v. Teipner*, 36 Minn. 535.

9. *Clark v. Gill*, 1 Kay & J. 19.

10. *Turnbull v. Janson*, 3 C. P. Div. 264.

11. See *Greene v. Monroe County*, 72 Miss. 306.

12. Code Iowa, 1897, § 4661.

13. *Le Mere v. McHale*, 30 Minn. 410.

14. *Stuart v. Hamilton*, 6 Ill. 255.

Expire in a Lease. — A lease for a term of

not in general mean its expiration by a forfeiture arising from a breach of conditions, but means its expiration by lapse of time.¹

EXPLICIT. — See note 2.

EXPLORATION. (See also the title EMINENT DOMAIN, vol. 10, p. 114.) — See note 3.

years, under which the rent was payable quarterly on certain days named, contained the following condition: "Provided, however, that if said party of the second part shall neglect to pay the rent as aforesaid, * * * then this lease shall thereupon, by virtue of this express stipulation therein, *expire* and terminate; and the party of the first part may, at any time thereafter, re-enter said premises, and the same have and possess as of his former estate." It was held that the terms *expire* and "terminate" were merely equivalent to the more common expression "shall become void," and that the lease, by the nonpayment of rent, did not become void, but only voidable at the option of the lessor. *Bowman v. Foot*, 29 Conn. 331. See also the title LANDLORD AND TENANT.

1. **Forfeiture.** — *Oakley v. Schoonmaker*, 15 Wend. (N. Y.) 226; *Beach v. Nixon*, 9 N. Y. 35; *Farnum v. Platt*, 8 Pick. (Mass.) 339. See also the title LANDLORD AND TENANT. And see *Burns v. Walford*, W. N. (84) 31; *Mansergh v. Rimmell*, W. N. (84) 34; *Friend v. Shaw*, 20 Q. B. Div. 374; *Doe v. Roe*, 2 B. & Ad. 922, 22 E. C. L. 211; *Doe v. Roe*, 10 M. & W. 670; *Hall v. Comfort*, 18 Q. B. Div. 11; *Arden v. Boyce*, (1894) 1 Q. B. 796.

In *Wrotesley v. Adams*, Plowd. 198, it was said, however, that *expiration* applied to an estate for years may aptly enough signify the end of it, whatever way it be.

Same — Double Rent. — A statute gave to a landlord double rent in case of a wilful holding over of the tenant after the *expiration* of the term. This was held to apply only to a wilful holding over after the term had *expired* by lapse of time, and not to a case of holding over where the term was ended by an act of the landlord in declaring a forfeiture. *Stuart v. Hamilton*, 66 Ill. 255.

Same — Restitution. — A *Minnesota* statute provided that in certain cases no writ of restitution should issue if the party against whom judgment was rendered stated that he intended to take an appeal. The statute then proceeded: "Provided, that if said action is brought upon a written lease, executed by both parties thereto, against a tenant holding over after the *expiration* of said lease, restitution of said premises shall be made forthwith." In construing this provision in *State v. Burr*, 29 Minn. 432, the court said: "It was under this clause that relator demanded the writ, he claiming that, within this clause, the lease in question had *expired*, by reason of the breach of the covenant not to sublet. We do not think that the correct interpretation of the statute. The phrase 'after the *expiration* of said lease' is, when referring to the same case, varied in section fourteen as amended, so as to read, 'after the *expiration* of the term thereof;' and in section fifteen, 'after the *expiration* of the term in said lease specified.' The term of this lease is five years, with a provision under which the lease may perhaps be sooner terminated. We think the phrase

means the *expiration* of the time expressed in the lease as the term thereof. After that time the written lease could not afford any pretext to the tenant for remaining in possession, while he might have a good defense against a claim by the landlord, based on an alleged breach of covenants or conditions." See generally the title LANDLORD AND TENANT.

Same — Patents. (See also the title PATENTS.) — The Revised Statutes of the United States provided that every patent granted for an invention which had been previously patented in a foreign country should be limited so as to *expire* at the same time with the foreign patent. It was held that under this provision a United States patent runs for the term under which the prior foreign patent was granted, without reference to whether the latter became lapsed or forfeited. *Pohl v. Anchor Brewing Co.*, 134 U. S. 387. See also *Bonsack Mach. Co. v. Smith*, 70 Fed. Rep. 383; *Holmes Electric Protective Co. v. Metropolitan Burglar Alarm Co.*, 21 Fed. Rep. 458; *Paillard v. Bruno*, 29 Fed. Rep. 864; *Bate Refrigerating Co. v. Gillett*, 31 Fed. Rep. 809.

Agreement of the Parties. — But in *Marshall v. Rugg*, (Wyoming 1896) 45 Pac. Rep. 487, it was held that where a lease was surrendered by the agreement of the parties it had *expired* at the time of the surrender. The court in this case *distinguished* *Reed v. Snowhill*, 51 N. J. L. 162, 49 N. J. L. 292, and said: "The language is not obscure or ambiguous, or even technical. Bouvier defines *expiration* in these words: 'Cessation; end; as the *expiration* of a lease, of a contract, or statute.' There are a number of ways in which a lease may be as effectually ended as by the lapse of its term, as by merger, by condemnation proceedings, by certain wrongful acts of the tenant, by the death of either landlord or tenant, in case of a tenancy at will, etc. And when the tenancy so terminates before the expiration of the term of the lease the lease is as effectually at an end as if it had expired by the lapse of its term. No rights or liabilities can afterwards accrue under it. But this does not affect rights or liabilities already mature. The covenant in the lease sued on in the case at bar is very broad — sufficiently so to include in its scope actions for damages in the nature of waste, and other actionable damages to the leased property, done or permitted by plaintiff in error during her tenancy, and not repaired at the time of the expiration of the lease, at which time any liability for its breach accrues and matures. The opinion of the Court of Errors and Appeals in the case of *Reed v. Snowhill* does not commend itself to favorable consideration."

2. See *CLEAR*, vol. 6, p. III, note.

3. **Exploration.** — Sinking a shaft to the depth of sixty-five feet was held not an *exploration* within a statute permitting railroads to enter upon land for the purpose of *exploration*, surveying, etc. *Morris v. Hudson Tunnel Co.*, 25 N. J. Eq. 384.

EXPLOSIONS AND EXPLOSIVES

BY JOSEPH R. LONG.

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CROSS-REFERENCES.

As to the liability of shippers and carriers of explosives, see the title CARRIERS OF GOODS, vol. 5, p. 154.

For other matters of SUBSTANTIVE LAW and EVIDENCE related to this subject, see the following titles: CONTRIBUTORY NEGLIGENCE, vol. 7, p. 368; FIRE INSURANCE; GAS COMPANIES; MASTER AND SERVANT; MINES AND MINING; NEGLIGENCE; NUISANCES.

I. DEFINITION. — The word "explosion" has no technical meaning in the law. As popularly used, it is defined as a sudden bursting or breaking up or in pieces from an internal or other force; a blowing up or tearing apart.¹

1. Definition. — Cent. Dict., *quoted in Louisville Underwriters v. Durland*, 123 Ind. 550. See also *St. Louis Gas Light Co. v. American F. Ins. Co.*, 33 Mo. App. 385. And see a further quotation from the opinion in *Louisville Underwriters v. Durland*, 123 Ind. 550, under COLLAPSE, vol. 6, p. 205.

The word "explosion" is considered in *Evans v. Columbian Ins. Co.*, 44 N. Y. 151, 4 Am. Rep. 650, to be synonymous with "burst." See the case cited and quoted from under BURSTING, vol. 5, p. 70.

Explosion Characterized — No Fixed Standard. — In *United L. etc., Ins. Co. v. Foote*, 22 Ohio St. 340, 10 Am. Rep. 735, the court, by McIlvaine, J., said: "The word 'explosion' is variously used in ordinary speech, and is not one that admits of exact definition. Its general characteristics may be described, but the exact facts which constitute what we call by that name are not susceptible of such state-

ment as will always distinguish the occurrences. It must be conceded that every combustion of an explosive substance whereby other property is ignited and consumed would not be an explosion within the ordinary meaning of the term. It is not used as the synonym of combustion. An explosion may be described, generally, as a sudden and rapid combustion, causing violent expansion of the air, and accompanied by a report. But the rapidity of the combustion, the violence of the expansion, and the vehemence of the report vary in intensity as often as the occurrences multiply. Hence, an explosion is an idea of degrees, and the true meaning of the word, in each particular case, must be settled, not by any fixed standard, or accurate measurement, but by the common experience and notions of men in matters of that sort."

In *Transatlantic F. Ins. Co. v. Dorsey*, 56 Md. 70, 40 Am. Rep. 403, the term "explo-

II. GENERAL RULES AS TO LIABILITY FOR EXPLOSIONS — No Liability in Absence of Negligence. — According to the rule generally recognized in the *United States* a person in the lawful possession or use of an apparatus or substance liable to explode is not responsible for damages resulting from its explosion to the person or property of another, unless there has been some fault or negligence on his part.¹ Perhaps in *England* the liability of one who keeps dangerous substances which explode and cause injury is not dependent upon his negligence.²

sion" was characterized in the same way as in the Ohio case just quoted, and the court proceeded: "That it [an explosion] greatly varies in its degrees of violence and the effects produced are facts fully within the experience of every one. We must suppose that the term was employed in the policy in its ordinary and popular meaning; and it is a question for the jury to determine in all such cases whether there has been an explosion, how and by what means produced, and whether the loss sustained was directly caused by the explosion or by an antecedent or subsequent fire, within the risk assumed by the insurers."

Parol Evidence as to Meaning. — The rule that parol evidence is not admissible to define or explain words used in a contract, unless such words are obscure or ambiguous, or controlled by some special usage, does not forbid that a witness should testify as to whether certain phenomena observed or supposed to have taken place answered to phenomena accompanying an explosion, conceding that the word was used in its ordinary sense. *St. Louis Gas Light Co. v. American F. Ins. Co.*, 33 Mo. App. 348.

For the Construction of the Word "Explosion" in Fire-insurance Policies, see the title FIRE INSURANCE.

1. No Liability for Damage by Explosion in Absence of Negligence. — *Sofield v. Sommers*, 9 Ben. (U. S.) 526; *Kinney v. Koopman*, 116 Ala. 310, quoting 7 AM. AND ENG. ENCYC. OF LAW (1st ed.) 517; *Cosulich v. Standard Oil Co.*, 122 N. Y. 118, 19 Am. St. Rep. 475; *Reiss v. New York Steam Co.*, 128 N. Y. 103.

The owner of a lighter loaded with petroleum is not liable for damages from an explosion on board caused by the striking of a match by a thief, where there was no want of due care on the part of such owner. *Sofield v. Sommers*, 9 Ben. (U. S.) 526.

Explosion of Lamp — Inevitable Accident. — Where an employee in a restaurant who was endeavoring to remove a burning gasoline lamp from the room, on discovering that he was himself in flames, instinctively threw the lamp towards the door, when it exploded, injuring the plaintiff, it was held that the proprietor of the restaurant was not liable. *Donahue v. Kelly*, 181 Pa. St. 93, 2 Am. Neg. Rep. 229.

Explosion of Gas in Manhole — Liability of City. — A city is not liable to a person passing along a street for injuries caused by an explosion of gas collected in a manhole constructed in the street by a private corporation having the right by charter and city ordinance to lay steam pipes beneath the street, subject to regulation by the city, where there is no positive proof of lack of care in conducting the work of locating the pipes, or that the explosion could be anticipated. *Hunt v. New York*, 109 N. Y. 134, 20 Am. & Eng. Corp. Cas. 380.

As to the liability of a city for injuries by the explosion of gas from oil allowed to flow into and remain in a sewer, see *Fuche v. St. Louis*, 133 Mo. 168.

Enlarging Well by Explosion of Nitroglycerine. — The owner of land containing a natural-gas well has the right to enlarge his well by the explosion of nitroglycerine therein for the purpose of increasing the flow of gas, but he has no right to explode nitroglycerine in his well in such a way as to endanger the lives or property of others, or to accumulate nitroglycerine upon his premises so as to have such an effect. *People's Gas Co. v. Tyner*, 131 Ind. 277, 31 Am. St. Rep. 433; *Tyner v. People's Gas Co.*, 131 Ind. 408.

Transporting Gunpowder through Streets — Evidence. — One sued for injuries caused by his negligent transportation of gunpowder through city streets may show that he submitted samples of the powder to experts, and that his course was governed by their opinion. *Furth v. Foster*, 7 Robt. (N. Y.) 484.

2. Fletcher v. Rylands — Negligence Immaterial. — In the leading case of *Rylands v. Fletcher*, L. R. 3 H. L. 330, affirming L. R. 1 Exch. 265, which was a case of damage resulting from a bursting reservoir, the principle was laid down that "if a person brings or accumulates on his land anything which, if it should escape, may cause damage to his neighbor, he does so at his peril. If it does escape and cause damage, he is responsible, however careful he may have been and whatever precautions he may have taken to prevent the damage."

This principle seems applicable to one who stores or maintains gas or other explosive substances upon his premises. Beven on Negligence (2d ed.) 562, 594; *Pollock on Torts* 407, 408. In *Clerk and Lindsell on Torts*, p. 339, it is declared that "one who brings gas on to his premises, or stores gunpowder or other explosives there, is presumably liable if an explosion occurs which does damage, without any proof of negligence."

In the case of *Losee v. Buchanan*, 51 N. Y. 476, 10 Am. Rep. 623, where it was held that a person who owned a steam boiler was not liable, in the absence of negligence, for the results of an explosion which projected the boiler on to the property of a neighbor and through several of his buildings, the court declared that the claim that the defendant's liability would exist without fault or negligence on his part seemed to be supported by the case of *Fletcher v. Rylands*, L. R. 1 Exch. 265, and that case was *disapproved*.

In *Marshall v. Welwood*, 38 N. J. L. 339, 20 Am. Rep. 394, where the facts were essentially similar to those in the New York case just cited, the court adopted a similar conclusion, and *Beasley, C. J.*, criticised and *disapproved* the case of *Fletcher v. Rylands*. He said:

But Where the Possession or Use Amounts to a Nuisance or is for any other reason unlawful, the person guilty of such unlawful use or possession will be liable for damages caused by an explosion whether chargeable with negligence or not.¹

Effect of Legislative Authority to Carry On Work. — Legislative authority to a corporation or an individual to do work for its or his profit does not carry with it authority to use, at the risk of others, highly explosive and dangerous materials, even though they be necessary to the convenient prosecution of the work, and if injury is caused by the use of such materials the party using them will be liable even though it be shown that the work was being performed in the most careful manner.²

Where the Person Having or Using Explosives Is Chargeable with Negligence, either on his own part or on the part of his servants, he will be liable for injuries resulting from their explosion.³

Contributory Negligence of Person Injured. — If the person injured by an explosion was himself guilty of negligence contributing to the injury, he cannot recover therefor, notwithstanding the negligence of the person sought to be charged.⁴

III. FACT OF EXPLOSION AS EVIDENCE OF NEGLIGENCE — **Decisions Not Harmonious.** — The question as to whether the mere fact of an explosion causing damage is of itself *prima facie* evidence of negligence on the part of a person sought to be charged therefor, so as to place upon him the burden of disproving negligence, is one upon which the decisions are not harmonious. The decisions may perhaps be reconciled to some extent by a consideration of the relationship between the parties and the nature of the particular explosion.

"This principle [of *Fletcher v. Rylands*] would evidently apply to and rule the present case; for water is no more likely to escape from a reservoir and do damage than steam is from a boiler; and, therefore, if he who collects the former force upon his property, and seeks with care and skill to keep it there, is answerable for his want of success, so is he who, under similar conditions, endeavors to deal with the latter. * * * The doctrine involved has been learnedly treated [in the English case], and the decision is of great weight, and yet its reasoning has failed to convince me of the correctness of the result to which it leads, and such result is clearly opposed to the course which judicial opinion has taken in this country."

1. See *infra*, this title, *Storing and Keeping Explosives*; *Particular Cases of Explosions Considered* — *Blasting*.

2. **Whether Legislative Authority to Carry On Work Authorizes Use of Explosives.** — *McAndrews v. Collier*, 42 N. J. L. 189, 36 Am. Rep. 508. In this case a railroad company, with legislative authority to construct a tunnel, let the work to a contractor, who constructed a magazine within the limits of a city for keeping blasting materials used in the work. The magazine exploded, doing great damage to neighboring property, and it was held that the contractor was liable, although there was no negligence on his part.

3. See *infra*, this title, *passim*.

If Negligence Exists Nuisance or Illegality Immaterial. — In an action to recover for injuries caused by an explosion the question as to whether the defendant was guilty of maintaining a nuisance or of a violation of law in the possession or use of the explosive is immaterial where actual negligence is proved. *Lee v. Vacuum Oil Co.*, 54 Hun (N. Y.) 156.

Liability for Servant's Negligence — Signal Torpedoes. — A railroad company is liable for the negligence of its servants in wantonly, recklessly, and needlessly leaving signal torpedoes at a point on its railroad where the public, including children, are permitted to pass, whereby a young child is injured by the explosion of a torpedo while being handled by him in ignorance of its dangerous character. *Harriman v. Pittsburgh, etc., R. Co.*, 45 Ohio St. 11, 4 Am. St. Rep. 507, 32 Am. & Eng. R. Cas. 37.

A railroad company is not liable for injuries to a stranger caused by the explosion of a signal torpedo left in charge of an employee and intended to be used only for a signal, but which is taken by another employee, without the knowledge of the person in charge, and placed on the track on the Fourth of July for the purpose of celebrating the day. *Chicago, etc., R. Co. v. Epperson*, 26 Ill. App. 72. See also *Jones v. Grand Trunk R. Co.*, 45 U. C. Q. B. 193.

4. **Contributory Negligence.** — *Mulligan v. Montana Union R. Co.*, 19 Mont. 135, 1 Am. Neg. Rep. 302. See also *Hill v. Meyer Bros. Drug Co.*, 140 Mo. 433 3 Am. Neg. Rep. 229, and *infra*, this title, *Liability of Master to Servant*; *Particular Cases of Explosions Considered*.

A boy more than seventeen years old who, impelled by mere curiosity, goes upon the premises of a railroad company to watch the burning of a train of cars loaded with petroleum cannot recover for injuries received in consequence of the explosion of the cars, nor is he given any greater rights by the fact that he voluntarily assisted in removing certain structures to prevent the spread of the fire. *Cleveland, etc., R. Co. v. Ballentine*, 84 Fed. Rep. 935.

Fact of Explosion Held Prima Facie Evidence of Negligence. — It has been held that where an unexplained explosion takes place and there is no evidence of the exercise of care on the part of the person charged, negligence on his part will be presumed. This ruling is based upon the principle that injuries which do not ordinarily happen when reasonable and proper care is taken to avoid them afford a presumption of negligence, and throw upon the person charged the burden of proving that ordinary and reasonable care was taken to avoid the accident; and also upon the principle of evidence that he who has peculiarly within his power the means of producing evidence of reasonable care shall be required to produce it.¹

Contrary Doctrine. — On the other hand, it has been held that the mere fact of explosion and injury is not *prima facie* evidence of negligence.²

Explosion of Steam Boiler. — It is so held by a decided weight of authority in the case of the explosion of a steam boiler.³ This holding rests upon the rule that the plaintiff in an action for damages assumes the burden of proving the defendant's negligence, and that, since undiscoverable defects might cause an explosion without negligence, it would reverse the rule as to the burden of proof to hold the fact of explosion *prima facie* evidence of negligence, and would require of the defendant proof of freedom therefrom.⁴ But at the same time the fact of the explosion is a circumstance to be considered in determining whether there was negligence in the management of the boiler, or any defect in its condition.⁵

Boiler of Steamboat. — In the case of the explosion of the boiler of a steamboat it was provided by an early Act of Congress,⁶ and has since been repeatedly held, that the fact of the explosion causing injuries is *prima facie* evidence of negligence on the part of the owners and officers.⁷ But this presumption may be rebutted by showing the use of proper diligence in furnish-

1. Warn v. Davis Oil Co., 61 Fed. Rep. 631; Judson v. Giant Powder Co., 107 Cal. 549, 48 Am. St. Rep. 146.

2. **Fact of Explosion Not Prima Facie Evidence of Negligence.** — Washington Gas Light Co. v. Eckloff, 4 App. Cas. (D. C.) 174; Walker v. Chicago, etc., R. Co., 71 Iowa 658; Voight v. Michigan Peninsular Car Co., 112 Mich. 504, 2 Am. Neg. Rep. 725; Cosulich v. Standard Oil Co., 122 N. Y. 118, 19 Am. St. Rep. 475; Reiss v. New York Steam Co., 128 N. Y. 103; Earle v. Arbogast, 180 Pa. St. 409, 1 Am. Neg. Rep. 677. See also cases cited in note following.

3. **Boiler Explosions.** — Texas, etc., R. Co. v. Barrett, 166 U. S. 617, 1 Am. Neg. Rep. 745; Louisville, etc., R. Co. v. Allen, 78 Ala. 494; 28 Am. & Eng. R. Cas. 514; Toledo, etc., R. Co. v. Moore, 77 Ill. 217; John Morris Co. v. Southworth, 154 Ill. 118; Louisville, etc., R. Co. v. Lynch, 147 Ind. 165, citing 7 AM AND ENG. ENCYC. OF LAW (1st ed.) 522; Huff v. Austin, 46 Ohio St. 386, 15 Am. St. Rep. 613; Young v. Bransford, 12 Lea (Tenn.) 232.

In Spencer v. Campbell, 9 W. & S. (Pa.) 32, and Losee v. Buchanan, 51 N. Y. 476, 10 Am. Rep. 623, which were actions for injuries caused by boiler explosions, it was held that the plaintiff could not recover without proving negligence, the doctrine of the text being thus sustained by these cases.

4. Louisville, etc., R. Co. v. Lynch, 147 Ind. 165, 1 Am. Neg. Rep. 585.

5. **Fact of Explosion as Evidence of Negligence.** — Louisville, etc., R. Co. v. Lynch, 147 Ind.

165, affirmed 1 Am. Neg. Rep. 585; Young v. Bransford, 12 Lea (Tenn.) 232.

In an action against a railroad company for injuries to the plaintiff while at work near the defendant's track, caused by the explosion of a locomotive boiler, it was held that the fact of the explosion was not sufficient evidence of the defendant's negligence, but was a fact to be considered in determining the question of negligence. Louisville, etc., R. Co. v. Lynch, 147 Ind. 165.

6. **By Act of Congress** of July 7, 1838, it was provided "that in all suits and actions against proprietors of steamboats, for injuries arising to persons or property from the bursting of the boiler of any steamboat, * * * the fact of such bursting * * * shall be taken as full *prima facie* evidence sufficient to charge the defendant or those in his employment with negligence, until he shall show that no negligence has been committed by him or those in his employment." 5 U. S. Stat. at L. 306, § 13. This statute is not found in the Revised Statutes of the United States.

7. **Explosion of Steamboat Boiler Evidence of Negligence.** — The Steamboat New World v. King, 16 How. (U. S.) 469; Dunlap v. Steamboat Reliance, 2 Fed. Rep. 249, 4 Woods (U. S.) 420; Posey v. Scoville, 10 Fed. Rep. 140; Rose v. Stephens, etc., Transp. Co., 11 Fed. Rep. 438; Grimsley v. Hankins, 46 Fed. Rep. 400; McMahon v. Davidson, 12 Minn. 357; Fay v. Davidson 13 Minn. 523. See also The High and Light, Chase's Dec. (U. S.) 150 and the title CARRIERS OF PASSENGERS, vol. 5, p. 627, note.

ing and maintaining in repair suitable machinery, and in the employment of competent officers and servants.¹

Effect of Contract Relationship Between Parties. — It has been held that the question as to whether or not the fact of an explosion raises a presumption of negligence is entirely independent of the existence or nonexistence of contractual relations between the parties.² In other cases, however, it is held that while the fact of explosion will raise a *prima facie* presumption of negligence as between the owner of explosive apparatus and a person not in his employ, so as to throw upon the former the burden of rebutting such presumption, inasmuch as in such case the owner would be equally liable whether the explosion was the result of defects in the apparatus or of negligence on the part of those in charge of it.³ Yet this rule would not obtain as between an employer and his employee, for in such case the master would not be liable if the explosion resulted from the negligence of the servant himself or of a fellow servant, and the presumption that it was caused by defects in the apparatus would be no stronger than that it resulted from the negligence of the servant in operating it.⁴

IV. LIABILITY OF MASTER TO SERVANT. — A servant entering on an employment in which he is exposed to the danger of injury from explosions assumes the perils incident to his service of which he is informed or which ordinary care would disclose to him. It is the duty of the master to exercise all reasonable care to provide his employees with a safe place in which to work, and with suitable and safe machinery and materials, and to employ faithful and competent servants, and when he has discharged his duty in these respects he is not liable for injuries to an employee caused by an explosion.⁵ But the master

1. Grimsley v. Hankins, 46 Fed. Rep. 400.

2. Judson v. Giant Powder Co., 107 Cal. 549, 48 Am. St. Rep. 146.

3. **Explosion Prima Facie Evidence of Negligence When Person Injured Is Not Employee.** — Kranz v. White, 8 Ill. App. 583.

Where a person lawfully in the depot of a railroad company, though not in its employ, was injured by the explosion of the boiler of one of the company's locomotives, it was held in an action against the company for damages that the mere fact of the explosion was *prima facie* evidence of negligence on the part of the defendants, throwing the burden of disproving the negligence upon them. Illinois Cent. R. Co. v. Phillips, 49 Ill. 234, 55 Ill. 194, explained and approved in Toledo, etc., R. Co. v. Moore, 77 Ill. 217.

Passenger on Railroad. — In an action against a railroad company to recover for injuries received by the plaintiff while a passenger on the defendant's train, caused by the explosion of the boiler, the jury may infer negligence on the theory that the explosion would not have taken place unless the boiler had been defective, or unless there had been some omission or mismanagement upon the part of those in charge of it. Robinson v. New York Cent., etc., R. Co., 20 Blatchf. (U. S.) 338, 9 Fed. Rep. 877. See also Louisville, etc., R. Co. v. Allen, 78 Ala. 494, 28 Am. & Eng. R. Cas. 514.

4. **Explosion Not Evidence of Negligence in Favor of Employee.** — Louisville, etc., R. Co. v. Allen, 78 Ala. 494, 28 Am. & Eng. R. Cas. 514; Kranz v. White, 8 Ill. App. 583; Illinois Cent. R. Co. v. Houck, 72 Ill. 285; Toledo, etc., R. Co. v. Moore, 77 Ill. 217.

Where an employee in an establishment where soda water was made and sold was injured by the explosion of a carbonic acid gas

generator used in the manufacture of the soda water, which was in charge of another employee, it was held that the fact of the explosion was not *prima facie* evidence of the employer's negligence. Kranz v. White, 8 Ill. App. 583.

5. **Master Not Liable in Absence of Negligence.** — Kranz v. White, 8 Ill. App. 583; Cumberland, etc., R. Co. v. State, 44 Md. 283; Cayzer v. Taylor, 10 Gray (Mass.) 274, 69 Am. Dec. 317; Voigt v. Michigan Peninsular Car Co., 112 Mich. 504, 2 Am. Neg. Rep. 725; Mulligan v. Montana Union R. Co., 19 Mont. 135, 1 Am. Neg. Rep. 302; Henderson v. Williams, 66 N. H. 405; Cerrillos Coal R. Co. v. Deserant, (N. Mex. 1897) 4 Am. Neg. Rep. 87, note; Prentice v. Wellsville, (Supreme Ct.) 21 N. Y. Supp. 820; Ardesco Oil Co. v. Gilson, 63 Pa. St. 146; Lehigh Valley Coal Co. v. Jones, 86 Pa. St. 432; Hard v. Vermont, etc., R. Co., 32 Vt. 473; Bertha Zinc Co. v. Martin, 93 Va. 791, 2 Va. L. Reg. 838; Innes v. Milwaukee, 96 Wis. 170, 2 Am. Neg. Rep. 782. See generally in this connection the title MASTER AND SERVANT.

A master is required to provide materials and implements for the use of his servants such as are ordinarily used by persons in the same business, but he is not required to secure the best known materials, or to subject such as he does provide to chemical analysis to determine what possible hazard may be incurred by their use. Thus where a servant was killed by an explosion of paint containing benzine, but it appeared that the employment was not considered dangerous, the materials were those in common use for the purpose for which they were used, the work was being done under competent supervision, and the explosion was outside the range of ordinary experience, it was held that the master was not liable. Allison Mfg. Co. v. McCormick, 118 Pa. St. 519, 4

will be liable for an injury to a servant caused by an explosion where he is chargeable with negligence either on his own part or on the part of his servants.¹

Duty of Master to Know Condition of Machinery. — It is the duty of a master using machinery and apparatus liable to explode to use all reasonable care to ascertain its condition, and if an employee is injured by the explosion of such apparatus or machinery owing to its defective condition, where the master knew or ought to have known of the defects, the master will be liable.²

Am. St. Rep. 613. See also *Bertha Zinc Co. v. Martin*, 93 Va. 791, 2 Va. L. Reg. 838.

In *Mather v. Rillston*, 156 U. S. 391, the plaintiff, an employee in the defendant's iron mine, sustained injury by an explosion of dynamite, and, upon the facts of the case, it was held that the defendant was negligent in the operation of his mine, and a verdict for the plaintiff was sustained by the court. In delivering the opinion of the court, Mr. Justice Field said: "We think it may be laid down as a legal principle that in all occupations which are attended with great and unusual danger, there must be used all appliances readily attainable known to science for the prevention of accidents, and that the neglect to provide such readily attainable appliances will be regarded as proof of culpable negligence. If an occupation attended with danger can be prosecuted by proper precautions without fatal results, such precautions must be taken by the promoters of the pursuit or employers of laborers thereon. Liability for injuries following a disregard of such precautions will otherwise be incurred and this fact should not be lost sight of."

Pouring Damp Lead into Molten Lead — Assumption of Risk. — The risk of an explosion arising from pouring damp lead into molten lead is not so obvious as to constitute one of the risks assumed by an employee, and if the evidence is conflicting as to whether an employee so injured had been warned of the danger, the question is for the jury. *Redmund v. Butler*, 168 Mass. 367, 2 Am. Neg. Rep. 712.

Removing Hot Slag Near Water. — A laborer employed to remove hot slag from a furnace near water is entitled to notice of the danger of explosion arising from contact of the slag and water. *McGowan v. La Plata Min., etc., Co.*, 3 McCrary (U. S.) 393.

1. Master Liable When Chargeable with Negligence. — *Texas, etc., R. Co. v. Barrett*, 156 U. S. 617, 1 Am. Neg. Rep. 745; *Cumberland, etc., R. Co. v. State*, 44 Md. 283, 45 Md. 229; *Cayzer v. Taylor*, 10 Gray (Mass.) 274, 69 Am. Dec. 317; *Kelley v. Cable Co.*, 7 Mont. 70; *Stevenson v. Jewett*, 16 Hun (N. Y.) 210; *Allison v. Western North Carolina R. Co.*, 64 N. Car. 382.

Where a section hand of a railroad company was directed by the company's agent to sleep in a certain house, in which, without the knowledge of the company or the section hand, an open keg of powder was standing under a bed, placed there shortly before, for temporary purposes, by a servant of a bridge contractor with the company and the section hand was killed by an explosion of the powder, apparently caused by fire from his torch, it was held that the company was chargeable with the negligence of the person who left the

powder in such a position. *Allison v. Western North Carolina R. Co.*, 64 N. Car. 382.

Explosion of Blast. — In *Berg v. Boston, etc., Consol. Copper, etc., Min. Co.*, 12 Mont. 212, a laborer engaged in handling rock, etc., thrown down in a quarry by blasting was warned that a blast was about to be set off, and retired to a place of safety. After waiting a while, the blast not exploding, and he not knowing the character of the blast or the time required to explode it, but acting upon the opinion of the foreman, he returned to work, when the blast exploded, injuring him. It was held that there was sufficient evidence of negligence on the part of the master to be submitted to the jury.

Unexploded Dynamite Charges in Quarried Rock. — In an action by a stone mason against his employer for injuries received by him from the explosion of an old charge of dynamite in a stone furnished by the defendant from his quarry, on which the plaintiff was at work, where the evidence showed that such unexploded charges had from time to time been found in quarried blocks from the defendant's quarry, notwithstanding the means used to discover and remove them, it was held that instructions to the jury that the defendant was bound to exercise reasonable, and only reasonable, care in discovering and removing such unexploded charge from the stone were correct, and that it was for the jury to say whether or not the defendant had used such care. *Neveu v. Sears*, 155 Mass. 303.

Injury of Employee by Explosion of Dynamite Near Railroad Track. — A railroad company which, by placing dynamite near its track, exposes its employees to a danger to which they ought not to have been subjected will be liable to them for injuries caused by an explosion. *Tissue v. Baltimore, etc., R. Co.*, 112 Pa. St. 91.

2. Duty of Master to Know Condition of Machinery. — It is the duty of a railroad company to observe the highest degree of vigilance to ascertain the condition of its machinery, and the company cannot escape liability for the death of an employee, caused by the explosion of a locomotive boiler reported to be unsafe, because the employees in charge of the locomotive negligently failed to ascertain its condition. *Chicago, etc., R. Co. v. Shannon*, 43 Ill. 338. See also *Badcock v. Freeman*, 21 Ont. App. 633.

In an action against a railroad company to recover for the death of a fireman killed by the explosion of a locomotive boiler it was shown that the engine had been purchased some time before as a second-class engine, that the agents intrusted with the duty of making the purchase failed to ascertain its age, use, or condition, that at the time of the explosion the engine was in a defective condition, and that this fact had been brought to the knowledge

Explosion Due to Latent Defect. — A railroad company is not liable to an employee for injuries caused by the explosion of a locomotive boiler due to a latent defect which could not have been discovered by the use of ordinary care in inspection and which was not known to the company or any of its servants.¹ Nor is the company required to employ extraordinary tests to discover such defects.²

Person Employed in Blasting. — A laborer contracting to do blasting assumes the risk of personal injury in the use of the ordinary appliances used in blasting, but not those risks attendant upon the use of an unusual and exceedingly dangerous explosive, of the dangerous quality of which, or of the proper manner of using which, he is ignorant; and in such case the master will be liable for injuries resulting to the servant from the employment of such explosives without informing him as to their nature or proper use.³

Unexploded Blast. — A servant injured by the explosion of an unexploded charge of powder in a blast hole while engaged in drilling out the hole, cannot recover from his employer unless the latter is chargeable with negligence.⁴

Negligence of Fellow Servant. — A master is not liable for injuries to a servant from an explosion caused by the negligence of a fellow servant where there has been no negligence on his part in employing such fellow servant.⁵

Contributory Negligence. — If a servant is guilty of contributory negligence in using explosive machinery which he knows or has reason to believe is in an unsafe condition the master is not liable for injuries sustained by the servant from an explosion.⁶

and attention of the employees of the defendant whose duty it was to make the repairs. It was held that there was evidence legally sufficient to justify the court below in submitting the case to the jury, although on the part of the defendant it was proved that every precaution was taken, and that the engine was repaired and was supposed to be in a safe condition. *Cumberland, etc., R. Co. v. State*, 44 Md. 283, 45 Md. 229.

1. **Latent Defect.** — *Louisville, etc., R. Co. v. Allen*, 78 Ala. 494, 28 Am. & Eng. R. Cas. 514; *Mulligan v. Montana Union R. Co.*, 19 Mont. 135, 1 Am. Neg. Rep. 303; *Racine v. New York Cent., etc., R. Co.*, 70 Hun (N. Y.) 453.

2. *Texas, etc., R. Co. v. Barrett*, 166 U. S. 617, 1 Am. Neg. Rep. 745, 67 Fed. Rep. 214; *Louisville, etc., R. Co. v. Allen*, 78 Ala. 494, 28 Am. & Eng. R. Cas. 514.

3. *Smith v. Oxford Iron Co.*, 42 N. J. L. 467, 36 Am. Rep. 537; *Spelman v. Fisher Iron Co.*, 56 Barb. (N. Y.) 151.

4. **Plaintiff Injured While Drilling Out Unexploded Blast.** — *Henderson v. Williams*, 66 N. H. 405. In this case it appeared that the fuse used for the purpose of igniting the charge was wet, as the defendant's superintendent knew, but the plaintiff did not know; but there was no evidence that this fact was material, or that the plaintiff's action could have been affected by his knowledge of or ignorance of it. It was held that there was no negligence, and hence no liability, on the part of the defendant because of his failure to inform the plaintiff of the condition of the fuse. See also *Anderson v. Daly Min. Co.*, 16 Utah 28.

In a similar case against the owners of a quarry for negligence in employing an incompetent foreman in charge of the blasting, and for the negligence of the foreman in directing

the drilling out of a hole in which there was an unexploded charge, it was held that a nonsuit was proper where there was no evidence that the foreman was incompetent or that he could by proper diligence have known of the presence of the unexploded charge. *Houston v. Culver*, 88 Ga. 34.

Contributory Negligence in Approaching Unexploded Blast. — Where a miner who has charged a blast and fired the fuse retires to a safe distance, and upon the failure of the blast to explode returns and is injured by its explosion, it is a question for the jury whether he is guilty of contributory negligence. *Davis v. Graham*, 2 Colo. App. 210. See also *Eureka Co. v. Bass*, 81 Ala. 200, 60 Am. Rep. 152.

5. **Fellow Servant.** — *Sullivan v. New York, etc., R. Co.*, 62 Conn. 209; *Kranz v. White*, 8 Ill. App. 583; *Ardesco Oil Co. v. Gilson*, 63 Pa. St. 146, *Lehigh Valley Coal Co. v. Jones*, 86 Pa. St. 432; *Matthews v. Hamilton Powder Co.*, 14 Ont. App. 261, *reversing* 12 Ont. Rep. 58; *McInnis v. Malaga Min. Co.*, 25 Nova Scotia 345. See the title FELLOW SERVANTS.

Defective System. — Where the injury is the result of a defective system not adequately protecting the workmen at the time of the explosion, and not of the negligence of a fellow workman engaged in the common work, the master is liable. *Sword v. Cameron*, 1 Sc. Sess. Cas. (2d ser.) 493, *explained* in *Bartons-hill Coal Co. v. Reid*, 3 Macq. 290, by Lord Cranworth, and by Lord Herschel in *Smith v. Baker*, (1891) App. 363.

6. Where an explosion occurs through the negligent management of an engine and kills the engineer, his personal representative cannot recover for his death if the deceased knew or had reason to believe that the boiler was unsafe and still used it after such knowledge. *Illinois Cent. R. Co. v. Houck*, 72 Ill. 285, *Toledo, etc., R. Co. v. Moore*, 77 Ill. 217.

V. STORING AND KEEPING EXPLOSIVES — Liability Where Keeping Amounts to Nuisance. — One who stores and keeps gunpowder, dynamite, or other explosives upon his premises under circumstances rendering him guilty of maintaining a nuisance in so doing is liable for all damages resulting from an explosion of such explosives, whether he is chargeable with negligence or not.¹

Keeping Explosives in Violation of Statute or Ordinance. — So also where the explosive is kept in violation of a statute or ordinance.²

When Keeping of Explosives Constitutes Nuisance. — Whether the keeping of explosives upon one's own premises constitutes a nuisance or not depends upon the locality, the quantity of the material stored, and the other circumstances of the case.³ The mere keeping of large quantities of explosives in a public place does not of itself amount to a nuisance.⁴ But the keeping of explosives in large quantities in such a manner and in such a situation as to endanger the lives and property of others constitutes a nuisance.⁵

1. Liability Absolute Where Keeping Amounts to Nuisance. — *Hazard Powder Co. v. Volger*, 58 Fed. Rep. 152; *Laffin, etc., Powder Co. v. Tearney*, 131 Ill. 322, 19 Am. St. Rep. 34; *McAndrews v. Colliard*, 42 N. J. L. 189, 36 Am. Rep. 508; *Myers v. Malcolm*, 6 Hill (N. Y.) 292, 41 Am. Dec. 744; *Fillo v. Jones*, 2 Abb. App. Dec. (N. Y.) 121; *Heeg v. Licht*, 80 N. Y. 579, 36 Am. Rep. 654; *St. Marys Woolen Mfg. Co. v. Bradford Glycerine Co.*, 14 Ohio Cir. Ct. Rep. 522, 7 Ohio Cir. Dec. 582; *Wilson v. Phoenix Powder Mfg. Co.*, 40 W. Va. 413, 52 Am. St. Rep. 890.

Every one who participates in the maintenance of a powder house constituting a nuisance, whether owner, lessee, or person using it for storing powder, is liable for damages caused by an explosion. *Prussak v. Hutton*, 30 N. Y. App. Div. 66. See *Abraham v. California Powder Works*, 5 N. Mex. 479.

Explosion Caused by Lightning. — In an action to recover for personal injuries caused by the explosion of a powder magazine situated in a city, it was held that the fact that the magazine was exploded by lightning constituted no defense if the maintenance of it in that place was a nuisance. *Prussak v. Hutton*, 30 N. Y. App. Div. 66. See also *Cheatham v. Shearon*, 1 Swan (Tenn.) 213, 55 Am. Dec. 734.

Amount of Damages. — A person injured by the explosion of a quantity of gunpowder stored in a building so as to constitute a nuisance, can recover no more than his actual damages, and evidence that the person liable was a man of wealth is incompetent. *Myers v. Malcolm*, 6 Hill (N. Y.) 292, 41 Am. Dec. 744.

2. Question of Negligence Immaterial Where Keeping Is Illegal. — *Hazard Powder Co. v. Volger*, 58 Fed. Rep. 152; *Laffin, etc., Powder Co. v. Tearney*, 131 Ill. 322, 19 Am. St. Rep. 34; *McAndrews v. Colliard*, 42 N. J. L. 189, 36 Am. Rep. 508. See also *Kinney v. Koopman*, 116 Ala. 310. But see *Fillo v. Jones*, 2 Abb. App. Dec. (N. Y.) 121.

Explosion Must Be Proximate Cause of Loss. — The mere act of keeping explosive oils in violation of an ordinance will not give a right of action to a person whose property is destroyed by a fire caused by an explosion of such oils; it must also appear that such keeping was the proximate cause of the damage. *Wright v. Chicago, etc., R. Co.*, 27 Ill. App. 200.

3. Collins v. Alabama G. S. R. Co., 104 Ala.

390; *Cook v. Anderson*, 85 Ala. 105; *Heeg v. Licht*, 80 N. Y. 579, 36 Am. Rep. 654. 8 Abb. N. Cas. (N. Y.) 355, reversing 16 Hun (N. Y.) 257; *Lounsbury v. Foss*, 80 Hun (N. Y.) 296.

4. Keeping Explosives in Public Place Not of Itself a Nuisance. — *Collins v. Alabama G. S. R. Co.*, 104 Ala. 390; *Kinney v. Koopman*, 116 Ala. 310; *People v. Sands*, 1 Johns. (N. Y.) 78, 3 Am. Dec. 296; *Heeg v. Licht*, 80 N. Y. 579, 36 Am. Rep. 654.

A well-constructed powder house, carefully guarded and prudently managed, situated in a sparsely settled neighborhood, is not a nuisance and abatable as such simply because possible injury may result therefrom to those residing in the vicinity. *Dumesnil v. Dupont*, 18 B. Mon. (Ky.) 800, 68 Am. Dec. 750.

In *Cheatham v. Shearon*, 1 Swan (Tenn.) 213, 55 Am. Dec. 734, it was held that the erection of a powder magazine in a populous part of a city, keeping stored therein large quantities of gunpowder, is *per se* a nuisance. In this case, which was an action to recover for damages caused by the explosion of a powder magazine by lightning, the court held that the fact that the magazine was liable to explode by means of lightning, against which liability no human agency could guard, was decisive of the question.

5. Keeping of Explosives Held to Be Nuisance. — *Rudder v. Koopman*, 116 Ala. 332; *Laffin, etc., Powder Co. v. Tearney*, 131 Ill. 322, 19 Am. St. Rep. 34; *Wright v. Chicago, etc., R. Co.*, 27 Ill. App. 200; *Myers v. Malcolm*, 6 Hill (N. Y.) 292, 41 Am. Dec. 744; *Bradley v. People*, 56 Barb. (N. Y.) 72; *Wier's Appeal*, 74 Pa. St. 230; *Comminge v. Stevenson*, 76 Tex. 642; *State v. Paggett*, 8 Wash. 579; *Wilson v. Phoenix Powder Mfg. Co.*, 40 W. Va. 413, 52 Am. St. Rep. 890. See also *Fillo v. Jones*, 2 Abb. App. Dec. (N. Y.) 121.

The careless or negligent keeping of gunpowder in large quantities near dwelling houses, or where the lives of persons are thereby endangered, is a nuisance at common law. *People v. Sands*, 1 Johns. (N. Y.) 78, 3 Am. Dec. 296; *Bradley v. People*, 56 Barb. (N. Y.) 72. See *Anonymous*, 12 Mod. 342; *Rex v. Taylor*, 2 Stra. 1167; *Crowder v. Tinkler*, 19 Ves. Jr. 617.

The manufacture and keeping of quantities of gunpowder, nitroglycerine, and other explosives in or dangerously near public places is a public nuisance, and if any one is injured

Number of Persons Affected Immaterial. — The erection and maintenance of a powder magazine may amount to a nuisance on account of the danger from explosion although it injuriously affects only a single household.¹

Question of Nuisance for Jury. — Whether or not the keeping of explosives in a particular case amounts to a nuisance is a question for the jury.²

Liability Where Keeping Is Negligent. — Where a person storing explosives is guilty of negligence in doing so he is liable for damages resulting from such negligence.³

Remedy by Injunction. — Where the erection of a contemplated magazine for the storing of dangerous explosives will render the community liable to irreparable damage from explosions it may be prevented by injunction.⁴ But where the erection and maintenance of a magazine will subserve important public interests and will be attended with little or no danger to lives or property an injunction to restrain it will be denied.⁵

Regulation by Municipal Corporation of Keeping of Explosives. — A municipal corporation has power to regulate the keeping and storing of explosives within the corporate limits,⁶ and, under the police power, may withdraw a previously

thereby by explosion he may recover therefor without proving negligence. *Wilson v. Phoenix Powder Mfg. Co.*, 40 W. Va. 413, 52 Am. St. Rep. 890; *Huntington, etc., Land Development Co. v. Phoenix Powder Mfg. Co.*, 40 W. Va. 711.

In *Reg. v. Lister*, 7 Cox C. C. 342, 3 Jur. N. S. 570, the keeping of large quantities of naphtha was held to be a public nuisance.

In *Pennsylvania* the legislature has recognized that the storing of gunpowder in large quantities in thickly settled places is a nuisance to be guarded against by public authority. *Wier's Appeal*, 74 Pa. St. 230, by Sharswood, J.

1. *Emory v. Hazard Powder Co.*, 22 S. Car. 476, 53 Am. Rep. 730.

2. *Heeg v. Licht*, 80 N. Y. 579, 36 Am. Rep. 654; *Lounsbury v. Foss*, 80 Hun (N. Y.) 296; *Prussak v. Hutton*, 30 N. Y. App. Div. 66.

3. **Liability for Negligence in Keeping Explosives.** — *Denver, etc., R. Co. v. Conway*, 8 Colo. 1, 54 Am. Rep. 537; *Clarkin v. Biwabik-Bessemer Co.*, 65 Minn. 483.

Negligence of Independent Contractor. — Where a railroad company let the work of grading its road to a contractor, who, with the consent of the company, sublet a portion of the work to another, and it was understood that the work was to be done by the subcontractor by blasting with nitroglycerine, and a magazine for storing the necessary nitroglycerine was located on the company's land under the direction of its engineer, but the subcontractor clandestinely and without the knowledge of the company stored and kept for sale in such magazine nitroglycerine belonging to other parties, and through the negligence of a servant of the subcontractor in the management of this other nitroglycerine an explosion occurred, killing the plaintiff's intestate, it was held that neither the company nor the contractor was liable. *Cuff v. Newark, etc., R. Co.*, 35 N. J. L. 17, 10 Am. Rep. 205, 35 N. J. L. 574.

4. **Enjoining Erection of Magazine.** — *Wier's Appeal*, 74 Pa. St. 230; *McDonough v. Roat* (C. Pl.), 8 Kulp (Pa.) 433. See also *Crowder v. Tinkler*, 19 Ves. Jr. 617.

A person injured by the erection and maintenance of a powder magazine amounting to a nuisance may recover damages and also have the continuance of the nuisance enjoined. *Emory v. Hazard Powder Co.*, 22 S. Car. 476, 53 Am. Rep. 730.

5. **When Injunction Denied.** — *Dilworth's Appeal*, 91 Pa. St. 247, *distinguishing Wier's Appeal*, 74 Pa. St. 230.

When a storehouse becomes necessary for keeping a dangerous explosive the utmost care should be taken in selecting the site and in its construction, with reference to safety of persons and rights of property. Places of storage of such substances must not be multiplied beyond the business requirements of the neighborhood. When consumption of the article is large, to give or limit the right of storage to a single natural or artificial person would impose a heavy burden on consumers for the benefit of the favored party, a wrong which a court will not do but for the most urgent reason. *Per Trunkey, J.*, in *Dilworth's Appeal*, 91 Pa. St. 247.

6. **Municipal Regulation.** — *Williams v. Augusta*, 4 Ga. 509; *Hays v. St. Marys*, 55 Ohio St. 197; *Davenport v. Richmond*, 81 Va. 636, 59 Am. Rep. 694. See also *Somerville v. Walker*, 168 Mass. 388.

Fog Signals Are Fireworks within the meaning of a statute providing a penalty for keeping fireworks in certain cases. *Bliss v. Lilley*, 3 B. & S. 128, 113 E. C. L. 128, 7 L. T. N. S. 319, 9 Jur. N. S. 410.

Ordinance Against Storing Petroleum. — An ordinance prohibiting the storing or keeping of oils or petroleum within a city except under certain limitations applies to the keeping of such articles by a railroad company in its warehouse for transportation. *Wright v. Chicago, etc., R. Co.*, 27 Ill. App. 200.

English Gunpowder Act. — As to the manufacture and keeping of gunpowder, etc., under the English Gunpowder Act (23 & 24 Vict., c. 139), see *Webley v. Woolley*, L. R. 7 Q. B. 61; *Elliott v. Majendie*, L. R. 7 Q. B. 429. See also *Rex v. Matters*, 1 B. & Ald. 362; *Biggs v. Mitchell*, 2 B. & S. 523, 110 E. C. L. 523.

granted privilege to erect and maintain magazines and require them to be removed.¹

VI. SALE OF EXPLOSIVES. — A person who, with knowledge that an article or substance is of a dangerous and explosive character, sells it to another who has no notice of its dangerous qualities, will be liable for injuries from its explosion resulting to innocent persons who are not themselves at fault.²

Sale to Child. — A person who sells dangerous explosives to a child, knowing that they are to be used in such a manner as to put in jeopardy the lives of others, must be taken to contemplate the probable consequences of his wrongful act, as that such explosives will be so used as to cause injury to the buyer or his associates.³

VII. PARTICULAR CASES OF EXPLOSIONS CONSIDERED — 1. **Blasting** — *a.* **GENERAL RULES AS TO LIABILITY.** — The law as to the liability of a landowner carrying on blasting operations on his own premises, for injuries resulting therefrom to the premises of another, seems to be in a somewhat unsettled condition. The rule deducible from the decisions seems to be that where a person lawfully engaged in blasting upon his own land so conducts the work as to cause damage to adjoining property in a way in itself unlawful, as where there has been a direct trespass upon the premises injured by casting soil or rocks thereon, the liability of the person causing the injury is absolute, and he may be made to respond in damages irrespective of the question of negligence or want of skill.⁴ And there is authority for the proposition that one who

1. **Requiring Removal of Magazines Previously Authorized.** — *Davenport v. Richmond*, 81 Va. 636, 59 Am. Rep. 694.

2. *Wellington v. Downer Kerosene Oil Co.*, 104 Mass. 64; *Elkins v. McKean*, 79 Pa. St. 493. See also the title IMPLIED WARRANTIES.

Sale for Resale. — A person who knowingly sells an explosive to be resold, without giving information of its nature, is liable to a purchaser from his vendee who, without notice of the dangerous qualities of the explosive, is injured by its explosion. *Wellington v. Downer Kerosene Oil Co.*, 104 Mass. 64.

Where a Person Sells Cartridges of a Different Calibre from Those Asked for by the purchaser, and the latter, without noticing the difference, is injured by a premature explosion of one of the cartridges, in consequence of such difference, while using it without negligence, the seller is liable. *Smith v. Clarke Hardware Co.*, 100 Ga. 163, 3 Am. Neg. Rep. 12.

Sale of Gasoline as Puroline. — When a dealer in petroleum fluids filled an order for a barrel of "puroline" by delivering a barrel of "gasoline," branding it "puroline," it was held that he was not guilty of deception, as the difference in the dangerous character and in the use of the two fluids was hardly measurable or perceptible, the barrel being also branded "Explosive and Dangerous," as required by statute; and the dealer was not liable for a fire originating from such barrel by reason of persons entering the room in which it was placed with a lighted lamp for the purpose of drawing oil at night. *Socla v. Chess Carley Co.*, 39 La. Ann. 344.

Act Forbidding Sale Does Not Prevent Keeping for Illuminating. — The *Pennsylvania* Act of May 15, 1874, which forbids the vending within the state of petroleum and other inflammable fluids not refined to a specified standard does not prohibit the keeping of such a fluid in a restaurant for illuminating purposes and not for sale. *Donahue v. Kelly*, 181 Pa. St. 93.

3. **Sale to Child.** — *Binford v. Johnston*, 82 Ind. 426, 42 Am. Rep. 508.

Thus, one who sells gunpowder to a young child, knowing that he has no experience or knowledge of its use, is liable for injuries to him from its explosion. *Carter v. Towne*, 98 Mass. 567, 96 Am. Dec. 682.

But in *Poland v. Earhart*, 70 Iowa 285, it was held that the defendant, who, contrary to the provisions of the *Iowa* statute, sold a pistol to a boy fifteen years old, was not liable to the mother of the boy for loss of the boy's service caused by his accidentally shooting himself in the hand with the pistol, it not appearing that he was ignorant of the character of the weapon, or inexperienced in its use, and there being nothing to show that there was anything in his character or disposition to render it dangerous to place the pistol in his hands.

Injury Not Direct Consequence of Sale. — The seller will not be liable if the injury is not the direct or proximate, natural or probable, consequence of the sale, as where the gunpowder has been in the custody of the child's parents for some time before the accident. *Carter v. Towne*, 103 Mass. 507. The mere fact, however, that there was an intervening agency between the original wrong of selling an explosive article to a child and the injury does not exonerate the seller from liability where the injury was the natural or probable result of the sale. *Binford v. Johnston*, 82 Ind. 426, 42 Am. Rep. 508. In this case the seller of a toy pistol to a boy was held liable for his death caused by the discharge of the pistol in the hands of another boy who had picked it up from a place where the first boy had left it.

4. **Liability Where Damage Accompanied by Physical Invasion of Neighbor's Lands.** — *Scott v. Bay*, 3 Md. 431; *Hay v. Cohoes Co.*, 2 N. Y. 159, 51 Am. Dec. 279; *Tremain v. Cohoes Co.*, 2 N. Y. 163, 51 Am. Dec. 284; *Gourdier v. Cormack*, 2 E. D. Smith (N. Y.) 200; *St. Peter v. Denison*, 53 N. Y. 416, 17 Am. Rep. 258.

blasts in a thickly settled city acts at his peril.¹ But ordinarily, when for the purpose of lawfully making use of or improving land it becomes necessary to resort to blasting as the only practicable method of doing so, the owner will not be liable for consequential damages to neighboring property unless he has failed to exercise due care in the performance of the work.²

Where a canal company, in excavating a canal upon its own land, by a blast of gunpowder threw fragments of rock against a dwelling house near by, damaging it, it was held that the company was liable for the injury although no negligence or want of skill was alleged or proved. *Hay v. Cohoes Co.*, 2 N. Y. 150, 51 Am. Dec. 279.

Blasting Near Public Highway.—A person engaged in blasting upon his own land near a public highway who inflicts personal injuries upon another lawfully upon the highway by means of fragments of rock or other objects thrown from the blast is responsible to the person injured, although guilty of no negligence. *Wright v. Compton*, 53 Ind. 337; *Sullivan v. Dunham*, 10 N. Y. App. Div. 438, 3 N. Y. Ann. Cas. 324. See also *Mills v. Wilmington City R. Co.*, 1 Marv. (Del.) 269.

A person engaged in blasting a stone quarry who, by using an excessive charge of powder, causes a great quantity of stones to fall upon a public highway and upon houses adjacent to the quarry and highway is guilty of nuisance to the highway. *Reg. v. Mutters*, Leigh & C. C. C. 491.

1. Blasting in Thickly Settled City—Liability Held Absolute.—In *Colton v. Onderdonk*, 69 Cal. 155, 58 Am. Rep. 556, it was held that the liability for injuries inflicted upon a house in a large city by blasting in the adjoining lot in grading such lot was absolute, whether the damage was caused by rocks thrown against the house or by a concussion of the air around it, because the blasting out of rocks under the circumstances must be taken as an unreasonable, unusual, and unnatural use of property, and the owner is not, therefore, excused from liability by the exercise of any degree of care. See also *Munro v. Pacific Coast Dredging, etc.*, Co., 84 Cal. 515, 18 Am. St. Rep. 248, where it was held that no degree of care would excuse a person from responsibility for a death caused by exploding a blast in a thickly settled portion of a city.

2. Liability Generally Dependent on Negligence.—*Booth v. Rome, etc.*, R. Co., 140 N. Y. 267, 37 Am. St. Rep. 552; *Wiener v. Hammell (City Ct.)*, 14 N. Y. Supp. 365; *Newell v. Woolfolk*, 91 Hun (N. Y.) 211; *French v. Vix*, 143 N. Y. 90, affirming 30 Abb. N. Cas. (N. Y.) 158. See also *Brennan v. Gellick*, 30 Abb. N. Cas. (N. Y.) 166, note.

Blasting in Railroad Construction—Damnum Absque Injuria.—In *Booth v. Rome, etc.*, R. Co., 140 N. Y. 267, 37 Am. St. Rep. 552, a railway company, in making a lawful excavation upon its right of way, necessarily resorted to blasting as the only means of doing the work, and in consequence thereof a house on adjoining land was seriously injured but without a technical trespass. It appeared that the company exercised due care. It was held that the company was not liable. The court held that it could not be laid down as a general rule that the use by an owner of property of ex-

plosives in excavating his land is at his peril and imposes liability for any injury caused thereby to adjacent property, irrespective of negligence. To establish such a rule would be virtually to exclude the defendant from building on his lot or adapting it to building purposes, because the plaintiff had previously built on an adjoining lot. There "would not be a compromise between conflicting rights, but an extinguishment of the right of one for the benefit of the other."

The right to remove rock by blasting for a roadbed is one of the necessary incidents to the right of construction granted to a railroad by its legislative franchise, and the proper exercise of this right, therefore, does not give a cause of action to those who suffer consequential damage therefrom. Such damages as necessarily result from blasting should be and are presumed to be included in the allowance of compensation under the various eminent-domain acts. The company is liable for damage occasioned by carelessness or negligence in the execution of the work, as by failure to remove stones thrown upon neighboring land by blasting. *Whitehouse v. Androsoggin R. Co.*, 52 Me. 208; *Dodge v. Essex County*, 3 Met. (Mass.) 380; *Brown v. Providence, etc.*, R. Co., 5 Gray (Mass.) 35; *Blackwell v. Lynchburg, etc.*, R. Co., 111 N. Car. 151, 32 Am. St. Rep. 786; *Sabin v. Vermont Cent. R. Co.*, 25 Vt. 363; *Watts v. Norfolk, etc.*, R. Co., 39 W. Va. 196, 45 Am. St. Rep. 694. See also the titles *DAMNUM ABSQUE INJURIA*, vol. 8, p. 697; *EMINENT DOMAIN*, vol. 10, p. 1167; *RAILROADS*.

In the case last cited the court said that the prohibition of the owner of lands injured by blasting to recover damages is confined to one whose lands have been condemned by legal process to the public use, and the principle does not apply "to one whose buildings are injured by blasting and none of whose land has been condemned, for, in the latter case, there is no inquisition to protect the party doing the injury and he is liable for such injury." *Hay v. Cohoes Co.*, 2 N. Y. 150, 51 Am. Dec. 279; *St. Peter v. Denison*, 58 N. Y. 416, 17 Am. Rep. 258; *Carman v. Steubenville, etc.*, R. Co., 4 Ohio St. 399.

Blasting by Contractor Engaged in Public Work.—In *Benner v. Atlantic Dredging Co.*, 134 N. Y. 156, 30 Am. St. Rep. 649, damages were claimed for injury to the plaintiff's house, caused by vibrations resulting from blasting done by the defendant, who was engaged under a contract with the federal government in removing rock from a harbor. The house claimed to have been injured was situated three thousand feet from the scene of the work. It was held that the defendant, being engaged in a public work under authority of the government, was not liable in the absence of proof of negligence on his part.

Necessary Blasting for Municipal Works.—In *Murphy v. Lowell*, 128 Mass. 396, 35 Am. Rep. 381, it was held that a city is not liable for an

Liability for Negligence. — A person engaged in blasting is clearly liable for injuries caused by his negligence.¹

Actual Trespass Not Necessary. — In order for a liability for an injury caused by blasting to exist, it is not necessary that there should be an actual invasion of the premises injured. Except, perhaps, for the purpose of establishing an absolute liability independent of negligence,² it is immaterial whether the injury results from the direct attack of broken rock or from the concussion caused by the blasting.³

The Burden of Proving Personal Injuries alleged to have been caused by blasting is upon the person seeking a recovery therefor, and if contributory negligence be relied upon as a defense the burden of proving it rests upon the party pleading it.⁴

Contributory Negligence. — Where a person injured by a blast was guilty of contributory negligence this constitutes a bar to a recovery for the injury.⁵ And it is error to exclude evidence of such negligence.⁶

b. DUTY TO TAKE PRECAUTIONS TO PREVENT INJURY — (1) *Generally.* — The law will not permit a property owner to conduct upon his own premises blasting operations from which injury to neighboring property may be apprehended without the most cautious regard for his neighbor's rights. He must exercise a degree of care measured by the danger to adjoining property that may reasonably be anticipated from the character of the work. If it is practicable, although at increased cost, to do the work without blasting, or by the use of less powerful blasts, a failure to do so shows a want of due care and regard for the interest of adjoining property owners that renders him liable for any damages that may ensue.⁷

injury caused by the necessary blasting of rocks in constructing a sewer, unless its agents are chargeable with negligence. See also *White v. Medford*, 163 Mass. 164. A contrary rule is laid down in *Joliet v. Harwood*, 86 Ill. 110, 29 Am. Rep. 17.

The city is liable where its agents are guilty of negligence. *Murphy v. Lowell*, 124 Mass. 564.

Persons engaged in the construction of a sewer in a street under a contract with the municipal authorities are not liable for injuries to a building standing on the side of the street due to the concussion caused by blasting necessarily done in prosecuting the work, where they exercise reasonable care and skill in the use of the explosives. *Simon v. Henry*, (N. J. 1898) 41 Atl. Rep. 692.

1. Negligence Is Attended with Liability. — Louisville, etc., R. Co. *v. Bonhayo*, 94 Ky. 67; *Murphy v. Lowell*, 124 Mass. 564; *Beauchamp v. Saginaw Min. Co.*, 50 Mich. 163, 45 Am. Rep. 30.

A mutual agreement entered into between two mining companies operating mines on adjoining premises by which each, in blasting, may throw rocks upon the land of the other is no defense to an action against one company for negligently killing a person rightfully on a highway on the land of the other. *Beauchamp v. Saginaw Min. Co.*, 50 Mich. 163, 45 Am. Rep. 30.

Evidence Showing Negligence. — The killing of a person by a blast while he was in a house nearly one thousand feet distant from the place of the blast, by a rock thrown from the blast through the roof of the house, is *prima facie* evidence of negligence in the management of the blast, and the presumption of negligence is not rebutted by proof that the

workmen in charge of the blast were competent and usually careful men, and had received strict instructions to be careful. *Klepsch v. Donald*, 8 Wash. 162.

Previous Absence of Accidents Does Not Establish that Care Was Used. — The fact that blasting in getting out rocks from a stone quarry has been carried on for a long time in a certain manner without accidents resulting does not establish the absence of negligence when an accident does happen. *Simmons v. McConnell*, 86 Va. 494.

2. See *supra*, this section, *General Rules as to Liability for Explosions.*

3. *Morgan v. Bowes*, 17 N. Y. Supp. 22, 62 Hun (N. Y.) 623; *Hill v. Schneider*, 13 N. Y. App. Div. 299. See also *Colton v. Onderdonk*, 69 Cal. 155, 58 Am. Rep. 556; *Newell v. Woolfolk*, 91 Hun (N. Y.) 211.

4. *Gates v. Latta*, 117 N. Car. 189.

5. *Smith v. Day*, 86 Fed. Rep. 62; *Wadsworth v. Marshall*, 88 Me. 263; *Graetz v. McKenzie*, 9 Wash. 696.

6. *Sullivan v. Dunham*, 10 N. Y. App. Div. 438, 3 N. Y. Ann. Cas. 324.

For evidence upon which it was proper to submit the question of contributory negligence to the jury, see *Devlin v. Gallagher*, 6 Daly (N. Y.) 494; *Koster v. Noonan*, 8 Daly (N. Y.) 231.

7. High Degree of Care Required. — *Booth v. Rome, etc., R. Co.*, 140 N. Y. 267, 37 Am. St. Rep. 552; *Newell v. Woolfolk*, 91 Hun (N. Y.) 211; *Hill v. Schneider*, 13 N. Y. App. Div. 299. See also *Morgan v. Bowes*, (Supreme Ct.) 17 N. Y. Supp. 22.

Presumption as to Blast Being Covered. — In an action for damages to the plaintiff's premises by blasting, in the absence of proof on the subject the presumption is that the blast was

Expense of Taking Due Precautions No Defense. — When there has been negligence in taking proper precautions to render blasting safe, it is no defense that the profits of the business carried on would not justify the expense of such further precautions.¹

Extraordinary Precautions Not Required. — But a person engaged in blasting is not required to take extraordinary precautions to prevent injury when it does not appear that such is the proper, usual, or reasonable thing to do.²

Failure to Comply with City Ordinance. — In an action to recover damages for injuries caused by negligence in blasting within the limits of a city, the failure of the defendant to take the precautions against accidents prescribed by the city ordinances is *prima facie* evidence of negligence³ and should be submitted to the jury on the question of negligence.⁴

Blasting Without Proper Precautions Enjoined. — A person engaged in blasting may be restrained by injunction from prosecuting the work as contemplated, where it appears that adjoining premises will be injured thereby, and the work can be done in a safer though more costly manner.⁵

(2) **Duty to Give Warning of Contemplated Blast.** — Persons engaged in blasting are bound to give seasonable notice of a contemplated blast to those who may reasonably be expected to be within range of the explosion, in order to enable them to retire to a point of safety.⁶ And if, in the absence of such

not properly covered. *Ulrich v. McCabe*, 1 Hilt. (N. Y.) 251.

Recovery for Interruption of Business. — One whose business is interrupted by blasting operations carried on in the vicinity, by reason of his workmen leaving their places under a reasonable apprehension of danger, can recover damages for such interruption as well as for the injury to his premises by such blasting. *Hunter v. Farren*, 127 Mass. 481, 34 Am. Rep. 423.

1. *Beauchamp v. Saginaw Min. Co.*, 50 Mich. 163, 45 Am. Rep. 30.

2. **Extraordinary Precautions Not Required.** — *Muchell v. Prange*, 110 Mich. 78.

Government contractors engaged in making river improvements are required to use only ordinary care to prevent injury to third persons by blasting. *Smith v. Day*, 86 Fed. Rep. 62.

3. **Violating City Ordinance.** — *Devlin v. Gallagher*, 6 Daly (N. Y.) 494.

The disregard of an ordinance requiring persons engaged in blasting rock first to cover it with timber is an omission of duty sufficient to render the guilty party liable for damages resulting therefrom. *Brannock v. Elmore*, 114 Mo. 55.

4. *Koster v. Noonan*, 8 Daly (N. Y.) 231.

Expert Opinion as to Precautions for Blast. — Experts may be asked whether a blast covered as prescribed by ordinance could have thrown rocks a certain distance equal to that at which the injury was done. *Koster v. Noonan*, 8 Daly (N. Y.) 231.

5. **Injunction.** — *Hill v. Schneider*, 13 N. Y. App. Div. 299.

An injunction may be granted not against the blasting itself, but against carrying it on without proper safeguards. *Rafter v. Tagliabue*, 20 Abb. N. Cas. (N. Y. Super. Ct.) 1.

A railway company may be enjoined from blasting, in grading its roadway near private premises, so as to hurl fragments of rock upon the same. *Arnold v. Furness R. Co.*, 22 W. R. 613.

Blasting in Mines at Night — Disturbing Sleep.

— The grantee of a mine under a warranty deed cannot be restrained from carrying on mining operations in the usual manner by blasting in the night-time because the sleep of the surface owner is thereby disturbed and the value of his property impaired. *Marvin v. Brewster Iron Min. Co.*, 55 N. Y. 538, 14 Am. Rep. 322.

6. **Duty to Give Notice of Contemplated Blast.** — *Cameron v. Vandergriff*, 53 Ark. 381; *Beauchamp v. Saginaw Min. Co.*, 50 Mich. 163, 45 Am. Rep. 30; *Driscoll v. Newark, etc., Lime, etc., Co.*, 37 N. Y. 637, 97 Am. Dec. 761; *Gates v. Latta*, 117 N. Car. 189.

Notice to all persons within a reasonable distance is sufficient. *Mitchell v. Prange*, 110 Mich. 78.

Statute Requiring Notice. — Where a statute requires seasonable notice of a blast, failure to give such notice is negligence which subjects the delinquent to the payment of damages caused thereby, whether such damage is produced by flying rocks and debris or by noise in frightening horses or otherwise. *Wadsworth v. Marshall*, 88 Me. 263.

Notice to Employee. — The owner of a quarry is liable to an employee for an injury sustained by him through the negligence of the foreman in charge of a blast to give notice thereof as it was his duty to do, the giving of warning being embraced in the duty the employer owed to his employees to provide a safe place in which to work, and such failure not being one of those obvious risks of his employment which the employee is held to assume. *Mooney v. Belleville Stone Co.*, (N. J. 1898) 4 Am. Neg. Rep. 195.

The *Maine* statute, Rev. Stat. 1883, c. 17, §§ 23, 24, providing a remedy against persons engaged in blasting rock for damages caused by blasting where no notice was given, does not apply to workmen in a quarry. *Harc v. McIntire*, 82 Me. 240. See *supra*, this title, *Liability of Master to Servant*.

notice, any one is injured by the blast, the question of negligence is for the jury.¹

c. BLASTING DONE BY INDEPENDENT CONTRACTOR. — The owner of premises upon which work requiring blasting is being performed is not liable for injuries to another caused by the negligence of those employed in the work, where the work has been let to an independent contractor who has entire control over the manner of its performance, unless such injuries would necessarily result from the character of the work authorized to be done.² Thus a city is not liable for damages caused by blasting done in a street by an independent contractor;³ nor a railroad company, where the blasting is done in the construction of its road by an independent contractor.⁴

Where the Principal Knows of or Authorizes use of Negligent Methods. — But if the contract between the principal and the contractor specifies that the blasting shall be done in a way in itself negligent, or if the principal contracts with the knowledge that the work will be done in a negligent manner, he will be liable for damages caused by the negligence of the contractor in blasting, even though he retains no control over the work.⁵

d. ACTION BY TENANT OF DAMAGED PREMISES. — The occupant of premises damaged by blasting may maintain an action for the injury to the possession although he holds the premises as tenant merely and not as owner.⁶

2. Boiler Explosions — Liability of Person Using Boiler. — A person who uses a steam boiler on his premises in such a manner as not to constitute a nuisance is not liable for damages caused by its explosion where there has been no fault or negligence on his part.⁷ But he will be liable for damages caused by his

1. Whether Notice Given Is Question for Jury. — *Driscoll v. Newark, etc., Lime, etc., Co.*, 37 N. Y. 637, 97 Am. Dec. 761.

Whether notice was given, or if given was sufficient, are questions for the jury. *Beauchamp v. Saginaw Min. Co.*, 50 Mich. 163, 45 Am. Rep. 30.

Where the evidence as to whether notice of a blast was given is conflicting, the question of negligence is for the jury. *Harris v. Simon*, 32 S. Car. 593, 10 S. E. Rep. 1076.

2. Rule as to Independent Contractor. — *Berg v. Parsons*, 156 N. Y. 109, 4 Am. Neg. Rep. 432; *Roemer v. Striker*, 142 N. Y. 134; *French v. Vix*, 143 N. Y. 90, *affirming* 30 Abb. N. Cas. (N. Y.) 158. See also *Brennan v. Gellick*, 30 Abb. N. Cas. (N. Y.) 166, note; *Hill v. Schneider*, 13 N. Y. App. Div. 299; and the title *INDEPENDENT CONTRACTOR*.

The owner of property who employs a competent contractor to do the work of blasting, and does not direct it himself, is not liable to a person injured by the negligence of the contractor. *Wiener v. Hammell*, (City Ct.) 14 N. Y. Supp. 365.

3. Rule Applied Where City Employs Independent Contractor. — *Pack v. New York*, 8 N. Y. 222; *Kelly v. New York*, 11 N. Y. 432; *Herrington v. Lansingburgh*, 110 N. Y. 145, 6 Am. St. Rep. 348.

The fact that the work is to be done under the direction and to the satisfaction of officers of the corporation does not change the rule. *Pack v. New York*, 8 N. Y. 222; *Kelly v. New York*, 11 N. Y. 432.

4. Rule Applied Where Railroad the Employer. — *McCafferty v. Spuyten Duyvil, etc., R. Co.*, 61 N. Y. 178, 19 Am. Rep. 267; *Edmundson v. Pittsburgh, etc., R. Co.*, 111 Pa. St. 316.

5. When Proprietor Liable for Independent Contractor. — *Joliet v. Harwood*, 86 Ill. 110, 29 Am. Rep. 17; *Brannock v. Elmore*, 114 Mo.

55; *Buddin v. Fortunato*, 16 Daly (N. Y.) 195; *Carman v. Steubenville, etc., R. Co.*, 4 Ohio St. 399.

Where a city employs an independent contractor to construct a sewer, in which work it becomes necessary to employ blasting, this work being intrinsically dangerous, the city is liable for all damage resulting therefrom, however carefully or skillfully done. *Joliet v. Harwood*, 86 Ill. 110, 29 Am. Rep. 17.

Notice from Proprietor as Affecting Proof of Blaster's Status. — A written notice, sent by a lot owner to an adjacent lot owner, of his intention to blast upon his premises is *prima facie* evidence, in an action against the sender for damages caused by such blasting, that he was himself the actor in the work so as to fix upon him the liability for damages caused by his agents in executing it, unless the contract between the agents and the owner was such as to relieve the latter from responsibility. But the mere fact that the owner, before the work commences, sends such notice in his own name will not fix the responsibility upon him where by the contract between him and the persons who are actually to perform the work the owner is to have no control or authority over the manner in which it is to be performed. *Gourdier v. Cormack*, 2 E. D. Smith (N. Y.) 254.

6. Action by Tenant. — *Gourdier v. Cormack*, 2 E. D. Smith (N. Y.) 200; *Hardrop v. Gallagher*, 2 E. D. Smith (N. Y.) 523; *Ulrich v. McCabe*, 1 Hilt. (N. Y.) 251; *Buddin v. Fortunato*, 16 Daly (N. Y.) 195.

A tenant may by injunction prevent the injury of his premises by contemplated blasting operations. *Hill v. Schneider*, 13 N. Y. App. Div. 299.

7. Liability for Damage from Boiler Explosion Depends on Negligence. — *John Morris Co. v. Southworth*, 154 Ill. 118; *Marshall v. Welwood*,

negligence in the management of the boiler, or in using it when in a defective condition.¹

Person Erecting Boiler. — A person employed to erect a steam boiler on the premises of another, and who has entire management of the same, is liable to the owner of adjoining property injured by an explosion of the boiler, while under his control, caused by the mismanagement of his servants and the insufficiency of the materials of which the boiler was composed.²

Liability of Manufacturer. — Where a steam boiler has been delivered by the manufacturer and vendor to a purchaser, and has been accepted by the latter, it has been held that the manufacturer is not liable to a third person for injuries received by him through the explosion of the boiler, in consequence of defects in its construction, while in use by the purchaser.³

38 N. J. L. 339, 20 Am. Rep. 394; *Losee v. Buchanan*, 51 N. Y. 476, 10 Am. Rep. 623; *Spencer v. Campbell*, 9 W. & S. (Pa.) 32; *Young v. Bransford*, 12 Lea (Tenn.) 232.

In an action against the owners of a steam boiler for damages to neighboring property by the explosion of the boiler, the jury was charged that the defendants were liable for the omission of such care as men of ordinary prudence engaged in the use of such a steam boiler in such business would exercise, and that they were liable for any imperfections in the boiler which contributed to the explosion which were known to them; but that if the explosion was caused by imperfections in the boiler which were imperceptible to the defendants or undiscoverable on examination or by the application of known tests, they were not liable. This charge was held to be correct. *Losee v. Buchanan*, 51 N. Y. 476, 10 Am. Rep. 623.

But see, for the view that liability is independent of negligence, *supra*, this title, p.500, note 2.

English Boiler Explosions Act. — Where an engine in a mine was worked by steam from a boiler at the surface more than thirteen hundred feet distant and a stop valve in the pipe near the engine blew out, it was held that this was a "boiler explosion" within the English Boiler Explosions Act of 1882, section 3 of which declares that "the term 'boiler' means any closed vessel used for generating steam, or for heating water, or for heating other liquids, or into which steam is admitted for heating, steaming, boiling, or other similar purposes." *Reg. v. Commissioners under Boiler Explosions Act*, [1891] 1 Q. B. 703, 64 L. T. N. S. 674.

As to what is a boiler used exclusively for domestic purposes under this act, see *Smith v. Müller*, [1894] 1 Q. B. 192, 70 L. T. N. S. 170.

1. *Losee v. Buchanan*, 51 N. Y. 476, 10 Am. Rep. 623; *Spencer v. Campbell*, 9 W. & S. (Pa.) 32.

Explosion of Unattended Boiler Injuring Licensee of Defendant. — In an action against a railroad company for injuries to the plaintiff caused by the explosion of a steam boiler of the defendants, used for working a pile driver, it appeared that the plaintiff, as licensee, was passing over the defendant's right of way at the time of the injury, and that the boiler had been left under steam unattended for more than half an hour before the explosion occurred. It was held that so leaving the boiler unattended in the condition shown by the evi-

dence was culpable negligence on the part of the defendant's servants, and it was for the jury, and not the court, to say whether such negligence was the cause of the explosion, and whether leaving the boiler unattended near where they knew people were passing was a want of ordinary care towards them; and that the court could not say as a matter of law that the explosion was due to unforeseen causes and would have happened had the man in charge remained in attendance. *Davis v. Chicago, etc., R. Co.*, 58 Wis. 646, 46 Am. Rep. 667, 15 Am. & Eng. R. Cas. 424.

Evidence that Boiler Purchased from Reputable Manufacturers. — In an action for damages caused by the explosion of a boiler the fact that the defendant bought the boiler of reputable manufacturers is a fact to be considered as tending to a justification, though not in itself conclusive. *Losee v. Buchanan*, 51 N. Y. 476, 10 Am. Rep. 623.

Where the circumstances are such that the owner is properly chargeable with knowledge of defects which caused the explosion he cannot screen himself behind the assurances of his vendor that the boiler was sufficient. *Spencer v. Campbell*, 9 W. & S. (Pa.) 32.

2. *Witte v. Hague*, 2 D. & R. 33, 16 E. C. L. 67.

3. **To Whom Manufacturer Liable.** — *Losee v. Clute*, 51 N. Y. 494, 10 Am. Rep. 638. In this case the court declared that when the boiler was accepted, the manufacturer's control over it ceased, and all responsibility for what was subsequently done with it devolved upon the purchaser. The manufacturer owed to the third person injured by its explosion "no duty whatever at the time of the explosion, either growing out of contract, or imposed by law."

It has been doubted whether this decision is reconcilable with the principle of *Thomas v. Winchester*, 6 N. Y. 397, 57 Am. Dec. 455. See 1 *Thompson on Negligence* (ed. 1880) 233; *Bigelow's Lead. Cas. on Torts* (ed. 1875) 618.

In *Thomas v. Winchester*, 6 N. Y. 397, 57 Am. Dec. 455, it was held that a manufacturer of drugs who carelessly labels a deadly poison as a harmless medicine and sends it so labeled into the market is liable in damages to all persons who are injured in using it in consequence of the false label, and this without regard to the number of intermediate sales through which the drug may have passed. The court expressly rested its decision on the ground that the drug was imminently dangerous to human life, and the later decision is

The Certificate of a Government Boiler Inspector will not exonerate the owner of a steamboat from liability for damages caused by the explosion of the boiler.¹ Such certificate is evidence of the fact of inspection, but not of the inspector's opinion as to the safety of the boiler.²

3. Explosion of Illuminating or Other Gas. — Gas companies or other persons using or controlling gas are liable for injuries caused by the explosion of escaping gas resulting from their negligence.³ But a gas company can be held liable for such injuries only when chargeable with the want of ordinary care and skill,⁴ that is, with the want of such skill and diligence as is proportioned to the delicacy, difficulty, and nature of the business.⁵

distinguished upon the ground that a steam boiler is not within the principle laid down.

In the English case of *Parry v. Smith*, 4 C. P. Div. 325, in which a defective gas fixture was put in so that the gas escaped and an explosion occurred, Lopes, J., said: "I think the plaintiff's right of action is founded on a duty which I believe attaches in every case where a person is using or is dealing with a highly dangerous thing which, unless managed with the greatest care, is calculated to cause injury to bystanders. To support such a right of action there need be no privity between the party injured and him by whose breach of duty the injury is caused, nor any fraud, misrepresentation, or concealment; nor need what is done by the defendant amount to a public nuisance. It is a misfeasance independent of contract." See also *Heaven v. Pender*, 11 Q. B. Div. 503.

1. *Erickson v. Smith*, 2 Abb. App. Dec. (N. Y.) 64; *Swarthout v. New Jersey Steamboat Co.*, 48 N. Y. 209, 8 Am. Rep. 541, *affirming* 46 Barb. (N. Y.) 222.

2. *Erickson v. Smith*, 2 Abb. App. Dec. (N. Y.) 64.

3. See cases cited in notes immediately following.

Liability of Gas Company to Meter Inspector. — A gas company is liable to a municipal inspector of meters for injuries received from an explosion of gas while inspecting a meter on the premises of the company, if such explosion is due to the company's negligence. *Washington Gas Light Co. v. Eckloff*, 4 App. Cas. (D. C.) 174.

Liability of Owner for Negligence of Gasfitter. — The owner of premises is liable to one of his employees thereon for injuries caused by the explosion of gas through the negligence of a gasfitter employed by him to repair a gas meter on the premises. *Parry v. Smith*, 3 C. P. Div. 325 41 L. T. N. S. 93.

Liability of Gasfitter where Work Is Done by Subcontractor. — A person employed to prepare and fit gasfittings in a house, and who lets a part of the work to a subcontractor, is not liable to a third person for injuries by an explosion of gas while the work was being done by such subcontractor. *Rapson v. Cubitt*, 9 M. & W. 710.

A Landlord Is Liable to His Tenant for injuries to the latter caused by an explosion of gas negligently permitted by the landlord to escape into the leased premises. *Kimmell v. Burfeind*, 2 Daly (N. Y.) 155.

Permitting Gas to Escape Near Burning Light. — In an action against a gas company for negligently permitting the escape of gas from its

main into premises where lights were known to be burning, the gas having found entrance through an open window nearly level with the trench from the main after a hole had been made by the defendant's workmen for the insertion of a service pipe, it was held that it was a question for the jury whether the defendant's men might reasonably have foreseen the entrance of the gas, and were bound to have the window closed. *Blenkiron v. Great Cent. Gas Consumers Co.*, 2 F. & F. 437.

Testing Natural-gas Pipes — Indiana Statute. — Under the *Indiana* statute (Burns's Rev. Stat. 1894, § 7507), providing that gas companies shall conduct natural gas only through sound wrought or cast iron pipes and casings, tested to a pressure of at least four hundred pounds to the square inch, and that such companies shall not convey natural gas through such pipes and casings at a pressure exceeding three hundred pounds per square inch, the failure of a gas company to test its pipes to a pressure of at least three hundred pounds is a violation of the statute, and is negligence on the part of the company rendering it answerable in damages for all resulting injuries. *Alexandria Min., etc., Co. v. Irish*, 16 Ind. App. 534.

Transporting Natural Gas — Ohio Statute. — Under the provisions of Rev. Stat. Ohio, § 3561a, persons engaged in transporting natural gas for fuel through pipes are bound absolutely to keep it under control, and are liable for damages caused by its explosion, whether guilty of negligence or not. *Gas Fuel Co. v. Andrews*, 50 Ohio St. 695.

Gas Pipe in Bed of River — Destruction of Steamboat. — Where a corporation having authority to lay a pipe for natural gas across the bed of a river did it in so negligent a manner as to obstruct navigation, so that a steamboat struck against and hung on the pipe, breaking it, whereupon gas escaped, filled the boat, exploded and destroyed the boat, it was held that the corporation was liable. *Omslaer v. Philadelphia Co.*, 31 Fed. Rep. 354.

4. Gas Company Liable for Explosion Only in Absence of Due Care. — *Hampton v. Cradley Heath Gas Co.*, 14 Gas J. 606; *Washington Gas Light Co. v. Eckloff*, 4 App. Cas. (D. C.) 174; *McGahan v. Indianapolis Natural Gas Co.*, 140 Ind. 335; *Hutchinson v. Boston Gas Light Co.*, 122 Mass. 219; *Schmeer v. Syracuse Gas Light Co.*, 147 N. Y. 529. See generally the title GAS COMPANIES.

5. Standard of Skill. — *Chisholm v. Atlantic Gas Light Co.*, 57 Ga. 28; *Koelsch v. Philadelphia Co.*, 152 Pa. St. 355, 34 Am. St. Rep. 653.

Duty to Inspect and Repair Pipes and Mains. — It is the duty of a gas company to use due and reasonable care, commensurate with the danger of explosion, in the inspection of its pipes and mains, and to repair defects and leaks therein, whether caused by its own fault or not. And when it has notice of a break in its pipes from which gas may escape and accumulate and injure persons or property, it must, as soon as practicable, by the use of due care and diligence, guard against such injurious consequences, either by cutting off the flow of gas or by repairing the break. If it fails to exercise this care and diligence, and injury results from such negligence, the company will be liable therefor in the absence of contributory negligence on the part of the person injured.¹ Whether the company has been guilty of negligence in failing to inspect and keep its pipes in repair is a question for the jury.²

Negligence of Company's Employee — Where a gas company sends a workman to repair a leak in a house, and the workman negligently strikes a match and causes an explosion, the company is liable.³

Negligence in Turning On or Shutting Off Gas. — A gas company is liable for the negligence of its servants in making connections between its mains and the pipes of a house for the purpose of supplying the house with gas,⁴ or in shutting off such supply,⁵ whereby an explosion occurs.

Evidence of Precautions Taken. — In an action against a gas company for injuries caused by an explosion of gas, evidence as to what precautions were taken and what means were employed by the defendant company to prevent injury is relevant and admissible.⁶

1. Gas Company Liable for Explosion When Negligent. — *Mose v. Hastings, etc., Gas Co.*, 4 F. & F. 324; *Tremain v. Halifax Gas Light Co.*, 11 Nova Scotia 394; *Pine Bluff Water, etc., Co. v. Schneider*, 62 Ark. 109 (*citing* 8 AM. AND ENG. ENCYC. OF LAW, 1st ed.), p. 1273; *Pine Bluff Water, etc., Co. v. McCain*, 62 Ark. 118; *Consumers' Gas Trust Co. v. Corbaley*, 14 Ind. App. 549; *Alexandria Min., etc., Co. v. Irish*, 16 Ind. App. 534; *Mississinewa Min. Co. v. Patton*, 129 Ind. 472, 28 Am. St. Rep. 203; *Lebanon Light, etc., Co. v. Leap*, 139 Ind. 443; *Consumers' Gas Trust Co. v. Perrego*, 144 Ind. 350; *Richmond Gas Co. v. Baker*, 146 Ind. 600; *Consolidated Gas Co. v. Crocker*, 82 Md. 113; *Brown v. New York Gas-light Co.*, Anth. N. P. (N. Y.) 351; *Koelsch v. Philadelphia Co.*, 152 Pa. St. 355, 34 Am. St. Rep. 653. See also *Lee v. Vacuum Oil Co.*, 54 Hun (N. Y.) 156, 126 N. Y. 670; *Henderson v. Allegheny Heating Co.*, 179 Pa. St. 513.

For evidence held insufficient to charge a gas company for negligence in causing an explosion, see *Schaum v. Equitable Gas Light Co.*, 15 N. Y. App. Div. 74, 2 Am. Neg. Rep. 204.

Where a gas company has been repeatedly notified of the escape of gas from the pipe furnishing gas to the premises of a customer, it is liable for damages resulting from an explosion due to its negligence in not making the necessary repairs. *Richmond Gas Co. v. Baker*, 146 Ind. 600, 1 Am. Neg. Rep. 25.

The destruction of a building by the explosion of natural gas which escaped from a leak in a high-pressure main eighty or ninety feet distant across a street, and reached the building by penetrating the soil under its frozen surface, was held to render the gas company liable, where it had made no effort to prevent the leak, although it had ample notice thereof. *Consumers' Gas Trust Co. v. Perrego*, 144 Ind. 350.

For Evidence Held Admissible on the question whether a defendant gas company knew, or might by the exercise of due care have known, of the existence of leaks causing an explosion, see *Lewis v. Boston Gas Light Co.*, 165 Mass. 411.

Negligence of Independent Contractor. — A gas company is not liable for injuries caused by an explosion due to the negligence of an independent contractor in laying its pipe unless it accepted the work when it knew or ought to have known that the work was so negligently done as to be unsafe and dangerous. *Chartiers Valley Gas Co. v. Lynch*, 118 Pa. St. 362.

Liability of Municipality. — A municipal corporation is liable for injuries caused by the explosion of gas escaping from its mains if the municipal authorities knew or ought to have known of the defective condition of the main; and such knowledge will be presumed when it might have been obtained by the exercise of proper and reasonable diligence. *Kibele v. Philadelphia*, 105 Pa. St. 41.

2. Pine Bluff Water, etc., Co. v. Schneider, 62 Ark. 109. See also *Koelsch v. Philadelphia Co.*, 152 Pa. St. 355, 34 Am. St. Rep. 653.

3. Lannen v. Albany Gas-light Co., 44 N. Y. 459, *affirming* 46 Barb. (N. Y.) 264.

4. Turning On Gas. — *Bastian v. Keystone Gas Co.*, 27 N. Y. App. Div. 584.

A gas company is not liable for an explosion caused by a workman's negligence in turning on gas into a house, where the workman had left the company's employment, and was merely permitted by it to do the work at the consumer's request. *Flint v. Gloucester Gas Light Co.*, 3 Allen (Mass.) 343, 9 Allen (Mass.) 552.

5. Shutting Off Supply. — *Louisville Gas Co. v. Gutenkuntz*, 82 Ky. 432; *Lanigan v. New York Gas-Light Co.*, 71 N. Y. 29.

6. Proving Precautions. — *Holly v. Boston Gas Light Co.*, 8 Gray (Mass.) 123, 69 Am.

Explosion Caused by Act of Third Person. — Where through the negligence of a gas company gas is allowed to escape and accumulate in a room or cellar, and an explosion occurs owing to the entrance of a third person with a light in search of the leak, the company is liable, and the person injured is not chargeable with the negligence of such third person in approaching the gas with a light.¹ But the company will not be liable, even though negligent, if the third person whose negligence was the immediate cause of the explosion was the servant or agent of the person injured.²

Contributory Negligence. — If a person seeking to recover damages for injuries caused by an explosion of gas was guilty of contributory negligence, this constitutes a bar to the action.³ The question of contributory negligence in a particular case is for the jury⁴ unless the facts are undisputed.⁵

Courts Take Judicial Notice that Natural Gas is a highly inflammable and explosive substance,⁶ and also that it will not explode spontaneously.⁷

Dec. 233; *Powers v. Boston Gas Light Co.*, 158 Mass. 257.

1. **When Act of Third Person Causes Leak.** — *Burrows v. March Gas, etc., Co.*, L. R. 5 Exch. 60, 26 L. T. N. S. 318; *Schermerhorn v. Metropolitan Gas Light Co.*, 5 Daly (N. Y.) 144. But see *McGahan v. Indianapolis Natural Gas Co.*, 140 Ind. 335.

A gas company which neglects to use due care in discovering and repairing a leak is jointly liable with one who negligently lights a match in endeavoring to locate the leak, for damages caused by the resulting explosion. *Pine Bluff Water, etc., Co. v. McCain*, 62 Ark. 118; *Koelsch v. Philadelphia Co.*, 152 Pa. St. 355, 34 Am. St. Rep. 653.

2. **Where Third Person Acts for Injured Person.** — *Pine Bluff Water, etc., Co. v. Schneider*, 62 Ark. 109; *Consolidated Gas Co. v. Crocker*, 82 Md. 113; *Lanigan v. New York Gas-Light Co.*, 71 N. Y. 29.

The owner of a house cannot recover damages from a gas company for injuries to his reversionary interest caused by an explosion of gas negligently permitted by the company to escape, if the negligence of the tenant was the immediate cause of the explosion. *Bartlett v. Boston Gas Light Co.*, 117 Mass. 533, 122 Mass. 209, 19 Am. Rep. 421.

The Company Is Not Liable for the Act of a Third Person over whom it has no control, and where an explosion occurs without the company's negligence, owing to the act of such a person, no recovery can be had as against the company. *Dodge v. Halifax Gas Co.*, 9 Nova Scotia 325. See also *Tremain v. Halifax Gas Co.*, 9 Nova Scotia 360; *Lee v. Vacuum Oil Co.*, 54 Hun (N. Y.) 156, 126 N. Y. 670.

3. **Contributory Negligence Bar to Recovery.** — *Taylor v. Baldwin*, 78 Cal. 517; *Brown v. New York Gas-light Co.*, Anth. N. P. (N. Y.) 351; *Kibele v. Philadelphia*, 105 Pa. St. 41; *Oil City Fuel Supply Co. v. Boundy*, 122 Pa. St. 449; *Strawbridge v. Philadelphia*, 13 Phila. (Pa.) 173, 36 Leg. Int. (Pa.) 276; *Dodge v. Halifax Gas Co.*, 9 Nova Scotia 325; *Tremain v. Halifax Gas Co.*, 9 Nova Scotia 360.

Going Near to Escaping Gas with a Light. — A person who knows that gas is escaping from the mains into his sewer or cellar, and that an explosion may reasonably be expected therefrom, and who, nevertheless, goes near it with a light, is guilty of contributory negligence, and cannot recover for injuries

sustained from an explosion. *Hampton v. Cradley Heath Gas Co.*, 14 Gas J. 606; *Consolidated Gas Co. v. Crocker*, 82 Md. 113; *Brown v. New York Gas-light Co.*, Anth. N. P. (N. Y.) 351; *Lanigan v. New York Gas-Light Co.*, 71 N. Y. 29; *Oil City Gas Co. v. Robinson*, 99 Pa. St. 1; *Mitchell v. Stewart*, 187 Pa. St. 217, 4 Am. Neg. Rep. 578.

But it is not contributory negligence *per se* to search for a gas leak with a light, if the quantity of gas escaping is small; or if there is nothing to cause a man of ordinary prudence to believe that there is danger of an explosion, it will not be negligence to approach the leak with a light. *Pine Bluff Water, etc., Co. v. Schneider*, 62 Ark. 109. See also *Washington Gas Light Co. v. Eckloff*, 7 App. Cas. (D. C.) 372; *Louisville Gas Co. v. Gutenkuntz*, 82 Ky. 432; *Bartlett v. Boston Gas Light Co.*, 122 Mass. 209.

4. **Existence of Contributory Negligence for Jury.** — *Washington Gas Light Co. v. Eckloff*, 7 App. Cas. (D. C.) 372; *Pine Bluff Water, etc., Co. v. Schneider*, 62 Ark. 109; *Schmeer v. Syracuse Gas Light Co.*, 147 N. Y. 529; *Kibele v. Philadelphia*, 105 Pa. St. 41; *Plonk v. Jessop*, 178 Pa. St. 71.

5. See the title CONTRIBUTORY NEGLIGENCE, vol. 7, p. 456.

Evidence Failing to Show Contributory Negligence. — Where a gas company is notified of a defective connection between the street main and a house pipe, and sends its agent to make repairs, and he, after professing to have done so, informs the family occupying the house that all is safe, and assures them that an odor of gas noticed is from a gas post on the street, a person who remains in the house and is injured by an explosion of gas from the defective connection is not guilty of contributory negligence. *Richmond Gas Co. v. Baker*, 146 Ind. 600.

For another case in which it was held that the evidence failed to show contributory negligence see *Lebanon Light, etc., Co. v. Leap*, 139 Ind. 443.

6. **Inflammability of Natural Gas Judicially Noticed.** — *Jamieson v. Indiana Natural Gas, etc., Co.*, 128 Ind. 555; *Mississinewa Min. Co. v. Patton*, 129 Ind. 472, 28 Am. St. Rep. 203; *Indiana Natural Gas, etc., Co. v. Jones*, 14 Ind. App. 55; *Alexandria Min., etc., Co. v. Irish*, 16 Ind. App. 534.

7. *McGahan v. Indianapolis Natural Gas Co.*, 140 Ind. 335.

4. Discharge of Fireworks. — A person who, by himself or an agent, inflicts injuries upon another by the negligent discharge of fireworks is liable for the injury so caused.¹

Setting Off Fireworks in Street. — The act of setting off firecrackers or other fireworks in a public street is illegal and constitutes a nuisance, and all persons directly or indirectly concerned in such act are liable for injuries resulting therefrom to the person or property of another.²

But the Discharge of Fireworks from a Public Building in the centre of a public square has been held to be not unlawful *per se*.³

A Municipal Corporation is not liable for the nonexercise of its discretionary powers in the regulation of the manufacture or use of fireworks, nor for the manner in which, in good faith, it exercises such powers. Thus it has been held that a city is not liable for negatively permitting the discharge of fireworks in the streets,⁴ nor for the failure to suppress a fireworks manufactory by the

1. Liability for Damage by Fireworks. — *Colvin v. Peabody*, 155 Mass. 104.

A minor may be held liable for injuries caused by the discharge of fireworks by him. *Conklin v. Thompson*, 29 Barb. (N. Y.) 218; *Bradley v. Andrews*, 51 Vt. 530.

Trespass and assault will lie for originally throwing a squib which, after being thrown about in self-defense by others, at last injures the plaintiff. *Scott v. Shepherd*, 2 W. Bl. 892, 3 Wils. 403, set out more fully under the title ASSAULT AND BATTERY, vol. 2, p. 954, note 1.

Permitting Use of Fireworks by Infant. — A schoolmaster who permits an infant pupil under his care to use fireworks is responsible in an action for the mischief which ensues. *King v. Ford*, 1 Stark. 421, 2 E. C. L. 163.

A father is liable under similar circumstances. *Mullins v. Blaise*, 37 La. Ann. 92.

Permitting Discharge of Fireworks on One's Premises. — A person who permits fireworks to be exhibited on his premises and is present as a spectator, but does not procure the fireworks nor, either by himself or his servants, explode them, is not liable for an injury to another spectator caused by a defect in the fireworks or by the manner in which they were handled. *Waixel v. Harrison*, 37 Ill. App. 323.

Accidental Discharge of Fireworks — When Not Proximate Cause of Injury. — Where a person was engaged in the manufacture and sale of fireworks in a house situated in a public street, and during his absence a fire occurred by negligence or accident among the fireworks, and set light to a rocket, causing it to fly across the street and set fire to a house, so that a person therein was burned to death, it was held that as the death was not caused alone by the illegal act of the person keeping the fireworks in so doing, but by the superadded act of some one else in setting them on fire, the illegal act of keeping the fireworks was too remotely the cause of the death to render him amenable to the charge of manslaughter. *Reg. v. Bennett*, 8 Cox C. C. 74, 4 Jur. N. S. 1088, 7 W. R. 40.

Evidence. — In an action to recover damages for injuries caused by a rocket fired by the defendant while a procession was passing, it was held that evidence that both the plaintiff and the defendant were members of a club which got up the procession and published notices calling upon citizens to illuminate their houses along the line of the procession, nothing being

said about fireworks, was immaterial and so incompetent. *Fisk v. Wait*, 104 Mass. 71.

2. Discharge in Street. — *Jenne v. Sutton*, 43 N. J. L. 257, 39 Am. Rep. 578; *Conklin v. Thompson*, 29 Barb. (N. Y.) 218.

3. Discharge Not Per Se Unlawful. — In *Dowell v. Guthrie*, 99 Mo. 653, 17 Am. St. Rep. 598, it appeared that fireworks were displayed from the second story of the veranda of a public building in the centre of a public square in a city. Those in charge of the exhibit so arranged the troughs that the rockets would pass over the assembled people. It was held that the display was not in itself unlawful, and that the case was distinguishable from those cases which hold a display of fireworks in the street to be wrongful in itself. The court said: "The discharge of fireworks at suitable places, when not prohibited by statute or municipal regulations, cannot be said to be unlawful, but the circumstances may be such as to make the act of discharging an explosive culpable negligence."

4. Municipality Not Liable. — *Hill v. Board of Aldermen*, 72 N. Car. 55, 21 Am. Rep. 451.

In *Morrison v. Lawrence*, 98 Mass. 219, it was held that the city was not liable to a person who was wounded by a rocket which was purchased by a committee of the city council and negligently fired under its direction in celebrating the Fourth of July, and this notwithstanding the fact that it appeared that the city paid for the fireworks purchased by the committee, it not appearing that any one had been empowered to purchase fireworks on behalf of the city.

In *Massachusetts* it has been held that when a city, in pursuance of the authority conferred by the Public Statutes, has undertaken the celebration of a holiday exclusively for the gratuitous amusement or instruction of the public, the city is not liable to an action by an individual who has sustained a personal injury through the negligence of the servants of the city in discharging fireworks in a public square, such discharge of fireworks forming a part of the celebration of the holiday. *Tindley v. Salem*, 137 Mass. 171, 50 Am. Rep. 289.

When Display Violates Ordinance. — Where the display of fireworks in a public place in a city is a violation of the city ordinance, the municipality is not liable to one who is injured by the explosion of one of the fireworks, although the town council and a majority of the

explosion of which a person is injured.¹ But the corporation is liable where it unlawfully permits a display of fireworks in an improper place, whereby a fire is caused.²

Contributory Negligence. — Being in a street in the midst of a crowd that is gathered to see a display of fireworks, in the place where the display shows that they are expected and invited to stand, is not contributory negligence which deprives a person injured by the negligent or wrongful discharge of one of the fireworks of his right to recover.³

5. Discharge of Firearms. — As firearms are extraordinarily dangerous, a person who handles such a weapon is bound to use extraordinary care to prevent injury to others, and is held to a strict accountability for a want of such care.⁴

citizens and officers of the town aided and assisted in maintaining the exhibition. *Ball v. Woodbine*, 61 Iowa 83, 47 Am. Rep. 805.

1. Liability of City for Injuries Caused by Explosion of Fireworks Manufactory. — The authority given to a city by its charter to prohibit or remove any nuisance, as to prohibit the manufacture or sale of fireworks, is discretionary, and hence an action cannot be maintained against it for injuries caused by the explosion of a fireworks manufactory which has been established in it for some time. *McDade v. Chester*, 117 Pa. St. 414, 2 Am. St. Rep. 681, 20 Am. & Eng. Corp. Cas. 440.

2. *Spier v. Brooklyn*, (Brooklyn City Ct.) 18 N. Y. Supp. 170.

City Failing to Take Proper Precautions as to Fireworks. — A municipal corporation which permits the use of a public place for purposes of amusement must take the necessary measures to protect the public against the dangers which result from such use. *Forget v. Cité de Montreal*, *Montreal L. R.* 4 Super. Ct. 77. In this case the defendant permitted a display of fireworks at a public place, and some of the fireworks used were of a dangerous character. A fragment of one of these fell upon a person who was in the crowd which had gathered to witness the display, and inflicted wounds from which she died. It was held that the city was liable to her husband for the damages resulting from her death.

3. Contributory Negligence. — *Forget v. Cité de Montreal*, *Montreal L. R.* 4 Super. Ct. 77; *Colvin v. Peabody*, 155 Mass. 104; *Dowell v. Guthrie*, 99 Mo. 653, 17 Am. St. Rep. 598; *Bradley v. Andrews*, 51 Vt. 530.

In *Scanlon v. Wedger*, 156 Mass. 462, it was held by a divided court that persons voluntarily present at an exhibition of fireworks upon a public highway in a city must be held to assent to it, and suffer no legal wrong if accidentally injured without negligence on the part of any one, although the show was unauthorized.

Where, in an action for injuries to the plaintiff's minor son, caused by a rocket fired by the defendant from his house, it appeared that the plaintiff and his son were in the vestibule of their house, opposite the defendant's house, preparing to set off fireworks while a procession was passing, and many other persons were also discharging fireworks, it was held that the question of contributory negligence was for the jury. *Fisk v. Wait*, 104 Mass. 71.

4. Care Required in Using Firearms. — *Bahel v. Manning*, 112 Mich. 24, citing 7 AM. AND

ENG. ENCYC. OF LAW (1st ed.) 523; *Moebus v. Becker*, 46 N. J. L. 41; *Hankins v. Watkins*, 77 Hun (N. Y.) 360.

Care Required Varies with Circumstances of Case. — One using firearms must exercise the ordinary and reasonable attention to matters which would govern ordinary men in deciding whether it is safe to fire a weapon of a particular kind at a particular time and place. *Whitten v. Hartin*, 163 Mass. 39. This was a case in which the person injured and the person who did the shooting were both members of a hunting party, and the plaintiff's exposure was, therefore, partly voluntary.

Where the defendant, by shooting off a gun upon a highway, caused injury from fright to a person in delicate health who happened to be in the yard of her residence near the highway, but of whose presence he knew nothing, the defendant's liability for the injury caused does not depend upon the lawfulness or unlawfulness of his object in shooting, but his liability, if any, must be grounded upon negligence in shooting in such proximity to a residence as might naturally and reasonably be anticipated to be liable to injure the inmates by fright or otherwise. *Renner v. Canfield*, 36 Minn. 90, 1 Am. St. Rep. 654.

In the English Law, "sometimes the term 'consummate care' is used to describe the amount of caution required, but it is doubtful whether even this be strong enough. At least, we do not know of any English case of this kind (not falling under some recognized head of exception) where unsuccessful diligence on the defendant's part was held to exonerate him." *Pollock on Torts* (1st ed.) 407.

Negligence Creates Liability. — The rule that one is liable for wounds inflicted by the negligent firing of a pistol or gun is illustrated in *Dalton v. Favour*, 3 N. H. 465; *Blin v. Campbell*, 14 Johns. (N. Y.) 432; *Taylor v. Rainbow*, 2 Hen. & M. (Va.) 423.

One who is grossly negligent in handling a loaded gun is liable for damages occasioned by its discharge. *Chataigne v. Bergeron*, 10 La. Ann. 699; *Chiles v. Drake*, 2 Metc. (Ky.) 146 74 Am. Dec. 406.

Negligence a Question for Jury. — It is generally a question of fact for the jury to determine whether, under the circumstances of the particular case, a reasonable and proper degree of care was exercised. *McCleary v. Frantz*, 160 Pa. St. 535; *Moebus v. Becker*, 46 N. J. L. 41.

Improper Firing of Cannon on Ship — Injury on Neighboring Vessel from Concussion. — Where a

Burden of Proof — What Defendant Must Show. — When an injury occurs from the discharge of a gun or other firearm, he by whom it was discharged, in order to excuse himself from liability for the injury, must show that the discharge was absolutely without his fault, and that it happened by inevitable accident.¹

cannon is fired on a steamship as a signal of its departure to sea while a tugboat is lying along the side and near the muzzle of the cannon, and from the concussion of the shot injury results to one on board the tug, the steamship is chargeable with negligence and is liable for the injury. *The Barracouta*, 39 Fed. Rep. 428.

Pointing Gun — Negligence Per Se. — Under the statutes of *Michigan* (How. Annot. Stat., 1882, §§ 9110-9113) one who snaps a gun while pointed towards another is guilty of negligence *per se*, although he believes that the gun is not loaded, and if injury results he is liable in damages. The result would be the same under the rules of the common law. *Bahel v. Manning*, 112 Mich. 24.

1. Defendant Must Have Been Absolutely Without Fault — Inevitable Accident. — *Weaver v. Ward*, Hob. 134; *Underwood v. Hewson*, 1 Stra. 596; *Atchison v. Dullan*, 16 Ill. App. 42; *Cole v. Fisher*, 11 Mass. 137; *Bahel v. Manning*, 112 Mich. 24; *Morgan v. Cox*, 22 Mo. 373, 66 Am. Dec. 623; *Tally v. Ayres*, 3 Sneed (Tenn.) 677.

The earliest case in which this rule was announced was that of *Weaver v. Ward*, Hob. 134, decided in 1607. The plaintiff and the defendant, "being trained soldiers," were skirmishing with their company and under their captain with their muskets charged with powder "for their exercise *in re militari* against another captain and his band," and while so engaged the defendant accidentally and involuntarily, in discharging his piece, hurt and wounded the plaintiff, and it was held that the defendant was liable for a trespass. The court laid down the rule that "no man shall be excused of a trespass * * * except it may be judged utterly without his fault; as, if a man by force take my hand and strike you, or if the defendant had said that the plaintiff ran across his piece when it was discharging, or had set forth the case with the circumstances so as it had appeared to the court that it had been inevitable, and that the defendant had committed no negligence to give occasion to the hurt."

In *Stanley v. Powell*, (1891) 1 Q. B. 86, Denman, J., referring to *Weaver v. Ward*, Hob. 134, said: "I can find nothing in the report to show that the court held that, in order to constitute a defense in the case of a trespass, it is necessary to show that the act was inevitable. If inevitable, it would seem that there was a defense under the general issue, but a distinction is drawn between an act which is inevitable and an act which is excusable, and what *Weaver v. Ward* really lays down is, that 'no man shall be excused of a trespass, except it may be judged utterly without his fault.'"

The rule as laid down in the American cases quoted at the beginning of this note is, however, that the injury must be proved to have been without the defendant's fault and inevitable.

One Handling a Gun Acts at His Peril. — In

Dixon v. Bell, 5 M. & S. 198, 17 Rev. Rep. 308, it appeared that the defendant, being possessed of a loaded gun, sent a young girl to fetch it, with directions to take the priming out, which was accordingly done, and a damage accrued to the plaintiff's son in consequence of the girl's presenting the gun at him and drawing the trigger, when the gun went off. It was held that the defendant was liable to damages for the injury, Lord Ellenborough saying: "It was incumbent on him [the defendant] who, by charging the gun, had made it capable of doing mischief, to render it safe and innoxious. This might have been done by the discharge or drawing of the contents; and though it was the defendant's intention to prevent all mischief, and he expected that this would be effectuated by taking out the priming, the event has unfortunately proved that the order to Leman was not sufficient; consequently as, by this want of care, the instrument was left in a state capable of doing mischief, the law will hold the defendant responsible."

This is an illustration, as Sir Frederick Pollock points out (17 Rev. Rep., Preface, p. vi.), of the rule long afterwards generalized in *Fletcher v. Rylands*, L. R. 1 Exch. 286. See *supra*, this title, p. 500, note 2. It would appear in view of this case and the principle it illustrates that in *England* it is required that the accident be inevitable unless some peculiar element is present.

Defense that Discharge Accidental and Involuntary Insufficient. — The fact that the discharge of a gun was accidental and without the concurrence of the will of the party in whose hands the weapon was does not relieve him from liability for damages occasioned by the discharge. To establish a defense, the defendant must show that the injury was unavoidable or the result of some superior agency without the imputation of any degree of fault to the defendant. *Tally v. Ayers*, 3 Sneed (Tenn.) 677.

In *Wright v. Clark*, 50 Vt. 130, 28 Am. Rep. 496, the defendant, while hunting, shot at a fox, as he supposed, and killed the plaintiff's dog. It was held that, the act being voluntary and not unavoidable, the defendant was liable.

Where the plaintiff was injured by the discharge of a revolver in the hands of the defendant while the two were reclining partially facing each other in the bottom of a moving wagon, and while the defendant was preparing to return the weapon to his pocket, it was held that, although the shooting was accidental, the defendant was liable because the accident was in no sense unavoidable, and "the test of liability is not whether the injury was accidentally inflicted, but whether the defendant was free from blame." *Judd v. Ballard*, 66 Vt. 668.

Nonliability for Purely Accidental Injury Declared. — In *Sutton v. Bonnett*, 114 Ind. 243, it appeared that two boys, one of whom was in

Respondent Superior. — Where one who is legally under the control and direction of another by an accidental shot injures a third person, the responsibility of the superior is determined by the usual principles of law applicable to the relation between the parties.¹

Assumption of Risk. — By his own actions one may assume the natural risks incident to the use of firearms by others, that is, the risk of accidents not produced or accompanied by negligence.²

Firing Cannon — Liability of Municipal Corporation. — A municipal corporation is not liable for injuries to an individual caused by the firing of a cannon in a public street by a crowd of citizens, although such firing amounts to a nuisance.³

EXPORT — EXPORTATION. (See also the titles *REVENUE LAWS*; *TAXATION*.) — To export an article of commerce is to carry such article out of a country or place.⁴

possession of a loaded pistol, were hunting. While the boy who held the pistol was playing with it, it went off accidentally and wounded his companion. The Supreme Court refused to disturb a verdict in favor of the defendant, declaring that the injury was purely accidental, and that for such accidental injury no recovery could be had.

1. **Where a Servant, Carrying Out His Master's Orders** to frighten away a thief from a sugar-cane patch, shot and accidentally killed one of the thieves, it was held that the master was liable, the shooting having been done while the servant was in the execution of his master's commands. *Priester v. Augley*, 5 Rich. L. (S. Car.) 44.

Husband Directing Firing by Wife. — Where a husband directed a wife to fire at a particular object, and the wife, instead, fired at a different object, and in so doing caused injury to a third person, it was held that the facts rebutted the presumption that the wife's act was committed by the consent and under the influence of the husband. *Bethel v. Otis*, 92 Iowa 502.

Common Carrier. — It has been held that a common carrier is not liable for the injury to a passenger occasioned by the accidental discharge of a gun in the hands of a servant of the carrier. *McClenaghan v. Brock*, 5 Rich. L. (S. Car.) 17.

The Owner of a Pleasure Yacht, by merely permitting the master to have possession and custody of a gun and ammunition, with other equipments, does not become responsible for their careless use and is not liable for injuries received in consequence of the discharge of the gun by the master without his orders, and when the discharge was not necessary for the purposes of navigation or by the customs governing vessels at the place of discharge. *Haack v. Fearing*, 5 Robt. (N. Y.) 528.

Officers Commanding the Militia on occasions of military musters are legally responsible for all damage sustained by citizens in consequence of their neglect in restraining the firing of guns by the militiamen in and near public highways; but such officers cannot be held liable where the firing takes place after the militia have been dismissed and are no longer under their command. *Moody v. Ward*, 13 Mass. 299.

2. **Assumption of Risk.** — This principle is announced by Mr. Justice Blackburn in *Fletcher v. Rylands*, L. R. 1 Exch. 286. He modifies the principle of that decision that one

who controls dangerous substances acts at his peril by declaring that persons who subjected themselves to the inevitable risks which accompany modern travel and traffic by going upon highways and streets or near wharves and warehouses may well be held to take on themselves all the risks of their own acts.

Hunting Parties. — This seems the proper ground upon which to place those cases in which one member of a hunting party was accidentally wounded by another. These cases are usually submitted to the jury on the ground of negligence. *Stanley v. Powell*, (1891) 1 Q. B. 86; *Moebus v. Becker*, 46 N. J. L. 41; *McCleary v. Frantz*, 160 Pa. St. 535; *Winans v. Randolph*, 169 Pa. St. 606. In none of them was it ruled, however, that by the relation of the one to the other the plaintiff had assumed the risks of accident from the defendant's use of firearms. That point was suggested on argument in *Stanley v. Powell*, (1891) 1 Q. B. 86, but the judgment proceeded upon a different ground. In *Moebus v. Becker*, 46 N. J. L. 41, the court said: "In no case is it said that where persons are gunning voluntarily together, each may be held responsible for every accident or mishap that may occur to the other while thus engaged."

The principle of the text is asserted in the case of one who stands to watch the discharge of fireworks in *Scanlon v. Wedger*, 156 Mass. 462.

Where the Firing Is a Direct Violation of Law. — In *Knott v. Wagner*, 16 Lea (Tenn.) 481, it appeared that the defendant was hunting near a highway when the plaintiff drove along the highway in a buggy. The plaintiff saw the defendant "in an attitude as though slipping up on some birds," and stopped his horse to see the defendant shoot. The defendant's fire injured the plaintiff. It was held that the defendant, having fired his gun within two hundred yards of a public highway, which was forbidden by the statutes of the state, was liable for the injuries resulting from his wrongdoing. In this case, but for the element of actual unlawfulness, it would seem that the plaintiff might have been held to have voluntarily assumed the risk of the situation when he stopped to watch the defendant.

3. *Robinson v. Greenville*, 42 Ohio St. 625, 51 Am. Rep. 857; *Chadwick v. Maginnes*, 94 Pa. St. 121.

4. *Turner v. State*, 55 Md. 240.

To Carry Out of a Port. — By 35 Vict. c. 13, commissioners were empowered to levy dues

EXPOSE — EXPOSURE. (See also the title EXPOSURE OF PERSON, *post.*) — I. To expose is to remove from shelter; to place in a situation to be affected or acted on; in reference to pain, to make liable, to subject; and

of one penny per ton on "coals *exported* from the port." It was held that, there being "nothing in the language of the act to show that the word *exported* was used in any other than its ordinary sense, namely, 'carried out of the port,' * * * coals carried away from the port, not on a temporary excursion, as in a tug or pleasure boat, which intends to return with more or less of the coals on board, and which may be regarded as always constructively within the port, but taken away for the purpose of being wholly consumed beyond the limits of the port," must be considered as coals *exported* within the meaning of the act. *Muller v. Baldwin*, L. R. 9 Q. B. 457.

Export and Import. (See also *IMPORT*.) — In *U. S. v. The Steamboat Forrester*, Newb. Adm. 81, 25 Fed. Cas. No. 15,132, it is said: "The term used is 'import,' and legislation employed that term in its commercial sense, which is to bring from a foreign jurisdiction into this jurisdiction merchandise not the product of the country. Its commercial meaning is directly contrary to the term *export*. Both phrases have a technical meaning in the law. We import teas from China, wines from France. We *export* cotton, tobacco, pork, and wheat. The one term signifies etymologically 'to bring in,' the other 'to carry out.'"

In *Kidd v. Flagler*, 54 Fed. Rep. 369, it was held that *export* meant the taking of goods from one state or country to another, and that it was entirely immaterial whether the owner intended to bring them back again or not. The court said: "The defendant maintains that if the owners intended to bring the property back it was not *exported*. The plaintiffs assert that the question of intent has no bearing whatever upon the point at issue. The dictionary meaning of the term *export* is as follows: 'To carry from a state or country, as wares in commerce.' Webst. Dict. 'To send goods and merchandise from one country to another.' 1 Bouv. Law Dict. 502; 1 Rap. & L. Law Dict. 487. The term is the direct converse of 'import,' which means 'to bring into a country merchandise from abroad.'"

To Carry to a Domestic Port. — The British Parliament has, upon various occasions, used the word *exportation* in a sense less extensive than the *exporting* of commodities to foreign ports or places, and in the more restricted sense of carrying commodities from one port to another within the kingdom. *Barrett v. Stockton, etc.*, R. Co., 2 M. & G. 163, 40 E. C. L. 312, affirmed 3 M. & G. 956, 42 E. C. L. 496, affirmed 11 Cl. & F. 590. As used in inspection laws of *Pennsylvania*, the word *exportation* was held to include the carrying of merchandise from a port within the state to a port in another state of the Union. *Shuster v. Ash*, 11 S. & R. (Pa.) 90; *Com. v. King*, 1 Whart. (Pa.) 448. But see *Forman v. Peaslee*, 9 Fed. Cas. No. 4,941, set out *infra*, this note.

In *Pittsburg, etc., Coal Co. v. Louisiana*, 156 U. S. 590, the court said: "Nor do we perceive that the statute of *Louisiana* in any respect lays an impost or duty on imports or

exports from *Pennsylvania* and *Louisiana*. The terms 'imports' and *exports* apply only to articles imported from foreign countries or *exported* to them. The inhibition imposed is the laying of duties on imports from foreign countries, and not on such as came from one state to another. This was directly held in *Woodruff v. Parham*, 8 Wall. (U. S.) 123. The exception from this restriction from levying a tax on imports and *exports* is confined to such as may be absolutely necessary to execute the inspection laws." The statute in question was an act of *Louisiana* providing that the governor should appoint two coal gaugers to gauge any coal or coke boat or barge in the state, and ascertain the number of bushels of coal in each load. See also the title *TAXATION*.

To Carry out as an Article of Trade. — A statute of *Delaware* provided that if any person should unlawfully *export* a slave from the state, the slave should become free. It was held that "the true meaning of the term *export* in this connection is the taking or carrying out as an article of trade or merchandise. It is a mercantile term. If a man carry his slave as a body servant, for his own use, and bring him back, it is not *exporting*." *State v. Turner*, 5 Harr. (Del.) 501.

Constitution of the United States. (For full treatment, see the title *TAXATION*.) — In *Ex p. Crandall*, 1 Nev. 294, it was held that the word *exports*, as used in the constitutional provision forbidding the states to lay imposts or duties on imports or *exports*, included property only and did not extend to individuals.

Same — Bill of Exchange. — In *Ex p. Martin*, 7 Nev. 140, a bill of exchange was held to be neither an *export* nor an import within the constitutional provision.

Same — Timber. — Timber at the port of *Darien*, being shipped and awaiting shipment; belonging to, and in the hands of, a subject of Great Britain, resident in *Darien*, Georgia, a part of the year, for the sole business of *exporting* timber to England, and under contract of sale to parties in England on the 1st of April, 1875; and actually *exported*, most of it before the 1st of July when the exporter was required to return it for taxes, and every log of it by the 1st of November, and thus segregated from the mass of property in the state on the 1st of April, 1875, and its situs as an *export* fixed at that time when, if at all, it was taxable, was not intended to be taxed by the law of *Georgia* taxing all property *ad valorem*, but expressly excepting all property exempted by the Constitution of the United States; and if so intended the act would be void, under the prohibition of the second paragraph of the tenth section of the first article of the Constitution of the United States, which prescribes that "no state shall, without the consent of the Congress, lay any imposts or duties on imports or *exports* except what may be absolutely necessary for executing its inspection laws," etc. *Blount v. Munroe*, 60 Ga. 61.

For Export. — In *Madison v. Fitch*, 18 Ind. 33, it was held that the provision in the char-

(referring to the custom of some nations to expose their children) to cast out to chance, to place abroad, or in a situation unprotected.¹ II. To expose is to exhibit; to bring into view; to display; to point out or show to the

ter of the city of Madison which exempted from municipal taxation "goods and produce for *export* or in transit, owned or in possession of any inhabitant of the city," was to be construed strictly, and to exempt only property in the possession of a consignee simply on storage or to be forwarded. This case, however, was *overruled* by *Fitch v. Madison*, 24 Ind. 425, where it was held that one engaged in pork packing in said city and having all of his capital invested in pork held for *export* and in process of shipment to a foreign market was exempt.

Merchant Exporter. — A license for the exportation of gunpowder was granted by the British government on petition of A B on behalf of himself and others, on condition that the "merchant *exporter*" should give a certain security therein mentioned. A B, the manufacturer of the gunpowder, sold it to C D, and contracted to deliver it free on board a ship. It was held that the condition of the license was not complied with by A B's giving the required security, he not being the "merchant *exporter*" within the meaning of the license. *Camelo v. Britten*, 4 B. & Ald. 184, 6 E. C. L. 442.

Place of Export. — An inland town from which butter was sent direct to a foreign country was held not a place of *export* within an English statute. *Hayes v. Dexter*, 13 Ir. C. L. Rep. 22.

Period of Exportation. — Under the Act of Congress of March 3, 1851, which required the custom-house appraisers to ascertain the market value of the import "at the period of the *exportation* to the United States," where A. entered into a contract with T. & Co. for the transportation of iron from Wales to the United States, in pursuance of which T. & Co. employed coasting vessels to carry it from Wales to Liverpool, where it was transhipped on board their packets for Boston, it was held that the "period of *exportation*" at which the market value was to be ascertained was the time when the iron left Liverpool. "The natural meaning of the words 'period of *exportation*' is," said the court, "termination of *exportation*." The period of *exportation* is that point of time when the act of *exportation* is complete. The subject-matter of the statute is the appraisal of goods *exported* from a foreign country, and imported into the United States; so that the inquiry in this case is, at what point of time was the act of *exportation* of this merchandise from the foreign country, England, complete? My opinion is, when it left Liverpool. Its transportation coastwise from one English port to another was not an *exportation* from England." *Forman v. Peaslee*, 9 Fed. Cas. No. 4,941, 21 Law Rep. 273, *distinguishing* *Barrett v. Stockton*, etc., R. Co., 2 M. & G. 134, 40 E. C. L. 298, 3 M. & G. 956, 42 E. C. L. 496, 11 Cl. & F. 590, *cited supra*, this note. See also *Sampson v. Peaslee*, 20 How. (U. S.) 571.

1. Webst. Dict., *quoted in* *Shannon v. People*, 5 Mich. 90, a case arising on the construction

of a statute imposing a penalty on *exposing* a child with intent to abandon it. See also the title CRUELTY TO CHILDREN, vol. 8, p. 456, and the references there given.

Dangerous Exposure. — See the title NAVIGATION.

Exposure to Unnecessary Danger — Insurance. (See also the titles ACCIDENT INSURANCE, vol. 1, p. 306; LIFE INSURANCE.) — A person who received an injury in consequence of getting from the platform at a railroad depot upon the cars while in motion at a rate of speed less than that of a man walking was held not to be "wilfully and wantonly *exposing* himself to any unnecessary danger or peril," within the meaning of a policy of insurance. *Schneider v. Provident L. Ins. Co.*, 24 Wis. 28.

It was held otherwise where the assured died by falling from the platform of a railroad car, between eleven and twelve o'clock at night, when the train was in full motion, and he was either riding on the platform of the car or passing from one car to another. *Sawtelle v. Railway Pass. Assur. Co.*, 15 Blatchf. (U. S.) 216. The court said: "Negligence and '*exposure* to unnecessary danger' are equivalent terms. * * * Negligence is the absence of that care which a reasonable and prudent man would exercise under the circumstances of the case."

Exposed to Injury. — Where an heir at law made a complaint that the administrator had, upon his appointment, taken possession of the estate, and had ever since held possession, but, though more than a year had elapsed, had never returned any inventory of the estate, and had in no manner discharged any of his duties as administrator, it was held that it sufficiently appeared, without direct averment to that effect, that the complainant was "*exposed* to injury." *Treat's Appeal*, 40 Conn. 288.

Fire Insurance. (See also the title FIRE INSURANCE.) — In *Davis v. Western Home Ins. Co.*, 81 Iowa 496, it was held that the use of a corn sheller, together with an engine and boiler, for the purpose of propelling the same, was within the meaning of a provision in a policy of insurance against fire, declaring that such policy would be rendered void if, without permission in writing thereon, "there be any change in the *exposure*, by the erection or occupation of adjacent buildings, or by any means whatever within the control and knowledge of the insured." The court said: "It will be observed that the condition of the policy in question is against 'change in *exposure*.' The word *exposure* means 'the state of being *exposed*;' 'openness to danger; accessibility to anything that may affect, especially detrimentally.' It is a word much used in the business of insurance, in the sense of this definition, to indicate danger of destruction or injury by fire, to property insured, from external sources, and not inherent to the property itself. The word does not in the meaning contemplate any particular source of danger. If danger results to the property from con-

bystanders.¹ The statutory prohibition against the "exposing to sale" of merchandise on Sunday is evidently directed against the public exposure of commodities for sale in the street, or in stores and shops, warehouses, or market places, and has no reference to mere private contracts which are made without violating, or tending to produce a violation of, the public order and solemnity of the day.²

tigious buildings because of their occupation, from pursuits whether carried on in a building or out of it, from the practice or habit to use fire, from the running of railroad locomotives, and the like, they are said to be *exposures* to the property."

An application for insurance against fire forming a part of the policy was in the form of answers to printed interrogatories furnished by the insurers. One of them asked the relative situation of the property insured as to other buildings, distance to each within ten rods, and the printed form concluded with the statement: "All *exposures* within ten rods are mentioned." It was held that the application constituted a warranty that no other buildings than those named therein existed within ten rods. *Chaffee v. Cattaraugus County Mut. Ins. Co.*, 18 N. Y. 376.

Streets.—In *Hubbell v. Yonkers*, 104 N. Y. 434, the plaintiff was riding along one of the defendant's streets, the roadbed of which was thirty feet wide, macadamized and in good condition. On one side, where the street was graded up about twelve feet, there was a sidewalk about ten feet wide, separated from the roadbed by a curbstone eight inches high. There was no fence, wall, or other obstruction to guard the outer edge of the sidewalk. It was held that this was not an *exposed* place within a provision in the defendant city's charter giving power to compel or cause the making and repairing of railings at *exposed* places in the streets. The court said: "*Exposed* places," with reference to such a case as this, must mean 'dangerous places,' and, considering the facts in this case, we do not think this was such a dangerous or *exposed* place that a failure to guard it with railings could fairly be called negligence." See generally the title MUNICIPAL CORPORATIONS; STREETS AND SIDEWALKS.

1. Adams Express Co. v. Schlessinger, 75 Pa. St. 246.

"**Exposed to View.**"—Where, by an act of incorporation, a turnpike company is required to keep its rates of toll "*exposed* to view," it is not sufficient that such rates be written and posted up in the toll house; they should be *exposed* to the view of travelers passing the gate. *Centre Turnpike Co. v. Smith*, 12 Vt. 212. See generally the title TURNPIKES.

Exposing Poison. (See also the title POISON.)—An information contained two counts framed upon two sections of a statute, imposing different penalties. The first section read: "A person who deposits any poison * * * shall be fined," etc. The other section read: "or wilfully or maliciously administers poison to such animal, or *exposes* a poisonous substance." The first count did not state on whose land the poison was deposited; in the second count the word "deposit" was used for *expose*. It was held that both counts were insufficient. The court said: "The

pleader used the word 'deposit' instead of the word *expose*; that is, he took the word found in section 4215, instead of the word in section 4191. Courts have rarely held that the exact words of the statute must be used. A well-selected collection of judicial utterances as to how far the statutory term may be deviated from may be found in note 3, to section 612, in *Bishop on Crim. Pro.*, 3d ed. In this state, in the early case of *State v. Little*, 1 Vt. 331, it was held not necessary to charge in the words of the statute, if other equivalent words were used. The word 'deposit' is not equivalent to the word *expose*. They are not synonymous. They not only do not mean the same thing, but are often, perhaps generally, used to express opposite ideas. Things are often deposited so as not to be *exposed*, and for that purpose. One word scarcely suggests the other. The uncertainty is increased by the fact that we have two statutes, one providing a penalty for depositing poison in certain places; the other for *exposing* it. It has often been held that an indictment so far lacking adherence to statutory terms that the court cannot see on which of two statutes it was drawn is bad." *State v. Pratt*, 54 Vt. 484.

2. Sunday. (See also the title SUNDAY.)—*Boynton v. Page*, 13 Wend. (N. Y.) 429; *Eberle v. Mehrbach*, 55 N. Y. 682.

Exposed to Sale. (See also the title INTOXICATING LIQUORS.)—In a declaration for infringing a patent which granted that the plaintiff, and no others, should "make, use, exercise, and vend" his invention, and forbade all persons to "make, use, or put in practice" the same, or counterfeit or imitate it, without the plaintiff's license, the plaintiff alleged that the defendant without his license "*exposed* to sale" articles intended to imitate, and which did imitate, his invention. It was held on general demurrer that the count was bad, as not stating anything which was necessarily an infringement of the patent. *Minter v. Williams*, 4 Ad. & El. 251, 31 E. C. L. 63.

Same — Oleomargarine. (See also the title OLEOMARGARINE.)—An English statute imposed penalties for *exposing* margarine for sale without a label marked "margarine." The respondent kept margarine for sale in his shop in a parcel which was not labeled, behind a screen, and not in sight of customers. It was held that the margarine was not *exposed* for sale. *Crane v. Lawrence*, 25 Q. B. Div. 152.

Under this statute it was held that margarine might be *exposed* for sale within the meaning of the act, though wrapped in paper so as to be invisible to the purchaser. *Wheat v. Brown*, (1892) 1 Q. B. 418.

So, in *Com. v. Byrnes*, 158 Mass. 172, it was held that keeping oleomargarine in the defendant's store in a closed and covered refrigerator where it could not be seen by customers was not *exposing* it for sale. The court said: "The case turns upon the meaning of the

words '*expose* for sale' in the statute under which the complaint was drawn. Stat. 1891, c. 58, § 1. The purpose of the statute is to prevent deception in the manufacture and sale of imitation butter, and the statute provides that no person 'shall render or manufacture, sell, offer for sale, *expose* for sale, or have in his possession with intent to sell,' certain articles. The phrase to be construed is perhaps susceptible of more than one meaning. Whenever goods are placed for convenient delivery upon expected sales, they are put out and in one sense *exposed* for sale, whether visible to customers or not. But in our opinion the words are not so used in the statute under consideration. The prohibited articles are designed and adapted to deceive the eye, and, because their appearance is likely to induce those who see them to buy them as the genuine butter of which they are in imitation, there is special reason for prohibiting their *exposure* to view. The language is so full that it is not necessary to give it a strained construction in order to make the statute effective. Offering to sell, and having in possession with intent to sell, are likewise prohibited in the same clause and under the same penalty, so that it is easy for the pleader to select language which describes the offense with reasonable accuracy. Similar words are used in the statutes relating to milk and intoxicating liquors, but as in such cases the charge of *exposing* for sale is uniformly joined with that of illegal keeping, and as such a complaint charges but one offense and is supported by proof of either act (Com. v. Nichols, 10 Allen (Mass.) 199, and Com. v. Dolan, 121 Mass. 374), it has not been necessary for this court to construe the phrase. Some of the decisions, however, intimate more or less clearly that in the statutes concerning liquors it means '*expose* to view.' Com. v. McCue, 121 Mass. 358; Com. v. Atkins, 136 Mass. 160. Under the English statute (50 & 51 Vict., c. 29, § 4) it has been held that mar-

garine kept for sale upon the counter of a shop, but behind a screen hiding it from the view of customers, is not *exposed* for sale, Crane v. Lawrence, 25 Q. B. Div. 152; and that parcels of margarine placed upon a counter or shelf in view of customers are *exposed* for sale, although so wrapped in paper that the margarine cannot be seen, Wheat v. Brown, [1892] 1 Q. B. 418. Whether, if the defendant had so kept the prohibited article in closed tubs or in paper that the packages were visible as articles of merchandise on sale in his store, although the oleomargarine itself could not be seen, he would thereby have *exposed* it for sale, we do not decide. The contention that the article was not prohibited because it was in imitation of artificially colored butter, as well as of genuine butter at its best, needs no consideration."

Same — Express Companies. — Several trunks were transported by an express company, and after remaining in their office for a considerable time an order of court was obtained to sell them for freight. It was held that this order did not protect the company for selling the trunks unopened and locked. The court said: "The first and second sections of the Act of 14th December, 1863 (Pur. Dig. 220, pl. 6 and 7), under which the plaintiff in error proposed to sell the property, authorized the company to *expose* it to sale at public auction. The fair meaning of *expose* in this statute obviously is 'to exhibit,' 'to bring into view,' 'display,' 'to point out or show to the bystanders.' Selling the trunks with the goods locked up in them, and describing the contents as unknown, withholds from the bidders all knowledge of the character or value of the contents, and clearly was not within the meaning of the law which directs the manner of sale. This manner of selling goods of value is unjust to the owner." Adams Express Co. v. Schlesinger, 75 Pa. St. 256. See also the title EXPRESS COMPANIES, *post*.

EX POST FACTO LAWS.

BY ALEXANDER STRONACH.

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See also the titles *CONSTITUTIONAL LAW*, vol. 6, p. 882; *CRIMINAL LAW*, vol. 8, p. 274; *STATUTES*.

I. DEFINITION AND GENERAL NATURE. — Of the several definitions which have been given of the phrase "*ex post facto* laws," the following seems to be the most accurate and comprehensive: An *ex post facto* law is "one which in its operation makes that criminal or penal which was not so at the time the action was performed, or which increases the punishment, or, in short, which, in relation to the offense or its consequences, alters the situation of a party to his disadvantage." 1

1. Phrase Defined. — U. S. v. Hall, 2 Wash. (U. S.) 366, *per* Washington, J., *quoted in* Kring v. Missouri, 107 U. S. 221. And see Duncan v. Missouri, 152 U. S. 377; Thompson v. Utah, 170 U. S. 343; Garvey v. People, 6 Colo. 559, 45 Am. Rep. 531; State v. Caldwell, 50 La. Ann. 666 [*citing* 7 AM. AND ENG. ENCYC. OF LAW (1st ed.) 525]; Lindsey v. State, 65 Miss. 542, 7 Am. St. Rep. 674; *In re* Wright, 3 Wyoming 478; People v. McDonald, 5 Wyoming 526. See also Cadwell v. State, 17 Conn. 467.

Marshall's Definition. — "An *ex post facto* law is one which renders an act punishable in a manner in which it was not punishable when it was committed." Marshall, C. J., in Fletcher v. Peck, 6 Cranch (U. S.) 138 [*quoted in* Cummings v. State, 4 Wall. (U. S.) 326; Gut v. State, 9 Wall. (U. S.) 35; Wilson v. Ohio, etc., R. Co., 64 Ill. 542, 16 Am. Rep. 565; Anderson v. Baker, 23 Md. 531; Lynn v. State, 84 Md. 67; Lindsey v. State, 65 Miss. 542, 7 Am. St. Rep. 674; State v. Willis, 66 Mo. 131; Rich v. Flanders, 39 N. H. 304; Hartung v.

People, 22 N. Y. 95, 26 N. Y. 167, 28 N. Y. 400; Shepherd v. People, 25 N. Y. 406].

Blackstone's Definition. — Blackstone describes an *ex post facto* law as follows: "When, after an action (indifferent in itself) is committed, the legislator then for the first time declares it to have been a crime, and inflicts a punishment upon the person who has committed it." 1 Black. Com. 46, *quoted in* The Brig Amy Warwick, 2 Black (U. S.) 698, and Coles v. Madison County, 1 Ill. 154.

Other Definitions. — "By an *ex post facto* law is meant one which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed; or changes the rules of evidence, by which less or different testimony is sufficient to convict than was then required." Cummings v. State, 4 Wall. (U. S.) 325 [*quoted in* Gut v. State, 9 Wall. (U. S.) 35; *In re* De Giacomo, 12 Blatchf. (U. S.) 391; State v. Jackson, 105 Mo. 196].

"An *ex post facto* law is a retroactive criminal law which makes an act punishable in a

Confined to Penal and Criminal Proceedings.—It is well settled that the phrase *ex post facto*, as used in the Constitution of the United States and the constitutions of the several states, applies only to penal and criminal proceedings which impose punishments or forfeitures, and not to civil proceedings which affect private rights retrospectively.¹

mode or measure in which it was not punishable when the act was committed, unless it be to diminish the punishment." Polk County v. Hierb, 37 Iowa 361.

"An *ex post facto* law is 'a criminal law retrospective in its operation.'" State v. Jackson, 105 Mo. 196. To the same effect is State v. Bulling, 105 Mo. 204.

And a statute which is prospective only in its operation and does not purport to have a retroactive effect is not *ex post facto*. France v. State, 57 Ohio St. 1. See also Conley v. State, 85 Ga. 348.

Time of Commission of Offense Determines.—"This term necessarily implies a fact or act done, after which the law in question is passed. Whether it is *ex post facto* or not relates, in criminal cases to which alone the phrase applies, to the time at which the offense charged was committed. If the law complained of was passed before the commission of the act with which the prisoner is charged, it cannot, as to that offense, be an *ex post facto* law. If passed after the commission of the offense, it is as to that *ex post facto*, though whether of the class forbidden by the Constitution may depend on other matters. But so far as this depends on the time of its enactment, it has reference solely to the date at which the offense was committed to which the new law is sought to be applied. No other time or transaction but this has been in any adjudged case held to govern its *ex post facto* character." Kring v. Missouri, 107 U. S. 221.

And a statute is none the less *ex post facto* because passed before the trial. Southwick v. Southwick, 49 N. Y. 510.

1. Inapplicable to Civil Proceedings.—*United States.*—*In re Sawyer*, 124 U. S. 200; *Albee v. May*, 2 Paine (U. S.) 74; *Burgess v. Salmon*, 97 U. S. 384; *Baltimore, etc., R. Co. v. Nesbit*, 10 How. (U. S.) 395; *Carpenter v. Com.*, 17 How. (U. S.) 456; *Calder v. Bull*, 3 Dall. (U. S.) 386; *Charles River Bridge Co. v. Warren Bridge*, 11 Pet. (U. S.) 420; *Ex p. Garland*, 4 Wall. (U. S.) 333; *Fletcher v. Peck*, 6 Cranch (U. S.) 87; *Green v. Biddle*, 8 Wheat. (U. S.) 1; *Locke v. New Orleans*, 4 Wall. (U. S.) 172; *Ogden v. Saunders*, 12 Wheat. (U. S.) 266; *Satterlee v. Mathewson*, 2 Pet. (U. S.) 380; *Society, etc., v. Wheeler*, 2 Gall. (U. S.) 138; *U. S. v. Schooner Peggy*, 1 Cranch (U. S.) 103; *Watson v. Mercer*, 8 Pet. (U. S.) 110; *Kring v. Missouri*, 107 U. S. 221.

Alabama.—*Hart v. State*, 40 Ala. 32, 88 Am. Dec. 752; *Bloodgood v. Cammack*, 5 Stew. & P. (Ala.) 276; *Aldridge v. Tuscumbia, etc., R. Co.*, 2 Stew. & P. (Ala.) 199, 23 Am. Dec. 307; *Holman v. Norfolk Bank*, 12 Ala. 369.

Arkansas.—*Taylor v. Governor*, 1 Ark. 21.

California.—*People v. Mortimer*, 46 Cal. 114; *Foster v. Police Com'rs*, 102 Cal. 483, 41 Am. St. Rep. 194.

Colorado.—*Denver, etc., R. Co. v. Woodward*, 4 Colo. 162.

Connecticut.—*Bridgeport v. Hubbell*, 5 Conn. 240.

Georgia.—*Boston v. Cummins*, 16 Ga. 102, 60 Am. Dec. 717; *Wilder v. Lumpkin*, 4 Ga. 208; *Tucker v. Harris*, 13 Ga. 1, 58 Am. Dec. 488; *Ex p. Law*, 35 Ga. 310.

Idaho.—*Shepherd v. Grimmer*, 2 Idaho 1123.

Illinois.—*Coles v. Madison County*, 1 Ill. 154.

Indiana.—*Strong v. State*, 1 Blackf. (Ind.) 193; *Martindale v. Moore*, 3 Blackf. (Ind.) 275.

Iowa.—*State v. Squires*, 26 Iowa 340; *Drake v. Jordan*, 73 Iowa 707; *Campbell v. Manderscheid*, 74 Iowa 708; *Farley v. Geisheker*, 78 Iowa 453.

Kentucky.—*Com. v. Bailey*, 81 Ky. 395; *Fisher v. Cockerill*, 5 T. B. Mon. (Ky.) 133; *Henderson, etc., R. Co. v. Dickerson*, 17 B. Mon. (Ky.) 173, 66 Am. Dec. 148; *Davis v. Ballard*, 1 J. J. Marsh. (Ky.) 563; *Walston v. Com.*, 16 B. Mon. (Ky.) 15.

Louisiana.—*Municipality No. One v. Wheeler*, 10 La. Ann. 745; *State v. Caldwell*, 50 La. Ann. 666 [citing 7 AM. AND ENG. ENCYC. OF LAW (1st ed.) 525]; *State v. Baker*, (La. 1898) 24 So. Rep. 240.

Maryland.—*Grinder v. Nelson*, 9 Gill (Md.) 299, 52 Am. Dec. 694; *Anderson v. Baker*, 23 Md. 531; *Wilson v. Hardesty*, 1 Md. Ch. 66.

Massachusetts.—*Forster v. Forster*, 129 Mass. 566; *Locke v. Dane*, 9 Mass. 360; *Ross's Case*, 2 Pick. (Mass.) 171.

Michigan.—*Scott v. Smart*, 1 Mich. 295.

Missouri.—*Ex p. Bethurum*, 66 Mo. 545.

Nevada.—*Esser v. Spaulding*, 17 Nev. 289.

New Hampshire.—*Rich v. Flanders*, 39 N. H. 304.

New Jersey.—*State v. Reed*, 31 N. J. L. 133; *State v. Moore*, 42 N. J. L. 208, 43 N. J. L. 203, 39 Am. Rep. 558; *Den v. Van Riper*, 16 N. J. L. 7; *Suydam v. New Brunswick Bank*, 3 N. J. Eq. 114.

New York.—*Bay v. Gage*, 36 Harb. (N. Y.) 447; *Dash v. Van Kleeck*, 7 Johns. (N. Y.) 477, 5 Am. Dec. 291; *Burch v. Newbury*, 10 N. Y. 374; *Southwick v. Southwick*, 49 N. Y. 510; *Isola v. Weber*, 13 Misc. Rep. (N. Y. C. Pl.) 99, citing 7 AM. AND ENG. ENCYC. OF LAW (1st ed.) 529.

Ohio.—*Butler v. Toledo*, 5 Ohio St. 225.

Pennsylvania.—*Grim v. Weissenberg School Dist.*, 57 Pa. St. 433, 98 Am. Dec. 237; *Com. v. Lewis*, 6 Binn. (Pa.) 266; *Evans v. Montgomery*, 4 W. & S. (Pa.) 218.

South Carolina.—*Byrne v. Stewart*, 3 De-
saus. (S. Car.) 466; *Callahan v. Callahan*, 36 S. Car. 454.

Texas.—*Ex p. Mayer*, 27 Tex. 715; *Holt v. State*, 2 Tex. 363; *De Cordova v. Galveston*, 4 Tex. 474; *Bender v. Crawford*, 33 Tex. 751, 7 Am. Rep. 270.

Virginia.—*Perry v. Com.*, 3 Gratt. (Va.) 602.

West Virginia.—*Ex p. Hunter*, 2 W. Va.

II. POWER TO ENACT — 1. In England. — Since, generally speaking, there are no restrictions upon the power of Parliament to make or repeal laws,¹ it seems that it may pass *ex post facto* laws; but it is doubtful whether it would, at this day, exercise this power, for such laws were denounced by Blackstone as unreasonable,² and in a recent English decision it is said that they are now looked upon as barbarous.³

2. In the United States. — The enactment of *ex post facto* laws either by Congress⁴ or the legislatures of the different states⁵ is expressly prohibited by the Federal Constitution, and the constitutions of most of the states of the Union contain provisions to the same effect.⁶

III. CLASSIFICATION — 1. **Laws Classified as Ex Post Facto** — *a. IN GENERAL.* — In an early case decided in the United States Supreme Court, the following classification of *ex post facto* laws was made: "1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action. 2d. Every law that aggravates a crime or makes it greater than it was when committed. 3d. Every law that changes the punishment and inflicts a greater punishment than the law annexed to the crime when committed. 4th. Every law that alters the legal rules of evidence and receives less or different testimony than the law required at the time of the

122; *Ex p. Quarrier*, 4 W. Va. 210; *Wyatt v. Morris*, 2 W. Va. 575.

In *Wilkinson v. Leland*, 2 Pet. (U. S.) 661, app. i., Mr. Justice Johnson criticises at length *Calder v. Bull*, 3 Dall. (U. S.) 386, in which the provision in the Federal Constitution was first construed.

"The Debates in the Federal Convention upon the Constitution show that the terms '*ex post facto* laws' were understood in a restricted sense, relating to criminal cases only, and that the description of Blackstone of such laws was referred to for their meaning." *Carpenter v. Com.*, 17 How. (U. S.) 456, citing 3 Madison Papers 1399, 1450, 1579.

Illustrations — *Regulation of Sale of Liquors.* — An act which prohibits the sale of intoxicating liquors which have been bought or manufactured previous to its passage is not *ex post facto*. *State v. Paul*, 5 R. I. 185; *State v. Keeran*, 5 R. I. 497.

Ordinance as to Liquor License. — A municipal ordinance provided that no license to sell liquor should be granted to any person "who has carried on, is carrying on, or is about to carry on" the business of liquor selling "in any place where females are suffered or procured to wait," etc. A person who had before the enactment of the ordinance employed female waiters applied for license and was refused. It was contended by him that such ordinance was *ex post facto* and therefore unconstitutional, but it was held by the court that as such ordinance was not a criminal law it was not *ex post facto* and that his application was properly refused. *Foster v. Police Com'rs*, 102 Cal. 483, 41 Am. St. Rep. 194.

Statutes as to Actions for Tort or Contract. — A statute affecting the right to maintain a civil action to recover damages for a tort is not *ex post facto*. *Eastman v. Clackamas County*, 32 Fed. Rep. 24. Nor is an act taking away remedies for a breach of contract or a tort. *Lord v. Chadbourne*, 42 Me. 429, 66 Am. Dec. 290.

Husband and Wife Made Competent Witnesses

Against Each Other. — A statute allowing husband and wife to be competent witnesses against each other in actions between them is not *ex post facto*. *Southwick v. Southwick*, 49 N. Y. 510.

Mortgagee Made Liable for Back Taxes. — A law making the mortgagee of land who takes possession thereof for the purpose of foreclosure liable for all taxes due thereon is not *ex post facto*. *Andrews v. Worcester County Mut. F. Ins. Co.*, 5 Allen (Mass.) 65.

Retrospective Divorce Statutes. — It has been decided that the legislature may authorize divorces to be granted for causes happening before the passage of the act, and which, at the time of their occurrence, furnished no grounds for such proceedings. *Carson v. Carson*, 40 Miss. 349; *Jones v. Jones*, 2 Overt. (Tenn.) 2, 5 Am. Dec. 645. See also *Elliott v. Elliott*, 38 Md. 357. But in *Dickinson v. Dickinson*, 3 Murph. (7 N. Car.) 327, 9 Am. Dec. 608, it was held that a statute making adultery committed before its passage a ground for divorce was *ex post facto*. And see the title *DIVORCE*, vol. 9, p. 730.

Law Imposing Retrospective Tax Constitutional. — *Locke v. New Orleans*, 4 Wall. (U. S.) 172; *State v. Reed*, 31 N. J. L. 133. *Butler v. Toledo*, 5 Ohio St. 225.

1. **Power of Parliament to Enact.** — 1 Black. Com. 160.

2. 1 Black. Com. 46.

3. *Phillips v. Eyre*, L. R. 6 Q. B. 1.

4. **Congress Forbidden to Enact.** — Const. U. S., art. 1, § 9.

5. **State Legislatures Forbidden to Enact.** — Const. U. S., art. 1, § 10.

6. **Provision Against in State Constitutions.** — 1 *Stimson's Am. Stat. L.*, § 142; *Denver, etc., R. Co. v. Woodward*, 4 Colo. 162; *Garvey v. People*, 6 Colo. 559, 45 Am. Rep. 531; *Lindzey v. State*, 65 Miss. 542, 7 Am. St. Rep. 674; *Rich v. Flanders*, 39 N. H. 304; *Moore v. State*, 43 N. J. L. 203, 39 Am. Rep. 558; *Ex p. Hunt* 28 Tex. App. 364. And see generally the constitutions of the several states.

commission of the offense in order to convict the offender." ¹ To this classification an eminent writer upon the subject has made the following additions: '5th. Every law which, assuming to regulate civil rights and remedies only, in effect imposes a penalty or the deprivation of a right for something which, when done, was lawful. And 6th. Every law which deprives persons accused of crime of some lawful protection to which they have become entitled, such as the protection of a former conviction or acquittal, or of a proclamation of amnesty.'" ² And to make the classification sufficiently general to embrace all the laws which have been adjudged *ex post facto*, it seems proper to add yet another class, viz.: 7th. Every law which, in relation to the offense or its consequences, alters the situation of a party to his disadvantage. ³

b. LAWS CREATING NEW CRIMES. — It cannot be doubted that a statute which makes an act, lawful when committed, criminal and punishes such act is *ex post facto*. ⁴

c. LAWS AGGRAVATING CRIMES. — It has been said that no case which

1. Ex Post Facto Laws Classified. — *Per Chase J.*, in *Calder v. Bull*, 3 Dall. (U. S.) 386; and this classification has been approved in a large number of cases:

United States. — *Albee v. May*, 2 Paine (U. S.) 74; *Cummings v. State*, 4 Wall. (U. S.) 277; *Charles River Bridge v. Warren Bridge*, 11 Pet. (U. S.) 421; *Carpenter v. Com.*, 17 How. (U. S.) 463; *Duncan v. Missouri*, 152 U. S. 382; *Ex p. Garland*, 4 Wall. (U. S.) 333; *Fletcher v. Peck*, 6 Cranch (U. S.) 87; *Gibson v. Mississippi*, 162 U. S. 590; *Kring v. Missouri*, 107 U. S. 228; *U. S. v. Gibert*, 2 Sumn. (U. S.) 101; *Watson v. Mercer*, 8 Pet. (U. S.) 110.

Alabama. — *Hart v. State*, 40 Ala. 32, 88 Am. Dec. 752.

Colorado. — *Garvey v. People*, 6 Colo. 559, 45 Am. Rep. 531; *In re Tyson*, 13 Colo. 482.

Connecticut. — *State v. Hoyt*, 47 Conn. 518.

Georgia. — *Wilder v. Lumpkin*, 4 Ga. 208; *Boston v. Cummins*, 16 Ga. 102, 60 Am. Dec. 717.

Illinois. — *Wilson v. Ohio, etc.*, R. Co., 64 Ill. 542, 16 Am. Rep. 565.

Indiana. — *Strong v. State*, 1 Blackf. (Ind.) 195.

Kentucky. — *Davis v. Ballard*, 1 J. J. Marsh. (Ky.) 563; *Fisher v. Cockerill*, 5 T. B. Mon. (Ky.) 133.

Maryland. — *Anderson v. Baker*, 23 Md. 531.

Mississippi. — *Lindzey v. State*, 65 Miss. 542, 7 Am. St. Rep. 674.

Missouri. — *Ex p. Bethurum*, 66 Mo. 545.

Nebraska. — *Marion v. State*, 16 Neb. 349.

New Hampshire. — *Woard v. Winnick*, 3 N. H. 475, 14 Am. Dec. 384.

New York. — *Hartung v. People*, 22 N. Y. 95, 26 N. Y. 167, 28 N. Y. 400; *People v. Hayes*, 140 N. Y. 484, 37 Am. St. Rep. 572.

North Carolina. — *Dickinson v. Dickinson*, 3 Murph. (7 N. Car.) 327, 9 Am. Dec. 608; *State v. Bond*, 4 Jones L. (49 N. Car.) 9.

Oklahoma. — *Ex p. Larkin*, 1 Okla. 53.

Pennsylvania. — *Com. v. Lewis*, 6 Binn. (Pa.) 271; *Tate v. Stooltzfoos*, 16 S. & R. (Pa.) 35, 16 Am. Dec. 546.

Texas. — *Holt v. State*, 2 Tex. 363; *Dawson v. State*, 6 Tex. 347; *Ex p. Mayer*, 27 Tex. 715; *Murray v. State*, 1 Tex. App. 417.

Vermont. — *State v. Welch*, 65 Vt. 50.

Washington. — *Lybarger v. State*, 2 Wash. 552.

West Virginia. — *Ex p. Hunter*, 2 W. Va. 122.

2. *Cooley on Constitutional Law* 286.

3. See *supra*, this title, *Definition and General Nature*.

4. Creation of New Crimes. — *In re Murphy*, 1 Woolw. (U. S.) 141; *Woodruff v. State*, 3 Ark. 285; *Com. v. Edwards*, 9 Dana (Ky.) 447; *State v. Doherty*, 60 Me. 504; *State v. Bond*, 4 Jones L. (49 N. Car.) 9. See also *Wartman v. Philadelphia*, 33 Pa. St. 202; *In re Ahung*, 9 Hawaiian 448. And see *infra*, this section, *Laws Imposing a Penalty or the Deprivation of a Right*.

Illustrations. — A statute which deprives a man of his estate, or any part of it, for a crime which was not declared by any previous law to be an offense, is void as an *ex post facto* law. *Fletcher v. Peck*, 6 Cranch (U. S.) 87.

A provision that "every surveyor who shall have wilfully and knowingly violated the instructions of the surveyor-general in not marking out the boundaries of all lands formerly granted, and which are within the survey by him or them made," shall be criminally prosecuted, is unconstitutional. *State v. Solomons*, 3 Hill L. (S. Car.) 96.

The trustees of a town discontinued a road in 1813. In 1816 a house was built on the old roadway, after which the legislature declared it a public highway. It was held that the builder of the house could not be held guilty of maintaining a nuisance. *People v. Lawson*, 17 Johns. (N. Y.) 277.

An act approved in the afternoon, increasing the duty on tobacco, and prescribing a fine for removing it from the manufactory without the proper stamp, is *ex post facto* as to a person who removed tobacco in the forenoon of that day. *Burgess v. Salmon*, 97 U. S. 381.

Extradition Treaty. — A treaty may provide for the extradition of a criminal for an offense committed abroad before the making of the treaty, without violating the constitutional inhibition, as the fact of extradition cannot properly be regarded as punishment within the sense of that word as used when considering the subject of *ex post facto* laws. *In re De Giacomo*, 12 Blatchf. (U. S.) 391. See also the titles EXTRADITION, *post*; TREATIES.

would fall under this class has ever arisen, and that it is not probable that such a case will arise.¹

d. **LAWS CHANGING PUNISHMENT.**—The authorities all agree that laws which change the punishment and inflict a greater punishment than the law annexed to the crime when committed are unconstitutional,² and it is equally well settled that statutes mitigating the punishment for crime may be made to apply to past offenses,³ but in applying these principles the authorities are not nearly so harmonious.⁴ It has been said that the better doctrine is that a law changing the punishment for offenses committed before its passage is *ex*

1. **Aggravation of Crime.**—5 Crim. L. Mag. 333.

2. **Laws Increasing Punishment**—*United States*.
—*Jaehne v. New York*, 128 U. S. 189.

Illinois.—*Johnson v. People*, 173 Ill. 131;
Mullen v. People, 31 Ill. 444.

Indiana.—*Hicks v. State*, 150 Ind. 293.

Iowa.—*State v. Squires*, 26 Iowa 340.

Maryland.—*Beard v. State*, 74 Md. 132;
Lynn v. State, 84 Md. 67.

Michigan.—See *People v. Dane*, 81 Mich. 36.

Mississippi.—*Lindzey v. State*, 65 Miss.
542, 7 Am. St. Rep. 674; *Hodnett v. State*, 66

Miss. 26, *State v. Gillis*, 1 Miss. Dec. 45.

New Hampshire.—*Rich v. Flanders*, 39 N.
H. 304.

Texas.—*Maul v. State*, 25 Tex. 166; *Murray v. State*, 1 Tex. App. 417; *Hannahan v. State*, 7 Tex. App. 664; *Ex p. Hunt*, 28 Tex. App. 361, citing 7 AM. AND ENG. ENCYC. OF LAW (1st ed.) 527.

3. **Laws Mitigating Punishment**—*Alabama*.
—*Turner v. State*, 40 Ala. 21.

Colorado.—*In re Tyson*, 13 Colo. 482.

Indiana.—*Hicks v. State*, 150 Ind. 293.

Massachusetts.—*Dolan v. Thomas*, 12 Allen (Mass.) 421; *Com. v. McKenney*, 14 Gray (Mass.) 1; *Com. v. Gardner*, 11 Gray (Mass.) 438.

Mississippi.—*Clarke v. State*, 23 Miss. 261.

Nebraska.—*Hair v. State*, 16 Neb. 601.

New Hampshire.—*Wuart v. Winnick*, 3 N. H. 473, 14 Am. Dec. 384; *State v. Arlin*, 39 N. H. 179; *Rich v. Flanders*, 39 N. H. 304.

New York.—*People v. Hayes*, 140 N. Y. 484, 37 Am. St. Rep. 572.

Texas.—*McInturf v. State* 20 Tex. App. 335.

Wisconsin.—*Keene v. State*, 3 Chand. (Wis.) 109.

4. **Examples of Laws Increasing—Minimum Imprisonment Increased.**—In *Com. v. McDonough*, 13 Allen (Mass.) 581, it was held that a law passed after the commission of the offense of which the defendant stood charged, which mitigated the punishment, as regarded the fine and the maximum of imprisonment that might be inflicted, was an *ex post facto* law as to that case, because the minimum of imprisonment was made three months, whereas before there was no minimum limit to the court's discretion. See also *Flaherty v. Thomas*, 12 Allen (Mass.) 428.

Imprisonment in Addition to Execution.—The repealed law provided that a person convicted of a capital crime should be confined in the county jail until the day of execution. The new law provided for solitary confinement in the penitentiary, and that the warden should fix the day and hour of execution and keep the prisoner in ignorance of it. It was held that

the act imposed greater punishment and was unconstitutional. *Medley, Petitioner*, 134 U. S. 160; *Savage, Petitioner*, 134 U. S. 176.

A statute providing that prisoners sentenced to be hanged shall be confined in the penitentiary at hard labor not less than one year and until the governor shall issue his order of execution is *ex post facto* in its application to crimes committed before it took effect. *In re Petty*, 22 Kan. 477; *Hartung v. People*, 22 N. Y. 95, 26 N. Y. 167, 28 N. Y. 400.

Amount Allowed for Labor Diminished.—By statute the rate allowed a county convict as credit upon his fine and cost, when working the same out by manual labor, was reduced from one dollar to fifty cents per day. It was held that as to persons convicted prior to the passage of this statute it was unconstitutional. *Ex p. Hunt*, 28 Tex. App. 361.

Penalty Increased.—Where the law in force at the time of the commission of an act or the omission of a duty affixed a penalty of fifty dollars as the exact measure of punishment, and this was subsequently amended by fixing a discretionary penalty not exceeding one hundred dollars, with a saving clause in the amendatory act that it should not apply to suits then pending under the prior law except as to the penalty, which was made to apply to suits then pending, it was held that so much of the saving clause as sought to change the punishment and apply it to existing suits for the penalty was an *ex post facto* law, and void. *Wilson v. Ohio, etc., R. Co.*, 64 Ill. 542, 16 Am. Rep. 565.

Costs Increased.—A statute increasing the costs in criminal prosecutions is *ex post facto* as to offenses committed before its enactment. *Caldwell v. State*, 55 Ala. 133.

Fine Added.—An act punishable by imprisonment when committed cannot by a subsequent statute be made punishable by both fine and imprisonment. *State v. McDonald*, 20 Minn. 136.

Examples of Laws Mitigating—Change from Death Penalty to Imprisonment.—Changing the punishment from death to imprisonment for life mitigates the punishment. *Com. v. Wyman*, 12 Cush. (Mass.) 237; *Com. v. Gardner*, 11 Gray (Mass.) 438; *McInturf v. State*, 20 Tex. App. 335. Compare *Shepherd v. People*, 25 N. Y. 406.

Term of Imprisonment Changed.—A change in the penalty for perjury from "imprisonment for not less than two nor more than ten years" to "a term not exceeding ten years," is in mitigation. *People v. Hayes*, 140 N. Y. 484, 37 Am. St. Rep. 572.

Hiring Out Convicts.—An act which is passed after sentence authorizing the leasing

post facto and void unless the change consists in the remission of some separable part of the punishment before prescribed, or is referable to prison discipline or penal administration as its primary object.¹

No Saving Clause. — When the rule of punishment laid down in a statute has been superseded and repealed, without any saving for prosecutions pending or offenses already committed, by a subsequent statute which is *ex post facto* as to such prior offenses because it establishes a new rule of punishment which changes the rule in force when the offense was committed, to the disadvantage of the offender, a person who has committed an offense prior to the enactment of such subsequent statute cannot be punished at all. He cannot be punished under the prior statute, for it has been repealed; nor under the latter statute, because as to him it is *ex post facto*.²

or hiring out of convicts does not, in contemplation of law, increase their punishment. *Mason, etc., Co. v. Main Jellico Mountain Coal Co.*, 87 Ky. 467; *State v. McCauley*, 15 Cal. 455.

Life Imprisonment Decreased. — A prisoner was indicted for a robbery which at the time of its commission was punishable by imprisonment for life; but by the same law he was entitled to have counsel assigned him by the government, process to compel the attendance of witnesses, and other privileges. A subsequent law mitigated the severity of the punishment and repealed the act giving the privileges. It was held that it changed the punishment to his advantage. *State v. Arlin*, 39 N. H. 179.

Death Penalty Commuted to Fine, etc. — Commutation of the death penalty to fine, whipping, and imprisonment is in mitigation. *State v. Williams*, 2 Rich. L. (S. Car.) 418, 45 Am. Dec. 741.

Whipping Altered to Fine, etc. — A law altering the punishment from whipping not exceeding one hundred stripes to fine and imprisonment in the penitentiary is constitutional. *Strong v. State*, 1 Blackf. (Ind.) 193.

Whipping Altered to Imprisonment. — A change in the punishment of larceny from whipping and imprisonment at common law to imprisonment in the state's prison or county jail for not less than four months nor more than ten years is not liable to the objection of an *ex post facto* law. *State v. Kent*, 65 N. Car. 311. See also *State v. Ratts*, 63 N. Car. 503.

In a case where the punishment was changed from thirty-nine stripes to confinement in the penitentiary for seven years it was considered doubtful whether the latter punishment was the more severe, and the prisoner was allowed to make his choice between them. *Herber v. State*, 7 Tex. 69.

Statute of Limitations. — A statute imposing a limitation upon prosecutions does not partake of the nature of an *ex post facto* law, as it mitigates or modifies the law in favor of the citizen. *Martin v. State*, 24 Tex. 61.

Prisoner's Election. — A law allowing the prisoner to make his election whether he shall receive the penalty provided by the law in force at the time of the commission of the crime or by the amended law enacted since is constitutional. *Clarke v. State*, 23 Miss. 261; *McInturf v. State*, 20 Tex. App. 335.

1. Remission of Separable Part of Penalty. — *Lindzey v. State*, 65 Miss. 542, 7 Am. St. Rep.

674; *State v. Willis*, 66 Mo. 131; *Hartung v. People*, 22 N. Y. 95; *Shepherd v. People*, 25 N. Y. 406; *Ratzky v. People*, 29 N. Y. 124.

2. Effect of Failure to Enact a Saving Clause.

— *Garvey v. People*, 6 Colo. 559, 45 Am. Rep. 531; *State v. Daley*, 29 Conn. 272; *Flaherty v. Thomas*, 12 Allen (Mass.) 428; *Com. v. McDonough*, 13 Allen (Mass.) 581; *Lindzey v. State*, 65 Miss. 542, 7 Am. St. Rep. 674; *Hodnett v. State*, 66 Miss. 26; *Hartung v. People*, 22 N. Y. 95; *Kuckler v. People*, 5 Park. Cr. Rep. (N. Y. Supreme Ct.) 212. See also *State v. Gray*, 34 Conn. 118. And see the title STATUTES.

Implied Saving Clause. — In *Beard v. State*, 74 Md. 130, *distinguishing Flaherty v. Thomas*, 12 Allen (Mass.) 428, it was held that a statute which provided that "any person who shall keep a disorderly house shall, on conviction thereof, be subject to a fine of not less than fifty dollars," etc., thereby increasing the minimum penalty for the offense, was prospective in its operation, and that a person who, prior to the passage of such statute, was convicted of the common-law offense of keeping a disorderly house should be punished as at common law. The court said: "Now, as there was no repeal of the old penalty, and as the plain and evident intention of the legislature was merely to apply the new penalty to cases which might occur in the future instead of the statute repealing by implication the common-law punishment it must be read as continuing that punishment in force as respects pending cases conformably to the intent of the framers of the law manifested by the language which they employed. It was competent to the legislature to save from the operation of the act cases then pending; and that saving could have been effected either by express declaration or by a reasonable implication, arising from the words actually used."

Express Saving Clause. — The provision in the repealing clause of a statute that no penalty theretofore incurred shall be affected leaves pending prosecutions to be regulated by the old law. *People v. Maxwell*, 83 Hun (N. Y.) 157. To the same effect is *People v. Nolan*, (Ct. App.) 24 N. Y. St. Rep. 588.

General Saving Clause. — A general statutory saving clause is sufficient where the new law contains no special clause. *People v. McNulty*, 93 Cal. 427.

In *Florida* there is a constitutional saving clause. *Ex p. Pells*, 28 Fla. 67; *Mathis v. State*, 31 Fla. 291.

e. LAWS CHANGING RULES OF EVIDENCE. — Statutes which so alter the rules of evidence as to make less or other testimony than the law admitted at the time of the commission of the offense competent in order to convict the offender are unconstitutional.¹ But a law which simply enlarges the class of persons who may be competent to testify is not *ex post facto* in its application to offenses previously committed.²

f. LAWS IMPOSING A PENALTY OR THE DEPRIVATION OF A RIGHT. — As a general rule, laws which attempt to deprive persons of some legal right, such as the right to exercise certain trades, callings, or professions, because of acts committed before the enactment of such laws, are *ex post facto*.³ But it seems that retrospective laws affecting the right to vote are constitutional, as the right to vote is only a privilege granted by the state and not strictly a legal right.⁴

Test Oaths. — Statutes and constitutional provisions making it necessary for persons to take an oath of past loyalty to the government before they could exercise certain trades, callings, or professions, have been held *ex post facto*.⁵ But statutes requiring persons to take such an oath as a prerequisite to the right to vote have been held valid.⁶

1. Changes in Rules of Evidence. — *U. S. v. Hughes*, 8 Ben. (U. S.) 29; *Hart v. State*, 40 Ala. 32, 88 Am. Dec. 752; *Martin v. State*, 22 Tex. 214; *Valesco v. State*, 9 Tex. App. 77.

Illustrations. — A law which provided that in actions for violation of the revenue laws the government could move for the production of papers under control of the defendant, and that on the failure of the defendant to produce them the allegations of the motion should be taken as true, was held unconstitutional as to past offenses. *U. S. v. Hughes*, 8 Ben. (U. S.) 29.

A provision in a state constitution which required a person, before officiating as a clergyman, to make oath that he had not done certain things before the adoption of the constitution, was declared to change the rules of evidence, and to assume guilt instead of innocence, and to be, therefore, an *ex post facto* law as to past offenses. *Cummings v. State*, 4 Wall. (U. S.) 277.

The repeal of a statute prohibiting a conviction on the uncorroborated testimony of an accomplice does not affect prosecutions pending prior to such repeal. As to such prosecutions it is *ex post facto*. *Hart v. State*, 40 Ala. 32, 88 Am. Dec. 752.

A statute enacted subsequent to the finding of an indictment for bigamy, allowing the marriage to be proved by indirect and circumstantial evidence instead of direct and positive evidence, is *ex post facto*. *State v. Johnson*, 12 Minn. 476, 93 Am. Dec. 241.

A statute changing the procedure so that in a prosecution for defacing brands, "where property is owned in common, or jointly, by two or more persons, the ownership may be alleged to be in all or either of them," alters the legal rules of evidence to the disadvantage of the accused. *Calloway v. State*, 7 Tex. App. 585; *Hannahan v. State*, 7 Tex. App. 604.

Statute Changing Evidence as to Character Constitutional. — In *Robinson v. State*, 84 Ind. 452, it was held that a statute which provided that "in all questions affecting the credibility of a witness his general moral character may be given in evidence" was applicable to prosecu-

tions for crimes committed before it took effect and was not *ex post facto*.

2. Number of Competent Witnesses Increased. — *Hopt v. Utah*, 110 U. S. 574; *Mrous v. State*, 31 Tex. Crim. Rep. 597, 37 Am. St. Rep. 834.

3. Statutes Depriving of Legal Right Unconstitutional. — *Pierce v. Carskadon*, 16 Wall. (U. S.) 234, reversing 4 W. Va. 234; *People v. Hawker*, 14 N. Y. App. Div. 188.

Qualifications for a Doctor. — In *Fox v. Territory*, 2 Wash. Ter. 297, it was held that a statute prescribing the qualifications for practicing medicine was in no sense an *ex post facto* law.

4. Statutes Depriving of Right of Suffrage Constitutional. — *Washington v. State*, 75 Ala. 582, 51 Am. Rep. 479; *State v. Echeveria*, 33 La. Ann. 709; *State v. Woodson*, 41 Mo. 227; *Garrett v. Weinberg*, (S. Car. 1898) 31 S. E. Rep. 341. And see the title ELECTIONS, vol. 10, p. 568.

5. Invalid Test Oaths. — *Ex p. Garland*, 4 Wall. (U. S.) 333; *Cummings v. State*, 4 Wall. (U. S.) 277; *Murphy*, etc., *Test Oath Cases*, 41 Mo. 339; *State v. Heighland*, 41 Mo. 388. But see *Ex p. Hunter*, 2 W. Va. 122; *Ex p. Quarrier*, 4 W. Va. 210.

A priest of the Roman Catholic church was indicted and convicted in one of the circuit courts of the state of *Missouri* of the crime of teaching and preaching as a priest and minister of that religious denomination without having first taken the oath of past loyalty to the United States government, and was sentenced to pay a fine and to be committed to jail until the same was paid. On appeal to the Supreme Court of the United States this judgment was reversed on the ground that the constitutional provision requiring the taking of such oath was *ex post facto* and void. *Cummings v. State*, 4 Wall. (U. S.) 277.

6. Valid Test Oaths. — *Blair v. Ridgely*, 41 Mo. 63, 97 Am. Dec. 248; *State v. Neal*, 42 Mo. 119; *Anderson v. Baker*, 23 Md. 531; *Randolph v. Good*, 3 W. Va. 551. Compare *Rison v. Farr*, 24 Ark. 161, 87 Am. Dec. 52; *Green v. Shumway*, 39 N. Y. 418.

Religious Test Oath. — In *Shepherd v. Grim-*

g. LAWS DEPRIVING ACCUSED OF LAWFUL PROTECTION. — A statute which purports to authorize the prosecution, trial, and punishment of a person for an offense previously committed, and as to which all prosecution, trial, and punishment were at the time of the passage of such statute already barred, according to pre-existing statutes, is *ex post facto*.¹ But it has been said that in any case where a right to acquittal has not been absolutely acquired by the completion of the period of limitation, that period is subject to enlargement or repeal without being obnoxious to the constitutional prohibition against *ex post facto* laws.² A person who has become entitled to immunity from prosecution by an amnesty act is not made liable to prosecution for past offenses by the repeal of such act.³ And it has been held that when, after an offender has been legally convicted, the law prescribing the punishment is superseded by a statute which so changes the punishment as to be within the constitutional inhibition against *ex post facto* laws, and there is no saving clause as to prior offenses, and, upon an appeal taken by him, such subsequent statute is adjudged *ex post facto*, such adjudication is equivalent to an acquittal, and the offender may, upon being arraigned a second time, plead former acquittal in bar and be discharged; and that the re-enactment of the statute in force when the offense was committed will not affect the offender's right to plead such former acquittal.⁴

h. LAWS ALTERING SITUATION OF ACCUSED TO HIS DISADVANTAGE. — Generally speaking, if, after the commission of an offense, a statute is passed which, in relation to such offense or its consequences, alters the situation of the person accused of the commission thereof to his disadvantage, such statute is unconstitutional.⁵

mett, 2 Idaho 1123, *distinguishing* *Cummings v. State*, 4 Wall. (U. S.) 277, and *Green v. Shumway*, 39 N. Y. 419, it was held that the elector's oath enacted at the first session of the legislature of the state of Idaho, and approved February 25, 1891, was not an *ex post facto* law, but was clearly within the constitutional power of the legislature. This oath was in these words: "I do swear, or affirm, * * * that since the first day of January, 1888, and since I have been eighteen years of age, I have not been a bigamist or polygamist, or have lived in what is known as patriarchal, plural, or celestial marriage, or in violation of any law of this state or of the United States forbidding any such crime, and I have not during said time taught, advised, counseled, aided, or encouraged any person to enter into bigamy, polygamy, or such patriarchal, plural, or celestial marriage," etc. See also *Murphy v. Ramsey*, 114 U. S. 15; *Davis v. Beason*, 133 U. S. 333; *Innis v. Bolton*, 2 Idaho 407; *Wooley v. Watkins*, 2 Idaho 555.

1. **Repeal of Statutes of Limitation.** — *Moore v. State*, 43 N. J. L. 203, 39 Am. Rep. 558; *State v. Sneed*, 25 Tex. Supp. 66. See also *Thompson v. State*, 54 Miss. 740.

2. **Enlargement of Statute of Limitation.** — *Com. v. Lord*, 12 Hun (N. Y.) 282.

3. **Repeal of Amnesty Statute.** — *State v. Keith*, 63 N. Car. 140.

4. **Former Acquittal.** — *Hartung v. People*, 26 N. Y. 167, 28 N. Y. 400, *reversing* 23 How. Pr. (N. Y. Supreme Ct.) 314. See also *Shepherd v. People*, 25 N. Y. 406. And see the title JEOPARDY.

5. **Situation of Person Altered to His Disadvantage.** — *U. S. v. Hall*, 6 Cranch (U. S.) 171; *Fletcher v. Peck*, 6 Cranch (U. S.) 138; *Garvey*

v. People, 6 Colo. 559, 45 Am. Rep. 531; *Marion v. State*, 16 Neb. 349, 20 Neb. 233, 57 Am. Rep. 825. See also *Myers v. Com.*, 90 Va. 785, *citing* 7 AM. AND ENG. ENCYC. OF LAW (1st ed.) 531.

Illustrations. — In *Kring v. Missouri*, 107 U. S. 221, at the time of the commission of the murder for which the defendant was indicted, the Supreme Court of *Missouri* had declared the law to be that when a conviction was had of murder in the second degree on an indictment charging murder in the first degree, if the conviction was set aside the defendant could not again be tried for murder in the first degree. After the commission of the crime the constitution of the state was so amended as to abrogate this rule and allow a defendant to be again put upon his trial for the highest crime charged in the indictment. After the change in the constitution, the defendant, having been put on his trial for murder, made an agreement with the prosecuting attorney by which he was to plead guilty of murder in the second degree and receive a sentence of ten years' imprisonment in the penitentiary of the state. He entered his plea of guilty of murder in the second degree, but the court refused to be bound by the agreement of the prosecuting attorney, and sentenced the defendant to the penitentiary for a term of twenty-five years. Upon appeal to the Supreme Court of the state the sentence was set aside and a new trial granted. When again arraigned for the trial the defendant insisted on his agreement with the prosecutor, but the court still refused to be bound by it. The defendant refused to withdraw his plea of guilty, but the court set it aside and entered a plea of not guilty. He was tried, found guilty of murder in the first degree, and sen-

2. Laws Classed as Not Ex Post Facto — a. LAWS REGULATING PROCEDURE.

— It is well settled that statutes regulating the mode of procedure only in the prosecution of antecedent crimes are not *ex post facto*, and that it is within the power of the legislature to change the form and method of procedure in any manner which, in relation to the offense or its consequences, does not alter the situation of the accused to his disadvantage.¹ Thus the number of

tenced to be hanged. Upon appeal to the Supreme Court of the state the judgment of the lower court was affirmed, and an appeal was then taken to the Supreme Court of the United States, where the judgment was set aside, that court holding that as at the time of the commission of the offense a judgment of guilty of murder in the second degree was a final acquittal of the crime of murder in the first degree, so it must continue to be so far as that crime was concerned.

A statute providing among other things that the credits of a prisoner for good behavior should be estimated upon a less favorable basis than that in force when he was sentenced is to that extent *ex post facto*. *Matter of Canfield*, 98 Mich. 644.

A statute providing that whenever a person is adjudged guilty of a misdemeanor, and punished by a fine, and the judgment is replevied, the clerk shall, upon the expiration of the stay, issue to the sheriff a copy of said judgment, with his mandate attached, and upon the receipt thereof "it shall be the duty of the sheriff or constable to arrest the defendant and commit him to jail unless or until such fine and costs are paid," is unconstitutional as to judgments replevied before its passage. *Dinckerlocker v. Marsh*, 75 Ind. 548.

Former Slaves Exempt from Punishment. — In *Burt v. State*, 39 Ala. 617, it was held that after the abolition of slavery a former slave could not be punished for murder committed by him while a slave, under the statute providing for the conviction and punishment of slaves, and that he could not be punished under the general criminal statutes, as they were not in force as to him when the offense was committed, and to punish him thereunder would be to punish him under an *ex post facto* law. To the same effect are *Nelson v. State*, 39 Ala. 667; *George v. State*, 39 Ala. 675. But it was held that former slaves were liable to punishment for offenses committed after they became freedmen although the laws applicable to freedmen were enacted while they were slaves. *Eliza v. State*, 39 Ala. 603; *Witherby v. State*, 39 Ala. 702; *Ferdinand v. State*, 39 Ala. 706.

1. Mode of Procedure May Be Changed — United States. — *Hopt v. Utah*, 110 U. S. 574; *Duncan v. Missouri*, 152 U. S. 377; *Gibson v. Mississippi*, 162 U. S. 566; *Thompson v. Missouri*, 171 U. S. 380, *affirming* 141 Mo. 408. *Arkansas*. — *Potter v. State*, 42 Ark. 29. *Connecticut*. — *State v. Hoyt*, 47 Conn. 518. *Indiana*. — *Robinson v. State*, 84 Ind. 452; *Sage v. State*, 127 Ind. 15.

Louisiana. — *State v. Caldwell*, 50 La. Ann. 666 [citing 7 AM. AND ENG. ENCYC. OF LAW (1st ed.) 525, 531]; *State v. Carter*, 33 La. Ann. 1214.

Maine. — *State v. Corson*, 59 Me. 137.

Massachusetts. — *Com. v. Bean*, Thach. Cr.

Cas. (Mass.) 85; *Com. v. Hall*, 97 Mass. 570; *Jacquins v. Com.*, 9 Cush. (Mass.) 279.

Missouri. — *State v. Johnson*, 81 Mo. 60.

Montana. — *State v. Ah Jim*, 9 Mont. 167.

Nebraska. — *Marion v. State*, 20 Neb. 233, 57 Am. Rep. 825, 16 Neb. 349.

New Jersey. — *Moore v. State*, 43 N. J. L. 203, 39 Am. Rep. 558.

South Carolina. — *Anderson v. O'Donnell*, 29 S. Car. 355.

South Dakota. — *State v. Bunker*, 7 S. Dak. 639.

Texas. — *March v. State*, 44 Tex. 64; *State v. Manning*, 14 Tex. 402.

Utah. — *State v. Bates*, 14 Utah 293; *State v. Carrington*, 15 Utah 480.

Vermont. — *State v. Welch*, 65 Vt. 50.

Virginia. — *Jones v. Com.*, 86 Va. 661.

Washington. — *Lybarger v. State*, 2 Wash. 552; *State v. Hoyt*, 4 Wash. 818.

Wyoming. — *People v. McDonald*, 5 Wyoming 526; *In re Wright*, 3 Wyoming 478.

See also *O'Donoghue v. Akin*, 2 Duv. (Ky.) 478.

Reduction in Number of Grand Jury. — The accused were indicted by a grand jury composed of twelve, under the provisions of article 117 of the new state constitution, and convicted by a petit jury of twelve, of whom less than the whole number concurred, under the provisions of article 116. The crime was burglary committed before the adoption of the constitution of 1898. The defense was made that these provisions of the constitution were *ex post facto* as applied to past offenses, and that the accused could be indicted only by a grand jury composed of sixteen, and convicted only by a concurrence of all twelve of the petit jury. It was held that the provisions referred to operate changes in the method of procedure only, relate to the remedy, and are in no sense *ex post facto* in character, and that articles 116 and 117 of the constitution are self-operative. *State v. Caldwell*, 50 La. Ann. 666, *citing* 7 AM. AND ENG. ENCYC. OF LAW (1st ed.) 525, 531.

Jury Regulations. — A statute regulating the mode of summoning and making up juries for the trial of offenses committed before its passage is constitutional. *Gibson v. Mississippi*, 162 U. S. 566; *Perry v. Com.*, 3 Gratt. (Va.) 602.

Right to Judge the Law Taken from Jury. — A statute making the court instead of the jury the judge of the law changes the procedure only and is constitutional. *Marion v. State*, 20 Neb. 233, 57 Am. Rep. 825.

Time of Challenge Changed. — A reduction of the time within which the accused is required to challenge veniremen is not unconstitutional. *State v. Taylor*, 134 Mo. 109.

Grounds of Challenge Regulated. — A retrospective statute regulating the grounds for challenging jurors is not unconstitutional. *Stokes v. People*, 53 N. Y. 164, 13 Am. Rep. 492.

peremptory challenges allowed the accused or the prosecution may be changed by statute after the commission of the offense.¹ A statute which abolishes an existing court, or creates a new court, or confers an additional jurisdiction on a court already organized, or enlarges or diminishes the powers of an existing court, does not fall under the constitutional ban against *ex post facto* laws.² A law changing the place of trial from one county to another county in the same district, or even to a different district from that in which the offense was committed or the indictment found, is not an *ex post facto* law, though passed subsequent to the commission of the offense or the finding of the indictment.³ But a statute which takes from the accused a substantial right given to him by the law in force at the time to which his guilt relates is *ex post facto* in its nature and operation, and a statute of that kind cannot be sustained simply because in a general sense it may be said to regulate procedure.⁴

b. LAWS INCREASING PUNISHMENT BECAUSE OF PRIOR OFFENSES.—A statute providing that the punishment for offenders who have been previously convicted shall be increased for that reason is not *ex post facto* though

Time and Place of Execution.—A statute passed after a criminal has been convicted and sentenced to capital punishment, fixing the time and place for executions and restricting the number of witnesses, is constitutional though retrospective in its application. *Holden v. Minnesota*, 137 U. S. 483.

Assessment of Punishment by Jury.—In *Holt v. State*, 2 Tex. 363, it was held that the *Texas* Act of 1846, requiring the jury in certain cases to assess the amount of punishment to be inflicted, was not an *ex post facto* law in reference to offenses for which there were prosecutions pending at the period of its enactment.

Right to Closing Argument.—In *People v. Mortimer*, 46 Cal. 114, it was held that a retrospective statute which deprived the counsel for the accused of the closing argument was constitutional.

Statutes as to Indictments.—A statute allowing the amendment of pending indictments is not *ex post facto*. *Lasure v. State*, 19 Ohio St. 43; *State v. Manning*, 14 Tex. 402. Nor is a statute which prescribes a simpler form of indictment. *State v. Corson*, 59 Me. 137.

Correction of Sentence.—In *Ex p. Bethurum*, 66 Mo. 545, it was held that a statute which provided that if an offender was sentenced to confinement in a place different from that required by law the court before whom he might be brought on habeas corpus should sentence him to confinement in the proper place, and that if he was sentenced for a longer term than the law authorized the court should sentence him for the proper time, is not *ex post facto* because it was made applicable to the correction of erroneous sentences imposed before the passage of such statute.

1. Change in Number of Challenges.—*South v. State*, 86 Ala. 617; *Mathis v. State*, 31 Fla. 291; *Jones v. State*, 1 Ga. 610; *Walston v. Com.*, 16 B. Mon. (Ky.) 15; *State v. Ryan*, 13 Minn. 370; *Dowling v. State*, 5 Smed. & M. (Miss.) 664; *State v. Wilson*, 48 N. H. 398; *Walter v. People*, 32 N. Y. 147; *Stokes v. People*, 53 N. Y. 164, 13 Am. Rep. 492; *Warren v. Com.*, 37 Pa. St. 45.

2. Changes in Court.—*Duncan v. Missouri*, 152 U. S. 377; *Wales v. Belcher*, 3 Pick. (Mass.) 508; *Com. v. Phillips*, 11 Pick. (Mass.)

28; *State v. Jackson*, 105 Mo. 196; *State v. Cooler*, 30 S. Car. 105; *State v. Shumpert*, 1 S. Car. 85; *State v. Moore*, 15 Rich. L. (S. Car.) 57; *State v. Sullivan*, 14 Rich. L. (S. Car.) 281; *State v. Scott*, 7 S. Dak. 610; *State v. Bunker*, 7 S. Dak. 639; *State v. Hughes*, 8 S. Dak. 338; *State v. Welch*, 65 Vt. 50.

If, however, there is no tribunal competent at the time to punish the offense, the jurisdiction cannot afterwards be conferred. *U. S. v. Starr*, *Hempst.* (U. S.) 469.

3. Change of Venue.—*Gut v. State*, 9 Wall. (U. S.) 35, 13 Minn. 341.

A statute repealing a law which allowed the accused in a criminal examination before a magistrate to obtain a change of venue upon filing an affidavit of prejudice is not *ex post facto*, although made applicable to offenses committed before its enactment. *People v. McDonald*, 5 Wyoming 526.

In *Cook v. U. S.*, 138 U. S. 157, it was held that an Act of Congress was not *ex post facto* because it subjected one accused of murder committed previously to the passage of the act to trial in the eastern district of Texas rather than in some other judicial district.

4. Substantial Rights Must Not Be Affected.—*Kring v. Missouri*, 107 U. S. 221; *Hopt v. Utah*, 110 U. S. 574; *Thompson v. Utah*, 170 U. S. 343; *State v. Kingsly*, 10 Mont 537, *disapproving* *People v. Campbell*, 59 Cal. 243, 43 Am. Rep. 257. See also *March v. State*, 44 Tex. 64.

Illustration.—In *Thompson v. Utah*, 170 U. S. 343, it was held that the provision in the Constitution of Utah providing for the trial in courts of general jurisdiction of criminal cases not capital, by a jury composed of eight persons, is *ex post facto* in its application to felonies committed before the territory became a state, because in respect of such crimes the Constitution of the United States gave the accused, at the time of his offense, the right to be tried by a jury of twelve persons, and made it impossible to deprive him of his liberty except by the unanimous verdict of such a jury. This case was *followed* in *State v. Baker*, (La. 1898) 24 So. Rep. 240, and *State v. Ardoin*, (La. 1899) 24 So. Rep. 802, *overruling* *State v. Carter*, 33 La. Ann. 1214, and *State v. Caldwell*, 50 La. Ann. 670.

it is provided by such statute that convictions which have taken place before its enactment are to be considered.¹ But if both offenses occurred before the passage of the statute, the punishment for the second offense must not be increased by reason of the former offense.²

EXPOSURE OF CHILDREN.—See the title CRUELTY TO CHILDREN, vol. 8, p. 456, and the references there given.

1. Additional Punishment on Account of Prior Offenses.—*Ex p. Gutierrez*, 45 Cal. 430; *State v. Woods*, 68 Me. 469; *Maguire v. State*, 47 Md. 485; *Com. v. Marchand*, 155 Mass. 8; *Com. v. Graves*, 155 Mass. 163; *Sturtevant v. Com.*, 158 Mass. 598; *Ross's Case*, 2 Pick. (Mass.) 165; *People v. Butler*, 3 Cow. (N. Y.) 347; *Blackburn v. State*, 50 Ohio St. 428; *Rand v. Com.*, 9 Gratt. (Va.) 738.

Illustrations.—The Ohio Habitual Criminal Act, providing that one who, after having been twice convicted, sentenced, and imprisoned in some penal institution for felony, whether committed heretofore or hereafter, shall be imprisoned in the Ohio penitentiary for felony hereafter committed, on the expiration of the term for which he shall be so sentenced shall not be discharged, but shall be detained therein for life, is not an *ex post facto* law. *Blackburn v. State*, 50 Ohio St. 428. See also *Matter of Kline*, 6 Ohio Cir. Ct. Rep. 215, 3 Ohio Cir. Dec. 422.

A statute providing a less favorable reduction of sentence for prisoners serving second terms is valid as to offenses committed after its passage by one who had completed a term before it took effect. *In re Miller*, 110 Mich. 676.

While a convict in the state prison was

liable to additional punishment under Stat. Mass. 1827, c. 118, in consequence of having been twice convicted and sentenced to confinement, the statute of 1832, c. 73, was passed, by which a convict was liable to additional punishment only in case he had been twice discharged from imprisonment; but before the prisoner was released from imprisonment upon his second sentence this statute was repealed by the statute of 1833, c. 85. It was held (the statute of 1827 not being repealed) that the statute of 1832 operated to suspend, so long as it remained in force, but not to discharge, the prisoner's liability to additional punishment. The court said: "If the crime had been committed, or if the defendant had been convicted, during the time that the statute of 1832 was in force, the repealing statute of 1833 might be considered as an *ex post facto* law in regard to him. But as the conviction took place in 1831, and he was then liable to the additional punishment, the Act of 1832 operated only as a suspension of his liability, and not in nature of a pardon. That act having been repealed, his liability remains as it was at the time of his conviction." *Com. v. Getchell*, 16 Pick. (Mass.) 452. To the same effect is *Com. v. Mott*, 21 Pick. (Mass.) 492.

2. *Ross's Case*, 2 Pick. (Mass.) 172.

EXPOSURE OF PERSON.

BY FRANCIS J. BYRNE.

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CROSS-REFERENCES.

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I. DEFINITION. — At common law, an indecent exposure of the person is an intentional exhibition, to more than one person, of the naked human body, or of the parts thereof which are commonly considered private.¹

II. AS AN OFFENSE AT COMMON LAW — 1. In General. — Indecent exposure of the person is an offense at common law.²

2. Specific Instances. — Illustrations of specific instances of the offense are given in the note.³

1. Bouvier's Definition. — "In criminal law, such an intentional exposure, in a public place, of the naked body, as is calculated to shock the feelings of chastity or to corrupt the morals." Bouv. L. Dict., tit. Exposure of Person.

The definition given by Bouvier, in so far as the publicity of the place of the offense is concerned, would not, in view of a late English decision, seem to be accurate; for it is by no means certain that at common law the offense must be committed in a public place. See *infra*, this title, *Elements of Offense — Publicity of Place Where Committed — At Common Law.*

2. Indecent Exposure of Person an Offense at Common Law. — *Rex v. Sedley*, 17 How. St. Tr. 155, note, cited in *Rex v. Curl*, 2 Stra. 790, *sub nom.* *Rex v. Sedley*, 1 Sid. 168, *sub nom.* *Sydlye's Case*, 1 Keb. 620; *Huddleston, B.*, in *Reg. v. Wellard*, 14 Q. B. Div. 67, 54 L. J. M. C. 14, 51 L. T. N. S. 604, 33 W. R. 156, 49 J. P. 296, 15 Cox C. C. 559, 1 East P. C. 3; *Knowles v. State*, 3 Day (Conn.) 108; *State v. Rose*, 32 Mo. 561; *State v. Roper*, 1 Dev. & B. L. (18 N. Car.) 208; *Com. v. Spratt*, 14 Phila. (Pa.) 365, 37 Leg. Int. (Pa.) 234.

3. Naked Exposure in a Balcony. — The first case on the subject is that of Sir Charles Sed-

ley in the time of Charles II. In the report of this case in 1 Sid. 168, in the Court of King's Bench, it is stated that Sir Charles Sedley was indicted at common law for having exposed his person naked in a balcony in Covent Garden; that he was offered a trial at bar, but pleaded guilty, when it was said to him by the justices, "that, notwithstanding there was not any Star Chamber, yet they would have him to know that the Court of King's Bench was the *custos morum* of all the king's subjects, and that it was then high time to punish such profane actions, committed against all modesty, which were as frequent as if not only Christianity but morality also had been neglected." There is also a note of this case in 1 Keb. 620, where it is stated that it was an information against Sir Charles Sedley "for showing himself naked in a balcony, and throwing down bottles *vi et armis* among the people in Covent Garden, *contra pacem*." A note of this case will also be found in 17 How. St. Tr. 155, which appears to be made from the reports in *Siderfin* and *Keble* conjoined; but in the observations of the court the assault by the throwing of the bottles does not appear to have been alluded to. See also a note of this

III. AS A STATUTORY OFFENSE. — This offense is regulated by statute in most of the states of the American Union. The statutes generally provide against indecent exposure of the person, or of the private parts thereof, or any obscene exhibition of the person,¹ or other public indecency.²

IV. ELEMENTS OF OFFENSE — 1. The Number of Persons Who See the Exposure — *a. AT COMMON LAW.* — It has been held that an exposure seen by one person only, although in a public place, whether that person be a female or not, is not, at common law, an offense; on the ground that the nuisance must

case in *Reg. v. Webb*, 2 C. & K. 933, 61 E. C. L. 933.

Bathing Near a Public Footway Without Any Screen or Covering. — It is unlawful for men to bathe, without any screen or covering, so near to a public footway frequented by females that exposure of their persons must necessarily occur; and they who so bathe are liable to an indictment for indecency. Nor is it any defense to such an indictment that there has been, as long as living memory extends, a usage so to bathe at the place, and that there has been no exposure beyond what is necessarily incident to such bathing. *Reg. v. Reed*, 12 Cox C. C. 1, 2 Moak 157.

Bathing in the Sea on a Beach Near Inhabited Houses, from which the person may be distinctly seen, is an indictable offense, although the houses may have been recently erected, and till then it may have been usual for men to bathe in great numbers at the place in question. *Reg. v. Crunden*, 2 Campb. 89, 1 Russ. Cr. (Eng. ed.) 326, 1 Gab. Cr. L. 744, 2 Chitt. Cr. L. 41.

An Obscene Exhibition in a Booth on a race-course, with closed doors, to a number of spectators who have paid for their admission upon the invitation of the keepers of the booth to the general public, is an offense at common law. *Reg. v. Saunders*, 1 Q. B. Div. 15, 45 L. J. M. C. 11, 33 L. T. N. S. 677, 24 W. R. 348, 13 Cox C. C. 116.

Exhibiting a Monstrous Child. — Exhibiting a being of unnatural and monstrous shape for money is a misdemeanor. 1 Russ. on Cr. (9th Am. ed.) 452, citing *Harring v. Walrond*, 2 Ch. Cas. 110. This was the case of a monstrous child that died and was embalmed to be kept for show, but was ordered by the lord chancellor to be buried. Cited in *Burn's Just.*, title Nuisance. See also *Knowles v. State*, 3 Day (Conn.) 103. But see *Reg. v. Webb*, 2 C. & K. 938, 61 E. C. L. 938, in which Pollock, C. B., says that exhibiting a monster is not indictable. This was not, however, the offense charged in this case.

Master Permitting Slave Indecently Clad to Go About. — Where an owner of slaves was indicted for disregarding laws of decency by open and notorious lewdness, in causing and permitting his slaves to go about so naked and destitute of clothing that their organs of generation and other parts of their bodies were publicly exposed, it was held that he was guilty of the offense by permitting a female slave to be seen upon several occasions in a state of nakedness, and at other times with garments greatly tattered and torn; for the jury might infer from these facts that the owner withheld from her the clothing necessary for her, and therefore it was not necessary

in order to sustain the indictment that it be proved that the slave exhibited herself in a state of nakedness by command of the master. *Britain v. State*, 3 Humph. (Tenn.) 203.

Stripped to the Waist in Public Place. — It seems that according to the old books a man is not punishable for passing through a thronged public way, stripped nearly to the waist. *Rex v. Tallard*, 2 Barn. 345, *sub nom. Rex v. Gallard*, 1 Sess. Cas. 231. The counsel for the defendant argued that "a man's being stripped from the middle upwards could be no indecent sight. If it was so, the legislature would not have ordered that men shall be whipped in that manner, as they have done by several Acts of Parliament." The court was of the same opinion, and quashed the indictment.

1. An Obscene Exhibition of the Person is any offensive, disgusting, and indelicate presenting to view, show, or display of the person. *State v. Hazle*, 20 Ark. 156.

By the terms "obscene and indecent exhibition of the person," as used in article 343 of the *Texas Penal Code*, is meant an exposure of those parts of the person which are commonly considered as private, and which custom and decency require should be covered and kept concealed from public sight. They do not mean or include an obscene or indecent print, picture, or written composition placed upon the clothes worn upon the person. And therefore where the indictment charged that the defendant made "an obscene and indecent exhibition of the persons of others," it is not sustained by proof that he placed an obscene and indecent writing upon the clothes worn by others. *Tucker v. State*, 28 Tex. App. 541.

2. Public Indecency. — Under a statute against "notorious lewdness or other public indecency" it has been held that "the term 'public indecency' has no fixed legal meaning — is vague and indefinite, and cannot in itself imply a definite offense. And hence the courts, by a kind of judicial legislation, in *England* and the *United States*, have usually limited the operation of the term to public displays of the naked person, the publication, sale, or exhibition of obscene books and prints, or the exhibition of a monster; acts which have a direct bearing on public morals, and affect the body of society." *McJunkins v. State*, 10 Ind. 145.

An indecent exposure of his person by the defendant, by making an uncovered exhibition of his privates, in presence of divers persons, is an act of "public indecency." *Arbery v. State*, 56 Ind. 328.

The Word "Indecently" has no definite legal meaning. *Per Pollock*, C. B., in *Reg. v. Webb*, 2 C. & K. 933, 61 E. C. L. 933.

be public, that is, to the injury or offense of several.¹ But although seen by one person only, yet if there are other persons so situated that they could see it, it would seem that the offense is complete.²

b. UNDER STATUTE. — Under statutes in the *United States* against open and gross lewdness and lascivious behavior, it has been held that the crime does not depend upon the number of persons who may see it, and therefore an exposure to one person is sufficient to complete the offense.³ And in some states the offense is committed whether the exposure be seen by any person or not.⁴

2. Publicity of Place Where Committed — *a. AT COMMON LAW.* — The earlier cases lay down the rule that at common law the offense must be committed in a public place,⁵ and several of the cases afterwards occurring presented for adjudication the question as to what was a public place within the meaning of the law, without the question being raised as to whether or not it should be committed in a public place. But in a later English case it would seem, from what was said by all the judges with the exception of one, who expressed no opinion upon the point, that in order to constitute the offense the place need not, at common law, be public.⁶

b. UNDER STATUTE. — Under statute in some of the *United States* the offense, to be indictable, need not be committed in a public place.⁷

1. Exposure Seen by One Person Only. — Reg. *v. Watson*, 20 Eng. L. & Eq. 599, 2 Cox C. C. 376, reported in note *f* to Reg. *v. Webb*, 2 C. & K. 933, 61 E. C. L. 933; Reg. *v. Webb*, 1 Den. C. C. 338, 3 Cox C. C. 183, T. & M. 23, 2 C. & K. 933, 61 E. C. L. 933, 18 L. J. M. C. 39, 13 Jur. 42; Reg. *v. Farrell*, 9 Cox C. C. 446.

But in Reg. *v. Elliot*, Leigh & C. 103, the evidence was that the prisoners committed fornication in open day, on a common, in the sight of one witness only, but so that any one passing over the common or along a public footway adjacent could have seen them. There was no proof that any persons were passing over the common or along the footway at the time. The judges were divided on the question as to whether the offense was complete, and no judgment was given.

And in Reg. *v. Levasseur*, 9 Leg. N. (Quebec) 386 (Canada), the learned judge said that it was questioned whether an indecent exposure to one person was sufficient to support an indictment of this sort, but that he did not hesitate to say that if the exposure was of a grossly indecent character, as where a man intentionally exposed his person to a woman or to a child, the indictment might be sustained, the gist of the offense being its indecency.

2. Exposure Seen by One Which Others Were in a Situation to See. — Reg. *v. Farrell*, 9 Cox C. C. 446. See also Reg. *v. Webb*, 1 Den. C. C. 338, 3 Cox C. C. 183, T. & M. 23, 2 C. & K. 933, 61 E. C. L. 933, 18 L. J. M. C. 39, 13 Jur. 42.

An indictment against a French master, for exposing his person at a window in Micklegate, York, to excite a servant girl on the second floor of a house on the opposite side of the street, was tried at Yorkshire, in 1830. Parke, B., left it to the jury to say whether those in the street could have seen him or not (not whether they did see him); and said that if they could have seen him, it was a nuisance. *Rex v. Rouverard*, cited in Reg. *v. Webb*, 1 Den. C. C. 338, 18 L. J. M. C. 39, 2 C. & K. 935, 61 E. C. L. 935.

3. Where the Crime Does Not Depend upon the Number Who May See It. — Com. *v. Wardell*, 128 Mass. 52, 25 Am. Rep. 357; *State v. Millard*, 18 Vt. 574, 46 Am. Dec. 170.

In the first of these cases the court, referring to the English decisions, says they were indictments at common law in which the offense charged must always amount to a common nuisance committed in a public place, and seen by persons lawfully in that place; that the word "lewdness" at common law means open and public indecency, but as used and qualified in the statutes it has a broader sense; it is held to mean, as used in the criminal statutes, "the irregular indulgence of lust, whether public or private."

4. Exposure Without Being Seen. — Van Houten *v. State*, 46 N. J. L. 16, 50 Am. Rep. 397.

Under the *Arkansas* statute, if a person appear naked, or partly so, with the intent to exhibit his nudity, he is guilty of the offense whether his nudity be actually seen by any person or not. The exposure to view is sufficient. *State v. Hazle*, 20 Ark. 156. See also *State v. Roper*, 1 Dev. & B. L. (18 N. Car.) 208, to the same effect, although it does not appear that the indictment was framed under a statute.

5. Place Where Offense Committed. — Reg. *v. Thallman*, Leigh & C. 326, 9 Cox 388; Reg. *v. Orchard*, 3 Cox C. C. 248, 20 Eng. L. & Eq. 598; Reg. *v. Levasseur*, 9 Leg. N. (Quebec) 386. See Reg. *v. Mallam*, 32 L. J. M. C. 58.

Where the indictment charged that the offense was committed on a highway, and the evidence was that the offense was committed in a place near the highway, but in full view of it, it was held that the charge was not proved. Reg. *v. Farrell*, 9 Cox C. C. 446.

6. Reg. v. Wellard, 14 Q. B. Div. 63, 54 L. J. M. C. 14, 51 L. T. N. S. 604, 33 W. R. 156, 49 J. P. 296, 15 Cox C. C. 559.

7. Obscene Exhibition of Person in Private House — Arkansas Statute. — Under the *Arkansas* statute providing that "every person who shall appear in public places naked, or partly so, with the intent of making a public exhibi-

c. WHAT IS A PUBLIC PLACE. — What is a public place is somewhat difficult to define affirmatively. It is, however, obvious that it may vary from time to time. Illustrations of what is a public place are given in the note hereto.¹ Any place may be made public by a temporary assemblage, and this

tion of his nudity, or who shall make any obscene exhibition of his person," etc., a person may commit the offense of making an obscene exhibition of his person in a private house. *State v. Hazle*, 20 Ark. 156.

Under the Massachusetts Statute against "open and gross lewdness and lascivious behavior," a party was indicted for an indecent exposure of his person to a girl eleven years old, in a private house, and it was held that the offense was committed. *Colt, J.*, delivering the opinion of the court, said: "The statute punishes not public, but open, lewdness. The word 'open' qualifies the intention of the perpetrator of the act; it does not fairly imply that it must be public, in the sense of being in a public place, or in the presence of many people. * * * The fact that the act in a given case was intended as an act of open lewdness is most commonly proved, it is true, by evidence that it occurred in a public place or in the presence of many people; but it does not follow that the intentionally open and immodest character of the act may not be equally well proved by other evidence. An indecent act cannot well be public in its character without being open and immodest, and yet it may have both these latter qualities without being in any sense public in its manifestation. In the language of the statute the word 'open' is used as opposed to 'secret.'" *Com. v. Wardell*, 128 Mass. 52, 35 Am. Rep. 357.

But under such statute secret or private lewdness and lascivious behavior between a man and a woman, in the latter's house, which was seen by others, but intended by the parties to be secret, is not an indictable offense. *Com. v. Catlin*, 1 Mass. 8.

Open Lewdness — Wisconsin Statute. — Under Rev. Stat. Wisconsin, § 4579, an act of gross lewdness is "open" though committed in a private place and when no one was present but the defendant and the person upon whom the act is alleged to have been committed, and although such person was a child of tender years. *State v. Juneau*, 88 Wis. 180.

The Illinois Statute (Crim. Code, § 55), denounces "open lewdness * * * or other notorious acts of public indecency." *Williams v. People*, 67 Ill. App. 344, citing 7 AM. AND ENG. ENCYC. OF LAW (1st ed.) 534. In this case the court said: "Lewdness is to be deemed 'open' only when it is committed in the presence of another person, or in a place open to the public view."

Kentucky. — In *Com. v. Hardin*, 2 Ky. L. Rep. 59, it was held that in order to sustain an indictment for indecent exposure of the person, the act must be done in a public place — it must affect the public generally; that the offense is not committed by exposure to two persons, in a private place and with their consent.

1. What Is a Public Place — *Per* Lord Coleridge, C. J., in *Reg. v. Wellard*, 14 Q. B. Div. 63, 54 L. J. M. C. 14, 51 L. T. N. S. 604, 33 W. R. 156, 49 J. P. 296, 15 Cox C. C. 559. In this case it was said, *per* Grove, J.: "A public

place is one where the public go, no matter whether they have a right to go or not. The right is not the question. Many shows are exhibited to the public on private property, yet they are frequented by the public."

A place is a public one if the exposure is such that it is likely to be seen by a number of casual observers. *Van Houten v. State*, 46 N. J. L. 17, 50 Am. Rep. 397, 3 Crim. L. Mag. 732; *Hawaii v. Ben*, 10 Hawaiian 278, citing 7 AM. AND ENG. ENCYC. OF LAW (1st ed.) 534.

Where the evidence showed that the place in question was out of sight of the public footpath, but was a place to which the prisoner had gone with several little girls, though without any legal right to go there, and was a place to which persons were in the habit of going without having any strict legal right so to do, and that persons so going were never in any way hindered or interfered with, it was held that the conviction was correct and that the jury were justified in finding that the place was public. *Reg. v. Wellard*, 14 Q. B. Div. 63, 54 L. J. M. C. 14, 51 L. T. N. S. 604, 33 W. R. 156, 49 J. P. 296, 15 Cox C. C. 559.

Exposure on a Public Road. — A charge that the defendant made an obscene and indecent exhibition of his person "in a public place, to wit, on a public road," is not tantamount to stating that he did it "in public," as expressed in Paschal's *Texas Dig.*, art. 2030. The publicity contemplated therein has reference to persons who do or can see it rather than to the place. A public road in the night-time or in a remote and unfrequented part of the country may be, and often is, such a place as that such an exhibition might be there made without its being made "in public," in the obvious meaning of the law. On the other hand, the place may itself be private, and yet the person be so exhibited to public view as to be an exhibition of the person "in public" in the meaning of the law. *Moffitt v. State*, 43 Tex. 346.

Omnibus. — A party was indicted for an indecent exposure in an omnibus, several passengers being therein. The indictment contained two counts; one laid the offense as having been committed in an omnibus, and the other in a public highway. It was held that an omnibus was a sufficiently public place to sustain the indictment. *Reg. v. Holmes*, *Dears C. C.* 207, 3 C. & K. 360, 6 Cox C. C. 216, 22 L. J. M. C. 122, 17 Jur. 562, 20 Eng. L. & Eq. 597.

Urinal Open to the Public. — Where the defendant exposed his person in a urinal open to the public, and upon a public footpath in Hyde Park, the entrance to which was from the footpath, this was held to be just as much a public place with respect to that portion of the public who used it as a public highway. *Bovill, C. J.*, in reply to the objection that the place must be open to public view, said: "Every place must be more or less screened from view on some side, and the size of an inclosure does not necessarily affect the question whether it is a public place or not. We are only bound to decide whether this could be a

is especially so where the assemblage is gathered to witness an exhibition for hire.¹ But it is not necessary that the exposure should be made in a place open to the public. If the act is done where a number of persons could see it, it is sufficient.²

3. Intent. — The intent is a necessary ingredient of the offense, and may be inferred from the acts of the defendant.³

An Accidental Exposure is not an offense.⁴ But it is within the police power of a city to make it an offense indecently to expose the person, without reference to the intent which accompanies the act.⁵

Intent a Question for the Jury. — But the question of intent is for the jury to

public place; but I think it clearly was so, and just the sort of public place to which the law ought to be applied." *Reg. v. Harris*, L. R. 1 C. C. 282, 40 L. J. M. C. 67, 24 L. T. N. S. 74, 19 W. R. 360, 11 Cox C. C. 659. This case *disapproves* of the ruling in substantially the same state of facts in *Reg. v. Orchard*, 3 Cox C. C. 248, 20 Eng. L. & Eq. 598, where it was held that a urinal with boxes or divisions for the convenience of the public, and situated in an open market, was not a public place within the meaning of the allegation that the defendants committed the act in an open and public place.

A Blacksmith Shop is not necessarily a public place. Such shop may be kept and used for doing the work of the owner or occupier only, and not that of the public. In that event it could not be regarded as a public place, any more than the private house or barn of an individual. *Lorimer v. State*, 76 Ind. 496.

1. Booth on a Racecourse. — The defendants, traveling showmen, during the Epsom races kept a booth on Epsom Downs for the purpose of an indecent exhibition, which booth people were invited to enter on payment. It was held that this was a public place. *Reg. v. Saunders*, 1 Q. B. Div. 15, 45 L. J. M. C. 11, 33 L. T. N. S. 677, 24 W. R. 348, 13 Cox C. C. 116.

A Room in a House of Prostitution in which six women made an indecent exposure of their persons, for money, to five men present and paying therefor was held to be a "public place" within the meaning of the statute, although it was not open to the general public. *People v. Bixby*, 67 Barb. (N. Y.) 221, 4 Hun (N. Y.) 636.

2. Roof of Back Part of House. — Where a man exposed himself indecently on a roof at the back of a house in London, so as to be visible to persons in the back premises of many other houses, but not so as to be capable of being seen from any other place open to the public, and seven persons in one house saw the exposure, the conviction was held good. *Reg. v. Thallman*, 9 Cox C. C. 388, Leigh & C. 326, 33 L. J. M. C. 58, 9 L. T. N. S. 425, 12 W. R. 88.

Yard of House. — Where the transaction in question occurred in the yard of a house which was occupied in part by the defendant and in part by the prosecutors, and the exposure was in view of the windows of two neighboring dwelling houses, it was held that this was a public place. *Van Houten v. State*, 46 N. J. L. 16, 50 Am. Rep. 397, 3 Crim. L. Mag. 732.

So also a private yard in which the defendant might be seen from a public road where persons were passing is a public place. *Reg. v. Levasseur*, 9 Leg. N. (Quebec) 386.

3. Intent a Necessary Ingredient of the Offense. — *State v. Stice*, 88 Iowa 27; *Miller v. People*, 5 Barb. (N. Y.) 203; *People v. Police Com'rs*, 13 N. Y. App. Div. 69, 153 N. Y. 657; *Van Houten v. State*, 46 N. J. L. 17, 50 Am. Rep. 397; *Com. v. Haynes*, 2 Gray (Mass.) 72, 61 Am. Dec. 437. See *People v. Webster*, 86 Hun (N. Y.) 68.

Under the Arkansas Statute providing that every person who shall appear in public places naked, or partly so, with the intent of making a public exhibition of his nudity, or who shall make any obscene exhibition of his person, etc., shall be guilty of a misdemeanor, the intent is material. The intent must be to exhibit the nudity. But a person who from destitution, necessity, or unavoidable casualty appears in a public place naked, or partly so, is guilty of no offense, because in such case the intention to outrage public decency by an exposure of his nudity is wanting. *State v. Hazle*, 20 Ark. 156.

Intent Inferred from Defendant's Acts. — Where the evidence at the trial was that the defendant went to a private house of another person with small articles to sell, and finding no one there but a girl of eleven years and a child of four, proceeded in the presence of both to make an indecent exposure of his person, this was evidence from which the jury would be fully justified in finding that the exposure was made with evil purpose by the defendant, with the intention that it should be seen by one or both of the children present. *Com. v. Wardell*, 128 Mass. 52, 35 Am. Rep. 357.

Where the defendant was charged with a wilful exposure of his person, it was held that evidence of similar acts committed by him at the same place, on the same day and on the preceding day, and in the presence of other persons than the prosecutor, was admissible on the question as to whether the act charged was wilfully done. And evidence in connection with one of such acts as to the defendant having made an indecent proposal to a young lady was also held to be admissible, as bearing on the question of intent. *State v. Stice*, 88 Iowa 27.

4. Accidental Exposure. — *People v. Police Com'rs*, 13 N. Y. App. Div. 69, 153 N. Y. 657.

Under an ordinance which provides that "no person shall make any indecent exposure of his or her person in the streets, lanes, alleys, or elsewhere in said city," an exposure purely accidental is not an offense; for the terms of the ordinance imply an affirmative voluntary act on the part of the accused. *Grand Rapids v. Bateman*, 93 Mich. 135.

5. Grand Rapids v. Bateman, 93 Mich. 135.

determine under all the circumstances of the case, and must not be withdrawn from them.¹

EXPRESS. (See also *DESIGNATE*, vol. 9, p. 405.)—"Express" is defined as directly stated; not implied or left to inference; distinctly and pointedly given; made unambiguous by special intention; clear; plain.²

1. **Question of Intent Is for the Jury.**—*Miller v. People*, 5 Barb. (N. Y.) 203.

2. *Hovey v. State*, 119 Ind. 412. This case was upon the construction of a constitutional provision that no person charged with official duties under one of the several departments, *i. e.*, legislative, executive, and judicial, should exercise any of the functions of another, "except as in this constitution expressly provided." See also *State v. Hyde*, 121 Ind. 34; *Evansville v. State*, 118 Ind. 443; *State v. Denny*, 118 Ind. 464. And see the title *CONSTITUTIONAL LAW*, vol. 6, p. 1008.

Figures—Words.—In *Nugent v. Roland*, 12 Martin (La.) 659, it was said: "The verb 'to express,' in our opinion, may properly be used to denote the designation of a sum of money, either in words or in figures."

"Expressed" Held Equivalent to "Described" or "Designated."—See *Scipio v. Wright*, 101 U. S. 670. This was upon the construction of a statute authorizing towns to borrow money to aid in the construction of railroads, and providing that all moneys borrowed should be turned over to the president and directors of such company, as might be expressed by the written assent of two-thirds of the resident taxpayers. See generally the title *MUNICIPAL AID*.

Express Direction. (See also the title *WILLS*.)—A subsequent ratification by a testator is not equivalent to an *express* direction to sign the testator's name to a will. *Greenough v. Greenough*, 11 Pa. St. 496; *Dunlop v. Dunlop*, 10 Watts (Pa.) 153.

Express Assent—Husband and Wife. (See also the title *HUSBAND AND WIFE*.)—A married woman's act provided that it should not affect the title of any husband to any personal property reduced to his possession with the *express* assent of his wife. In *McGuire v. Allen*, 108 Mo. 403, it was held that the mere blank indorsement by the wife of a check for money due her and delivery of the check to her husband did not constitute an *express* assent, but an implied one. The court said: "Our statute still allows the husband to reduce his wife's personal property to his possession, but this only with her *express* assent. The word *express* is used in its ordinary legal signification in contradistinction to 'implied,' as an *express* warranty, an *express* contract." Compare *Franc v. Nirdlinger*, 41 Ohio St. 298.

Express Promise—Statute of Limitations. (See also the title *LIMITATION OF ACTIONS*.)—In *Ross v. Ross*, 20 Ala. 105, it was held that a charge which asserted that it required an *express* promise or something equivalent to an *express* promise to revive the original cause of action after the statute of limitations had effected a bar was erroneous. The court

said: "When this charge affirms that it took an *express* promise or something equivalent to an *express* promise to revive, etc., if it is to be construed as signifying that it took an *express* promise or something equivalent to an *express* promise in law to revive, etc., it was correct. That was what the court had just declared. But if it is to be construed as signifying that it took an *express* promise or something equivalent to an *express* promise in terms, it is incorrect. The two, though generally equivalent in law as the foundation of an action, are in no other respects equal or equivalent; not in the terms which create them, at any rate, for here they are strictly opposites, as the words *express* and 'implied' of themselves import; these are antagonistic terms. To say, then, in a charge to a jury in this case, that it took an *express* promise or something equivalent to an *express* promise, without more, without noticing in any manner this distinction, was calculated to mislead, and as it was not the duty of the court to modify or give precision to the charge, as asked, it was properly refused."

Obligations of a Railroad.—In *People v. Albany, etc., R. Co.*, 37 Barb. (N. Y.) 218, it was said: "The obligations thus imposed are either *express* or implied; *express*, when they are declared in positive terms in their charter; 'implied,' when they necessarily result from the *express* obligations assumed, or are essential to carry out the substantial objects of the charter."

"*Express Understanding*," in an answer, was held, in *Spence v. Spence*, 17 Wis. 448, to be an equivalent expression for "*express contract*" or "*express agreement*."

Express Acceptance.—Under the statute 7 & 8 Vict., c. 110, § 45, if a bill of exchange drawn upon a joint-stock company regulated by that act be accepted by two of the directors, the acceptance is void as against the company if not *expressed* "to be accepted" by such directors "on behalf of such company," though the clause does not contain any words of nullification. But where a bill, drawn upon the company by its corporate name and sealed with its seal having the name of the company circumscribed, was accepted by two persons styling themselves directors of the company, appointed to accept that bill, and the acceptance was countersigned by the company's secretary, it was held that such acceptance was sufficiently *express*. *Halford v. Cameron's Coalbrook Steam Coal, etc., Co.*, 16 Q. B. 442, 71 E. C. L. 442.

Express Stipulation.—English Apportionment Act of 1870, see *In re Lysaght*, (1898) 1 Ch. 115.

Subject Expressed in the Title.—See the title *STATUTES*.

EXPRESS COMPANIES.

BY ALEXANDER STRONACH.

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For other matters of *SUBSTANTIVE LAW AND EVIDENCE* related to this subject, see the following titles in this work: *ACT OF GOD*, vol. 1, p. 584; *AGENCY*, vol. 1, p. 930; *BAGGAGE*, vol. 3, p. 528; *BAILMENTS*, vol. 3, p. 732; *BILLS OF LADING*, vol. 4, p. 507; *CARRIERS OF GOODS*, vol. 5, p. 154; *CARRIERS OF LIVE STOCK*, vol. 5, p. 427; *CARRIERS OF PASSENGERS*, vol. 5, p. 474; *COMMON CARRIERS*, vol. 6, p. 236; *CONNECTING CARRIERS (OF GOODS)*, vol. 6, p. 603; *CONTRACTS OF AFFREIGHTMENT AND CHARTER-PARTIES*, vol. 7, p. 156; *CORPORATIONS (PRIVATE)*, vol. 7, p. 620; *INTERSTATE COMMERCE*; *NEGLIGENCE*; *RAILROADS*; *REVENUE LAWS*; *SALES*; *SHIPS AND SHIPPING*; *STOCK AND STOCKHOLDERS*; *STOPPAGE IN TRANSITU*; *TAXATION*; *TICKETS AND FARES*; *WAREHOUSEMEN*.

I. DEFINITION. — An express company may be defined to be "a common carrier that carries, at regular and stated times, over fixed and regular routes, money and other valuable packages which cannot be conveniently or safely carried as common freight, and also other articles and packages of any description which the shipper desires, or the nature of the article requires, should have safe and rapid transit and quick delivery, transporting the same in the immediate charge and custody of its own messenger, on passenger steamers and express and passenger railway trains, which it does not own or operate, but with the owners of which it contracts for the carriage of its messengers and freights, and within cities and towns or other defined limits it collects from the consignors and delivers to the consignees at their places of business the goods that it carries." ¹

II. RIGHTS, DUTIES, AND LIABILITIES — **1. Right to Express Facilities.** — It seems now to be well settled that, in the absence of some statute requiring it to do so, it is not the duty of a railroad company to furnish an express company with facilities for doing an express business upon its road, the same in all respects as those it provides for itself, or affords to another express company, and that a railroad is not required to furnish express facilities to all express companies which may demand them. A railroad company performs its whole duty to the public at large, and to each individual, when it affords the public all reasonable express accommodations. If this is done the railroad company owes no duty to the public as to the particular agencies it shall select for that purpose. The public require the carriage, but the company may choose its own appropriate means of carriage, always provided they are such as to insure reasonable promptness and security. Railroads cannot be compelled to convert their passenger trains to the purposes of freight at the discretion of parties not responsible for the management of the trains, nor can they be compelled to admit others than their own agents or servants upon their trains, or to their stations, for the custody, care, receipt, and delivery of freight or parcels. The right to conduct an express business upon the trains of a railroad company arises only by contract. ²

1. Express Company Defined. — *Pacific Express Co. v. Seibert*, 44 Fed. Rep. 310, *per* Caldwell, J. See also *Express Cases*, 117 U. S. 1; *Retzer v. Wood*, 109 U. S. 185; *Southern Express Co. v. St. Louis*, etc. R. Co., 10 Fed. Rep. 210; *Wells v. Oregon R., etc., Co.*, 8 Sawy. (U. S.) 600, 15 Fed. Rep. 561, 18 Fed. Rep. 517, 667; *Witbeck v. Holland*, 45 N. Y. 13, 6 Am. Rep. 23; *Alsop v. Southern Express Co.*, 104 N. Car. 278.

Origin of Express Companies. — See *Pfister v. Central Pac. R. Co.*, 70 Cal. 169, 59 Am. Rep. 404.

2. Railroads Need Not Furnish Express Facilities. — *Express Cases*, 117 U. S. 1, 23 Am. & Eng. R. Cas. 545 *reversing* 3 Am. & Eng. R. Cas. 594; *Pfister v. Central Pac. R. Co.*, 70 Cal. 169, 59 Am. Rep. 404; *Louisville, etc., R. Co. v. Keefer*, 146 Ind. 21; *Sargent v. Boston, etc., R. Corp.*, 115 Mass. 416; *Atlantic Express*

Right of Railroad to Inspect Packages. — According to the older cases it would seem that a railroad company as such cannot lawfully demand that the large boxes or bundles in which express companies usually transport small packages shall be opened in order that its officials may inspect their contents and charge for each package separately.¹ And it has been decided that when the

Co. v. Wilmington, etc., R. Co., 111 N. Car. 463, 32 Am. St. Rep. 805. See also *The D. R. Martin*, 11 Blatchf. (U. S.) 233; *Delaware, etc., R. Co. v. Central Stock-Yard, etc., Co.*, 43 N. J. Eq. 77; *Barney v. Oyster Bay, etc., Steamboat Co.*, 67 N. Y. 301; *Camblos v. Philadelphia, etc., R. Co.*, 4 Brewst. (Pa.) 563.

But prior to the decision in *Express Cases, supra*, the contrary doctrine had been announced in several cases, some decided by the federal courts and some by the state courts. *Texas Express Co. v. Texas, etc., R. Co.*, 6 Fed. Rep. 426, 4 Woods (U. S.) 370; *Dinsmore v. Louisville, etc., R. Co.*, 2 Fed. Rep. 465; *Southern Express Co. v. Louisville, etc., R. Co.*, 4 Fed. Rep. 481; *Southern Express Co. v. Memphis, etc., R. Co.*, 8 Fed. Rep. 799, 2 McCrary (U. S.) 570; *Southern Express Co. v. Nashville, etc., R. Co.*, 20 Am. L. Reg. N. S. 590; *Wells v. Oregon R., etc., Co.*, 19 Fed. Rep. 20, 9 Sawy. (U. S.) 601, 15 Fed. Rep. 561, 8 Sawy. (U. S.) 600, 18 Fed. Rep. 517, 667; *Wells v. Northern Pac. R. Co.*, 23 Fed. Rep. 469, 10 Sawy. (U. S.) 441; *Sandford v. Catawissa, etc., R. Co.*, 24 Pa. St. 378, 64 Am. Dec. 667, 2 Phila. (Pa.) 107, 13 Leg. Int. (Pa.) 132; *Baltimore, etc., R. Co. v. Adams Express Co.*, 22 Fed. Rep. 404, 18 Am. & Eng. R. Cas. 455. See also *McDuffee v. Portland, etc., R. Co.*, 52 N. H. 430, 13 Am. Rep. 72; *Alsop v. Southern Express Co.*, 104 N. Car. 278.

'Express Facilities' is a term which, from the nature of things, must by this time be pretty well understood between the parties most interested — the express company and the railroad company. As interpreted by the customs and usages of these parties and sanctioned and adopted by the decisions of the courts, these facilities may be said to include the right to enter depots and stations with loaded and empty wagons; the use of the platforms and space for the loading and unloading of express freight; sufficient space in suitable cars, drawn in passenger or quick trains, for the transportation of such freight; and a messenger in charge thereof, with room for its assortment while in transit, and a sufficient delay at stations for the delivery and receipt of express matter. *Southern Express Co. v. St. Louis, etc., R. Co.*, 10 Fed. Rep. 213, 869; *Southern Express Co. v. Memphis, etc., R. Co.*, 8 Fed. Rep. 802. 'Express facilities,' from the nature of the business, cannot be limited to a definite space, but must correspond in this and other particulars to the public want and convenience to which the express company ministers.' *Wells v. Oregon R., etc., Co.*, 15 Fed. Rep. 561, 8 Sawy. (U. S.) 600, *per Deady, J.*

Specific Performance of Contract for Express Facilities. — An express company brought an action against a railroad company for the specific performance of a contract for express facilities, and on application for a mandatory injunction *pendente lite* it appeared that the

contract in question was exceedingly comprehensive and most minute in its working details; that those details provided for special and varying contingencies and the elements of discretion and judgment with regard thereto; that the due execution thereof would involve the ascertainment of what is right and proper the parties thereto should do from day to day with regard to ever varying circumstances. It was held that the action could not be maintained and the injunction should be denied. *Fargo v. New York, etc., R. Co.*, 3 Misc. Rep. (N. Y. Supreme Ct.) 205.

English Statute. — By statute in England a railroad company is forbidden to discriminate in favor of, or against, any particular person or company, and this statute is applicable to persons or companies engaged in the business of transporting freight over the lines of such railroad companies. *Railway and Canal Traffic Act of 1854*, 17 & 18 Vict., c. 31; *Baxendale v. North Devon R. Co.*, 3 C. B. N. S. 324, 91 E. C. L. 324; *Baxendale v. Great Western R. Co.*, 5 C. B. N. S. 309, 94 E. C. L. 309, 14 C. B. N. S. 1, 108 E. C. L. 1, 16 C. B. N. S. 137, 111 E. C. L. 137; *Garton v. Bristol, etc., R. Co.*, 6 C. B. N. S. 639, 95 E. C. L. 639; *In re Palmer*, L. R. 6 C. P. 104. See also *Parker v. Great Western R. Co.*, 7 M. & G. 253, 49 E. C. L. 253; *Crouch v. Great Northern R. Co.*, 9 Exch. 556, 11 Exch. 742. And see the title *CARRIERS OF GOODS*, vol. 5, p. 177.

Canada Statute. — By the Railway Act of the Dominion of Canada it is required that every railroad company shall grant to any incorporated express company the same facilities that it has granted to any other incorporated company. *Ontario Express, etc., Co. v. Grand Trunk R. Co.*, *Montreal L. R. 7 Super. Ct.* 308; *Vickers Express Co. v. Canadian Pac. R. Co.*, 9 Ont. Rep. 251, *affirmed* in 13 Ont. App. 210.

Maine Statute. — By statute in Maine railroads must extend equal facilities and accommodations to all persons and companies doing an express business. *New England Express Co. v. Maine Cent. R. Co.*, 57 Me. 188, 2 Am. Rep. 31; *International Express Co. v. Grand Trunk R. Co.*, 81 Me. 32.

New Hampshire Statute. — And in New Hampshire there is a statute to the same effect. *McDuffee v. Portland, etc., R. Co.* 52 N. H. 430, 13 Am. Rep. 72.

Liability of Railroad for Injury to Employee of Express Company. — Elsewhere in this work will be found a discussion of the liability of a railroad company for injury to an employee of an express company. See the title *CARRIERS OF PASSENGERS*, vol. 5, p. 512.

1. Railroad's Right of Inspection. — *Wells v. Oregon R. Co.*, 15 Fed. Rep. 561, 8 Sawy. (U. S.) 600, 18 Fed. Rep. 517. See also *Dinsmore v. Louisville, etc., R. Co.*, 2 Fed. Rep. 465; *Camblos v. Philadelphia, etc., R. Co.*, 9 Phila. (Pa.) 411, 30 Leg. Int. (Pa.) 149.

railroad is carrying on a competing business, it cannot make such a demand.¹ But in view of the fact that the more recent cases take a different view of the relation existing between express companies and railroad companies from that taken in the earlier cases, it seems probable that the older were not correctly decided.²

2. Rights as to Rival Companies. — An express company is not obliged to act as the carrier of the goods of a rival company, making use of its capital and facilities to the aggrandizement of such rival and its own destruction. And, therefore, when a rival company makes it a business to collect small parcels, pack them in one large parcel, and carry such small parcels for much less than the ordinary and regular charges of the express company, such express company cannot be compelled to carry such packed parcels at the same rate as any other parcel similar in size and weight would be carried under its tariff, without reference to the fact that such packed parcels contain several parcels addressed to different persons to be delivered by the agent of its rival for reward in that behalf. But it has the right to charge for each small parcel according to the ordinary rates, and to require from its rival a statement of the number of small parcels placed in the packed parcels. An express company is not bound to carry except according to its profession, is entitled to discriminate as to its customers, and is not confined by any rule or regulation as to the charges it may make, provided they are reasonable.³

3. Duty to Receive and Carry. — An express company, being a common carrier, is, as a general rule, bound to receive and carry all goods offered for transportation upon the payment, or tender, of its charges, but prepayment will be considered waived if not demanded.⁴

1. *Southern Express Co. v. Louisville, etc.*, R. Co. 4 Fed. Rep. 481.

2. In *Express Cases*, 117 U. S. 1, it was decided that the right to express facilities arises entirely from contract, and a decree declaring among other things "that the defendant [a railroad company], its officers, agents, and servants, have no right to open or inspect any of the packages or express matter which may be offered to it for transportation by the plaintiff's company [an express company], or to demand a knowledge of the contents thereof, nor to refuse transportation thereof unless such inspection be granted or such knowledge be afforded," was overruled. Nothing is said, however, as to this particular part of the decree.

Right of One Express Company to Inspect Packages of Another. — And it has been expressly decided that an express company may require the contents of the large boxes or packages of a rival to be stated and charge for each small package therein contained. *Johnson v. Dominion Express Co.*, 28 Ont. Rep. 203.

3. Right to Know Contents of Rival's Packages. — *Johnson v. Dominion Express Co.*, 28 Ont. Rep. 203.

4. Duty to Receive and Carry. — *Southern Express Co. v. St. Louis, etc.*, R. Co. 5 Myers Fed. Dec., § 1511; *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. (U. S.) 344; *Southern Express Co. v. Moon*, 39 Miss. 822; *Alsop v. Southern Express Co.*, 104 N. Car. 278. And see the titles *CARRIERS OF GOODS*, vol. 5, p. 158; *CONNECTING CARRIERS (OF GOODS)*, vol. 6, p. 603.

Goods Not Properly Packed. — An express company may refuse to receive goods offered for transportation unless they are properly

packed. *Fitzgerald v. Adams Express Co.*, 24 Ind. 447, 87 Am. Dec. 341; *Union Express Co. v. Graham*, 26 Ohio St. 595.

An express company accustomed to receive jugs of liquor in an unboxed condition, under a special arrangement voluntarily made by it with shippers, may at will withdraw from the arrangement without liability to shippers who have been availing themselves of it, though they incur increased expense by reason of the change. *Vicksburg Liquor, etc., Co. v. U. S. Express Co.*, 68 Miss. 149.

Breakable Goods. — A mandamus will not issue to compel an express company to carry breakable goods, such as glassware, subject to all the common-law liabilities of a common carrier, when the uniform practice of the defendant company, as well as others, has been only to carry such wares under a limited liability. *People v. Babcock*, 16 Hun (N. Y.) 313.

Live Pigeons. — As to whether or not live pigeons would be regarded in any specific case as common-law freight for an express company, *quære*. *American Merchants' Union Express Co. v. Phillips*, 29 Mich. 515.

Goods Received at Wrong Place. — When an express company holds itself out as carrying only between certain designated points, it cannot be compelled to carry for intermediate points; and where it is sued for property delivered to an agent at an intermediate point, it is competent for it to show that it was not a carrier from such point and that the agent was not authorized to receive the goods. *Thurman v. Wells*, 18 Barb. (N. Y.) 500.

Unusual Rush of Business. — An express company may, in the absence of a statutory requirement, refuse goods on account of an unusual rush of business, especially when the

Dangerous or Prohibited Articles. — Like any other carrier, an express company may refuse to receive or carry dangerous articles, such as nitroglycerine, dynamite, vitriol, etc., or such articles as are prohibited by law to be carried.¹

Right to Know Contents of Package. — The law, however, does not permit an express company, in cases free from suspicion, to require information as to the contents of the packages offered, as a condition of carrying them. It is only when the appearance of the package or other circumstances tend to excite suspicion, that the express company is authorized, in the absence of any special legislation on the subject, to require a knowledge of the contents of the packages offered, as a condition of receiving them for carriage.²

4. Liability to Owner of Goods — a. IN GENERAL. — It is well settled that an express company is a common carrier, and therefore, in the absence of a special contract, is liable for all loss of or damage to goods intrusted to it for transportation, unless such loss or damage is occasioned by the act of God or the public enemy.³

goods offered for transportation are of a perishable nature. It is, however, required to have adequate facilities within a reasonable time, and cannot be exonerated for delay on account of increased expense, though not foreseen and not entirely unreasonable. Also *v. Southern Express Co.*, 104 N. C. 278. See also *Condict v. Grand Trunk R. Co.*, 54 N. Y. 500; *Southern Express Co. v. Womack*, 1 Heisk. (Tenn.) 256.

Consignor Refusing Assent to Limitation of Liability. — An express company cannot refuse to receive goods because the consignor will not assent to a special contract limiting the company's common-law liability. *Southern Express Co. v. Moon*, 39 Miss. 822. In this case Harris, J., delivering the opinion of the court, said: "Consignors have only to insist on a simple receipt for their goods, offering to pay reasonable compensation for insurance and transportation, and steadily refusing the artfully prepared receipts limiting the carrier's liability and depriving the consignor of his legal rights, to restore in practice the security and safety which the law affords. They will in this manner avoid the losses which scheming corporations and unconscionable tricksters, under the guise of special agreements, are daily inflicting on them." *Quoted with approval in Kirby v. Adams Express Co.*, 2 Mo. App. 369. To the same effect is *Leonard v. American Express Co.*, 26 U. C. Q. B. 533.

1. Right to Refuse Dangerous or Prohibited Articles. — Nitro-glycerine Case. 15 Wall. (U. S.) 524. And see the title CARRIERS OF GOODS, vol. 5, p. 164.

Intoxicating Liquor. — An express company is not bound to transport and deliver intoxicating liquor if thereby it would incur a penalty. *State v. Goss*, 59 Vt. 266, 59 Am. Rep. 706, 30 Am. & Eng. R. Cas. 118. And see the title INTOXICATING LIQUORS.

United States Statute — Letters or Other Mailable Matter. — The Act of Congress of March 3, 1845, § 9, making it unlawful regularly to carry mailable matter by any private express, is not violated by an express that carries an unstamped letter of advice which accompanies a package of money being transmitted. *U. S. v. U. S. Express Co.*, 5 Biss. (U. S.) 91.

Packages of bonds and deeds are mailable matter under the Act of Congress of March 3, 1845, and any contract, either express or im-

plied, by an express company for their transportation is void, and the company has no lien for its charges for transporting such packages. *Hill v. Mitchell*, 25 Ga. 704.

Illinois Statute — Unlawful Transportation of Game. — An express company which transports game in violation and with the knowledge of the provisions of the Illinois game law is amenable to the penalties prescribed in section 2 thereof. *American Express Co. v. People*, 133 Ill. 649, 23 Am. St. Rep. 641.

2. No Right to Know Contents. — Nitro-glycerine Case, 15 Wall. (U. S.) 524; *Parrott v. Barney*, 1 Sawy. (U. S.) 423. See also *Crouch v. London, etc., R. Co.*, 14 C. B. 255, 78 E. C. L. 255. And see the title CARRIERS OF GOODS, vol. 5, p. 164.

3. Liable as Insurer — Alabama. — *Southern Express Co. v. Crook*, 44 Ala. 468, 4 Am. Rep. 140; *Southern Express Co. v. Hess*, 53 Ala. 19. *California.* — *Scammon v. Wells*, 84 Cal. 311.

Colorado. — *Overland Mail, etc., Co. v. Carroll*, 7 Colo. 43.

Georgia. — *Southern Express Co. v. Newby*, 36 Ga. 635, 91 Am. Dec. 783.

Illinois. — *Gulliver v. Adams Express Co.*, 38 Ill. 503; *American Merchants' Union Express Co. v. Schier*, 55 Ill. 140; *U. S. Express Co. v. Hutchins*, 67 Ill. 348; *Pacific Express Co. v. Shearer*, 160 Ill. 215.

Indiana. — *U. S. Express Co. v. Rush*, 24 Ind. 403; *American Express Co. v. Hockett*, 30 Ind. 250, 95 Am. Dec. 691; *Adams Express Co. v. Darnell*, 31 Ind. 20, 99 Am. Dec. 582.

Kentucky. — *Bland v. Adams Express Co.*, 1 Duv. (Ky.) 232, 85 Am. Dec. 623.

Maine. — *Bennett v. American Express Co.*, 83 Me. 236, 23 Am. St. Rep. 774.

Massachusetts. — *Buckland v. Adams Express Co.*, 97 Mass. 124, 93 Am. Dec. 68.

Minnesota. — *Christenson v. American Express Co.*, 15 Minn. 270, 2 Am. Rep. 122.

Mississippi. — *Southern Express Co. v. Moon*, 39 Miss. 822.

Missouri. — *Wolf v. American Express Co.*, 43 Mo. 421, 97 Am. Dec. 406.

New York. — *Place v. Union Express Co.*, 2 Hilt. (N. Y.) 19, *disapproving* *Hersfield v. Adams*, 19 Barb. (N. Y.) 577; *Read v. Spaulding*, 5 Bosw. (N. Y.) 395; *Haslam v. Adams Express Co.*, 6 Bosw. (N. Y.) 235; *Robinson v. Cornish*, (City Ct.) 13 N. Y. Supp. 577.

b. FOR NEGLIGENCE. — An express company is, of course, liable for any

North Carolina. — *Alsop v. Southern Express Co.*, 104 N. Car. 278.

Ohio. — *U. S. Express Co. v. Backman*, 28 Ohio St. 144.

Pennsylvania. — *Eagle v. White*, 6 Whart. (Pa.) 505, 37 Am. Dec. 434.

South Carolina. — *Stadhecker v. Combs*, 9 Rich. L. (S. Car.) 193.

Tennessee. — *Adams Express Co. v. Jackson*, 92 Tenn. 326; *Southern Express Co. v. Woniack*, 1 Heisk. (Tenn.) 256. See also *Southern Express Co. v. Glenn*, 16 Lea (Tenn.) 472.

Texas. — *Texas Express Co. v. Scott*, (Tex. 1883) 16 Am. & Eng. R. Cas. 111; *Pacific Express Co. v. Hartzberg*, 17 Tex. Civ. App. 100.

Virginia. — *Southern Express Co. v. McVeigh*, 20 Gratt. (Va.) 264.

Wisconsin. — *Marshall v. American Express Co.*, 7 Wis. 1, 73 Am. Dec. 381; *Klauber v. American Express Co.*, 21 Wis. 21, 91 Am. Dec. 452.

Canada. — *Ouimet v. Canadian Express Co.*, 32 L. C. Jur. 319, 17 Rev. Leg. 225.

And see the titles *ACT OF GOD*, vol. 1, p. 584; *CARRIERS OF GOODS*, vol. 5, p. 233; *COMMON CARRIERS*, vol. 6, pp. 256, 262; *CONTRACTS OF AFFREIGHTMENT AND CHARTER-PARTIES*, vol. 7, p. 202.

Inherent Vice of Goods. — If, during transportation, without default on the part of the express company, the goods intrusted to it deteriorate or decay, the company is not liable. *American Express Co. v. Smith*, 33 Ohio St. 511, 31 Am. Rep. 561. And see the titles *CARRIERS OF GOODS*, vol. 5, p. 242; *CONTRACTS OF AFFREIGHTMENT AND CHARTER-PARTIES*, vol. 7, p. 203.

Goods Defectively Packed. — The object of packing is, in general, to secure convenience, safety, and dispatch in the handling and transportation, and not to prevent injury from such accidental causes as rain, happening in the course of transit, against which the carrier is presumed to have provided. The owner may, therefore, if he choose, deliver the goods without any external protection; and if he does, and they are of a nature to be injured by the mere handling and carriage in a careful and proper manner, and are so injured, the loss will be his own; but if they are otherwise injured, by rain or other cause for which the carrier is not excused, the loss will fall upon the carrier. *Klauber v. American Express Co.*, 21 Wis. 21, 91 Am. Dec. 452.

Package Misdirected. — Through the mistake of the consignors in misdirecting a package shipped through an express company, it was carried to the wrong place, where, without the fault of the company, it was destroyed by fire. It was held that the company was not liable. *Southern Express Co. v. Kauffman*, 12 Heisk. (Tenn.) 161.

Live Stock. — In *Lachner v. Adams Express Co.*, 72 Mo. App. 13, it was held that an express company, in transporting live stock, was required to exercise such care and prudence as would be exercised by a careful and prudent man in the handling and treatment of his own live stock. See also *American Merchants' Union Express Co. v. Phillips*, 29 Mich. 515.

And see the title *CARRIERS OF LIVE STOCK*, vol. 5, p. 427.

"Proper Vice" of Animals. — An express company transporting live stock is liable as an insurer, with the exception that it is not liable for injuries accruing through the "proper vice" of the animals being carried. *Hance v. Pacific Express Co.*, 48 Mo. App. 179. And see the title *CARRIERS OF LIVE STOCK*, vol. 5, p. 443.

Goods Seized by Officer Without Warrant. — When property in the hands of an express company as a common carrier *in transitu* is seized by an officer without any warrant or other legal process, the officer is a mere trespasser, and the express company is liable under the rule of the common law in the same manner as if it had allowed any other trespasser to take the property out of its custody. *Bennett v. American Express Co.*, 83 Me. 236, 23 Am. St. Rep. 774.

Goods Embezzled by Agent. — When an agent or clerk of an express company embezzles part of the contents of a package which is being transported by such company, the company becomes liable to the owner of the package. *Hagerstown Bank v. Adams Express Co.*, 45 Pa. St. 419.

Through the fraud and false pretense of an agent of an express company, a person was induced to deliver his money to the company to be carried and delivered to a fictitious person. The company received and receipted for the money, and carried it to the place directed, where it was received by its agent and by him converted and embezzled. It was held that the company was liable. *Jasper Trust Co. v. Kansas City, etc., R. Co.*, 99 Ala. 416, 42 Am. St. Rep. 75, *followed in* *Southern Express Co. v. Tupelo Bank*, 108 Ala. 517.

Right of Express Company to Recover Stolen Goods. — An express company from which goods have been stolen and which has paid the owner for them succeeds to the rights of the original owner and is entitled to recover them. And so when United States treasury notes were stolen from an express company and afterwards sold for value after due, in the regular course of business, it was held that the company might recover them from the purchaser. *Vermilye v. Adams Express Co.*, 21 Wall. (U. S.) 138.

Lost Draft. — The liability of an express company for the loss of a draft which it has undertaken to carry and deliver is primary and not secondary to that of the drawer of the draft. *Jones v. Wells*, 28 Cal. 260.

The Act of God which excuses an express company from liability "must not only be the proximate cause of the loss, but the better opinion is that it must be the sole cause. And where the loss is caused by the act of God, if the negligence of the carrier mingles with it as an active and cooperative cause, he is still responsible." *Wolf v. American Express Co.*, 43 Mo. 421, 97 Am. Dec. 406.

Goods Lost or Destroyed by Public Enemy. — Although an express company is not responsible for the destruction or loss of goods by the act of a public enemy, it is nevertheless bound to use due diligence to prevent such

negligence whereby the goods transported are lost or damaged;¹ and when the question of negligence becomes material in determining the liability of a carrier, there is no definite rule to be stated as to the precise care required in the transportation and handling of goods intrusted to it. Such care varies according to the character of the goods and the circumstances of transportation. What would be sufficient care in the case of ponderous articles not liable to be deteriorated by exposure might be most palpable negligence in the case of costly and perishable goods.²

c. **FOR DELAY.** — An express company is not an insurer as to time,³ but it is the duty of such a company to carry and deliver goods with reasonable promptness, and it is liable for any loss or damage occasioned by its failure to do so.⁴ When there is an express contract to carry within a prescribed time, an express company is held to a rigid performance of it, and is not excused even by inevitable necessity, unless it has provided against such contingency by express stipulation.⁵

Duty as to Route. — In contracts of shipment which are silent in their express terms as to the matter of route, the express company has the right to choose the route, but this must be understood with the qualification that this selection must be made with due regard to the rights of the other parties concerned. The express company must, at its peril, select a usual and reasonably safe and direct route, and it cannot arbitrarily select a route known to be unsafe, except at the risk of incurring liability for negligence. Neither can it arbitrarily choose a long, inexpeditious route without assuming the risk of delay incident to the choice.⁶

d. **EFFECT OF SHIPPER'S CONCEALMENT OR MISREPRESENTATION.** — When the shipper uses artifice or fraud to conceal the nature or value of his goods, or deceives the express company in any way as to them, the company

destruction or loss. If its negligence or want of proper attention contributed thereto, it would be liable therefor. To render it liable it is not necessary that there should have been fraud or collusion with the enemy or wilful negligence on the part of the company or its agents. *Holladay v. Kennard*, 12 Wall. (U. S.) 254. See also *Caldwell v. Southern Express Co.*, 1 Flipp. (U. S.) 85.

During the civil war, Confederate soldiers were public enemies and an express company was not liable for goods lost or destroyed by their acts. *Bland v. Adams Express Co.*, 1 Duv. (Ky.) 232, 85 Am. Dec. 623. See also *Hubbard v. Harnden Express Co.*, 10 R. I. 244; *Southern Express Co. v. Womack*, 1 Heisk. (Tenn.) 256.

Charges Paid in Confederate Money. — In *Southern Express Co. v. Womack*, 1 Heisk. (Tenn.) 256, it was held that the fact that an express company received its charges in advance in Confederate money did not relieve it from its obligation to carry goods according to its contract or from liability for their loss.

1. **Liability for Negligence.** — *Holladay v. Kennard*, 12 Wall. (U. S.) 254; *Adams Express Co. v. McDonald*, 1 Bush (Ky.) 32; *Wolf v. American Express Co.*, 43 Mo. 421, 97 Am. Dec. 406; *Westcott v. Fargo*, 61 N. Y. 542, 19 Am. Rep. 300, affirming 63 Barb. (N. Y.) 349; *Adams Express Co. v. Sharpless*, 77 Pa. St. 516.

2. **Care and Diligence Required** — *Southern Express Co. v. Crook*, 44 Ala. 468, 4 Am. Rep. 140; *Williams v. Morgan*, 32 La. Ann. 168; *Hastings v. Pepper*, 11 Pick. (Mass.) 41. See also *Hayes v. Wells*, 23 Cal. 185; and *infra*,

this section, *Effect of Shipper's Concealment or Misrepresentation*. And see the title **CARRIERS OF GOODS**, vol. 5, p. 364.

No Compensation. — When an express company undertakes to transport goods without compensation, it is not liable for their loss unless such loss results from its gross negligence. *Adams Express Co. v. Cressap*, 6 Bush (Ky.) 572. And see the title **BAILMENTS**, vol. 3, p. 745.

3. **Not Insurer as to Time.** — *American Express Co. v. Smith*, 33 Ohio St. 511 31 Am. Rep. 561. And see the title **CONTRACTS OF AFFREIGHTMENT AND CHARTER-PARTIES**, vol. 7, p. 207.

4. **Liability for Delay.** — *Adams Express Co. v. Williams*, (Ark. 1890) 14 S. W. Rep. 40; *Eiswald v. Southern Express Co.*, 60 Ga. 496; *American Merchants' Union Express Co. v. Schier*, 55 Ill. 140; *Alsop v. Southern Express Co.*, 104 N. Car. 278; *Wells, etc., Express v. Fuller*, 4 Tex. Civ. App. 213; *Kennedy v. American Express Co.*, 22 Ont. App. 278. See also *Southern Express Co. v. McVeigh*, 20 Gratt. (Va.) 264. And see the titles **CARRIERS OF GOODS**, vol. 5, p. 244; **CONTRACTS OF AFFREIGHTMENT AND CHARTER-PARTIES**, vol. 7, p. 206.

5. **Time Prescribed.** — *Place v. Union Express Co.*, 2 Hilt. (N. Y.) 19. And see the title **CARRIERS OF GOODS**, vol. 5, p. 249.

6. **Safe, Expeditious Route.** — *Wells, etc., Express v. Fuller*, 4 Tex. Civ. App. 213. To the same effect are *U. S. Express Co. v. Kountze*, 8 Wall. (U. S.) 342; *American Merchants' Union Express Co. v. Schier*, 55 Ill. 140; *Merchants' Despatch Transp. Co. v. Kahn*, 76 Ill. 520.

is at most liable for only the apparent value of the goods.¹ And when the concealment of the character of the goods operates to induce the express company to transport them in a different manner from that it would have adopted had it known their true character, and they are thereby lost, the express company is relieved from liability altogether if it appears that the method of transportation actually employed was a proper one for goods of the character that such goods appeared to be.²

c. BURDEN OF PROOF. — When it has been shown that goods were received by an express company in good order and that such goods have been lost or injured, the onus is upon the company to show that such loss or damage was occasioned by one of the causes excepted by implication of law, by statute, or by express contract. When this is done, the burden is shifted to the shipper to show that the damage might have been avoided by the exercise of reasonable skill and attention on the part of the express company.³ And when the

1. Recovery Limited to Apparent Value. — *Hayes v. Wells*, 23 Cal. 185. See also *Richards v. Westcott*, 2 Bosw. (N. Y.) 589, 7 Bosw. (N. Y.) 6. And see the title *CARRIERS OF GOODS*, vol. 5, p. 345.

Illustration. — The defendant delivered to the plaintiff express company at St. Paul, Minn., to be carried to Washington, D. C., a sealed package containing twenty registered United States government bonds of the value of two hundred and thirty-four thousand dollars, informed it that the value was one thousand dollars, concealed from it that they were of greater value, and paid for carrying them seventy-five cents, which was the usual price for so carrying such a package of the value of only one thousand dollars. In an action to recover additional compensation it was held that in case of loss the limit of the plaintiff's liability was for failure to deliver one thousand dollars' worth of such bonds, and it was not entitled to recover on the theory that in case of loss the limit of its liability was for failure to deliver the whole two hundred and thirty-four thousand dollars' worth of bonds. *U. S. Express Co. v. Koerner*, 65 Minn. 540.

2. Recovery Entirely Defeated. — 2 Kent's Com. 603; *St. John v. Southern Express Co.*, 1 Woods (U. S.) 612; *American Express Co. v. Perkins*, 42 Ill. 458; *Warner v. Western Transp. Co.*, 5 Robt. (N. Y.) 490; *Texas Express Co. v. Scott*, 2 Tex. App. Civ. Cas., § 72; *Texas Express Co. v. Dupree*, etc., *Express Co.*, 2 Tex. App. Civ. Cas., § 318. See also *Southern Express Co. v. Crook*, 44 Ala. 468, 4 Am. Rep. 140; *Southern Express Co. v. Everett*, 37 Ga. 688, 46 Ga. 303; *Wood v. Southern Express Co.*, 95 Ga. 451, 98 Ga. 268, 5 Am. & Eng. R. Cas. N. S. 83; *Oppenheimer v. U. S. Express Co.*, 69 Ill. 62, 18 Am. Rep. 596; *Bennett v. American Express Co.*, 83 Me. 236, 23 Am. St. Rep. 774. And see the title *CARRIERS OF GOODS*, vol. 5, p. 371.

Carrier Must Make Inquiries. — "The carrier is bound to make the inquiry as to the value of the box or the articles delivered to him, and the owner must answer at his peril; and if such inquiries are not made, and it is received for such price for transportation as is asked with reference to its bulk, weight, or external appearance, the carrier is responsible for the loss, whatever may be its value." *Gorham Mfg. Co. v. Fargo*, 45 How. Pr. (N. Y. Super. Ct.) 90. Compare *Southern Express Co. v. Crook*, 44 Ala. 468, 4 Am. Rep. 140.

Effect of Shipper's Failure to State Value. — The omission of the shipper to advise the express company that the actual was greater than the apparent value of the articles shipped does not affect his right unless it justifies the company in adopting the course of conduct by which the loss occurred. *Galt v. Adams Express Co.*, *MacArthur & M.* (D. C.) 124, 48 Am. Rep. 742.

A mere failure on the part of the shipper to inform a carrier as to the value of goods shipped would not *per se* be such fraud as would discharge the carrier. *Texas Express Co. v. Scott*, 2 Tex. App. Civ. Cas., § 72.

Value of Sealed Letters Should Be Stated. — In the case of sealed letters tendered to an express company for transmission, it is the duty of the person employing the company to inform it of the value of the letter in all cases where he desires to hold the company responsible for any loss beyond that of an ordinary letter not containing articles or papers of special value. *Hayes v. Wells*, 23 Cal. 185.

Georgia Statute. — By section 2080 of the Code of Georgia, 1882 (Code 1895, § 2290), it is provided that "the carrier may require the nature and value of the goods delivered to him to be made known, and any fraudulent acts, sayings, or concealment by his customers will release him from liability." *Southern Express Co. v. Everett*, 37 Ga. 688, 46 Ga. 303; *Green v. Southern Express Co.*, 45 Ga. 309; *Wood v. Southern Express Co.*, 95 Ga. 451, 5 Am. & Eng. R. Cas. N. S. 83.

A small paper box, unsealed, tied with a cotton string, containing a diamond breastpin of the value of five hundred dollars, was delivered to the agent of an express company by a negro boy of about ten or twelve years of age. No information of the contents of the box at the time of the delivery was given to the agent, and no questions were asked by the agent as to its contents. The box was delivered unopened, and twenty-five cents was charged and received for its transportation. It was held that the facts and circumstances attending the delivery of this box to the defendant constituted a fraud in law which under the statute discharged the express company from liability for the loss of the pin. *Southern Express Co. v. Everett*, 37 Ga. 688, 46 Ga. 303.

3. Burden of Proof — *United States*. — *U. S. v. Pacific Express Co.*, 15 Fed. Rep. 867.

Illinois. — *Adams Express Co. v. Haynes*, 42

delivery of goods to an express company, in good condition, is shown, and it is further shown that such goods have been lost or damaged, the presumption is that the loss of the goods or damage to them occurred while in the express company's possession.¹

f. COMMENCEMENT OF LIABILITY. — There must be an actual delivery to an express company or to some person authorized to act in its behalf, before its liability as a common carrier commences.² When, however, there has been such a delivery, the general rule is that even if the goods are placed in a warehouse and not shipped immediately, the company's liability as an insurer begins on the receipt of them.³

g. TERMINATION OF LIABILITY — DELIVERY — (1) *In General.* — The liability of an express company as a common carrier does not end until it has delivered the goods to the consignee or owner, or to some person authorized by him to receive them,⁴ or has deposited them in a reasonably safe ware-

Ill. 89; *Adams Express Co. v. Stettaners*, 61 Ill. 184, 14 Am. Rep. 57.

Iowa. — *Mitchell v. U. S. Express Co.*, 46 Iowa 214.

Kansas. — *Kallman v. U. S. Express Co.*, 3 Kan. 205.

Kentucky. — *Crawford v. Adams Express Co.*, 7 Ky. L. Rep. 362, 8 Ky. L. Rep. 619; *Hoeing v. Adams Express Co.*, 8 Ky. L. Rep. 154.

Missouri. — *Nave v. Pacific Express Co.*, 19 Mo. App. 563; *Levering v. Union Transp. etc., Co.*, 42 Mo. 88, 97 Am. Dec. 320; *Wolf v. American Express Co.*, 43 Mo. 421, 97 Am. Dec. 406; *Ketchum v. American Merchants' Union Express Co.*, 52 Mo. 390.

Ohio. — *Union Express Co. v. Graham*, 26 Ohio St. 595; *U. S. Express Co. v. Backman*, 28 Ohio St. 144.

Pennsylvania. — *American Express Co. v. Sands*, 55 Pa. St. 140; *Grogan v. Adams Express Co.*, 114 Pa. St. 523, 60 Am. Rep. 360; *Adams Express Co. v. Holmes*, (Pa. 1887) 9 Atl. Rep. 166.

Rhode Island. — *Hubbard v. Harnden Express Co.*, 10 R. I. 244.

South Carolina. — *Stadhecker v. Combs*, 9 Rich. L. (S. Car.) 193.

And see the titles *CARRIERS OF GOODS*, vol. 5, p. 353; *CONTRACTS OF AFFREIGHTMENT AND CHARTER-PARTIES*, vol. 7, p. 229.

Nondelivery to Be Proved by Owner. — The burden is upon the owner of the goods to show that they have not been delivered by an express company to which they were intrusted for transportation. *Morley v. Eastern Express Co.*, 116 Mass. 97.

Loss Through Gross Negligence Excepted. — Upon receiving goods for transportation an express company gave a receipt with the condition therein that it would not be "responsible for any loss or damage arising from the dangers of railroad, steam, or river navigation, leakage, fire, or from any cause whatever, unless the same be proved to have occurred by the fraud or gross negligence" of the company or its agents. It was held that the burden of proof to show such fraud or negligence was on the plaintiff, and that in order to recover he must also show that such negligence caused or contributed to the injury. *Cochran v. Dinsmore*, 49 N. Y. 249. To the same effect is *Landsberg v. Dinsmore*, 4 Daly (N. Y.) 490. See also *Whitworth v. Erie R. Co.*, 87 N. Y.

413; *Platt v. Richmond, etc., R. Co.*, 108 N. Y. 358.

1. *Nave v. Pacific Express Co.*, 19 Mo. App. 563; *Bowden v. Fargo*, 2 Misc. Rep. (N. Y. County Ct.) 551. See also *American Express Co. v. Titusville Second Nat. Bank*, 69 Pa. St. 394, 8 Am. Rep. 268.

2. **Liability Commences upon Delivery.** — *Cronkite v. Wells*, 32 N. Y. 247; *Aikin v. Westcott*, 123 N. Y. 363; *Abrams v. Platt*, 23 Misc. Rep. (N. Y. Supreme Ct.) 637; *Southern Express Co. v. McVeigh*, 20 Gratt. (Va.) 264. See also *Pitlock v. Wells*, 109 Mass. 452; *Wells v. American Express Co.*, 44 Wis. 342. And see the titles *CARRIERS OF GOODS*, vol. 5, p. 180; *CONTRACTS OF AFFREIGHTMENT AND CHARTER-PARTIES*, vol. 7, p. 215.

No Liability without Delivery. — A delivery of a package at the office of an express company, even to a person placed temporarily in charge thereof, would be a good delivery to such company; and so, perhaps, a delivery to its agent at any place outside of such office. But when there is neither a delivery at the office nor to any agent of the company elsewhere, it does not become liable as a carrier, and if the package is lost the express company is not liable. *Cronkite v. Wells*, 32 N. Y. 247.

3. **Goods Stored.** — *Alsop v. Southern Express Co.*, 104 N. Car. 278, citing 7 AM. AND ENG. ENCYC. OF LAW (1st ed.) 546; *White v. Goodrich Transp. Co.*, 46 Wis. 493. And see, *infra*, this section, *As Warehouseman*.

4. **When Liability Ceases.** — *Southern Express Co. v. Armstead*, 50 Ala. 350; *American Merchants' Union Express Co. v. Milk*, 73 Ill. 224; *Laporte v. Wells, etc., Express*, 23 N. Y. App. Div. 267; *Eagle v. White, 6 Whart. (Pa.) 505*, 37 Am. Dec. 434; *Gary v. Wells, etc., Express*, (Tex. Civ. App. 1897) 40 S. W. Rep. 845; *Marshall v. American Express Co.*, 7 Wis. 1, 73 Am. Dec. 381. And see the titles *CARRIERS OF GOODS*, vol. 5, p. 191; *CONTRACTS OF AFFREIGHTMENT AND CHARTER-PARTIES*, vol. 7, p. 216.

Power of Consignee to Prolong Liability. — "The reason for this rule of law [making an express company an insurer] ceases when the carrier has tendered the property to the consignee and put it in the power of the latter to take possession of it. And it would be extremely unjust to leave it in the power of the consignee to prolong this extraordinary responsibility upon the carrier so long as his convenience or caprice

house after making a proper effort to deliver them.¹

What Constitutes Delivery. — No fixed rule, however, can be laid down as to what will constitute a sufficient delivery, and much must depend on the facts of each particular case.²

(2) *To Whom Delivery Should Be Made.* — The general rule is that delivery must be made to the consignee or his duly authorized agent.³

To the True Owner. — An express company may, however, always deliver the goods to the true owner, but when it delivers to another than the consignee or

might suggest. If the carrier delivers or offers to deliver the goods or property at the proper time, at the proper place, and to the proper person, his liability as a common carrier from that moment is at an end, and it is not in the power of the consignee to prolong that liability, however inconvenient it may be for him to receive the goods. Other duties with corresponding liabilities may be assumed by the carrier, owing to the neglect or refusal of the consignee to receive the consignment, but these are commensurate only with the new trusts devolving upon the new relation, and which are widely different from those of a common carrier." *Marshall v. American Express Co.*, 7 Wis. 26, 73 Am. Dec. 381. To the same effect is *Adams Express Co. v. Darnell*, 31 Ind. 20, 99 Am. Dec. 582.

Consignee Generally Controls Delivery. — Where it is known that the goods are the property of the shipper, and have been shipped by him for delivery to the consignees as his agents at a distant place, the express company cannot deliver the goods to such consignees or to their order at another place, or without starting them on their journey. The rule is that where the consignor is known to the carrier to be the owner, the carrier must be understood to contract with him only, for his interest, upon such terms as he dictates in regard to the delivery, and that the consignees are to be regarded simply as agents selected by him to receive the goods at a place indicated. Where, however, the carrier has no notice of the ownership of the property other than that implied from the relation of the parties to each other as consignor and consignee, this gives to the consignee the implied ownership of the property, and hence justifies the carrier in taking his direction as to the manner of delivery. *Southern Express Co. v. Dickson*, 94 U. S. 549.

1. See *infra*, this section, *As Warehouseman*.

2. **Sufficiency of Delivery Dependent upon Circumstances.** — See *Aldrich Car-Seal Mfg. Co. v. American Express Co.*, (Mich. 1898) 75 N. W. Rep. 94; *Weil v. Express Co.*, 7 Phila. (Pa.) 88; *Howard Express Co. v. Wile*, 64 Pa. St. 201.

Illustrations. — A consignee of goods occupied a room on the fourth floor of a building. An express company sent a box to him, weighing about sixty pounds, and the agent placed it just inside the outer door and then went up to the consignee's room and told a boy about fourteen years old that the box was downstairs and that he must take care of it. The boy was not authorized to receive packages for the consignee, and it was lost. It was held that there was not a sufficient delivery to discharge the express company. *Haslan v. Adams Express Co.*, 6 Bosw. (N. Y.) 235.

H. told C., the agent of an express company at a way station, that he was looking for a package of money by the next train and wanted to board the same train and carry the money with him. The agent said his company's rules forbade him to deliver except on receipt signed in the company's books, and that the train would not stop long enough to permit that. H. replied that he would sign the receipt in advance, and that would relieve the agent, and this was done. On the arrival of the train H. got on the platform of the coach, and as the train moved off C. called to H. and threw the package of money to him, but H. did not receive it, and it was lost. It was held that the express company was relieved by the act of H., the consignee, from its liability to the consignor for the safe delivery of the money, as C. became the agent of H. so soon as the money was received by C. *Carroll v. Southern Express Co.*, 37 S. Car. 452.

Actual Delivery Necessary. — If a driver for an express company, having laid a package on the counter of the consignee, steals it while the clerk of the consignee is signing a receipt, the delivery is incomplete and the company is not discharged. A delivery to discharge the company must be actual and *bona fide*, and not merely formal. An express company is a common carrier and must be held to the strictest responsibility for the honesty of its agents, and if one of them abstracts a parcel while in the act of delivering it the company will be liable even though a receipt be signed and the form of delivery gone through by the driver's laying the property for a moment out of his hands. *American Express Co. v. Haggard*, 37 Ill. 465, 87 Am. Dec. 257.

3. **To the Consignee or His Agent.** — *Hayes v. Wells*, 23 Cal. 185; *American Merchants' Union Express Co. v. Milk*, 73 Ill. 224; *Adams Express Co. v. Tingle*, 7 Ky. L. Rep. 441; *Sweet v. Barney*, 24 Barb. (N. Y.) 533; *Pacific Express Co. v. Hertzberg*, 17 Tex. Civ. App. 100; *Wells v. American Express Co.*, 44 Wis. 342, 55 Wis. 23, 42 Am. Rep. 695. See also *Southern Express Co. v. Everett*, 37 Ga. 688. And see the title *CARRIERS OF GOODS*, vol. 5, p. 194.

Package Sent in Care of Another. — An express package directed to A in care of B is properly delivered to B. *Ela v. American Merchants' Union Express Co.*, 29 Wis. 611, 9 Am. Rep. 619.

In Care of Express Agent. — According to the weight of authority, where goods are consigned to the owner in care of the agent of an express company a delivery to such agent will constitute a complete delivery and relieve the carrier from further responsibility. *Bennett v. North-Pac. Express Co.*, 12 Oregon 49. And see the title *CARRIERS OF GOODS*, vol. 5, p. 198.

his agent, it does so at its peril, and it devolves upon it to show that it has made delivery to the real owner.¹

Delivery to Wrong Person. — An express company is liable as an insurer for the delivery of the goods to the proper person as well as for their safe and speedy transportation to their destination, and nothing will excuse a delivery of them to any other person.²

Consignor Defrauded. — When, however, the express company delivers to the person to whom goods were sent, although by false and fraudulent devices, that person impersonates another to whom the consignor believed he was sending the goods, it is not liable if it acts in good faith and with due diligence.³

1. Delivery to True Owner. — *Rosenfield v. Express Co.*, 1 Woods (U. S.) 131; *American Express Co. v. Greenhalgh*, 80 Ill. 68; *Thomas v. Northern Pac. Express Co.*, (Minn. 1898) 75 N. W. Rep. 1120; *Wells v. American Express Co.*, 44 Wis. 342, 55 Wis. 23, 42 Am. Rep. 695. And see the title *CARRIERS OF GOODS*, vol. 5, p. 196.

2. Liability for Misdelivery. — *Southern Express Co. v. Crook*, 44 Ala. 468, 4 Am. Rep. 140; *Survey v. Wells*, 5 Cal. 124; *Southern Express Co. v. Van Meter*, 17 Fla. 783, 35 Am. Rep. 107; *Shearer v. Pacific Express Co.*, 43 Ill. App. 641; *Wells v. Windham*, 1 Tex. Civ. App. 267; *Pacific Express Co. v. Hertzberg*, 17 Tex. Civ. App. 100; *Pacific Express Co. v. Critzer*, (Tex. Civ. App. 1897) 42 S. W. Rep. 1017.

Illustrations. — In *American Express Co. v. Fletcher*, 25 Ind. 492, a person claiming to be J. O. Riley applied at a telegraph office to have a message sent, signed J. O. Riley, requesting a remittance of money to his address. The message was sent, and the money was forwarded by an express company, as requested, and received by the agent of the company at the place from which the message was sent. The same person was express agent and telegraph operator, and he paid over the money to the person who had sent the telegraph message. It turned out that this person was a swindler. It does not appear from the case that there was a real J. O. Riley, but it is assumed that there was. It was held that the express company was liable in delivering the money without further proof of the person to whom it was delivered being the right party than the mere fact that he had sent the dispatch in response to which the money was received.

In *American Express Co. v. Stack*, 29 Ind. 27, a person who had knowledge that certain goods were in the possession of the wife of one James Stack, and that said James Stack was absent from her, telegraphed to her in the name of her husband to send goods to his address. She sent the goods by the express company, as directed, at the same time writing a letter addressed to James Stack, at the place to which the goods had been forwarded, telling him that they had been sent as he directed. This letter came into the hands of the swindler, as he had prearranged. He then demanded the goods of the company, showing this letter, and describing the goods, as proof that he was the genuine James Stack. The agent refused to deliver the goods to him without further evidence of identity, and he produced to the agent of the company a person known to said agent, who stated the man's name to be James Stack,

as he honestly thought it was. The goods were then delivered, and it turned out that the man was not the real James Stack to whom the goods had been sent. The company was held liable.

Forged Order. — An express company is not relieved from liability by delivering the goods to a person other than the owner on a forged order of the owner. *American Merchants' Union Express Co. v. Milk*, 73 Ill. 224.

3. Effect of Defrauding Consignor. — *Edmunds v. Merchants Despatch Transp. Co.*, 135 Mass. 283; *Pacific Express Co. v. Hertzberg*, 17 Tex. Civ. App. 100.

Consignee Using Another's Name. — In *Samuel v. Cheney*, 135 Mass. 278, 46 Am. Rep. 467, the facts were as follows: There were at Saratoga Springs two persons named A. Swannick, one a reputable merchant having a permanent place of business, the other a person who rented a shop and secured a numbered box at the post office. The latter wrote to the plaintiffs for a bill of goods to be consigned to him, giving his address as "A. Swannick, P. O. box 1595, Saratoga Springs, N. Y." The plaintiffs, supposing that the letter came from the responsible Swannick, though it does not appear that they knew him, or had ever dealt with him before, consigned the goods as directed, and wrote a letter inclosing a bill for the goods to A. Swannick, post office box 1595. This letter the swindler received, as it came to his box, and the goods were delivered to him without any further identification after they were offered to the responsible Swannick who had not ordered any goods and who refused to receive them. The court held the carrier not liable, as the goods were delivered to the very person to whom they were sold and consigned, and to whom the letter inclosing the bill for the goods was addressed. This case was followed in *Wilson v. Adams Express Co.*, 27 Mo. App. 360, 43 Mo. App. 659; *Southern Express Co. v. Oskamp*, 7 Ohio Cir. Dec. 417.

Where goods are received by an express company under a contract for their delivery to a named consignee at a point beyond its terminal office, and the company, at that office, delivers such goods to an agent of that consignee duly authorized to receive them, such delivery completes the contract of carriage. This is true although the goods were not ordered by the consignee to whom the shipper really intended to send them, but by another person bearing or pretending to bear the same name, to whom the goods were finally delivered after passing through the hands of the real consignee's agent. *Southern Express Co. v. Williams*, 99 Ga. 482.

(3) *Place of Delivery.* — An express company is not only required as a common carrier to transport the goods to the place of destination, but the further duty is enjoined upon it to deliver the goods to the consignee at his residence or place of business.¹

Special Contract. — But the contract of carriage may in this respect be essentially modified by express agreement or by circumstances from which an intention of the parties can be clearly gathered, to change the usual incidents of the contract so as to put an end to the responsibility of the express company as soon as the goods are transported by it to a particular terminus.²

Usage. — Usage will sometimes relieve the express company from actual delivery at the residence of the consignee, as where it is the well-established custom at small way stations, where the business will not justify the keeping of special-delivery messengers and wagons, to give notice to the owner and deliver at the office.³ Such custom must be reasonable,⁴ and it must be of so long continuance, uniformity, and notoriety as to justify the belief that it was known to the owner of the goods.⁵

(4) *Time of Delivery.* — An express company must deliver goods within a reasonable time after they reach their destination, and within business hours.⁶

(5) *Goods Sent C. O. D.* — (a) **In General.** — There is no common-law duty devolving upon an express company to act as the collecting agent of the shipper. Such obligation arises only by contract, express or implied. Such a contract may be implied when the goods received by the express company for transportation are so clearly marked as to indicate that payment is a condition of delivery, and making such collection has now come to be a part of the usual business of express companies.⁷

1. Delivery at Residence or Place of Business Necessary — *Alabama.* — Southern Express Co. v. Holland, 109 Ala. 362, citing 7 AM. AND ENG. ENCYC. OF LAW (1st ed.) 561.

California. — Hayes v. Wells, 23 Cal. 185.

Illinois. — Baldwin v. American Express Co., 23 Ill. 197, 74 Am. Dec. 190, 26 Ill. 504; Gulliver v. Adams Express Co., 38 Ill. 502; American Merchants' Union Express Co. v. Wolf, 79 Ill. 430; American Express Co. v. Wettstein, 28 Ill. App. 96.

Indiana. — American Express Co. v. Hockett, 30 Ind. 250, 95 Am. Dec. 691.

New York. — Mierson v. Hope, 2 Sweeney (N. Y.) 561; Witbeck v. Holland, 45 N. Y. 13, 6 Am. Rep. 23, affirming 55 Barb. (N. Y.) 443. See also Sweet v. Barney, 24 Barb. (N. Y.) 533.

North Carolina. — Alsop v. Southern Express Co., 104 N. Car. 278.

Oregon. — Bennett v. Northern Pac. Express Co., 12 Oregon 49.

Pennsylvania. — American Union Express Co. v. Robinson, 72 Pa. St. 274; Union Express Co. v. Ohleman, 92 Pa. St. 323.

And see the title CARRIERS OF GOODS, vol. 5, p. 218.

2. Modification by Contract. — Conway Bank v. American Express Co., 8 Allen (Mass.) 512.

3. Modification by Usage. — Southern Express Co. v. Holland, 109 Ala. 362; Baldwin v. American Express Co., 23 Ill. 197, 74 Am. Dec. 190, 26 Ill. 504; Gulliver v. Adams Express Co., 38 Ill. 502; Bullard v. American Express Co., 107 Mich. 695; Mierson v. Hope, 2 Sweeney (N. Y.) 561.

Custom as to Delivery Limits. — An express company may, so long as the public have notice of the custom, fix limits beyond which its agents are not required to go for delivery; and where the company, in apparent good faith,

has assumed to fix limits, having regard to the public requirements, with regard to persons who have dealt with it, having knowledge of this fact, it is not bound to deliver beyond these limits. Bullard v. American Express Co., 107 Mich. 695.

4. Sullivan v. Thompson, 99 Mass. 259. See generally the title USAGES AND CUSTOMS.

5. Mierson v. Hope, 2 Sweeney (N. Y.) 561.

Knowledge of Owner. — In Packard v. Earle, 113 Mass. 281, distinguishing Sullivan v. Thompson, 99 Mass. 259, it was held that a usage to leave packages at a certain place and give the owner notice instead of making personal delivery, in order to bind the owner, must be proved to have been known by him at the time when he made the contract of carriage.

6. Reasonable Time Allowed for Delivery. — Eiswald v. Southern Express Co., 60 Ga. 496; Alsop v. Southern Express Co., 104 N. Car. 278; Union Express Co. v. Ohleman, 92 Pa. St. 323; Marshall v. American Express Co., 7 Wis. 1, 73 Am. Dec. 381. See the title CARRIERS OF GOODS, vol. 5, p. 217.

Perishable Goods. — An express company which carries perishable goods is bound to use great diligence in their delivery, and upon the failure of the consignee to receive them it ought, if possible, to give notice to the shipper without delay, and if it fails to do so it is liable for damages. Gauvreau v. Dominion Express Co., 18 Rev. Leg. 301.

7. No Duty to Collect Without a Contract. — Cox v. Columbus, etc., R. Co., 91 Ala. 392; McNichol v. Pacific Express Co., 12 Mo. App. 401. See also Lane v. Chadwick, 146 Mass. 68.

Acceptance of Receipt Containing No Contract for Collection. — In Smith v. Southern Express Co., 104 Ala. 387, the consignor sent a package

(b) **Meaning of "C. O. D."** — When the sum due upon goods is to be collected by an express company upon delivery, it is usual to mark the package containing them "C. O. D." These letters mean that the express company is to collect of the consignee on delivery the amount due from him and marked on the package and to return such amount to the consignor. They are now generally understood to be the initials of the words "Collect on delivery."¹ They have nothing to do with the transportation charges upon the package.²

(c) **Liability of Express Company for Sum Due.** — If the express company delivers goods sent C. O. D., and receives the sum due thereon, it is of course liable to the consignor for that amount,³ and if the company chooses to deliver such goods without receiving the sum due it is equally liable.⁴

of goods to an express company, by his servant, with instructions written on a small piece of paper that the package should be sent C. O. D. The agent of the company gave to the servant a receipt which nowhere showed that it was a C. O. D. package, but on the contrary its terms were such that, unaffected by any other fact, it was the company's duty to deliver the package to the consignee upon the collection of the freight charges only. The servant carried this receipt to the consignor's house and laid it away without showing it to the consignor, who never saw it until about ten days afterwards, when he went to the company's office, inquired for the money, and was informed by the agent that the package had not been shipped C. O. D. It was shown to be the company's custom, which was known to the consignor, when goods were shipped C. O. D. to issue a receipt like that in the present case, with the letters "C. O. D." and figures showing the amount to be collected written down in the left-hand corner thereof. When only freight charges were to be collected the letter "C" was written in the same place, and it was shown in the present instance that the receipt had only the letter "C." It was held that the consignor was charged with notice of the contents of the receipt which the company's agent delivered to his servant, and that its retention without objection was an acceptance of it on the consignor's part as the evidence of the contract between the parties; that if the consignor desired to insist on the carriage of the package as a C. O. D. package, it was his duty to have refused the receipt as it was written and insisted upon the contract's being so written as to carry out that object, and that as he had failed to do so and retained the receipt as written, he could not recover of the express company for delivering the package to the consignee without collecting the value thereof.

1. **"C. O. D." Means Collect Price of Goods.** — *American Express Co. v. Lessem*, 39 Ill. 312; *American Merchants' Union Express Co. v. Schier*, 55 Ill. 140; *U. S. Express Co. v. Keefer*, 59 Ind. 263; *Adams Express Co. v. McConnell*, 27 Kan. 238; *Com. v. Fleming*, 130 Pa. St. 138, 17 Am. St. Rep. 763. See also *American Merchants' Union Express Co. v. Wolf*, 79 Ill. 430.

Judicial Notice of Meaning. — In some cases the courts have taken judicial notice of the meaning of these letters, *U. S. Express Co. v. Keefer*, 59 Ind. 263; *State v. Intoxicating Liquors*, 73 Me. 278; while in other they have

refused to do so, *McNichol v. Pacific Express Co.*, 12 Mo. App. 401; *Collender v. Dinsmore*, 55 N. Y. 200, 14 Am. Rep. 224. See also *American Express Co. v. Lessem*, 39 Ill. 312; *American Merchants' Union Express Co. v. Wolf*, 79 Ill. 430.

Parol Evidence. — It is competent to explain the meaning of these letters and to remove all ambiguity by parol evidence. *Collender v. Dinsmore*, 55 N. Y. 200, 14 Am. Rep. 224. See also *American Express Co. v. Lessem*, 39 Ill. 312.

"Please Collect the Bill." — In *Tooker v. Gormer*, 2 Hilt. (N. Y.) 71, it was held that an indorsement upon a bill accompanying goods, "Please collect the bill," was a mere request, which the express company might or might not comply with, and would not of itself be sufficient evidence of an engagement or undertaking on the part of the defendant not to deliver the goods unless paid for. See also *Wells v. American Express Co.*, 44 Wis. 342.

2. **No Reference to Transportation Charges.** — *American Merchants' Union Express Co. v. Schier*, 55 Ill. 140.

3. **Liable for Money Received.** — *Com. v. Fleming*, 130 Pa. St. 138, 17 Am. St. Rep. 763.

4. **Liable for Failure to Collect.** — *Tooker v. Gormer*, 2 Hilt. (N. Y.) 71; *Com. v. Fleming*, 130 Pa. St. 138, 17 Am. St. Rep. 763; *Bennett v. Vickers*, 12 L. J. N. S. 51. See also *Murray v. Warner*, 55 N. H. 546, 20 Am. Rep. 227.

Part Payment by Consignee. — When a part of the sum due is paid by the consignee, the consignor can recover only the balance from the express company. *American Express Co. v. Lessem*, 39 Ill. 312.

Note or Check Taken in Payment. — Though generally an express company or other carrier is responsible if it takes in payment anything other than legal-tender money, yet payment by note or check may constitute a valid payment if the consignor accepts it as such. *Rathbun v. Citizens' Steamboat Co.* 76 N. Y. 376, 32 Am. Rep. 321.

Right of Company to Proceed by Attachment — Missouri Statute. — The fact that an express company receiving goods from a vendor to be transported and delivered to a vendee upon the payment of the price renders itself liable to respond to the vendor for the price in consequence of its delivering the goods to the vendee without the payment thereof will not entitle it to proceed by attachment against the vendee under subdiv. 13, § 1, of the Missouri Attachment Act. *Richardson's Missouri Express Co. v. Cunningham*, 25 Mo. 396.

(d) **When Consignee Fails or Refuses to Accept.** — If the consignee neglects or refuses to take the goods and pay the amount due, they remain in the hands of the express company as a warehouseman precisely as if no money besides the express charges were to be collected.¹ It then becomes the duty of the express company safely to store and care for the goods,² and it seems that the company should notify the consignor of such failure or refusal at once.³ When this is done, but not before, it is relieved of its responsibility as a common carrier and holds the goods subject to the order of the consignor.⁴ In case the consignee does not refuse to accept and pay for the goods, but is not ready to receive and pay for them at the time when the tender of delivery is made, it seems that the company should hold them for a reasonable time to enable the consignee to make such payment.⁵

(e) **Right of Consignee to Examine.** — It seems that when goods are forwarded by an express company to be paid for on delivery the consignee is ordinarily entitled to a reasonable opportunity to examine such goods to ascertain whether they answer the description of those ordered by him.⁶ If, however, the consignor forbids the consignee to inspect the contents of the parcel until such payment is made, it is the duty of the express company to obey the direction, and if the company should, in violation of the prohibition, permit an examination of the contents of the parcel, and the consignee should refuse without cause to receive it and pay the sum required, it seems that the company would be liable to the consignor for damages.⁷

1. **Liability as Warehouseman.** — *Gibson v. American Merchants' Union Express Co.*, 1 Hun (N. Y.) 387. See also *Hasse v. American Express Co.*, 94 Mich. 133, 34 Am. St. Rep. 328; *Landsberg v. Dinsmore*, 4 Daly (N. Y.) 490.

Agreement for Liability as Warehouseman. — Where a carrier, receiving packages to be shipped C. O. D., stipulates that its liability while holding them for collection shall be that of a warehouseman, such an agreement is valid if there is nothing to show that it is unreasonable; and without negligence on his part the carrier will not be liable for the destruction by a mob of the packages so held. *Pacific Express Co. v. Wallace*, 60 Ark. 100. See also *Landsberg v. Dinsmore*, 4 Daly (N. Y.) 490.

2. **Duty to Store.** — *Hasse v. American Express Co.*, 94 Mich. 133, 34 Am. St. Rep. 328. See also *American Merchants' Union Express Co. v. Wolf*, 79 Ill. 430.

A tailor delivered to an express company a suit of clothes to be transported to the purchaser thereof and the price to be collected from him. The consignee refused to receive the goods, partly upon the ground that they did not arrive within the time that the tailor agreed he would deliver them, but principally upon the ground that the clothes were not such as he ordered. There was no evidence to show that the express company was guilty of any negligence or wrong, or that the tailor ever demanded the clothes of the defendant, or ever ordered their return to him, or ever ordered their delivery to any other person than the consignee, or ever even offered to pay for their transportation back to the place of shipment. In an action brought by the consignor against the express company for the value of the clothes, which still remained in its possession, it was held that the express company was not liable. *Adams Express Co. v. McConnell*, 27 Kan. 238.

3. **Duty to Notify Consignor.** — *American Merchants' Union Express Co. v. Wolf*, 79 Ill. 430; *American Express Co. v. Wettstein*, 28 Ill. App. 96; *Hasse v. American Express Co.*, 94 Mich. 133, 34 Am. St. Rep. 328. See also *Landsberg v. Dinsmore*, 4 Daly (N. Y.) 490.

Under some circumstances, however, notice to the consignor is unnecessary. *Weed v. Barney*, 45 N. Y. 344, 6 Am. Rep. 96; *Grossman v. Fargo*, 6 Hun (N. Y.) 310; *Landsberg v. Dinsmore*, 4 Daly (N. Y.) 490; *Kremer v. Southern Express Co.*, 6 Coldw. (Tenn.) 356.

4. **Goods Subject to Consignor's Order.** — *American Express Co. v. Wettstein*, 28 Ill. App. 96.

And if the consignee pays the express charges upon goods, but refuses to pay the amount due the consignor thereupon and requests the return of the goods to the consignor, and the consignor orders them returned, the express company is not liable to the consignee, though at the time when the consignor orders the goods returned such consignor had brought a suit and obtained a verdict against the consignee for the value of the goods, upon which verdict a final judgment is afterwards rendered, when the consignee has not at any time prior to the return of the goods required the company to hold them and not return them to the consignor until the litigation was ended. *American Express Co. v. Greenhalgh*, 80 Ill. 68.

5. **Goods Kept Over for Consignee.** — *Hasse v. American Express Co.*, 94 Mich. 133, 34 Am. St. Rep. 328. See also *Weed v. Barney*, 45 N. Y. 344, 6 Am. Rep. 96.

6. **Consignee May Examine Before Accepting.** — *Lyons v. Hill*, 46 N. H. 49, 83 Am. Dec. 189; *Wilson v. Elliott*, 57 N. H. 316. See also *Aaron v. Adams Express Co.*, (C. Pl.) 27 Ohio L. J. 183. And see the title *CARRIER OF GOODS*, vol. 5, p. 224.

7. **Examination Forbidden by Consignor.** — *Herrick v. Gallagher*, 60 Barb. (N. Y.) 566. See also *Wiltse v. Barnes*, 46 Iowa 210.

(f) **Repayment by Express Company.** — If the consignee should pay the charges, and then, on opening the parcel, should find the contents to be of no value, he would be entitled to recall the money paid at any time before it was paid over to the consignor. The express agent would be liable to refund if the money remained in his hands at the time when it was demanded by the consignee. The illegality of the transaction would be a perfect defense to the express company against the consignor.¹

(g) **Fraud of Consignee.** — When goods sent C. O. D. are fraudulently obtained from the express company by the consignee without payment therefor, he acquires no title thereby, and the express company is entitled to recover the goods.²

h. AS WAREHOUSEMAN — (1) *Before Commencement of Transportation.* — Since express companies are common carriers, the general rule that if, after the delivery of the goods for shipment, anything remains to be done by the shipper, the liability of the carrier as an insurer does not attach and it is responsible only as a warehouseman, would seem to apply to them.³

(2) *After Termination of Transportation.* — Although, as will be seen elsewhere in this title, personal delivery of goods is one of the duties of an express company,⁴ yet after the company has made a proper effort to deliver such goods at the proper time and place and to the proper person, its responsibility as an insurer ceases and it becomes liable as a warehouseman only.⁵

1. Refunding Payment for Valueless Goods. — *Herrick v. Gallagher*, 60 Barb. (N. Y.) 566.

Conditional Payment by Consignee. — The plaintiffs, who were tailors, contracted with a customer for a suit of clothes, which they warranted should fit, and should be sent subject to inspection. They were sent C. O. D., and the customer paid the amount of the bill, but notified the express agent of his agreement with the plaintiffs, and instructed him to retain the money until further notice. The clothes did not fit, and he took them to the plaintiffs, who promised to alter them and send them back, and he at the same time told the plaintiffs that they could not have the money paid to the express company until the clothes were satisfactory. They returned them to him a second time but as they were still unsatisfactory he returned them to the agent and took back the money. It was held that the act of the plaintiffs, after knowing of the terms upon which the money was paid to the agent, was a ratification of the act of the agent in receiving the money with such conditions, and they could not recover. *Brooks v. American Express Co.*, 14 Hun (N. Y.) 364.

2. Goods Obtained by Consignee's Fraud. — *American Merchants' Union Express Co. v. Willisie*, 79 Ill. 92.

3. Goods Awaiting Action of Shipper. — See *Barron v. Eldredge*, 100 Mass. 455, 1 Am. Rep. 126; *Barter v. Wheeler*, 49 N. H. 9, 6 Am. Rep. 434; *Basnight v. Atlantic, etc., R. Co.*, 111 N. Car. 592, citing 2 Am. AND ENG. ENCYC. OF LAW (1st ed.) 808; *Clarke v. Needles*, 25 Pa. St. 338; *White v. Goodrich Transp. Co.*, 46 Wis. 493. See also *supra*, this section, *Commencement of Liability*; and see the title *CARRIERS OF GOODS*, vol. 5, p. 261.

Special Directions from Shipper. — "He [the owner] may relieve him [the carrier] from his common-law liability by directing him to do that which is incompatible with his common-law duty as carrier. As, for example, if the owner directs him to 'keep back the goods,'

or not to forward them 'until further orders,' or until 'he hears from his consignee,' he is relieved by such instructions by the owner from his liability as carrier; because it is impossible for him, if he obeys the instructions, which the owner has a right to give, and he is bound to obey, to discharge his duty of carrier to forward the goods presently, or in a reasonable time. And the goods remaining in his custody, he is not liable as carrier, but only as an ordinary bailee, as long as the special instructions are operative. But when they are revoked, and the owner gives orders to forward the goods, his liability as carrier immediately attaches." *Southern Express Co. v. McVeigh*, 20 Gratt. (Va.) 264.

Shipment Delayed for Shipper's Convenience. — The responsibility of a common carrier for goods intrusted to him commences when there has been a complete delivery for the purpose of immediate transportation. If, without putting them in transit, the carrier, for his own temporary convenience, places them in store, still the liability of a carrier attaches. The delivery must be for immediate transportation, and of course it cannot be complete if anything remains to be done by the shipper before the goods can be sent on their way. If by the usage and course of business, and especially if by express request, the shipment is delayed for further orders as to the destination of the goods, or for the convenience of the owner, then, during the time of such delay, the liability is that of warehouseman. *Barron v. Eldredge*, 100 Mass. 455, 1 Am. Rep. 126.

4. See *supra*, this section, *Termination of Liability — Delivery*.

5. Liability After Effort to Deliver. — *American Express Co. v. Hockett*, 30 Ind. 250, 95 Am. Dec. 691; *Hasse v. American Express Co.*, 94 Mich. 133, 34 Am. St. Rep. 328; *Landsberg v. Dinsmore*, 4 Daly (N. Y.) 490; *Grossman v. Fargo*, 6 Hun (N. Y.) 310; *Marshall v. American Express Co.*, 7 Wis. 1, 73 Am. Dec. 381. See also *Merchants' Dispatch*, etc.,

Storing Goods. — If the consignee is absent and the express company after diligent inquiry cannot find him or ascertain the place of his residence or business, or if he refuses to receive the goods, it is the duty of the express company to store them in its own warehouse or that of a responsible third person for a reasonable length of time.¹

Notice. — And, as a general rule, upon the failure or refusal of the consignee to receive the goods the company should notify the consignor of such failure or refusal.²

Care Required. — After an express company has become a warehouseman only with respect to the goods in its charge, it is liable only for such losses or injuries as are shown to have resulted from the want of ordinary care on its part, such care as men of reasonable prudence ordinarily exercise for the safety of their own goods under similar circumstances.³

Co. v. Moore, 88 Ill. 136, 30 Am. Rep. 541; Adams Express Co. v. Darnell, 31 Ind. 20, 99 Am. Dec. 582; Miersen v. Hope, 2 Sweeny (N. Y.) 561; Weil v. Express Co., 7 Phila. (Pa.) 88; Southern Express Co. v. Kaufman, 12 Heisk. (Tenn.) 161; Stephenson v. U. S. Express Co., 21 Wis. 410.

1. Duty to Store. — American Express Co. v. Hockett, 30 Ind. 250, 95 Am. Dec. 691; Hasse v. American Express Co., 94 Mich. 133, 34 Am. St. Rep. 328. See also Merchants' Despatch Transp. Co. v. Kahn, 76 Ill. 520; American Merchants' Union Express Co. v. Wolf, 79 Ill. 430. And see the title CARRIERS OF GOODS, vol. 5, p. 222.

2. Notice to Consignor. — American Merchants' Union Express Co. v. Wolf, 79 Ill. 430. See also Gauvreau v. Dominion Express Co., 18 Rev. Leg. 301; *supra*, this section, *Termination of Liability—Delivery—Goods Sent C. O. D.* And see the title CARRIERS OF GOODS, vol. 5, p. 222.

3. Only Reasonable Care Necessary. — American Express Co. v. Hockett, 30 Ind. 250, 95 Am. Dec. 691; Adams Express Co. v. Darnell, 31 Ind. 20, 99 Am. Dec. 582; Grossman v. Fargo, 6 Hun (N. Y.) 310; Landsberg v. Dinsmore, 4 Daly (N. Y.) 490; Marshall v. American Express Co., 7 Wis. 1, 73 Am. Dec. 381. See also Oederkirk v. Fargo, 58 Hun (N. Y.) 347, 61 Hun (N. Y.) 418. And see the titles BAILMENTS, vol. 3, p. 746; CARRIERS OF GOODS, vol. 5, p. 284; WAREHOUSEMEN.

Illustrations. — The agent of an express company placed a package in a safe, locked the safe, and placed the key in his trousers pocket. Then he closed the office in which the safe was, placed the office key in his coat pocket, and left the premises for the night. When he retired for the night, he hung his trousers on the bedpost and his coat behind an open door in an adjoining room. His bedroom was on the ground floor, with a window opening not more than two feet from the ground. It was a warm night, and this window was left open. He was a sound sleeper, and was not easily awakened unless spoken to. During the night the keys were taken from his pockets, the office and safe were opened, and the money was stolen. It was held that the express company was liable, for even when an express company is liable only as a common bailee or warehouseman, it is bound to the exercise of ordinary care for the safe-keeping of a package. American Express Co. v. Baldwin, 26 Ill. 504, 79 Am. Dec. 389.

"The remaining question in the case, as to whether the jewelry was properly cared for by the defendant as a warehouseman, may also become a question of law where there is no dispute in regard to the facts. In a country village the same degree of security, either as to fire or burglary, cannot be required of a warehouseman or a common carrier, as such, as in larger cities where greater facilities for warehousing exist. In these cases reasonable care is a relative term, being governed by the circumstances surrounding the carrier. He is bound to take the same care of the goods which are in his custody as a reasonable man would take of his own property. If there were no better or safer place in which to deposit the goods, it would seem that he had no alternative but to leave them in the warehouse provided by the carrier for that purpose." Laporte v. Wells, etc., Express, 23 N. Y. App. Div. 267.

An express company, after making the proper effort to deliver a package, deposited it in a fireproof safe in its office. Two nights afterwards a fire, for which the express company was in no way responsible, broke out in the building. The watchman of the company, having the key of the fireproof safe left with him for the very purpose of using in such a contingency, opened the safe and removed the package in order to take it to a place of security. In the hurry, excitement, and confusion of the scene, the package was lost or stolen. The fireproof safe fell into the cellar, and was found uninjured the next day, and it was shown that if the package had been allowed to remain therein it would not have been injured. It was held that the watchman acted with reasonable care and prudence, and that the company was not liable for the loss of the package. Howard Express Co. v. Wile, 64 Pa. St. 201.

When the agent of an express company is so utterly unmindful of the duty which he owes to the consignee to exercise at least some degree of care not to deliver his goods to a stranger that he not only omits to ascertain whether the persons applying for the goods have any authority to receive them, but does not even look at the applicants to ascertain what manner of men they are, he is guilty of gross negligence, and the express company is liable for a wrongful delivery, although its liability as a carrier has ceased and it is acting as a warehouseman only. Oederkirk v. Fargo, 58 Hun (N. Y.) 347, 61 Hun (N. Y.) 418.

i. WHO MAY SUE—(1) In General. — The general rule is that an action for damages against an express company should be brought by the owner of the goods.¹

(2) *Consignor or Consignee.* — Usually the consignee is the proper person to bring an action for a breach of the contract of carriage, since if the goods have been placed at his absolute disposal, and no other fact appears, the legal presumption is that he is the true owner.² With reference to the proper party plaintiff, whether consignor or consignee, an examination of the authorities shows that the right of action changes from the one to the other upon what might perhaps be considered very nice distinctions. Under circumstances, the consignor, though without either a general or a special interest in the property, may sue for damages *in transitu* if no objection be made by the real owner. To illustrate: If by the express receipt the contract to transport and deliver is with the consignor, then he may sue for damages to the goods if not objected to by the real owner, though he be a mere agent and without interest general or special. If, however, the receipt states the contract to be with the consignee, then he should sue. The right of the consignor arises by force of the original contract for safe carriage made by the carrier with him. The consignor is a party in interest to the contract, and it does not lie with the carrier who made the contract with him to say upon a breach of it that he is not entitled to recover the damages, unless it be shown that the consignee objects, for without that it will be presumed that the action is commenced and is prosecuted with the knowledge and consent of the consignee and for his benefit. The consignor or shipper is, by the operation of the rule, regarded

1. Action Brought by Owner. — *Stadhecker v. Combs*, 9 Rich. L. (S. Car.) 193. See also *Southern Express Co. v. Armstead*, 50 Ala. 350. And see the title CONTRACTS OF AFFREIGHTMENT AND CHARTER-PARTIES, vol. 7, p. 220.

Illustration. — A, who was indebted to B for a certain sum of money, received a letter from B requesting him to send the money, or a portion of it, whatever he could, to apply on the debt. A delivered to an express company a sealed money package containing two hundred dollars. When the package was delivered to B at its destination, it contained but one hundred dollars. It was held that A was the proper person to bring an action against the express company for the loss of the money, as the ownership of the money remained in A after he delivered it to the express company and until it was delivered to B. *Bernstine v. Union Express Co.*, 40 Ohio St. 451.

Person Injured. — It is a general principle applicable to common carriers that when a duty is imposed on them by law, an action may be sustained against them by any person who is specially injured by their failure to perform that duty. *Cohen v. Southern Express Co.*, 53 Ga. 128.

2 Action Brought by Consignee. — *Southern Express Co. v. Armstead*, 50 Ala. 350; *Hoeing v. Adams Express Co.*, 7 Ky. L. Rep. 663; *Adams Express Co. v. Tingle*, 10 Ky. L. Rep. 358. See also *Scammon v. Wells*, 84 Cal. 311; *Adams Express Co. v. Bleich*, 5 Ky. L. Rep. 122. And see the title CONTRACTS OF AFFREIGHTMENT AND CHARTER-PARTIES, vol. 7, p. 220.

Consignor Agent of the Consignee. — In *Thompson v. Fargo*, 49 N. Y. 188, 10 Am. Rep. 342, 63 N. Y. 479, it was held that when

one who was simply the agent of another for the purpose of collecting money delivered to an express company the money collected, such money became the property of the consignee, and from that time the consignor ceased to have any title to or interest in it which would enable him to maintain an action therefor.

Consignor's Claim Released to Consignee. — "The remaining question is as to whether the action, in the nature of an action for money had and received, could be maintained. The package was a money package, and contained nothing but money. The bill of lading, or defendant company's receipt, was not transferred to the plaintiff, and he did not sue upon that contract. He sued merely as the party lawfully entitled to receive the package, and for whose use the money in it was intended. It is objected that privity of contract is necessary to sustain the action for money had and received; and the rule is invoked that until the bill of lading is delivered the shipper remains the owner and may change the direction of the property, or that acceptance of the property by the consignee, or the delivery of the bill to him, is necessary to transfer the title. The latter proposition may in many and perhaps most cases be true, but it is undoubtedly competent for the parties to come to a different agreement. If goods consigned be lost or destroyed in transit, so as never to come to the hands of the consignee, the consignor may, if he choose and the consignee assents thereto, release his title or claim to the consignee, so that the latter may maintain any proper action against the carrier to recover the value of the goods.' *Ela v. American Merchants' Union Express Co.*, 29 Wis. 611, 9 Am. Rep. 619.

as the trustee of an express trust, like a factor or other mercantile agent who contracts in his own name on behalf of his principal.¹

(3) *Corporator*. — The fact that the owner of goods lost or damaged by an express company is a corporator or member of such company will not prevent his bringing an action against the company.²

5. As to Collections. — Express companies, as a part of their business, are accustomed to receive for collection, and to collect, drafts and notes.³ An express company is liable for the negligent loss of a note intrusted to it for collection, and *prima facie* the measure of damages is the face of the note; but the company may show that the damages are less, by showing that the maker is insolvent or by other proof going to show a defense to the note.⁴ And when, by reason of the negligence of an express company with regard to collecting a note or draft, such note or draft becomes worthless, the company is liable in damages to the amount of the note and interest.⁵ Where an express company receives a promissory note to be transmitted to a bank for discount and the proceeds returned, and it appears that the company was acting only as a carrier, it is not liable though it subsequently turns out that the person delivering the note and receiving the proceeds had stolen the note, falsely representing himself as the maker and rightful owner.⁶

1. Action Brought by Consignor. — *Southern Express Co. v. Craft*, 49 Miss. 480, 19 Am. Rep. 4, *per* Tarbell, J. See also *Blanchard v. Page*, 8 Gray (Mass.) 281; *Hooper v. Chicago, etc.*, 51 N. Y. 27 Wis. 81, 9 Am. Rep. 439.

2. Action Brought by Corporator. — *Westcott v. Fargo*, 63 Barb. (N. Y.) 349. And see the titles CORPORATIONS, vol. 7, p. 855; STOCKHOLDERS.

3. Collection of Drafts and Notes. — *Reed v. U. S. Express Co.*, 48 N. Y. 462, 8 Am. Rep. 561; *Bland v. Southern Express Co.*, 1 Hughes (U. S.) 343. In this latter case articles such as an express company does not ordinarily receive for carriage were shipped to a distant point through a railroad company; and the receipt given by the railroad company, together with a draft drawn for collection, was delivered into the hands of an express company to be taken to the point of destination of the goods, where the draft was to be collected. It appeared that the agent of the railroad company at that point was also the agent of the express company. It was held that the express company did not have constructive or actual possession of the goods by reason of having the receipt and draft in its hands for collection, and that it was not liable for the delivery by the agent as the servant of the railroad company of the goods into the hands of the consignee without first collecting the draft.

4. Damages for Loss of Note. — *American Express Co. v. Parsons*, 44 Ill. 312.

5. Damages for Negligence in Collection. — *Knapp v. U. S., etc., Express Co.*, 55 N. H. 348. See also *American Express Co. v. Haire*, 21 Ind. 4, 83 Am. Dec. 334; *Palmer v. Holland*, 51 N. Y. 416, 10 Am. Rep. 616.

Illustration. — An overdue draft was delivered to an express company for collection, with instructions to return it at once if not paid. The principal only was tendered on presentation, and the company agreed to hold the draft until the drawee could communicate with the drawer as to the collection of interest, but upon getting an explanation as to the interest negligently held it for two days, during which time the drawee was ready to pay, but

at the end of which time he became insolvent. It was held that the express company was liable for the loss. *Whitney v. Merchants' Union Express Co.*, 104 Mass. 152, 6 Am. Rep. 207. See also *Fahy v. Fargo* (Supreme Ct.) 17 N. Y. Supp. 344, 43 N. Y. St. Rep. 589.

Duty to Notify Owner. — An express company receiving a draft for collection, in case of nonpayment should duly notify the person from whom it was received, otherwise the company is liable for all damages sustained for failure so to do. But if the company used due diligence to collect the draft, before it can be liable for more than nominal damages the plaintiff must show that he could in all probability have collected the amount of the draft, or some part of it, from the drawee, if he had received proper notice of nonpayment, which it was the company's duty to give. *Lienau v. Dinsmore*, 41 How. Pr. (N. Y. C. Pl.) 97.

Duty to Notify Indorser. — "The carrier is intrusted with the collection of a note, payable at a distant point, and of which an important part of the value arises from its indorsement by a responsible man. The duty of the carrier is first to present the note to the maker or at the place indicated. If paid, the money is to be transmitted to the employer. If not paid, the further duty of protest and notice to the indorser devolve upon the carrier. These are now every-day contracts with express companies, are well understood, and are expressed by a single word." *Reed v. U. S. Express Co.*, 48 N. Y. 462, 8 Am. Rep. 561.

Delivery to a Notary. — A note was delivered to an express company to be carried to a certain place for payment or protest. It was held that the undertaking of the company was completed when it carried the note to the place designated and there placed it in the hands of a notary for presentment and protest, and that it was not bound to give notice of its nonpayment. *McQuarrie v. Fargo*, 21 U. C. C. P. 478. Compare *American Express Co. v. Haire*, 21 Ind. 4, 83 Am. Dec. 334.

6. Liability in Case of Fraud. — *Norwalk Bank v. Adams Express Co.*, 4 Blatchf. (U. S.) 455, 19 How. Pr. (N. Y.) 462.

6. As Connecting Carriers. — A full discussion of the rights, duties, and liabilities of express companies as connecting carriers will be found elsewhere in this work.¹

7. Liability for Acts and Declarations of Agents. — In accordance with the general doctrines of agency, an express company is bound by the acts done or representations and declarations made by its authorized agent in the course of its business.²

Undisclosed Agency. — An express company received a draft on the plaintiff for collection, but presented it and received the money without disclosing that it was acting only as agent in the collection of the money. It turned out that the draft had been stolen, and the payee's indorsement thereon had been forged, and the plaintiff was compelled to pay the amount a second time. It was held that the express company was bound by the rule that an agent, in order to shield himself from liability, must disclose his agency, and was therefore liable to the plaintiff. *Holt v. Ross*, 54 N. Y. 472, 13 Am. Rep. 615. See the title AGENCY, vol. I, p. 1122.

1. See the title CONNECTING CARRIERS (OF GOODS), vol. 6, p. 603.

2. **Liability for Acts of Agents.** — *Southern Express Co. v. Boullemet*, 100 Ala. 275; *American Express Co. v. Lesem*, 39 Ill. 312; *Petersen v. Hubbell*, 12 N. Y. App. Div. 372; *Schlessinger v. Adams Express Co.*, 9 Phila. (Pa.) 70, 29 Leg. Int. (Pa.) 140. And see the titles AGENCY, vol. I, p. 1136; CORPORATIONS (PRIVATE), vol. 7, p. 824.

Contract. — An arrangement made by the consignee of a trunk with the agent of an express company, by which he was to be allowed to remove a part of the contents of the trunk and leave the trunk in the express company's custody, is within the apparent scope of the authority of the agent, and is binding upon the company in the absence of any notice to the consignee of any restriction on the agent's authority. *Oderkirk v. Fargo*, 58 Hun (N. Y.) 347, 61 Hun (N. Y.) 418.

Assaults. — While an express company may be liable for personal injuries inflicted upon a person by its agent in the transaction of its business, still one who is a wrongdoer and trespasser undertaking to carry away the property of another from the office of the company has no just cause to complain if physical force is used to prevent the asportation of the property. The agent of the company has a right to lay his hand upon the package and take it from such trespasser's possession when he undertakes to carry it away, and the only liability for which the company is responsible is any violence of physical force and battery. *Wright v. Southern Express Co.*, 80 Fed. Rep. 85.

In *Richberger v. American Express Co.*, 73 Miss. 161, it was held that when a person who went to the office of an express company upon business was cursed, abused, insulted, and maltreated by the agent of the express company, immediately after the transaction of such business and as a consequence thereof, he could recover damages from the express company.

False Imprisonment. — An express company may employ agents to pursue, arrest, and

prosecute in lawful ways those who have stolen or are supposed to have stolen money or goods from the company. But if, in the course or scope of his general employment for those purposes, the agent negligently or willfully commits a trespass and falsely imprisons the accused or suspected one, the company is liable although it has not expressly authorized or sanctioned the illegal arrest or imprisonment. *American Express Co. v. Patterson*, 73 Ind. 430. See generally the title FALSE IMPRISONMENT, *post*.

Libel. — An express company is not liable for a libelous letter written by its agent when such letter was not written in performance of any duty which the agent was required or permitted to perform. *Southern Express Co. v. Fitzner*, 59 Miss. 581, 42 Am. Rep. 379.

Limitation to Acts for Principal's Benefit. — An agent of an express company who is authorized to employ and discharge employees and agents and direct their conduct, make contracts, and exercise general supervision over the business of the company is not empowered to license or authorize one of his co-employees, who is himself intrusted with large important control over the business transactions of the company, to engage in and carry on a business in competition with that which he had been employed to foster and promote. The court said: "It is a universal principle in the law of agency that the powers of the agent are to be exercised for the benefit of the principal only and not of the agent or of third parties. A power to do all acts that the principal could do, or all acts of a certain description, for and in the name of the principal, is limited to the doing of them for the use and benefit of the principal only as much as if it were so expressed." *Adams Express Co. v. Trego*, 35 Md. 47.

Evidence as to Agency. — A shipper sought to hold an express company for an injury done to a dog while transporting the dog from the owner's house to the express company's office where it received and delivered matter carried by it as an express company, partly on the ground that it had knowingly held out its agent as having apparent authority — whether he had such authority in fact or not — to receive express matter at the shipper's residence and at the residence of its other patrons in the village. It sought to establish this apparent authority in part by the use, in the business of collecting and delivering express packages, of the wagon in which the dog was being transported when injured, which wagon had the name of the express company printed upon its side, and by the use of call cards in connection with such use of the wagon. As bearing upon this issue raised by the shipper, it was material for the express company not only to show that it did not own the wagon and did not

8. Rights as Against Employees. — An express company may recover from a messenger or other employee the value of goods lost or injured through his negligence or embezzled by him. An express messenger is not, however, an insurer of the safety of goods intrusted to him, though he is bound to use the utmost care and skill in protecting such goods.¹

Bonds. — And bonds for careful and faithful service are sometimes required by express companies of their employees.²

III. LIMITATION OF LIABILITY — **1. How Effected** — *a.* **BY SPECIAL CONTRACT** — (1) *In General.* — The general rule is that an express company may by special contract stipulate for such a reasonable modification of its common-law liability as is not inconsistent with its essential duties to the public, but that it cannot, even by special contract, relieve itself from liability for the negligence of its servants or agents.³

authorize its use in collecting or delivering express packages, but also to show that the whole use of the wagon and team, known to the shipper, was such that the shipper, in the exercise of reasonable prudence, was not authorized in believing that the receipt of the dog by the agent or his servant into this wagon was a receipt by the express company. *Winchell v. National Express Co.*, 64 Vt. 15.

1. Liability of Employees. — *De Reamer v. Pacific Express Co.*, 84 Mo. 529. See also *Southern Express Co. v. Frink*, 67 Ga. 201; and see the title **MASTER AND SERVANT**.

2. Bonds. — *Southern Express Co. v. Moeller*, 85 Mo. 208; *Collier v. Southern Express Co.*, 32 Gratt. (Va.) 718.

Agent Not Liable as a Common Carrier. — An express company employed a messenger and required him to give bond which provided that he should "well and truly perform all the duties required of me in any position or place to which I may be assigned in said employment, and well and truly account for all money and property of every description which may come into my possession or control, or for which I may have given my receipt, by reason of said employment, and make good all loss or damage which may happen to such money or property while under my control, for which I may be legally responsible, and indemnify and save harmless the said company from all liability on account of my fault or neglect." It was held that as between the company and the messenger his liability was not that of a common carrier, but that of an agent, and that it depended on his diligence or negligence. *Southern Express Co. v. Frink*, 67 Ga. 201.

Indiana Statute — Failure to File Statement. — By the Indiana Act of March 5, 1855, an express company is required to file a statement in the recorder's office, showing the entire amount of capital employed by the company in the express business, and not simply the probable amount employed in its business in the state. If merely the amount of capital employed in the business of the company in the state be shown, an action will not lie against the agent and his sureties on their bond in favor of the express company for moneys received by the agent, while acting as such, for services rendered by the company. *Barney v. Daniels*, 32 Ind. 19.

But the company may still bring suit against the agent himself upon an implied assumpsit to pay over money received in the

course of his agency to the use of the company. *U. S. Express Co. v. Lucas*, 36 Ind. 361.

3. Liability Limited by Contract — *United States.* — *Kentucky Bank v. Adams Express Co.*, 1 Flipp. (U. S.) 242, 93 U. S. 174; *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. (U. S.) 382; *U. S. Express Co. v. Kountze*, 8 Wall. (U. S.) 342; *Muser v. Holland*, 17 Blatchf. (U. S.) 412, 1 Fed. Rep. 382; *Earnest v. Southern Express Co.*, 1 Woods (U. S.) 573.

Alabama. — *Southern Express Co. v. Crook*, 44 Ala. 468, 4 Am. Rep. 140.

California. — *Hooper v. Wells*, 27 Cal. 11, 85 Am. Dec. 211.

Colorado. — *Merchants' Dispatch, etc., Co. v. Cornforth*, 3 Colo. 280, 25 Am. Rep. 757.

District of Columbia. — *Galt v. Adams Express Co.*, *MacArthur & M. (D. C.)* 124, 48 Am. Rep. 742.

Georgia. — *Purcell v. Southern Express Co.*, 34 Ga. 315; *Southern Express Co. v. Newby*, 36 Ga. 635, 91 Am. Dec. 783.

Indiana. — *Adams Express Co. v. Fendrick*, 38 Ind. 150; *Adams Express Co. v. Harris*, 120 Ind. 73, 16 Am. St. Rep. 315.

Kansas. — *Pacific Express Co. v. Foley*, 46 Kan. 457, 26 Am. St. Rep. 107, citing 2 AM. AND ENG. ENCYC. OF LAW (1st ed.) 822.

Kentucky. — *Adams Express Co. v. Guthrie*, 9 Bush (Ky.) 81; *Crawford v. Adams Express Co.*, 3 Ky. L. Rep. 362, 8 Ky. L. Rep. 619; *Adams Express Co. v. Hoeing*, 9 Ky. L. Rep. 814; *Adams Express Co. v. Spalding*, 10 Ky. L. Rep. 540. Compare *Adams Express Co. v. Loeb*, 7 Bush (Ky.) 499.

Maryland. — *Brehme v. Dinsmore*, 25 Md. 328.

Massachusetts. — *Grace v. Adams*, 100 Mass. 505, 97 Am. Dec. 117, 1 Am. Rep. 131.

Mississippi. — *Southern Express Co. v. Moon*, 39 Miss. 822.

Missouri. — *Levering v. Union Transp., etc., Co.*, 42 Mo. 88, 97 Am. Dec. 320; *Wolf v. American Express Co.*, 43 Mo. 421, 97 Am. Dec. 406; *Ketchum v. American Merchants Union Express Co.*, 52 Mo. 390; *Snider v. Adams Express Co.*, 63 Mo. 376.

New Hampshire. — *Rand v. Merchants' Dispatch Transp. Co.*, 59 N. H. 363.

Ohio. — *Union Express Co. v. Graham*, 26 Ohio St. 595; *U. S. Express Co. v. Backman*, 28 Ohio St. 144.

Pennsylvania. — *American Express Co. v. Sands*, 55 Pa. St. 140; *Adams Express Co. v.*

(2) *What Constitutes*. — The law is well settled that if the shipper assents to the limitation of the express company's liability as stated in the receipt

Sharpless, 77 Pa. St. 516; *Armstrong v. U. S. Express Co.*, 159 Pa. St. 640. See also *American Express Co. v. Titusville Second Nat. Bank*, 69 Pa. St. 394, 8 Am. Rep. 268.

South Carolina. — *Levy v. Southern Express Co.*, 4 S. Car. 234.

West Virginia. — *Brown v. Adams Express Co.*, 15 W. Va. 812.

See also *Frank v. Adams Express Co.*, 18 La. Ann. 279; *Olwell v. Adams Express Co.*, (Tenn. 1874) 1 Cent. L. J. 186. And see the titles CARRIERS OF GOODS, vol. 5, pp. 288, 307; CONTRACTS OF AFFREIGHTMENT AND CHARTER-PARTIES, vol. 7, pp. 221, 227.

Must Be Freely Made and Clearly Understood. — "Analogy, principle, and authority now, however, preponderate decidedly in favor of the legality of such contracts, when fairly made, without duress, imposture, or delusion, and fully understood and clearly proved. But no such special contract will ever be implied from the mere publication of notice that the carrier will exact conditions essentially various from those prescribed by law. Nor, in a case of importunate necessity for immediate transportation, and a refusal so to carry without a special contract, should the exaction of such a contract be sanctioned; such unreasonable extortion might be deemed duress. As public carriers are bound to carry articles within their scope of business without any other contract than such as the law would imply, if owners will freely and understandingly make special contracts less favorable to themselves, they can have no cause to complain that the law will enforce them. But, before the law should do so, the proof must be clear that such contract was freely made and fully understood." *Adams Express Co. v. Nock*, 2 Duv. (Ky.) 562, 87 Am. Dec. 510. See also *Adams Express Co. v. Hoeing*, 88 Ky. 373.

Cannot Assume Position of Bailee. — "A common carrier may, by contract, restrict his liability as an insurer, but his duties as a common carrier do not originate in contract, and he will not be permitted, whilst acting as a common carrier for hire, to shirk the responsibilities which the law affixes to his calling, and to assume the position of an ordinary bailee. The law still holds him to a higher degree of care than that required of a private carrier; and the rule of evidence which, for the wisest reasons, has been adopted in his regard must still prevail. The consignor does not accompany his goods; the carrier does. The carrier must account for them, and if they are lost, whatever agreement he may have made with the owner, the law will presume that they are lost by his fault, and, in the absence of testimony to rebut this presumption, he must pay their value. This doctrine seems to be clearly laid down in *Levering v. Union Transp., etc., Co.*, 42 Mo. 88, 97 Am. Dec. 320, and the point is expressly decided in *Ketchum v. American Merchants' Union Express Co.*, 52 Mo. 391." *Kirby v. Adams Express Co.*, 2 Mo. App. 369. To the same effect is *Drew v. Red Line Transit Co.*, 3 Mo. App. 495.

Limitation Must Be Reasonable. — The limitation of an express company's liability by con-

tract must be reasonable in itself and not such as to operate as a snare or fraud upon the public. *Adams Express Co. v. Reagan*, 29 Ind. 21, 92 Am. Dec. 332.

"Forwarders Only." — An express company, upon receiving a package for transportation, gave the shipper a receipt in which it was stated that the company were "forwarders only." It was held that these words were ineffectual to restrict the company's liability. The law determines the character of the occupation of expressmen; it assigns to them the liabilities of common carriers, and this status is not affected by an agreement between the parties that they are not carriers but forwarders. *Galt v. Adams Express Co., MacArthur & M. (D. C.)* 124, 48 Am. Rep. 742. To the same effect is *Regan v. Adams Express Co.*, 49 La. Ann. 1579. See also *Hooper v. Wells*, 27 Cal. 11, 85 Am. Dec. 211.

Limitation of Liability to Own Line. — An express company may limit its liability in its receipt to transport the package safely to the point on its line nearest to the place of destination, and there deliver it to the proper carrier to be forwarded to its destination, and having done this the company is not responsible for its subsequent loss. *U. S. Express Co. v. Haines*, 67 Ill. 137; *U. S. Express Co. v. Rush*, 24 Ind. 403. See also *Coates v. U. S. Express Co.*, 45 Mo. 238; *Hadd v. U. S., etc., Express Co.*, 52 Vt. 335, 36 Am. Rep. 757. And see the title CONNECTING CARRIERS (OF GOODS), vol. 6, p. 639.

Exemption from Loss by Fire. — A stipulation in a contract of carriage which exempts a carrier from liability for loss of goods by fire does not apply where the jury can reasonably infer that the goods were stolen from the car and the latter set on fire to conceal the robbery. *Merchants' Dispatch Transp. Co. v. Hoskins*, (Ky. 1897) 41 S. W. Rep. 31, 11 Am. & Eng. R. Cas. (N. S.) 832.

Limitation by Custom. — An express company kept its office in the freight office of a railroad company. Fruit trees were delivered at the office and a receipt was given by the railroad agent, but they were rendered worthless by a delay in shipment. When sued for the loss, the express company claimed that it was its habit to take up the receipt given by the railroad agent and give a bill of lading limiting its liability; but there was no evidence that the plaintiff had any knowledge of such custom. It was held that inasmuch as the express company received the trees and proceeded to transport them without any contract except that evidenced by the receipt given by the railroad agent, it could not claim the benefit of the limited liability. *Little v. Fargo*, 43 Hun (N. Y.) 233, *distinguishing* *Shelton v. Merchants' Dispatch Transp. Co.*, 59 N. Y. 258. See also *Texas Express Co. v. Dupree, etc., Express Co.*, 2 Tex. App. Civ. Cas., § 317.

New York Doctrine. — In New York an express company may, by special contract, stipulate for exemption from liability, even for losses resulting from its own negligence or that of its servants. *Lee v. Marsh*, 28 How. Pr. (N. Y. Supreme Ct.) 275; *Westcott v.*

given by it, then it becomes his contract as fully as if he had signed it, and he is bound by its terms.¹ And according to the weight of authority, if a receipt is accepted by the shipper, without objection, he is, in the absence of fraud, accident, or mistake, presumed to have assented to the conditions in the receipt, not unusual or unreasonable, limiting the common-law liability of such company, and the shipper cannot afterwards be heard to say that he omitted to read the receipt and was ignorant of such conditions, but will be bound thereby.² In some cases, however, it has been held that while the shipper's

Fargo, 61 N. Y. 542, 19 Am. Rep. 300, 63 Barb. (N. Y.) 349; Rawson v. Holland, 59 N. Y. 611, 17 Am. Rep. 394; Prentice v. Decker, 49 Barb. (N. Y.) 21; Ghormley v. Dinsmore, 51 N. Y. Super. Ct. 196. See also Hersfield v. Adams, 19 Barb. (N. Y.) 577. And see the title CARRIERS OF GOODS, vol. 5, p. 313.

Express Contract Necessary.—The contract of the carrier exempting him for loss or injury in the carriage of goods should not, however, be deemed to include negligence by any general words, nor unless the contract in clear and explicit form embraces negligence. Magnin v. Dinsmore, 56 N. Y. 168; Westcott v. Fargo, 61 N. Y. 542, 19 Am. Rep. 300; Ghormley v. Dinsmore, 51 N. Y. Super. Ct. 196.

Illinois Rule.—It would seem from some of the cases in this state that common carriers may by contract exempt themselves from liability for loss or injury caused by the negligence of their servants unless such negligence is gross or wilful. Arnold v. Illinois Cent. R. Co., 83 Ill. 273, 25 Am. Rep. 383; Chicago, etc., R. Co. v. Chapman, 133 Ill. 96, 23 Am. St. Rep. 587. See also Brockway v. American Express Co., 168 Mass. 257. In other cases, however, it is said that a common carrier cannot, even by express contract, exempt himself from the exercise of reasonable care. Adams Express Co. v. Haynes, 42 Ill. 90; Adams Express Co. v. Stettaners, 61 Ill. 184, 14 Am. Rep. 57; Boscowitz v. Adams Express Co., 93 Ill. 523, 34 Am. Rep. 191. It is therefore impossible to state any well-settled rule upon this question in this jurisdiction. For other cases upon this subject see the title CARRIERS OF GOODS, vol. 5, p. 319.

Wisconsin Rule.—It would seem that in Wisconsin an express company can by special contract exempt itself from liability for all negligence on the part of its servants or agents except that which is gross. Black v. Goodrich Transp. Co., 55 Wis. 319, 42 Am. Rep. 713. See also Lawson v. Chicago, etc., R. Co., 64 Wis. 455; Abrams v. Milwaukee, etc., R. Co., 87 Wis. 485.

1. Shipper's Signature Unnecessary.—Adams Express Co. v. Haynes, 42 Ill. 89; U. S. Express Co. v. Haines, 48 Ill. 248, 67 Ill. 137. And see the title BILLS OF LADING, vol. 4, p. 515.

Dakota Statute.—In Hartwell v. Northern Pac. Express Co., 5 Dakota 463, 37 Am. & Eng. R. Cas. 635, it was decided that a receipt given by an express company was not a special contract within the meaning of the Dakota statute providing that "the obligations of a common carrier cannot be limited by general notice on his part, but may be limited by special contract," unless it was signed by the consignor or consignee.

2. Assent Presumed from Acceptance.—*Iowa.*—Robinson v. Merchants Despatch Transp. Co., 45 Iowa 470.

Massachusetts.—Grace v. Adams, 100 Mass. 505, 97 Am. Dec. 117, 1 Am. Rep. 131.

Michigan.—Smith v. American Express Co., 108 Mich. 572.

Minnesota.—Christenson v. American Express Co., 15 Minn. 270, 2 Am. Rep. 122.

Missouri.—Levering v. Union Transp., etc., Co., 42 Mo. 88, 97 Am. Dec. 320; Snider v. Adams Express Co., 63 Mo. 376.

New Hampshire.—Merrill v. American Express Co., 62 N. H. 514.

New York.—Belger v. Dinsmore, 51 N. Y. 166, 10 Am. Rep. 575, reversing 51 Barb. (N. Y.) 69, 34 How. Pr. (N. Y.) 421; Soumet v. National Express Co., 66 Barb. (N. Y.) 284; Kirkland v. Dinsmore, 62 N. Y. 171, 20 Am. Rep. 475, reversing 2 Hun (N. Y.) 46; Gillespie v. Platt, 19 Misc. Rep. (N. Y. Supreme Ct.) 43. See also Huntington v. Dinsmore, 4 Hun (N. Y.) 66; Giles v. Fargo, 60 N. Y. Super. Ct. 117.

Pennsylvania.—Newburger v. Howard & Co.'s Express, 6 Phila. (Pa.) 174, 23 Leg. Int. (Pa.) 205.

Rhode Island.—Ballou v. Earle, 17 R. I. 441, 33 Am. St. Rep. 881.

Tennessee.—Merchants' Dispatch Transp. Co. v. Bloch, 86 Tenn. 392, 6 Am. St. Rep. 847, 35 Am. & Eng. R. Cas. 579.

And see the titles BILLS OF LADING, vol. 4, p. 516; CARRIERS OF GOODS, vol. 5, p. 292.

Receipt Made Out by Shipper.—When a shipper of goods who has been provided with blank receipts fills up one ready for the signature of the company's agent and presents it at the office with the goods, when it is signed by the agent and returned, this constitutes a special contract between the parties, including all the provisions therein contained relating to the manner of shipment and the limitations of the carrier's liability, and the shipper cannot plead ignorance of its terms. Kentucky Bank v. Adams Express Co., 93 U. S. 174, 1 Flipp. (U. S.) 242; Wallace v. Matthews, 39 Ga. 617, 99 Am. Dec. 473; Durgin v. American Express Co., 66 N. H. 277; Falkenan v. Fargo, 44 How. Pr. (N. Y. Super Ct.) 325; Westcott v. Fargo, 63 Barb. (N. Y.) 349. See also Newman v. Smoker, 25 La. Ann. 303.

Blank of Another Company Used.—The receipt taken by the shippers at the time of the delivery of goods to an express company was filled up by an employee of the shippers and was presented with the goods for the signature of the agent acting on behalf of the company. The blank used for that purpose was one of a large number furnished by the United States Express Company to its customers. In the receipt prepared by the bookkeeper of the

possession of an express company's receipt containing restrictive clauses is *prima facie* evidence of his assent to its terms, parol evidence is admissible to show that he never in fact accepted the instrument as a contract binding between himself and the company.¹ And in other cases it has been held that the simple delivery of a receipt to a shipper is not conclusive upon the latter, that whether he had knowledge of its terms and assented to its restrictions is for the jury to determine as a question of fact upon evidence *aliunde*, and that all the circumstances attending the giving of the receipt are admissible in evidence to enable the jury to decide that fact.²

(3) *Who May Make.* — If the owner of goods intrusts an agent to attend to their shipment, such agent is impliedly authorized to make a special contract with an express company limiting its liability which will bind his principal.³ And a consignor who is authorized by the owner to ship goods must be

shippers, for the goods to be shipped, the word "Adams" was written over the printed words "United States," so as to make it the receipt of the Adams Express Company. A line made with a pen was drawn over the blank left for stating the valuation of the goods. The articles mentioned in the body of the receipt were "three (3) bales, said to contain peltries." On the upper left-hand corner of the receipt was stated in figures the separate and total weights of the three bales, and also "two bales mink" and "one bale skunk." Among the printed conditions of the receipt was the following: "And it is hereby expressly agreed that the said United States Express Company are not to be held liable for any loss or damage except as forwarders only, nor for any loss or damage of any box, package, or thing for over fifty dollars, unless the just and true value thereof is herein stated." It was held that this clause of the receipt did not limit the right of recovery in case of the loss of the goods to the sum of fifty dollars, because the true value was not stated therein, but that, notwithstanding the restriction as to the extent of the express company's liability, the shipper could recover the full value of the goods as shown by the evidence. *Boscowitz v. Adams Express Co.*, 93 Ill. 523, 34 Am. Rep. 191, *distinguishing* *Oppenheimer v. U. S. Express Co.*, 69 Ill. 62, 18 Am. Rep. 596.

Subsequent Erasures.—A release from liability containing erasures is properly excluded as evidence when such erasures were made by the agent of the express company after the consignor had signed the release and when there is no evidence to show that such release was shown or read to the consignor after the erasures were made. *Armstrong v. U. S. Express Co.*, 159 Pa. St. 640.

Receipts of Local Express Companies. — No such presumption, however, arises from the acceptance of a receipt by a traveler for his trunk or other articles of baggage from a local express or transfer company. Such receipt is said to amount simply to a voucher enabling the traveler to follow and identify his property, and he is not bound by the provisions thereof. *Madan v. Sherard*, 73 N. Y. 329, 29 Am. Rep. 153; *Grossman v. Dodd*, 137 N. Y. 599, *affirming* 63 Hun (N. Y.) 324. And see the titles *BAGGAGE*, vol. 3, p. 557; *TRANSFER COMPANIES*.

1. Possession Prima Facie Evidence of Assent. — *King v. Woodbridge*, 34 Vt. 571; *Boorman v.*

American Express Co., 21 Wis. 154. See also *Hadd v. U. S.*, etc., *Express Co.*, 52 Vt. 335, 36 Am. Rep. 757.

2. Assent a Question of Fact. — *Adams Express Co. v. Haynes*, 42 Ill. 89; *American Merchants' Union Express Co. v. Schier*, 55 Ill. 140; *Adams Express Co. v. Stettaners*, 61 Ill. 184, 14 Am. Rep. 57; *U. S. Express Co. v. Haines*, 67 Ill. 137; *Merchants' Despatch Transp. Co. v. Theilbar*, 86 Ill. 71; *Merchants' Despatch Transp. Co. v. Leysor*, 89 Ill. 43; *Merchants' Despatch Transp. Co. v. Joesting*, 89 Ill. 152; *Erie, etc., Transp. Co. v. Dater*, 91 Ill. 195, 33 Am. Rep. 51; *Merchants' Despatch Transp. Co. v. Furthmann*, 149 Ill. 66, 41 Am. St. Rep. 265, *affirming* 47 Ill. App. 561. See also *Pereira v. Central Pac. R. Co.*, 66 Cal. 92; *Adams Express Co. v. King*, 3 Ill. App. 316; *Southern Express Co. v. Moon*, 39 Miss. 822; *Olwell v. Adams Express Co.*, (Tenn. 1874) 1 Cent. L. J. 186; *Gaines v. Union Transp., etc., Co.*, 28 Ohio St. 418. And see the titles *BILLS OF LADING*, vol. 4, p. 519; *CARRIERS OF GOODS*, vol. 5, p. 205.

Receipt Given after Time of Shipment. — In *American Express Co. v. Spellman*, 90 Ill. 455, no receipt was given by the express company at the time of the delivery of the package to it for transportation. That of which a copy was given in evidence was given some time afterwards, and the evidence negatived expressly all presumption of any knowledge on the part of the consignor that the receipt contained a clause limiting the company's liability as claimed and that he ever had any knowledge that the company thus claimed to limit its liability. It was held that the express company's liability was not limited thereby.

Georgia Statute. — It is provided by statute in Georgia that no contract limiting the liability of a common carrier shall be valid unless it has the express assent of the shipper. *Purcell v. Southern Express Co.*, 34 Ga. 315; *Southern Express Co. v. Barnes*, 36 Ga. 532. See also *Wallace v. Sanders*, 42 Ga. 486; *Southern Express Co. v. Newby*, 36 Ga. 635, 91 Am. Dec. 783; *Wood v. Southern Express Co.*, 95 Ga. 451.

3. Agent May Make. — *Smith v. Southern Express Co.*, 104 Ala. 387; *Shelton v. Merchants' Dispatch Transp. Co.*, 59 N. Y. 258. See also *Van Schaack v. Northern Transp. Co.*, 3 Biss. (U. S.) 394. And see the title *AGENCY*, vol. 1, p. 1034.

regarded as authorized to bind the owner by a contract with the express company.¹

(4) *Law Governing.* — The general rule that contracts are to be governed as to their nature, validity, and interpretation by the law of the place where they are made, unless it clearly appears that the contracting parties had some other law in view, is applicable to contracts of express companies for the transportation of goods.²

b. *BY NOTICE.* — The general rule is that an express company cannot limit its liability by any mere notice unless such notice is shown to have been brought to the knowledge or attention of the shipper within a reasonable time before shipment and to have been expressly assented to by him.³ An express company may, however, limit its liability by a publicly posted notice to the effect that the true value of all articles shipped must be declared at the time when the shipment is made or else the express company will be liable only for the apparent value of such articles, although such notice is not shown to have been called to the attention of the particular shipper whom it is sought to affect.⁴

2. *Extent of Limitation* — a. *AMOUNT OF LIABILITY LIMITED.* — An express company may undoubtedly stipulate in its contract of carriage that its liability in case of loss or damage shall be limited to an amount stated in such contract when the true value of the goods offered for transportation is not made known to the company.⁵ And, according to the weight of authority,

1. *Consignor May Make.* — *Levy v. Southern Express Co.*, 4 S. Car. 234. To the same effect are *Robinson v. Merchants' Despatch Transp. Co.*, 45 Iowa 470; *Meyer v. Harnden's Express Co.*, 24 How. Pr. (N. Y. C. Pl.) 290, 1 Daly (N. Y.) 227. See also *Christenson v. American Express Co.*, 15 Minn. 270, 2 Am. Rep. 122; and see the title *CARRIERS OF GOODS*, vol. 5, p. 306.

2. *What Law Governs.* — *Brockway v. American Express Co.*, 168 Mass. 257, 171 Mass. 158. And see the titles *CARRIERS OF GOODS*, vol. 5, p. 302; *PRIVATE INTERNATIONAL LAW*.

3. *Limitation of Liability by Notice.* — *Southern Express Co. v. Crook*, 44 Ala. 468, 4 Am. Rep. 140; *Southern Express Co. v. Armstead*, 50 Ala. 350; *Peck v. Weeks*, 34 Conn. 145; *Oppenheimer v. U. S. Express Co.*, 69 Ill. 62, 18 Am. Rep. 596; *Adams Express Co. v. Nock*, 2 Duv. (Ky.) 562, 87 Am. Dec. 510; *Roberts v. Riley*, 15 La. Ann. 103, 77 Am. Dec. 183; *Buckland v. Adams Express Co.*, 97 Mass. 124, 93 Am. Dec. 68; *Gott v. Dinsmore*, 111 Mass. 45; *Blossom v. Dodd*, 43 N. Y. 265, 3 Am. Rep. 701; *Westcott v. Fargo*, 63 Barb. (N. Y.) 349; *Farmers', etc., Bank v. Champlain Transp. Co.*, 18 Vt. 131; *Brown v. Adams Express Co.*, 15 W. Va. 812. And see the title *CARRIERS OF GOODS*, vol. 5, p. 290.

Evidence as to Notice. — Proof that notice was given to the shipper of a dog that a dog when sent by express must be sent at the owner's risk, if received without objection or protest, would be one step towards establishing that the shipper consented to send the dog agreeable to the notice, at his own instead of the express company's risk. And upon the question whether the agent had given this notice to the shipper it is proper to show that at the time of the alleged notification there was in the express company's office at the place of shipment a book of instructions one rule of which required such notice to be given. *Winchell v. National Express Co.*, 64 Vt. 15.

4. *Western Transp. Co. v. Newhall*, 24 Ill. 466, 76 Am. Dec. 760; *Orndorff v. Adams Express Co.*, 3 Bush (Ky.) 194, 96 Am. Dec. 207. And see the title *CARRIERS OF GOODS*, vol. 5, p. 289.

5. *Amount of Liability Limited.* — *Muser v. Holland*, 17 Blatchf. (U. S.) 412; *Muser v. American Express Co.*, 1 Fed. Rep. 382; *Earnest v. Southern Express Co.*, 1 Woods (U. S.) 573; *Wood v. Southern Express Co.*, 95 Ga. 451, 98 Ga. 268; *Brehme v. Dinsmore*, 25 Md. 328; *Smith v. American Express Co.*, 108 Mich. 572; *Ghormley v. Dinsmore*, 53 N. Y. Super. Ct. 36; *Fibel v. Livingston*, 64 Barb. (N. Y.) 179; *Wetzell v. Dinsmore*, 54 N. Y. 496, *reversed*, 4 Daly (N. Y.) 193; *Ballou v. Earle*, 17 R. I. 441, 33 Am. St. Rep. 881; *Levy v. Southern Express Co.*, 4 S. Car. 234; *Boorman v. American Express Co.*, 21 Wis. 152; *Black v. Goodrich Transp. Co.*, 55 Wis. 319, 42 Am. Rep. 713.

Notice of Value. — A package was marked "C. O. D. \$292.00." It was held that the express company to which the package was delivered for transportation was sufficiently informed of the value of the goods so as to enable the owner to have a recovery beyond the extent of fifty dollars as limited in the receipt. *Van Winkle v. Adams Express Co.*, 3 Robt. (N. Y.) 59.

Bill of Delivery Obtained Fraudulently. — Where the bill of delivery was made out in the office of an express company and given to the driver could be used by reason of its form to perpetrate a fraud, and by means thereof the driver got a receipt for three packages when only two were delivered, a provision in the shipping receipt given by the express company limiting its liability to fifty dollars was held to be of no effect, but the express company was held liable for the full value of the undelivered package. *Gillespie v. Platt*, 19 Misc. Rep. (N. Y. Supreme Ct.) 43.

Contents Known. — When an express company

an express company may by an express contract limit the amount of its liability for loss or damage to goods of which the true value is not disclosed, to a certain sum, even though the loss or damage is occasioned by its common or ordinary negligence.¹ But in some jurisdictions it has been held otherwise.²

b. TIME FOR BRINGING SUIT OR MAKING CLAIM LIMITED. — A stipulation that a suit for loss or damage must be brought within a shorter time than that fixed by the statute of limitations is valid unless the time for bringing the suit is unreasonably short;³ and a stipulation requiring the claim for loss or dam-

receives a package of gold with full knowledge of its character and contents, it becomes liable for the full value of the package, even though it gives a receipt treating it as an ordinary package valued at fifty dollars. When the company was informed of the contents of the package, it should have given a receipt for the full amount and not attempted to limit its liability to a smaller value; and if the owner sues for a loss, he is not concluded by the receipt, but may show the contents of the package and recover its full value. *Kember v. Southern Express Co.*, 22 La. Ann. 153, 2 Am. Rep. 719.

"Package" Defined. — Bales of cotton are not packages within the meaning of a provision of an express receipt providing that the liability of the company for loss or damage shall be limited to fifty dollars "to each package," unless its value be expressed. The term "package" must be held to include small parcels or bundles the appearance of which could give the carrier no adequate knowledge as to their value. But there could be no deception practiced on the carrier as to the value of a bale of cotton, as what it is and its market value must be as well known to the carrier as to the shipper. *Southern Express Co. v. Crook*, 44 Ala. 468, 4 Am. Rep. 140.

Several Separate Packages. — An express company limited the amount to be recovered for the loss of or damage to "any box, package, or thing" to fifty dollars. The goods destroyed consisted of two bales of fine and one of coarse furs, all distinct packages, and each proved to be of a value in excess of the sum named in the restricting clause of the receipt. It was held that it made no difference that the several distinct packages were all embraced in one receipt, and that the owner of the goods was entitled to recover fifty dollars for each one of the destroyed bales. *Boscowitz v. Adams Express Co.*, 93 Ill. 523, 34 Am. Rep. 191.

Inapplicable in Actions for Delay. — A stipulation contained in a receipt taken by a consignor upon the delivery of goods to an express company, limiting the amount to be recovered and the time for commencing an action, does not apply in an action for negligence on the part of the express company in not delivering the goods within a reasonable time. *Vroman v. American Merchants' Union Express Co.*, 5 Thomp. & C. (N. Y.) 22.

California Statute. — The Civil Code of California, § 2200, provides that "a common carrier of gold, silver, platinum, or precious stones, or of imitations thereof, in a manufactured or unmanufactured state, * * * is not liable for more than fifty dollars upon the loss or injury of any one package of such articles, unless he has notice, upon his receipt thereof, by mark upon the package, or otherwise, of the

nature of the freight; nor is such carrier liable upon any package carried for more than the value of the articles named in the receipt or the bill of lading." *Scammon v. Wells*, 84 Cal. 311.

1. View That Amount May Be Limited Though Company Negligent. — *Muser v. Holland*, 17 Blatchf. (U. S.) 412; *Oppenheimer v. U. S. Express Co.*, 69 Ill. 62, 18 Am. Rep. 596; *Pacific Express Co. v. Foley*, 46 Kan. 457, 26 Am. St. Rep. 107, commenting upon *Kallman v. U. S. Express Co.*, 3 Kan. 205; *Magnin v. Dinsmore*, 70 N. Y. 410, 26 Am. Rep. 608, 56 N. Y. 168, 62 N. Y. 35, 20 Am. Rep. 442, distinguishing *Newstadt v. Adams*, 5 Duer (N. Y.) 43; *Belger v. Dinsmore*, 51 N. Y. 166, 10 Am. Rep. 575; *Westcott v. Fargo*, 61 N. Y. 542, 19 Am. Rep. 300; *Ballou v. Earle*, 17 R. I. 441, 33 Am. St. Rep. 881. See also *Hart v. Pennsylvania R. Co.*, 112 U. S. 331; *Earnest v. Southern Express Co.*, 1 Woods (U. S.) 573; *Adams Express Co. v. Stettaners*, 61 Ill. 184, 14 Am. Rep. 57; *Conover v. Pacific Express Co.*, 40 Mo. App. 31, commenting upon *Kirby v. Adams Express Co.*, 2 Mo. App. 377; *Gillespie v. Platt*, 19 Misc. Rep. (N. Y. Supreme Ct.) 43.

California Statute. — Under the provisions of sections 2175, 2176, of the Civil Code of California, an express company may limit the amount of its liability for packages the value of which is not stated, except when the loss or damage results from the gross negligence, fraud, or wilful wrong of itself or its servants, and for loss or damage so caused it cannot thus exonerate itself. *Michalitschke v. Wells*, 118 Cal. 683.

2. Contrary View. — *Galt v. Adams Express Co.*, *MacArthur & M. (D. C.)* 124, 48 Am. Rep. 742; *Southern Express Co. v. Gutman*, 6 Ky. L. Rep. 587; *Southern Express Co. v. Seide*, 67 Miss. 609; *U. S. Express Co. v. Backman*, 28 Ohio St. 144; *Grogan v. Adams Express Co.*, 114 Pa. St. 523, 60 Am. Rep. 360; *Adams Express Co. v. Holmes*, (Pa. 1887) 9 Atl. Rep. 166. See also *Overland Mail, etc., Co. v. Carroll*, 7 Colo. 43; *Southern Express Co. v. Moon*, 39 Miss. 822; *Pittsburgh, etc., R. Co. v. Sheppard*, 56 Ohio St. 68. For a detailed discussion of this question see the title CARRIERS OF GOODS, vol. 5, p. 328.

No Consideration for Stipulation. — A limitation of the amount for which an express company will be liable will not control when there is evidence of negligence and no evidence that a lower rate of freight was given on account of the limitation placed upon the value of the property. *Adams Express Co. v. Harris*, 120 Ind. 73, 16 Am. St. Rep. 315.

3. Time for Bringing Suit Limited. — *Ginn v. Ogdenburg Transit Co.*, 85 Fed. Rep. 985. And see the title CARRIERS OF GOODS, vol. 5, p. 320.

age to be made in writing within a prescribed time is likewise valid when the time fixed is not unreasonable.¹

IV. MEASURE OF DAMAGES. — The same rules which determine the amount of the liability of other carriers of goods for loss of or damage to the goods intrusted to them for transportation, or for failure or delay in carrying and

1. Time for Making Claim Limited. — U. S. Express Co. *v.* Harris, 51 Ind. 129; Southern Express Co. *v.* Hunnicutt, 54 Miss. 566, 28 Am. Rep. 385; Kirkland *v.* Dinsmore, 62 N. Y. 171, 20 Am. Rep. 475; Weir *v.* Express Co., 5 Phila. (Pa.) 355, 21 Leg. Int. (Pa.) 36; Southern Express Co. *v.* Glenn, 16 Lea (Tenn.) 472; Northern Pac. Express Co. *v.* Martin, 26 Can. Sup. Ct. Rep. 135. And see the title CARRIERS OF GOODS, vol. 5, p. 321.

Unreasonable Stipulation Invalid. — A stipulation that a claim for loss or damage must be made within thirty-two days from the time of shipment is unreasonable and invalid as tending to fraud. Southern Express Co. *v.* Tupelo Bank, 108 Ala. 517, *following and approving* Southern Express Co. *v.* Caperton, 44 Ala. 101, 4 Am. Rep. 118. To the same effect is Adams Express Co. *v.* Spalding, 10 Ky. L. Rep. 540.

Where a package was shipped from C. in Indiana to S. in Georgia during the war, when transportation was much interrupted, a condition that the express company should not be liable for any loss unless a claim therefor was presented within thirty days after the shipment at C. was held void. Adams Express Co. *v.* Reagan, 29 Ind. 21, 92 Am. Dec. 332.

Where an express bill of lading contained a stipulation that the company should not be liable for loss or damage unless demand therefor should be made within thirty days from the date of the bill of lading, and the company instructed its agents not to return undelivered packages until the expiration of thirty days from their arrival at their destination, it was held that the stipulation was unreasonable and void. Dixie Cigar Co. *v.* Southern Express Co., 120 N. Car. 348, *followed in* U. S. Watch Case Co. *v.* Southern Express Co., 120 N. Car. 351.

Not a Condition Precedent. — A provision in an express company's receipt requiring the shipper to give notice of a claim for loss or damage "within thirty days from the accruing of the cause of action" is not a condition precedent to the plaintiff's right of recovery, but is in the nature of a limitation, and to be available as a defense must be specially pleaded in the company's answer. Westcott *v.* Fargo, 61 N. Y. 542, 19 Am. Rep. 300, *affirming* 63 Barb. (N. Y.) 349.

Delay Caused by Express Company. — When time is taken by the express company in searching for the lost goods in the expectation of finding them, the owner is excused for not having presented his claim within the time specified in the express receipt. Ghormley *v.* Dinsmore, 51 N. Y. Super. Ct. 196.

Waiver of Stipulation. — A stipulation requiring a claim for loss or damage to be made in a certain manner within a certain time is waived by the express company if it does not exact a compliance therewith. Merrill *v.* American Express Co., 62 N. H. 514; Bennett *v.* Northern Pac. Express Co., 12 Oregon 49.

Collection of a Draft. — Upon receiving a draft for collection, an express company gave a receipt for it, signed by it, which contained numerous conditions respecting its liability, among which was the following: "In no event shall this company be liable for any loss or damage unless the claim therefor shall be presented to them in writing at this office, within ninety days after this date, in a statement to which this receipt shall be annexed." It was held that this condition had no application to a case where the express company, after receiving the money, neglected or refused to pay it over to a person entitled to it, as such neglect or refusal could not be deemed a "loss or damage" such as the receipt contemplated. Bardwell *v.* American Express Co., 35 Minn. 344.

Claim Based upon a Subsequent Contract. — When the consignors of goods do not sue on the original contract of shipment, but sue on the subsequent parol promise of an express company to return the goods shipped to the consignors, made after the consignors had received notice from the consignee that he refused to receive the goods, a limitation in the original contract as to the time and manner in which a claim for damages is to be made is not applicable. Green *v.* Pacific Express Co., 37 Mo. App. 537.

Of No Effect in an Action for Nondelivery. — A clause in the contract of an express company that it is not "to be held liable for any loss or damage whatever, unless claim be made therefor within ninety days from the delivery to it," will not limit the liability of the company in an action upon the contract to recover for the nondelivery of goods. Porter *v.* Southern Express Co., 4 S. Car. 135, 16 Am. Rep. 752.

Inapplicable in Action for Failure to Forward. — A condition in a receipt issued by an express company that the claim for damages must be presented to the office issuing the receipt within thirty days after the loss or damage occurs is inapplicable when the claim sued on is for damages for negligence by that office in not sending forward the article named, and there is no necessity to bring to the notice of the company at that office the claim for what that office was fully cognizant of, its negligence having caused the loss. Baltimore, etc., Express Co. *v.* Cooper, 66 Miss. 558, 14 Am. St. Rep. 586.

Dakota Statute — Consignee's Signature Necessary. — Under the provisions of the Dakota Civil Code, §§ 1261, 1262, a consignee is not bound by a condition in a receipt given by an express company to him to the effect that the company will not be liable for loss or damage unless a claim therefor be presented within a specified time, when such receipt has not been signed by the consignee or any one acting for him. Hartwell *v.* Northern Pac. Express Co., 5 Dakota 463, 37 Am. & Eng. R. Cas. 635.

delivering such goods, are generally applicable to express companies.¹

Market Value. — And so in the case of a loss of the goods, the measure of damages recoverable is the market value of the goods at the place of destina-

1. General Rules as to Measure of Damages. — For a full discussion of these rules see the titles CARRIERS OF GOODS, vol. 5, p. 373; CONTRACTS OF AFFREIGHTMENT AND CHARTER-PARTIES, vol. 7, p. 290; DAMAGES, vol. 8, p. 537.

Building Plans Lost. — When plans for the construction of a house are lost by an express company, the company is liable in damages for the reasonable cost of new plans and for other expenses, if there were any, necessarily incurred in procuring these. But it is not liable for the delay in constructing a house caused by the loss of the original plans, where it does not appear that it had notice of the contents of the package at the time when it was delivered for transportation, or knowledge that the plaintiff needed the plans for the construction of a house which he had begun to build. Such damages do not usually and naturally arise from the breach of a contract of carriage, and are not within the reasonable contemplation of both parties to the contract as likely to arise. *Mather v. American Express Co.*, 138 Mass. 55, 52 Am. Rep. 258, following *Hadley v. Baxendale*, 9 Exch. 341.

Amount of Recovery for Delay. — For a negligent delay in the transportation of goods an express company is liable for such damages only as are the direct and immediate consequence of the breach and are deemed to have been contemplated by the parties when they made the contract. Thus, in case of such delay, an express company will be liable for the difference between the market value of the goods at the time and place where they ought to have been delivered and such value when they were delivered; also for any extra expense incurred in writing or telegraphing for them; but not for the difference between the price for which the consignor had contracted to sell them and their market value when and where they were delivered, unless the company was notified that they were shipped to complete contracts of sale theretofore made. *Murrell v. Pacific Express Co.*, 54 Ark. 22, 26 Am. St. Rep. 17.

Machinery Delayed. — An action was brought against an express company to recover damages for negligently delaying the shipment of a piece of machinery delivered to such company for transportation and intended to be used in the plaintiffs' sawmill and grist mill. The plaintiffs alleged in effect that the company's agent was notified at the time of the delivery of the machinery for shipment that they were operating a sawmill and grist mill, that they were sending the machinery away for repairs, and that their mill would remain suspended until it was repaired and returned, and they offered evidence tending to establish these facts. It was held that the following instruction given by the trial judge as to the measure of damages was a correct statement of the law: "In estimating the damages plaintiffs have sustained, you will take into consideration the loss of time, the expense of idle hands, the contracts plaintiffs had for lumber, the corn plaintiffs got to grind, and the profits

arising from running and operating the steam mill, and multiplying the amount per day by the number of days would give the amount plaintiffs would be entitled to, not to include Sundays." *Pacific Express Co. v. Darnell*, (Tex. 1887) 32 Am. & Eng. R. Cas. 543.

Drawings Sent for Competition Delayed. — A box containing plans and specifications was delivered to an express company to be forwarded to a committee who had offered a premium to the successful competitor for the best plans for an almshouse. These drawings were sent for competition. In consequence of the default of the company, they were not delivered until after the appointed day for receiving them, nor until after the premium had been awarded. It was held that the consignor was not entitled to recover for the time and labor spent in making the plans and specifications, but that he was entitled to recover for the loss of the opportunity to compete for the prize; but that in the absence of evidence showing that there was the least probability that the premium would have been awarded to him had his plans been submitted to the committee in time, he was entitled to nominal damages only. *Adams Express Co. v. Egbert*, 36 Pa. St. 360, 78 Am. Dec. 382.

Loss of Profits. — To authorize a recovery for the loss of profits, as damages occasioned by the delay of an express company in delivering certain goods, it is essential for the consignees not only to prove that such damage was caused or rather continued by the failure promptly to forward such goods, but also that such facts had been communicated to the express company as would have reasonably indicated the result which would or might have been expected to flow from a delay in forwarding the same. Such elements of damage would not necessarily result from such delay, nor are they such as might reasonably be supposed to have entered into the contemplation of the respective parties at the time the contract was made as the probable result of its breach. *Pacific Express Co. v. Darnell*, 62 Tex. 639, citing *Hadley v. Baxendale*, 9 Exch. 353.

Delivery of Money Delayed. — Where money is sent by express, in a suit for delay in its transmission, in the absence of proof of special damages, the measure of damages is interest on the money from the time it should have reached its destination to the time when it did. *U. S. Express Co. v. Haines*, 67 Ill. 137.

Wrongful Delivery. — The wrongful delivery of goods by an express company is a conversion, and generally the measure of damages is the value of the goods at the time of such conversion, with interest. But this rule is subject to be modified in its application by circumstances, and although there may have been a technical conversion, yet if it was not wilful, and the goods were restored to the consignor uninjured before suit brought, this fact would go in mitigation of damages even without proof of their acceptance. *American Express Co. v. Brunswick*, 4 Ill. App. 606.

Check Delivered to Wrong Person. — When a

tion, with interest from the time when they should have been delivered, less the amount of express charges due for their transportation.¹

V. CHARGES FOR CARRIAGE — 1. Rights as to Rate. — Since an express company is a common carrier engaged in a business affected with public interest, it cannot arbitrarily fix its own rates or make such a contract with each shipper as it pleases. It must carry for all and at a reasonable rate or charge.²

Discrimination. — In the absence of statutory enactment, an express company is not bound to treat all its patrons with absolute equality. It is bound to carry for every shipper at a reasonable rate, but so long as it does so no one can complain if it is willing to carry for others at a less rate.³

2. Prepayment. — An express company, like any other common carrier, has a right to demand that its charges for transportation shall be paid in advance, and is under no obligation to receive goods for transportation unless such charges are paid if demanded.⁴

3. Lien for Charges. — An express company has a lien on goods carried by it and still in its possession for all charges that may be due for transportation and for all proper storage and warehouse charges.⁵

Sale to Satisfy Lien. — And in most of the states it is provided by statute that

check is delivered by an express company to the wrong person, by whom its payment is obtained, the measure of damages is the full face value thereof. *Survey v. Wells*, 5 Cal. 124.

Failure to Deliver Confederate Money. — A package of Confederate notes was shipped by express during the civil war, but before it reached the place of destination this was within the Federal control, and before the package could be returned to the place of shipment that was likewise in Federal control, and a delivery to either the consignee or the shipper was thus prevented while the war lasted. It was held in an action against the company for a failure to deliver that the measure of damages was the value of the package at the close of the war when a demand was made, with interest thereon from the time of the demand, and that the company was not liable for a depreciation in the value of the notes. *Caldwell v. Southern Express Co.*, 1 Flipp. (U. S.) 85.

Goods Paid for in Confederate Money. — In an action against an express company to recover damages for the nondelivery, in 1864, of goods purchased and paid for by the plaintiff in Confederate currency, it was not error to refuse to instruct the jury that the measure of damages was the value in lawful money of the Confederate currency paid for the goods. *Porter v. Southern Express Co.*, 4 S. Car. 135, 16 Am. Rep. 762.

Injury to a Dog. — In an action brought by the owner of a dog intended for breeding purposes, for injury thereto, the breeding and pedigree of the dog are elements to be considered in determining its value, as well as its personal characteristics. *Winchell v. National Express Co.*, 64 Vt. 15.

Evidence as to Amount of Lost Package. — The words "said to contain \$300," in a receipt given by an express company for a package intrusted to its care, are evidence of the amount which the package contained, in a suit to recover damages for its loss. *Weil v. Express Co.*, 7 Phila. (Pa.) 88.

Amount of Insurance upon Goods. — In an action for the conversion of goods by an express company it is competent to show upon the

question of damages that the company had insured the goods for a certain amount. *Garardeau v. Southern Express Co.*, 48 S. Car. 421.

Consignor Incompetent as Witness. — In *Adams Express Co. v. Haynes*, 42 Ill. 89, it was held that a consignee of packages transported by an express company could not, in case of loss, prove their contents. This decision does not, however, seem to accord with the weight of authority. See the titles *BAGGAGE*, vol. 3, p. 582; *CARRIERS OF GOODS*, vol. 5, p. 375.

1. Recovery for Loss. — *Lachner v. Adams Express Co.*, 72 Mo. App. 13; *Vroman v. American Merchants' Union Express Co.*, 5 Thomp. & C. (N. Y.) 22. See also *Adams Express Co. v. Hoeing*, 9 Ky. L. Rep. 814.

Market Value at Place of Shipment. — In *Vroman v. American Merchants' Union Express Co.*, 5 Thomp. & C. (N. Y.) 22, it was held that as the evidence showed with reasonable certainty that the goods had no market value at their destination, the place of shipment was properly resorted to for the purpose of determining their value.

2. Reasonable Rate. — *Western Wheel Works v. U. S. Express Co.*, (Ill. 1898) 5 Detroit Leg. N. No. 21. And see the title *CARRIERS OF GOODS*, vol. 5, p. 177.

3. Right to Discriminate. — See *Johnson v. Dominion Express Co.*, 28 Ont. Rep. 203. And see the title *CARRIERS OF GOODS*, vol. 5, p. 179.

4. Right to Demand Prepayment. — *Southern Indiana Express Co. v. U. S. Express Co.*, 88 Fed. Rep. 659. And see the title *CARRIERS OF GOODS*, vol. 5, p. 166.

5. Lien of Express Company. — *Southern Indiana Express Co. v. U. S. Express Co.*, 88 Fed. Rep. 659. See also *American Merchants' Union Express Co. v. Schier*, 55 Ill. 140; *Western Transp. Co. v. Barber*, 56 N. Y. 544; *Schlessinger v. Adams Express Co.*, 9 Phila. (Pa.) 70, 29 Leg. Int. (Pa.) 140. And see the titles *CARRIERS OF GOODS*, vol. 5, p. 399; *CONTRACTS OF AFFREIGHTMENT AND CHARTER-PARTIES*, vol. 7, p. 266.

goods upon which the charges are not paid may be sold after a specified time in order that the express company's lien may be satisfied.¹

EXPRESS CONDITIONS. — See the title CONDITIONS, vol. 6, p. 500.

EXPRESS CONSIDERATION. (See also the titles CONSIDERATION, vol. 6, p. 673; IMPLIED CONTRACTS.) — Considerations are either express or implied. An express consideration is one that is distinctly declared in the contract. A consideration is implied where an act is done or forbore at the request of another without an express stipulation, in which case the law presumes an adequate compensation for the act or forbearance to have been the inducement of the one party and the undertaking of the other.²

EXPRESS CONTRACT. — See the title CONTRACTS, vol. 7, pp. 91, 92.

EXPRESS CORPORATION. — An express corporation is one existing where an individual or body is expressly constituted and declared to be a body politic or corporate, by a given name, and for a specified object.³

EXPRESS COVENANT. — See the title COVENANTS, vol. 8, pp. 54, 83.

EXPRESS MALICE. — See the title MALICE.

EXPRESS MESSENGER. — See the titles CARRIERS OF PASSENGERS, vol. 5, pp. 512, 622; EXPRESS COMPANIES, *ante*.

EXPRESS TRUST. (See also the titles TRUSTS AND TRUSTEES.) — Trusts are either express or implied, the former being such as are raised or created by the act of the parties, and the latter being such as are raised or created by presumption or construction of law.⁴

EXPRESS WARRANTY. — See the titles IMPLIED WARRANTY; WARRANTY.

EXPRESSIO EORUM QUÆ TACITE INSUNT, NIHIL OPERATUR. — The express mention of those things which are tacitly comprised or implied has no effect.⁵

EXPRESSIO UNIUS EST EXCLUSIO ALTERIUS. (See also the titles INTERPRETATION AND CONSTRUCTION; STATUTES; WILLS.) — The expression of one thing is the exclusion of another. This maxim expresses a common rule of construction, that the express mention of one thing, person, or place, implies the exclusion of another.

EXPRESSLY. — The word "expressly" is defined to mean in an express, direct, or pointed manner; in direct terms; plainly.⁶

1. Statutes Authorizing Sale for Charges. — 1 Stimson's Am. Stat. Law, §§ 4354-4356; Schlessinger v. Adams Express Co., 9 Phila. (Pa.) 70, 29 Leg. Int. (Pa.) 140; Garardeau v. Southern Express Co., 48 S. Car. 421. See the statutory enactments of the several states; and see the title CARRIERS OF GOODS, vol. 5, p. 417.

2. Bixler v. Ream, 3 P. & W. (Pa.) 284.

3. Warner v. Beers, 23 Wend. (N. Y.) 176. The court said further: "Its essential powers, according to its nature and object, and within the enumeration of the statute flow from this act of creation, and as incidents of the body created."

4. Walden v. Skinner, 101 U. S. 577; Lafferty v. Turley, 3 Sneed (Tenn.) 172; Cook v. Fountain, 3 Swanst. 585, 592. See also Gunter v. Janes, 9 Cal. 659; School Directors v. School Directors, 16 Ill. App. 653; Brown v. Cherry, 56 Barb. (N. Y.) 635, 38 How. Pr. (N. Y. Supreme Ct.) 352; Considerant v. Brisbane, 22 N. Y. 394; Hallahan v. Herbert, 57 N. Y. 413; Person v. Warren, 14 Barb. (N. Y.) 493; Rigby v. Great Western R. Co. 15 L. J. Ch. 266; Petre v. Petre, 1 Drew. 393; Salter v. Cavanagh, 1 Dr. & Wal. 668; Patrick v. Simpson, 24 Q. B. Div. 128; *In re Alison*, 11 Ch. Div. 284.

5. "We fail to see the application of the maxim, *Expressio eorum quæ tacite insunt, nihil operatur*, in a case where all the implications of the law following an indorsement in blank, or in full, in the regular form, are not expressed. On the contrary, it seems clear to us that the payee, by expressing one only of the implications which the law attaches to an indorsement in blank or in full, in the regular way, and that one, too, not imposing any personal liability upon him, excludes every other." Spencer v. Halpern, 62 Ark. 595.

6. State v. Hyde, 121 Ind. 34; Hovey v. State, 119 Ind. 412. See also Magone v. Heller, 150 U. S. 74; Evansville v. State, 118 Ind. 443; State v. Denny, 118 Ind. 464. And see EXPRESS, *ante*.

"Specifically Charged," used synonymously with "expressly charged," see Flaum v. Wallace, 103 N. Car. 312.

Lease — "Expressly Provided." — On the construction of an act allowing lessees under certain circumstances where the demised premises had been destroyed, to quit them and pay no further rent "unless otherwise expressly provided by written agreement or covenant," the court said: "The statute doubtless requires that there should be an *express* agreement as

EXPRESSUM FACIT CESSARE TACITUM. (See also the titles INTERPRETATION AND CONSTRUCTION: STATUTES; WILLS.)—That which is expressed makes that which is implied to cease, *i. e.*, supersedes it or controls its effect. The express mention of one thing puts an end to that which is implied.¹

contradistinguished from an agreement implied only, and it must also be in writing; and having in view the occasion and purpose of the statute, and the fair construction of its language, we think the intention to take away the benefit of the exemption should be clearly shown on the face of the lease or other written agreement, before a tenant can be deprived of the benefit of the act * * * We think the words 'unless otherwise expressly provided by written agreement or covenant,' while they do not require an agreement *in totidem verbis* that the rent shall continue notwithstanding the destruction of the premises or their becoming untenable, are nevertheless not satisfied unless it appears from the lease or other writing that the parties had in mind the contingency mentioned in the statute, and inserted provisions or covenants inconsistent with the right of surrender thereunder." *Bulter v. Kidder*, 87 N. Y. 98. See generally the title LANDLORD AND TENANT.

Expressly Used for Manure—Customs.—In *Magone v. Heller*, 150 U. S. 74, it was held that, under the tariff act of 1883, a kind of sulphate of potash, the only common use of which either by itself or in combination with other materials is as manure or in the manufacture of manure, was within the clause of the free list which exempted from duty "all substances expressly used for manure." The court said: "The phrase 'expressly used for manure' is equivalent to 'used expressly,' or 'particularly,' or 'especially' for manure, and denotes those substances the only common use of which, either by themselves or in combination with other materials, is for the purpose of fertilizing the soil. If the only common use of a substance is to be made into manure, or to be itself spread upon the land as manure, the fact that occasionally, or by way of experiment, it is used for a different purpose will not take it out of the exemption. But if it is commonly, practically, and profitably used for a different purpose, it cannot be considered as 'expressly used for manure,' even if in the majority of instances it is so used. To hold otherwise would be to extend to other industries an exemption intended for the benefit of agriculture only." See generally the title REVENUE LAWS.

Married Women—"Expressly Withheld."—A married woman who has a separate estate in land, "with full power to dispose of it in her lifetime by sale, or by last will and testament," cannot validly mortgage it to secure money loaned to her husband, under an act giving married women power to "sell, convey, devise, charge, or mortgage" their separate realty as *femes sole*, "provided the power of disposition is not expressly withheld in the deed or will under which they hold the property." *Lightfoot v. Bass*, 2 Tenn. Ch. 677. The chancellor said: "The whole difficulty grows out of the use of the word *expressly*. But to *expressly* withhold anything is only a

mode of saying that it is withheld intentionally. The act of withholding is passive and negative, not active or positive except in the intention. To ascertain when the power of disposition is or is not expressly withheld, we must still, as before the statute, look to the intention of the grantor. * * * The words 'expressly withheld' mean withheld by a general clause restrictive of all disposition, or by words restrictive of any other mode of disposition than those prescribed, and the latter contingency may occur when the language used, either by limiting the power or purpose of disposition, shows a clear intention to restrain by implication equivalent to an express provision.' That a power may be 'expressly withheld' it is not necessary that it should be *expressly* forbidden. In this view the word *expressly* is only used as a mode of saying that the power is 'intentionally,' 'effectually,' or 'certainly' withheld." See generally the title SEPARATE PROPERTY (OF MARRIED WOMEN).

"Expressly Named."—Where the name of the attorney attesting a warrant of attorney on behalf of one party was first suggested by the other party's attorney, but *expressly* adopted by the former party as his attorney for that purpose, and it was held that he was "*expressly* named" by this party. *Parke, B.*, said: "We cannot, therefore, suppose that it was intended that the defendant must *expressly* pronounce at length the Christian and surname of the attorney; but he must be *expressly* named by him, in contradistinction to his being impliedly named or adopted. There is not a word to lead to the conclusion that he must be originally or spontaneously named by the party, or to exclude the suggestion of a name by a third person. What then, is there to exclude the suggestion of a name by the plaintiff's attorney? I cannot import such words into the act, when no such prohibition is expressed in it." *Taylor v. Nicholls*, 6 M. & W. 91.

1. In *Kansas City Planing Mill Co. v. Brundage*, 25 Mo. App. 272, it was said: "Where there is an express promise the law does not raise an implied one in reference to the same matter, for *expressum facit cessare tacitum*." Quoting 2 Steph. Com. 112.

Warranty.—In *Greer v. Van Meter*, 54 N. J. Eq. 270, it was said: "Now, in respect to an express warranty of quality, Justice Maule, in delivering judgment in the case of *Dickson v. Zizinia*, 10 C. B. 602-610, 70 E. C. L. 602-610, remarked: 'If a man sell a horse and warrant it to be sound, the vendor knowing at the time that the purchaser wants it for the purpose of carrying a lady, and the horse, though sound, proves to be unfit for that purpose, this would be no breach of warranty; so, with respect to any other kind of warranty the maxim *expressum facit cessare tacitum* applies to such cases. If this were not so, it would be necessary for the parties to every agreement to provide in terms that they are

EXPROMISSION. (See also the title **NOVATION**.) — That kind of novation which takes place by the intervention of a new debtor, where another person becomes debtor in place of the original debtor, and is accepted by the creditor, who discharges the original debtor from the original debt, is called expromission.¹

EXPULSION. — See the titles **AMOTION**, vol. 2, p. 310; **BY-LAWS**, vol. 5, p. 86; **CARRIERS OF PASSENGERS**, vol. 5, p. 474, **DISFRANCHISEMENT**, vol. 9, p. 477; **EVICTIION**, vol. 11, p. 457; **RELIGIOUS SOCIETIES**; **SOCIETIES AND CLUBS**; **THEATRES**.

EXSCINDED. — See note 2.

EXTEND. (As to the United States constitutional provision that the judicial power shall extend, etc., see the title **UNITED STATES COURTS**.) — The word "extend" means to enlarge, prolong, expand, stretch out;² to stretch, reach, or continue in any particular direction.⁴ The word "extend" implies

to be understood not to be bound by anything which is not expressly set down — which would be manifestly inconvenient.' Broom Leg. Max. 658.' See generally the titles **IMPLIED WARRANTY**; **WARRANTY**.

1. *Crosby v. Jeroloman*, 37 Ind. 272.

2. **Exscinded.** — The term *exscinded*, in a partnership agreement that a partner might be *exscinded* from membership, means cut off. *Robinson v. Floyd*, 159 Pa. St. 175.

3. **Time of Delivery of Goods.** — *Goulding v. Hammond*, 54 Fed. Rep. 639. In that case the plaintiffs, who had an option to require the delivery of certain rock at any time from June 1 to September 30, telegraphed the defendants: "Please *extend* time for delivery of rock until November first." This was held not to be an abandonment by the plaintiffs of the right to demand delivery at any time before September 30. The court said: "The word *extend*, used in the sense in which it was here used, could not, in our opinion, in any way be construed to mean postpone or arbitrarily put off to later day. Neither the etymology of the word nor its ordinary use would permit such an understanding. The word *extend*, used by plaintiffs, in derivation, construction, and the definition of every authority, means 'to enlarge, prolong, expand, stretch out;' while the sense and meaning which defendants desire to apply to the telegram are 'to postpone, to defer, to put off, to place after or beyond something else.' Webster, Dict.; Cent. Dict.; 7 AM. AND ENG. ENCYC. OF LAW (1st ed.) 583. We do not consider that any reasonable interpretation can be had of the language used which would express any idea different from that which would add the month of October to the time which plaintiffs had to claim the cargo."

4. *Piqua Branch of State Bank v. Knoup*, 6 Ohio St. 355.

Extend and Renew. (See also **RENEW**.) — A lease contained a covenant that if the lessees so signified their wish, the lessors should *extend* the lease for the term of ninety-nine years. In construing this covenant, in *Orton v. Noonan*, 27 Wis. 282, *Dixon, C. J.*, said: "The verb 'to *extend*' implies far less in this connection than the verb 'to *renew*,' found in other cases. In fact it has nothing of the same strength and significance. 'To *extend*' is to draw forth or stretch; to prolong; to protract; to continue. 'To *renew*' signifies to

make over; to make anew; to give new life to; to restore; to recreate; to rebuild. Each word is so defined by the lexicographers. The covenant 'to *extend* this lease,' therefore, means no more than to prolong or to continue it at the option of the lessees, or that it shall be so prolonged or continued, which clearly forbids the inference that a new lease is to be executed. The language implies, as clearly as language can, that if the lessees so signified their wish, the lease was to be a continuing one. Every provision is made for its continuance. The term, the rent, the times of payment, the manner of drawing the water, and every condition to the minutest particular are distinctly stated and agreed upon. Nothing is left to be ascertained or made more clear and definite by a new lease."

In *Kollock v. Scribner*, 98 Wis. 104, it was held that the question whether the covenant to *extend* a lease implied the making of a new lease was settled in *Wisconsin* in *Orton v. Noonan*, 27 Wis. 272, in the affirmative, and that a covenant to *renew* must have the same effect. See generally the titles **LANDLORD AND TENANT**, **LEASE**.

For instances of "renew" and *extend* used synonymously, see *Goodyear v. Cary*, 4 Blatchf. (U. S.) 303; *Mobile, etc., R. Co. v. State*, 29 Ala. 583. And in *Wilson v. Rousseau*, 4 How. (U. S.) 697, it was said: "It is true that some renewals are not *extensions* in the sense of prolonging the term of the patent — that is, when an old patent is surrendered and a new one taken out, or a renewal made for the rest of the term — while all *extensions* prolong the term. But still 'renewals' are as often used for a prolongation of the term, or for a new term, as *extensions* are, and in this very section 'to *renew* and *extend*' is used as if synonymous." See generally the title **PATENT LAW**.

Same — Charter. — The *Pennsylvania* Constitution provided that no corporate body should thereafter be created, renewed, or *extended* with banking or discounting privileges without previous public notice of the intended application for the same. In construing this provision in *Moers v. Reading*, 21 Pa. St. 201, the court said: "To create a charter is to make one which never existed before. To renew a charter is to give a new existence to one which has been forfeited, or which has lost its vitality by lapse of time. To *extend* a

something to be extended, and must necessarily be connected with that something. It is derived from *ex*, from or out of, and *tendere*, to stretch, or stretch out, and signifies to draw forth or stretch or prolong. A power to extend or continue an act or piece of business cannot authorize a totally distinct transaction.¹

charter is to give one which now exists greater or longer time to operate in than that to which it was originally limited. I do not say that these words have no other meaning in the English language. They are not entirely free from ambiguity. Their signification, like that of other words, must depend much on the context. But the definitions here given are consistent with the sense in which they are, if not always, at least very often used, both in popular and legal phraseology; and to understand them so here is no violation of the *jus et norma loquendi*."

Waive and Extend. (See also the title **WAIVER**.)—A statute provided that the time for bringing suit in certain cases provided for by it might be *extended* or waived. In construing this provision the court in *Walker v. Wigginton*, 50 Ala. 583, said: "The waiver does not mean a mere postponement of the time for bringing the suit, because the word *extended* used in the same connection, which means postponement, is used in opposition to it. They are disjunctively connected, and are, consequently, intended to mean two things; the one to postpone, and the other to relinquish and altogether abandon the requisition to sue. But only the time for bringing the suit is waived, not the suit itself. It was still necessary, after the waiver, to sue; and suit at any time before the statute of limitations barred the demand was sufficient."

Boundaries. (See generally the title **BOUNDARIES**, vol. 4, p. 786.)—In a deed of conveyance the description was as follows: "Second tract being an undivided third part of all the salt marsh belonging to the said party of the first part, situate, lying, and being north of the fourth line of the aforesaid three hundred and forty-seven acres, and *extending* to the thoroughfare." It was held that all that followed the word "marsh" referred to the marsh as a whole, and not to the part conveyed, by way of limitation. The court said: "The expression 'and *extending* to the thoroughfare,' which occurs in each of the deeds, concords with this view. The context deals with land, not with mathematical lines; hence the natural synonym for *extending* is 'reaching' or 'stretching' and not 'produced' or 'produced.' This construction is, moreover, the only one that fairly harmonizes with the topography." *Steelman v. Atlantic City Sewerage Co.*, 60 N. J. L. 461.

Streets. (See also the title **STREETS AND SIDEWALKS**.)—The power given to a municipal corporation to "open and *extend*" streets was held to signify construction as well as laying out. *Matthiessen, etc., Sugar Refining Co. v. Jersey City*, 26 N. J. Eq. 247.

1. *Wisconsin Cent. R. Co. v. Comstock*, 71 Wis. 91; *Brooke v. Clarke*, 1 B. & Ald. 403.

In *Clement v. Dickey*, 1 Paine (U. S.) 365, it was said: "The word *extend* is relative in its application, and refers to something already begun, and implies a continuation of the same

act. A power to *extend* or continue an act or piece of business cannot authorize a totally distinct transaction. Can an authority to draw on A for a certain sum, with a contingent power to *extend* such drawing, by any possibility confer the right of drawing on B for such further sum?"

Extend and Project—Streets.—A statute authorized a city to project or *extend* its streets over and across any tide lands within its corporate limits. It was held that this did not empower the city to lay out over the tide lands a street which was not an extension of any of the existing streets of the city. The court said: "But, in searching for the authority claimed by the respondent, we note: (1) That the power is to *extend* or project streets, and by those two words we understand the legislature to have meant the same thing. They are common words, and when applied to an existing thing, like a street, they mean to construct it in the same direction, and with the same width. (2) They are used with reference to existing things, since what a city may *extend* is 'its' streets. (3) The power is exhausted with the extension of existing streets." *Seattle, etc., R. Co. v. State*, 7 Wash. 157.

Straight Line.—When the state directs the *extension* of a street to a certain point, to embrace added territory, the street must be continued in its length in the direction to which it points, and to its destination designated by the legislation. It cannot be deflected, unless there are physical obstructions which make it necessary so as to reach the point in the most direct line. *Monroe v. Police Jury*, 47 La. Ann. 1061, where the court said: "To *extend* a street means its prolongation and continuance in the direction to which it already points, unless it appears that the change in its direction has been authorized. *South Boston R. Co. v. Middlesex R. Co.*, 121 Mass. 485. Insurmountable physical objects may compel a deflection, but it must resume its course in the direction to its objective point."

In *Charlotte St.*, 23 Pa. St. 288, it was said: "*Extension* of a line already defined as straight implies that it is to be continued, or in mathematical language produced, as a straight line to the point indicated for intersection, and this is certain enough for the terminus of a road or street."

But in *South Boston R. Co. v. Middlesex R. Co.*, 121 Mass. 489, under a statute that provided that a city might authorize any street-railway corporation whose charter had been duly accepted and whose tracks had been located and constructed, to *extend* the location of its tracks within the territorial limits of such city, whenever it could be done without entering upon or using the tracks of any other street-railway corporation, it was held that a street-railway corporation might be authorized to locate additional tracks not connected with its existing tracks except by the tracks of

EXTENT. (See also *EXTEND*, *ante.*)—The word “extent,” in common parlance, varies somewhat in meaning, according to the subject to which it is applied, and as that changes it may as well refer to time as to space or proportion; and more especially so, when applied to interests, as in patents, for a particular term of years.¹

EXTENT, WRIT OF. (See also 8 ENCYC. OF PL. AND PR. 783.)—A writ, issuing from the exchequer, by which the body, goods, and lands of the debtor may all be taken at once to satisfy the judgment.²

EXTERNAL. (See also the next definition following.)—See note 3.

EXTERNAL MEANS.—See the title ACCIDENT INSURANCE, vol. 1, pp. 294-314.

EXTINCT. (See also *EXTINGUISH*—*EXTINGUISHMENT*, *post.*)—The word “extinct” comes from the word *extinguere*, to destroy or put out.⁴

EXTINGUISH—EXTINGUISHMENT. (See also such titles as *GROUND RENTS*; *LIENS*; *MORTGAGES*; *NOVATION*, etc.)—When the law speaks of a right or interest as extinguished, it means that it is put out, taken away, destroyed.⁵ Whenever a right or interest is destroyed or taken away by the act

another corporation. The court said: “The word *extend* may, in its primary sense, when applied to a railroad track or other line, import a continuation of the line without a break. But we do not think that in this statute the legislature intended to use it in this restricted sense. The object of the statute was to delegate to the local authorities of the cities and towns the powers of authorizing and controlling the location of street railways within their limits, and to obviate the necessity of an appeal to the legislature whenever it is desired to establish a new street railway, or an existing company desires to locate additional tracks. The power to authorize a railway ‘to extend the location of its tracks’ may be held, without any violence of construction, to include the location of an additional track, not connected with the existing tracks except by the tracks of another railway corporation. This construction is in harmony with the general spirit and purpose of the statute.”

Gas Works.—A statute provided that it should be lawful for a city council to agree with any person for the *extension* of gas works to supply the corporation or its inhabitants with gas. In construing this provision the court in Cincinnati Gas Light, etc., Co. v. Avondale, 43 Ohio St. 268, said: “*Extend* means to draw forth or stretch, to prolong, especially in a single direction, as a line. *Extension* is the act of *extending* or stretching out. Gas works are *extended* when the mains and pipes are prolonged into a village so as to supply the village and its inhabitants with the gas of such works.”

Exemption from Taxation. (See generally the title EXEMPTIONS (FROM TAXATION).) — A statute *extended* for three years the time in which certain lands were exempt from taxation. It was held that the three years began to run from the termination of the original exemption and not from the date when the statute *extending* the time took effect. Wisconsin Cent. R. Co. v. Comstock, 71 Wis. 91.

1. Wilson v. Rousseau, 4 How. (U. S.) 698.

2. Bouv. L. Dict. See 3 Black. Com. 420; Tidd's Pr. 1046, 1058, 1063, 1089.

3. **External to the Boat.**—A policy of insurance on a steamboat limited the insurer's liability for bursting of boilers or breaking of the

engine to such breaking or bursting as should be caused by *external* violence. It was held that “*external* violence” meant, not violence *external* to the boiler or engine, but *external* to the boat, such as striking a log, rock, or sandbar, or collision with another boat. Citizens' Ins. Co. v. Glasgow, 9 Mo. 411. See generally the title MARINE INSURANCE.

“**External to a Company,**” in an opinion, referring to a contract, was said to mean “not being a part of the original constitution of the company, but a contract made by the company as a corporation, and somebody else; but that somebody else might be a director or promoter.” *In re Wedgwood Coal, etc., Co.*, 26 W. R. 447.

Lease—“External Parts.”—Where a lessor covenanted to repair the “*external* parts” of the demised premises, and an adjoining house was pulled down, leaving the wall of the demised house exposed and without support, and this wall gave way, and the house became uninhabitable, it was held that the wall, even before the neighboring house had been removed, was an “*external* part of the demised premises,” and that the lessee could recover on his covenant. Green v. Eales, 2 Q. B. 225, 42 E. C. L. 648. The court said: “The *external* parts of premises are those which form the inclosure of them, and beyond which no part of them extends; and it is immaterial whether those parts are exposed to the atmosphere, or rest upon and adjoin some other building which forms no part of the premises let.”

Same—Alterations.—Where a covenant prohibited “any *external* alteration whatsoever” in the demised premises, it was held that the word *external* was meant to apply to “everything *external* to the house, or, as it is popularly called, ‘out of doors.’” Perry v. Davis, 3 C. B. N. S. 777, 91 E. C. L. 777. See generally the titles LANDLORD AND TENANT; LEASES.

4. Co. Litt. 147b; Taylor v. Hampton, 4 McCord L. (S. Car.) 101; Moultrie v. Smiley, 16 Ga. 300; Robinson v. Lane, 19 Ga. 380.

Extinction.—See the title ADEMPMENT OF LEGACIES, vol. 1, p. 611. And see King v. Sheffey, 8 Leigh (Va.) 617.

5. Co. Litt. 147b; 1 Roll. Abr. 933; Commercial Bank v. Lockwood, 2 Harr. (Del.) 14.

of God, operation of law, or the act of a party, this is called extinguishment.¹

EXTORSIVE. (See also the title EXTORTION, *post*; and see 8 ENCYC. OF PL. AND PR. 791.) — See note 2.

1. Taylor *v.* Hampton, 4 McCord L. (S. Car.) 101; Moultrie *v.* Smiley, 16 Ga. 343.

Executors and Administrators. — As to the *extinguishment* of a debt where the creditor makes the debtor his executor, see the title EXECUTORS AND ADMINISTRATORS, vol. 11, p. 787.

As to Accepting Security of a Higher Grade, see the title MERGER.

Suspension and Extinguishment. (See also SUSPENSION.) — "Suspension" and *extinguishment* are sometimes used as convertible terms. Moultrie *v.* Smiley, 16 Ga. 304; Robinson *v.* Lane, 19 Ga. 380. But for the usual distinction between the words see the cross-references given above, and see Taylor *v.* Hampton, 4 McCord L. (S. Car.) 101.

Incorporeal Hereditament. (See also the titles EASEMENTS, vol. 10, p. 397; INCORPOREAL HEREDITAMENTS.) — In Taylor *v.* Hampton, 4 McCord L. (S. Car.) 101, it was said: "In the prosecution of that inquiry I shall make use of the word *extinguishment* as being, in my opinion, the best calculated to convey the idea I mean to express. It is also to be understood that I mean by that word an entire annihilation or destruction, and not a mere suspension of the right. And I shall endeavor to show that a right of this sort (that is, an incorporeal hereditament), once *extinguished* is forever gone and cannot revive; that an *extinguishment* therefore for one moment is an *extinguishment* forever."

State Debt. — The *Michigan* Constitution pro-

vided that the state revenues should be applied to paying the interest upon the educational funds and the interest and principal of the state debt, "until the *extinguishment* of the state debt." It was held that the state debt was to be considered *extinguished* when there was money enough in the state treasury not subject to other claims to pay it, even though it had not matured and had not been actually paid. Auditor Gen. *v.* State Treasurer, 45 Mich. 161.

Release and Extinguishment of Debt. — In Baker *v.* Baker, 28 N. J. L. 20, it was said: "A release is a discharge of a debt by act of the party; an *extinguishment* is a discharge by operation of law." See generally the title RELEASE.

2. **Extorsive — Extorsively.** — In Loftus *v.* State, (N. J. 1890) 19 Atl. Rep. 184, the court said: "The words 'extort' and *extorsively* are descriptive of the crime, and charge the corrupt purpose. They are invariably used for that purpose in the approved precedents of common-law indictments for extortion. It has been considered that the word *extorsive* is as essential in such an indictment for extortion as the word *proditorie*, in treason, or *felonice*, in felony. 2 Starkie Crim. Pl. 140; Reg. *v.* Baynes, 2 Salk. 680, 2 Ld. Raym. 1265."

In Leeman *v.* State, 35 Ark. 438, 37 Am. Rep. 44, it was held that a corrupt intent was essential to constitute the crime of extortion, and that such intent is sufficiently charged by the use of the word *extorsively*.

EXTORTION.

By A. S. H. BRISTOW.

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CROSS-REFERENCES.

For other matters of SUBSTANTIVE LAW and EVIDENCE related to this subject, see the titles FINES AND PENALTIES; PUBLIC OFFICERS; THREATS AND THREATENING LETTERS.

I. DEFINITION. — The Ordinary Meaning of the word "extortion" is the taking or obtaining of anything from another by means of illegal compulsion or oppressive exaction.¹

In Technical Sense. — But the word has acquired a technical meaning in the common law, and in this sense may be defined to be the corrupt and unlawful

1. **Extortion in Ordinary Sense.** — 1 Hawk. P. C., c. 68, § 1; U. S. v. Deaver, 14 Fed. Rep. 595; Mitchell v. Sharon, 51 Fed. Rep. 424; Com. v. O'Brien, 12 Cush. (Mass.) 90; Kirby v. State, 57 N. J. L. 320; People v. Barondess, 61 Hun (N. Y.) 571; People v. Whaley, 6 Cow.

(N. Y.) 661; Mann v. State, 47 Ohio St. 563; Cohen v. State, 37 Tex. Crim. Rep. 118. See further the title THREATS AND THREATENING LETTERS.

Under the Penal Code of California, extortion is defined to be the obtaining of property

taking by any officer of the law, under color of his office, of any money or thing of value that is not due to him, or the corrupt or unlawful taking of any money or thing of value, under color of his office, in excess of what is due to him, or before it is due to him.¹ Extortion, in its technical sense, is also made the subject of statutory enactment substantially declaratory of the common law in *England* and in most jurisdictions in the *United States*.²

II. WHO MAY COMMIT — 1. In General. — In general, it may be said that any officer, whether he be a federal, state, or municipal officer, or a ministerial or judicial officer, may commit extortion.³

from another with his consent, induced by a wrongful use of force or power, or under color of official right. *People v. Tonielli*, 81 Cal. 277; *Morrill v. Nightingale*, 93 Cal. 456, 27 Am. St. Rep. 207.

1. Extortion in Technical Sense — England. — 1 Hawk. P. C., c. 68, § 1; Co. Litt. 368b; 4 Black. Com. 141; Hescott's Case, 1 Salk. 330; *Rex v. Burdett*, 1 Ld. Raym. 148.

United States. — U. S. v. Deaver, 14 Fed. Rep. 595; U. S. v. Waitz, 3 Sawy. (U. S.) 473. *Alabama.* — McElhaney v. Gilleland, 30 Ala. 187.

Indiana. — State v. Stotts, 5 Blackf. (Ind.) 460; State v. Burton, 3 Ind. 93.

Massachusetts. — Shattuck v. Woods, 1 Pick. (Mass.) 171; Com. v. Bagley, 7 Pick. (Mass.) 279; *Runnells v. Fletcher*, 15 Mass. 525.

Missouri. — State v. Vasel, 47 Mo. 416.

New Jersey. — Loftus v. State, (N. J. 1890) 19 Atl. Rep. 183; *Kirby v. State*, 57 N. J. L. 320.

New York. — *People v. Calhoun*, 3 Wend. (N. Y.) 420; *People v. Whaley*, 6 Cow. (N. Y.) 661; *People v. Barondess*, 61 Hun (N. Y.) 571.

North Carolina. — State v. Pritchard, 107 N. Car. 921.

Pennsylvania. — Com. v. Hagan, 9 Phila. (Pa.) 574, 29 Leg. Int. (Pa.) 293; Com. v. Saulsbury, 152 Pa. St. 554, citing 7 AM. AND ENG. ENCYC. OF LAW (1st ed.) 585.

Tennessee. — Williams v. State, 2 Sneed (Tenn.) 160.

Texas. — Cohen v. State, 37 Tex. Crim. Rep. 118, citing 7 AM. AND ENG. ENCYC. OF LAW (1st ed.) 585.

In 1 Hawk. P. C., c. 68, § 1, it is said that extortion, in a large sense, signifies any oppression under color of right, but that in a strict sense it signifies the taking of money by any officer by color of his office, either where none at all is due, or not so much is due, or where it is not yet due. See also *People v. Whaley*, 6 Cow. (N. Y.) 661.

2. Extortion in Technical Sense Provided for by Statute. — Statute of Westminster, 1, c. 26; 33 Geo. III., c. 52, § 62; 1 Hawk. P. C., c. 68, § 2; U. S. v. Deaver, 14 Fed. Rep. 595; *White v. State*, 55 Ga. 385; *State v. Jones*, 71 Miss. 872; *Cutter v. State*, 36 N. J. L. 125.

Constitutionality of Statute Imposing Penalties for Extortion. — In *Nebraska* it has been held that the statute which gives to the party injured a right of action for the recovery of fifty dollars damages against an officer taking illegal fees is not unconstitutional. *Graham v. Kibble*, 9 Neb. 182.

In *California* the same decision has been made. *Ryan v. Johnson*, 5 Cal. 87.

3. Who May Commit Extortion — In General. — Reg. v. Baines, 6 Mod. 192; *Smythe's Case*,

Palm, 318; Reg. v. Buck, 6 Mod. 306; *Rex v. Loggen*, 1 Stra. 73; *Smith v. Mall*, 2 Rolfe 263; Com. v. Saulsbury, 152 Pa. St. 554.

Justices of the Peace. — Thus, both at common law and under statute, justices of the peace have been held to be officers who may commit this offense. *Rex v. Seymour*, 7 Mod. 382; Reg. v. Tisdale, 20 U. C. Q. B. 272; *Irons v. Allen*, 14 Pa. Co. Ct. Rep. 319. See also *Territory v. McElroy*, 1 Mont. 86; *State v. Maires*, 33 N. J. L. 142; *Cutter v. State*, 36 N. J. L. 125; *Lane v. State*, 49 N. J. L. 673.

And a justice's clerk may commit the offense. Anonymous, 12 Mod. 512.

Judge's Clerk. — Under a statute in *Alabama* authorizing the probate judge to employ at his own expense a clerk, for whose official acts he is responsible, it has been held that if the clerk knowingly makes an overcharge the judge may be made liable for the penalty. *Lee v. Lide*, 111 Ala. 126.

Clerk of Court. — So clerks of court may commit the offense. Reg. v. Baines, 6 Mod. 192.

When a clerk of the District Court takes fees in excess of those limited by law, he is liable to the party injured for the penalty provided by statute in *Nebraska*. *Lydick v. Palmquist*, 31 Neb. 300.

Attorneys. — In *England* it has been held that attorneys and counsellors admitted to practice are officers of the court and within the provisions of the law against extortion. *Adams v. Savage*, Holt 179; *Troy's Case*, 1 Mod. 5.

Similar decisions under statute have been made in this country. *State v. Sanders*, 62 Mo. App. 33; *Waters v. Whittemore*, 22 Barb. (N. Y.) 593; *Tanner v. Croxall*, 17 N. J. L. 332.

Under statute in *New Hampshire* it has been held that attorneys, while receiving compensation in their offices for services rendered by them for their clients in matters preliminary to proceedings before a judicial tribunal, cannot be regarded as public officers demanding and receiving compensation for services rendered in discharge of official duties, and that the provision that only one dollar shall be allowed for a writ, including the blank, in bills of costs taxed in the Supreme Court or Court of Common Pleas, is not violated by an attorney's receiving a larger sum as his compensation for making a writ while adjusting a suit for his client before the same has been entered in court. *Wilcox v. Bowers*, 36 N. H. 372.

Pension Agent or Attorney. — Under acts of Congress, penalties are imposed for the demanding and receiving by a pension agent or attorney of excessive fees for services in procuring pensions. U. S. v. Moore, 18 Fed. Rep. 686; U. S. v. Van Vliet, 23 Fed. Rep. 35;

Extortion Not Committable by Person Other than Officer. — Extortion in its technical sense consists in the oppressive misuse of the exceptional power with which the law invests the incumbent of an office, and hence may be committed only by an officer.¹

Effect of Statute Enumerating Officers or Classes. — Where a statute provides that the offense may be committed by certain enumerated officers, it has been held to be of the very essence of a prosecution thereunder that the accused must be

U. S. v. Mathews, 23 Fed. Rep. 74. See further on this question the title PENSIONS.

Sheriff. — A sheriff or under sheriff may be guilty of extortion. Hescott's Case, 1 Salk. 330; Empson v. Bathurst, Hutt. 52; Rex v. Beechcroft, 12 Mod. 255; Randal v. Keite, 1 Keb. 873; Nelms's Case, 1 Keb. 623; Peshall v. Layton, 2 T. R. 712. See also Williams v. Lyons, 8 Mod. 189; Stotesbury v. Smith, 2 Burr. 924; Burnham v. Aiken, 6 N. H. 306.

Constables. — The offense may also be committed by a constable. Levar v. State, 103 Ga. 42; State v. Merritt, 5 Sneed (Tenn.) 67; Parker v. Newland, 1 Hill (N. Y.) 87.

Jailer. — Also by a jailer. Rex v. Broughten, Trem P. C. 111; Reg. v. Tracy, 6 Mod. 178; Com. v. Mitchell, 3 Bush (Ky.) 25, 96 Am. Dec. 192.

Tax Collectors. — And the same has been held of tax collectors. Reg. v. Atkinson, 1 Salk. 382; Reg. v. Buck, 6 Mod. 306.

Coroners. — Also it has been said that a coroner may be guilty of the offense where he refuses to take a view of a dead body until his fees are paid. 1 Russ. on Crimes 209, 3 Inst. 149.

So a coroner has been convicted for extortion in taking a sum of money for not holding an inquest on the body of a young woman, where he was without authority for taking an inquisition at all. Rex v. Harrison, 1 East P. C. 382.

A County Treasurer who exacts and receives from a taxpayer a fee as for a distress and sale of his goods for taxes when none have actually been made is guilty of extortion. State v. Burton, 3 Ind. 93.

County Surveyor. — Also a county surveyor may commit the offense. Hays v. Stewart, 8 Tex. 358.

Municipal Officer. — An officer of a municipal corporation who demands and receives any greater fee for performing any duty or service than is allowed by ordinance of the corporation is guilty of extortion. State v. Critchett, 1 Lea (Tenn.) 271.

Pound Keeper. — Thus, a person may be guilty of extortion for taking more than his proper fees as pound keeper appointed by a municipal ordinance. State v. Critchett, 1 Lea (Tenn.) 271.

An Alderman acting as a local magistrate has been held to be such an officer under the Pennsylvania statute as may commit the offense. Com. v. Hagan, 9 Phila. (Pa.) 574, 29 Leg. Int. (Pa.) 293.

Chinese Inspector. — Under section 5481 of the Rev. Stat. of the United States, providing that "every officer of the United States who is guilty of extortion under color of his office shall be punished by a fine of not more than five hundred dollars, or by imprisonment not

more than one year, except those officers or agents of the United States otherwise differently and specially provided for in subsequent sections of this chapter," it has been held that a Chinese inspector guilty of extortion under color of his office may be prosecuted and subjected to fine and imprisonment. Williams v. U. S., 168 U. S. 382.

Revenue Collector. — Under a United States statute providing that "every officer or agent appointed and acting under the authority of any revenue law of the United States * * * who knowingly demands other or greater sums than are authorized by law, or receives any fee, compensation, or reward, except as by law prescribed, * * * shall be punished," etc., it has been held that, in order to find a revenue collector guilty of demanding or receiving greater sums than he was entitled to under the law, he must know that he was violating the law, and the fact that he demanded or received the several amounts charged in the indictment is not of itself sufficient to sustain the indictment. U. S. v. Highleyman, 26 Fed. Cas. No. 15,361.

Collector of Post-horse Duty. — Also it has been held that a collector of post-horse duty may be guilty of extortion. Rex v. Higgins, 4 C. & P. 247, 19 E. C. L. 368.

Churchwarden. — Also it has been held to be extortion in a churchwarden to obtain a silver cup or other valuable thing by color of his office. Roy v. Eyres, 1 Sid. 307.

Farmer of Market. — In Rex v. Burdett, 1 Ld. Raym. 149, it was held that if the owner of the soil of a market covers the market place so completely with stalls that the market people are obliged to use them, taking stallage is extortion, but it is otherwise where sufficient standing room is left.

The Persons Mentioned in the Last Three Examples as being persons who may commit the offense cannot properly come within the designation of public officers.

1. Extortion Committable by Officer Only. — White v. State, 56 Ga. 388; Kirby v. State, 57 N. J. L. 320.

Taking by Person Out of Office. — In Pennsylvania it has been held that the Act of March 28, 1814, against any officer taking greater or other fees, etc., than are expressed and limited in the bill, being penal in its consequences, must be strictly construed, and therefore the case of taking fees by a person out of office for services rendered while in office is not within the act, and such person is not liable for taking fees illegally. Gallagher v. Neal, 3 P. & W. (Pa.) 183.

Under the Criminal Code of Illinois it has been held that the offense of extortion can be committed only by an officer authorized to charge fees. Ferkel v. People, 16 Ill. App. 310.

charged and proved to hold one of the offices therein designated.¹ But it has been held that a person may be guilty of extortion if there is sufficient evidence of his having acted under color of office to sustain an indictment for that offense at common law, though he may not be an officer within the meaning of a particular statute.²

2. Officer's Attorney. — It has been held that the receiving of an illegal fee by an attorney of an officer, which is subsequently assented to and recognized by the officer as being done by his authority, must be regarded as being the same as if it had been received by the officer in person, and renders him liable to the statutory penalty.³

3. Deputies — Liability of Deputy. — A deputy, as well as his principal, may commit the offense of extortion, and may be held liable in either a criminal⁴ or a civil⁵ action therefor.

Liability of Principal for Deputy's Extortion. — And the principal may be made liable in a civil action for an extortion committed by his deputy; and whether the principal recognized the act of his deputy or not need not be shown,⁶ but the principal cannot be held liable to indictment therefor.⁷

4. De Facto Officers. — A *de facto* officer, as well as a *de jure* officer, may commit the offense.⁸ But the law recognizes no one, even as an officer

1. Under a Statute in Louisiana providing that any judge, justice of the peace, sheriff, coroner, constable, or other civil officer who shall be guilty of oppression or extortion in the administration or under color of his office shall, on conviction, suffer fine or imprisonment, or both, at the discretion of the court, it has been held that it is of the very essence of a prosecution thereunder that the accused must be charged and proved to hold one of the offices therein designated. *State v. Lubin*, 42 La. Ann. 79.

2. *Com. v. Saulsbury*, 152 Pa. St. 554.

A Deputy Constable appointed under the *Pennsylvania* Act of May 9, 1889, has been held not to be an officer of the commonwealth within the provisions of the Act of March 31, 1860, § 12, providing a penalty for the crime of extortion, but he may be convicted of extortion at common law if the evidence is sufficient to justify it. *Com. v. Saulsbury*, 152 Pa. St. 554.

3. Ratification of Extortion by Attorney. — *Fowler v. Tuttle*, 24 N. H. 9.

4. Liability of Deputy to Indictment. — *Hescott's Case*, 1 Salk. 330; *Nelms's Case*, 1 Keb. 623; *Com. v. Bagley*, 7 Pick. (Mass.) 279; *Com. v. Saulsbury*, 152 Pa. St. 554. See also *Peshall v. Layton*, 2 T. R. 712. And see the title *DEPUTY*, vol. 9, p. 390.

5. Liability of Deputy to Civil Action. — *Peshall v. Layton*, 2 T. R. 712; *Empson v. Bathurst*, Hutt. 52. See also *Williams v. Lyons*, 8 Mod. 189. And see the title *DEPUTY*, vol. 9, p. 388.

Liability to Both Civil and Criminal Action. — In *Hescott's Case*, 1 Salk. 330, the court said that the plaintiff may bring an action against him for not doing his duty or might pay him his fees and then indict him for extortion.

6. Liability of Principal for Extortion by Deputy. — *M'Intyre v. Trumbull*, 7 Johns. (N. Y.) 35.

Action for Money Had and Received. — If a sheriff's officer takes illegal fees *colore officii*, an action for money had and received lies against the sheriff, though the money never came into his hands. *Jons v. Perchard*, 2 Esp. N. P. 507.

A collector of the port has been held liable in a civil action for the recovery of fees not authorized by law, exacted by his deputy. *Ogden v. Maxwell*, 3 Blachf. (U. S.) 320.

Penal Action. — In *Woodgate v. Knatchbull*, 2 T. R. 148, it was held that if it appeared by the sheriff's return to a writ of execution that greater fees had been taken for the levy than were allowed by 29 Eliz., c. 4, the sheriff was liable to an action on the statute for treble damages at the suit of the party aggrieved. To the same effect see *Overholtzer v. McMichael*, 10 Pa. St. 139; *Miller v. Lockwood*, 17 Pa. St. 253.

In *Woodgate v. Knatchbull*, 2 T. R. 155, the court said: "This was then argued to be a criminal charge against the sheriff, because the subject itself is of such a nature as would warrant an indictment, but that argument is inconclusive because actions are brought every day against sheriffs for acts done by their bailiffs which would warrant a criminal prosecution."

And in *Overholtzer v. McMichael*, 10 Pa. St. 139, the court said: "The only remaining error insisted on is the fourth. It is grounded upon the position that the sheriff is not liable criminally for the acts of his deputy or bailiff. This is true, but by the rule nothing more is meant than that he is not subject to an indictment for an offense committed by his official agent. * * * But he is liable for extortion practiced by his officer, * * * and to a penal action given by statute because of the action of his deputy, as here." See also the title *DEPUTY*, vol. 9, p. 290.

7. Nonliability of Principal Criminally for Extortion of Deputy. — See *Woodgate v. Knatchbull*, 2 T. R. 155; *Overholtzer v. McMichael*, 10 Pa. St. 143; *Miller v. Lockwood*, 17 Pa. St. 253.

For the nonliability criminally of a sheriff for acts of his deputy generally, see the title *DEPUTY*, vol. 9, p. 395.

8. The Offense Committable by Officer De Facto. — *Kirby v. State*, 57 N. J. L. 320; *Com. v. Saulsbury*, 152 Pa. St. 554. See generally the title *DE FACTO OFFICERS*, vol. 8, p. 806.

de facto, who fills an alleged public office that has no existence under any constitutional provision,¹ or by virtue of any color of legislative enactment, and such person may not be guilty of extortion under statutes directed against public officers.²

5. Whether There May Be Accessory. — There are no accessories in extortion, and hence two officers, one of whom aided the other, may be jointly indicted for contriving to get money where none is due.³

III. ESSENTIAL ELEMENTS — 1. The Intent — *a.* IN GENERAL. — It is a general rule at common law that before an officer can be convicted under an indictment for extortion, it must be shown that his act was done with a corrupt intent.⁴ And the same rule has been laid down under the statutes in several jurisdictions in respect to both criminal⁵ and penal⁶ actions. But in some jurisdictions the rule has been held not to apply in case of penal actions.⁷

Officer Failing to Take Oath of Office. — If one elected to an office takes possession of it and engages in the exercise of his duties, and misbehaves by taking unlawful and extortionate fees, he will be liable to indictment for such misbehavior, notwithstanding the fact that he failed to take the oath of office. *State v. Cansler*, 75 N. Car. 442. In this case the court said: "It would be strange if one who is in office and exercising the duties thereof could excuse himself for committing a crime in the manner of exercising the duties by showing that he had committed another crime in getting into the office."

1. Offense Not Committable by Alleged Incumbent of Unconstitutional Office. — *Kirby v. State*, 57 N. J. L. 320.

2. *Herrington v. State*, 103 Ga. 318. In this case it was held that where neither the constitution nor the legislature of the state had ever attempted to create the office of county policeman of Fulton county, an indictment which charged one with the offense of extortion in that he did, by color of his office as such county policeman, wrongfully extort money from another was demurrable on the ground that there was no such public officer under the laws of Georgia.

3. No Accessories in Extortion. — *Rex v. Loggen*, 1 Stra. 73. See also *Reg. v. Atkinson*, 2 Ld. Raym. 1248, 1 Salk. 382; *Lake's Case*, 3 Leon 268. In the first case cited the court said: "This would be an exception if they were indicted for taking more than they ought, but it is only against them for contriving to get money where none is due, and this is an entire charge. For there are no accessories in extortion, but he that is assisting is as guilty as the extortioner; as he that is party to a riot is answerable for the acts of the others."

In *Reg. v. Tisdale*, 20 U. C. Q. B. 272, it was held that where two magistrates sat together, and one exacted a sum of money from a person charged before them with felony, the other not dissenting, they might be jointly convicted of extortion, since it is a misdemeanor and all are principals.

That all are principals in misdemeanors, see the title *ACCESSORY*, vol. I, p. 261.

4. Corrupt Intent an Essential Element of Extortion. — *Cleaveland v. State*, 34 Ala. 254; *Collier v. State*, 55 Ala. 128; *State v. Jones*, 71 Miss. 872; *Cutter v. State*, 36 N. J. L. 125; *Loftus v. State*, (N. J. 1890) 19 Atl. Rep. 183; *People v. Whaley*, 6 Cow. (N. Y.) 661; *State v.*

Cansler, 75 N. Car. 442; *State v. Pritchard*, 107 N. Car. 921. See also *State v. Stotts*, 5 Blackf. (Ind.) 460.

A Question for the Jury. — In *State v. Pritchard*, 107 N. Car. 921, the court said: "While the rulings of the courts have been somewhat conflicting upon this point, the weight of authority as well as reason lead us to the conclusion that all officers, and especially those who are acting judicially, have a right to demand that a jury shall pass upon their intent in taking the fees, and find that the act was wilful and corrupt before they can be lawfully convicted of this serious charge." To the same effect see *People v. Whaley*, 6 Cow. (N. Y.) 661. See also *Hurd v. Atkins*, 1 Colo. App. 440.

Presumption of Bad Faith. — Where an officer executed fees for making out certain certificates of sale, and it was alleged that the certificates were more lengthy than was necessary, and that, by reason of the length of the certificate, the charges therefor were extortionate, it was held that where no form for the certificate was prescribed by statute, and it was left to the discretion of the officer to adopt such form as he might choose, it would not be presumed, in the absence of any showing, that the form was fraudulently gotten up for the purpose of creating illegal charges against the county, or that he was actuated by bad faith in using it. *Hamer v. Weber County*, 11 Utah 1.

But under statute in *California* it has been intimated that if the taking of illegal fees is established, the burden will be on the defendant to show affirmatively that it was done honestly and in good faith. *Triplett v. Munter*, 50 Cal. 644.

5. Corrupt Intent Necessary in Criminal Action under Statute. — *Ridenhour v. State*, 75 Ga. 382; *Cutter v. State*, 36 N. J. L. 125; *Loftus v. State*, (N. J. 1890) 19 Atl. Rep. 183.

6. Corrupt Intent Necessary in Penal Action under Statute. — *Bowman v. Blyth*, 7 El. & Bl. 26, 90 E. C. L. 26; *Lee v. Lide*, 111 Ala. 126; *Triplett v. Munter*, 50 Cal. 644; *Parsons v. Crabbe*, 31 U. C. C. P. 151.

7. Jurisdictions Holding Corrupt Intent Unnecessary in Penal Actions. — *Dean v. Todd*, 49 S. Car. 461; *Miller v. Lockwood*, 17 Pa. St. 248, in which case the court said: "The difference between a civil action and an indictment for taking illegal fees is that in the indictment it must be shown that the illegal charge was made 'wilfully, fraudulently, and corruptly,'

And it seems to be undisputed that it is not necessary to a maintenance of a civil action for the recovery of the money wrongfully collected that any turpitude should be proved against the officer.¹

b. EFFECT OF IGNORANCE OF FACT. — The offense cannot be committed by an officer honestly acting upon a supposed state of facts that does not really exist.²

c. EFFECT OF IGNORANCE OF LAW. — But, according to the prevailing authority, the same rule does not apply to a mistake or ignorance of the law, for in general every person is presumed to know the law of the country in which he lives,³ which principle, it is said, is applicable with irresistible force to the case of an officer.⁴ The rule has been held to apply in both criminal actions⁵ and in civil actions for a penalty.⁶ But, it seems, a distinction has

while in an action the officer is liable, although the charge was made by mistake and without any intention to extort."

Evidence of Intent. — In *Graham v. Kibble*, 9 Neb. 182, it was held that the fact that the officer, at the time of exacting an illegal fee, remarked that "if it is not all right I will make it right" was not conclusive as to his good faith, and did not, consequently, exclude the idea of extortion, but that it was some evidence of the good faith on the part of the officer in fixing the amount of compensation demanded.

1. Corrupt Intent Unnecessary in Civil Action for Recovery of Fees. — *Ogden v. Maxwell*, 3 Blatchf. (U. S.) 323.

2. Rule Where Officer Acts in Ignorance of Facts. — *Bowman v. Blyth*, 7 El. & Bl. 43, 90 E. C. L. 43. See also *People v. Monk*, 8 Utah 35.

In *Bowman v. Blyth*, 7 El. & Bl. 26, 90 E. C. L. 26 it was held that if a clerk to justices demands and receives a fee for taking recognizances, as for a principal and two sureties, there being in fact only one surety, he is not guilty of an offense or liable to a forfeiture under statute 26 Geo. II., c. 14, § 2, if he actually believed there were two sureties.

3. Presumption that Every One Knows Law. — *People v. Monk*, 8 Utah 35; *Levar v. State*, 103 Ga. 42; *State v. Dickens*, 1 Hayw. (2 N. Car.) 406. See also *Johnson v. Burnham*, 22 Vt. 639.

Advice of Counsel. — It seems that the fact that an officer makes an illegal overcharge for fees under the advice of counsel will not operate as a defense. *State v. Dickens*, 1 Hayw. (2 N. Car.) 406. See also *People v. Monk*, 8 Utah 35. And see the title **ADVICE OF COUNSEL**, vol. 1, p. 897.

4. Presumption Applies Particularly to Officers. — In *Coates v. Wallace*, 17 S. & R. (Pa.) 75, the court said: "Ignorance of the law will not excuse in any case; and this principle is applicable with irresistible force to the case of an officer selected for his capacity, and in whom ignorance is unpardonable. The very acceptance of the office carries with it an assumption of a sufficient share of intelligence to enable the party to follow a guide provided for him, with an unusual attention to clearness and precision. On any other principle, a contest would seldom take place, even in cases of the most flagrant abuse; for pretexts would never be wanting. Sound policy, therefore, requires that the officer should be held to act

at his peril, and we are of opinion that the absence of a corrupt motive, or the existence of an agreement by the party injured, furnishes no justification for doing what the law forbids."

5. Ignorance of Law No Defense to Criminal Action. — *People v. Monk*, 8 Utah 35; *Levar v. State*, 103 Ga. 42; *State v. Dickens*, 1 Hayw. (2 N. Car.) 406.

If a constable takes or collects costs not due to him, or more than is due, he cannot be excused on the ground that he was ignorant of the law, for he is chargeable with a knowledge of it, and consequently must be held criminally responsible for his act. *Levar v. State*, 103 Ga. 42. In this case the court said: "There can be no doubt that if a constable, in utter disregard of a plain and unambiguous statute, takes or collects costs 'not due to him, or more than his due,' he cannot be excused on the ground of ignorance, and the same rule is of necessity applicable even where, in a particular instance, the criminality of an unlawful collection of costs is not so obvious because of the fact that the law bearing upon the subject is involved in more or less confusion, and therefore less capable of being easily and readily understood. Under the last cited section of the Penal Code, the unlawful taking of the costs is a criminal act, no matter with what intent it is done. The intention does not, in this kind of a case, as in some others, constitute the gist of the offense."

In *State v. Merritt*, 5 Sneed (Tenn.) 69, it was held that even an honest belief that the officer was entitled to the fee will not shield him, as he is bound to know the legal fees to which he is entitled.

In *Reg. v. Tisdale*, 20 U. C. Q. B. 272, it was held that it was not necessary for the indictment for extortion to charge an officer with having acted corruptly, since he cannot set up as a defense such extraordinary ignorance of the law as it would be necessary to believe he labored under before it could be credited that he had fallen into a mistake as to his right to make a charge as to costs.

In *Com. v. Bagley*, 7 Pick. (Mass.) 281, it was held that it was extortion where an honest and meritorious public officer, by misapprehension of his rights, has demanded and received a legal fee for his service not yet performed, but which almost necessarily must be performed at some future time.

6. Ignorance of Law No Defense to Civil Action. — *Leggatt v. Prideaux*, 16 Mont. 205; *Cones*

been made in some jurisdictions in favor of judicial officers. Thus it has been held that if a justice of the peace, being called upon to construe a statute with respect to the fees coming to himself, should, exercising due care, form an honest judgment as to his dues, and should act upon such judgment, he could not be held criminally liable if it should happen that a higher tribunal should dissent from the view thus taken, and should decide that the statute was not susceptible of the interpretation put upon it.¹

d. EFFECT OF CUSTOM CONTRARY TO LAW REGULATING FEES. — In some jurisdictions it has been held that if an officer, honestly relying upon a custom in the community or state, takes higher fees than are allowed by law for his services, or takes fees for services for which no fees are given by statute, he cannot be made liable, either to a criminal² or a civil³ action for extortion. But it would appear to be the better view that custom or usage will have no such effect, in either civil⁴ or criminal⁵ actions for extortion.

2. Color of Office. — It is essential also, to constitute extortion, that the officer charged therewith should be shown to have acted under color of office.⁶

Taking Compensation for Unofficial Services. — Thus it has been held under statute in many jurisdictions that the rendition by an officer of services not official, and the acceptance of money for such services not in an official capacity, but as a private individual, will not render him liable for extortion.⁷

v. Wallace, 17 S. & R. (Pa.) 75; *Cobbey v. Burks*, 11 Neb. 161, 38 Am. Rep. 364.

But under statute in *Alabama* it has been held that, in order to make an officer liable for extortion, he must have knowingly received a higher fee than was allowed by law. *Lee v. Lide*, 11 Ala. 126. See also *Millar v. Douglass*, 42 Tex. 288.

1. Interpretation of Statute by Judicial Officer Reversed by Higher Court. — *Cutter v. State*, 36 N. J. L. 128. And the same rule has been applied to a judge of a probate court. *Leeman v. State*, 35 Ark. 438, 37 Am. Rep. 44. But in *Cutter v. State*, 36 N. J. L. 128, it was intimated that where the law which has been infringed upon was settled and plain, a different rule was to be applied.

2. Custom Sanctioning Fees May Prevent Liability. — *Respublica v. Hannum*, 1 Yeates (Pa.) 71.

3. Henry v. Tilson, 17 Vt. 479; *Haynes v. Hall*, 37 Vt. 20.

4. Custom Held Not to Excuse Illegal Exaction. — *Ogden v. Maxwell*, 3 Blatchf. (U. S.) 319; *Lincoln v. Shaw*, 17 Mass. 410; *Shattuck v. Woods*, 1 Pick. (Mass.) 171. Compare *Com. v. Shed*, 1 Mass. 227.

5. Rex v. Seymour, 7 Mod. 382; *People v. Monk*, 8 Utah 35. See also *Com. v. Dennie*, Thach. Cr. Cas. (Mass.) 165.

Under a statute allowing one shilling for the granting of a license, it was held that justices of the peace were guilty of extortion where they refused to grant licenses to publicans except on the payment of ten shillings, and this although there had been a custom to this effect for twenty-five years previous, and the money was applied to public purposes, and the overcharge was made with the consent of the other ruling members of the borough. *Rex v. Seymour*, 7 Mod. 382.

But it has been held that the immemorial existence of fees of an office may be presumed from uninterrupted usage, unless there be some evidence to the contrary. *Shepard v. Payne*, 16 C. B. N. S. 132, 111 E. C. L. 132.

6. Act under Color of Office Necessary. — *Reg. v. Baines*, 6 Mod. 192; *Collier v. State*, 55 Ala. 125; *Ming v. Truett*, 1 Mont. 322; *State v. Pritchard*, 107 N. Car. 921; *State v. Bauer*, 1 N. Dak. 273; *Com. v. Saulsbury*, 152 Pa. St. 554; *Brackenridge v. State*, 27 Tex. App. 513. See also *Reg. v. Tracy*, 6 Mod. 30.

Under the *Illinois* statute, to be guilty of the offense of extortion, the officer must have the process or summons, or whatever legal writ it may be, and must charge, claim, take, or demand a greater fee than is allowed him by the statute. *Ferkel v. People*, 16 Ill. App. 310.

7. Taking Compensation for Unofficial Services. — *Collier v. State*, 55 Ala. 128; *Runnells v. Fletcher*, 15 Mass. 525.

Under Statute in Massachusetts it has been held that where an officer, in settling an execution, demands and receives of the debtor a sum beyond the amount of his legal fees as compensation for trouble he has had at a former time from the debtor's resisting the officer, for which he has been indicted and convicted, there is no extortion within the statute. *Runnells v. Fletcher*, 15 Mass. 525.

Under the Code of Georgia, declaring that extortion shall consist in any public officer's unlawfully taking, by color of his office, from any person any money or thing of value not due to him, or more than is due, it has been held that for an officer having in his hands a warrant for assault and battery to receive money which is voluntarily offered and paid by the defendant is not extortion if the money is received in good faith to be used in settling the prosecution, and not for the officer's own use. *White v. State*, 56 Ga. 385.

Under Statute in Illinois it has been held that where money was not paid as a fee claimed or taken by the officer in excess of the fees allowed him by the statute, but for the purpose of disposing of a suit then claimed to be pending against the prosecuting witness, a case of extortion was not made out as provided by the statute. *Ferkel v. People*, 16 Ill. App. 310.

Taking Fees from Third Person Not Liable. — Also it has been held under statute that fees demanded of a person not liable or voluntarily paid by a person not liable, although improperly and unjustly taken by an officer, will not amount to an extortion, as the fees, if excessive, are not obtained by color of office.¹

3. The Thing Extorted — *a.* IN GENERAL. — To constitute extortion at common law and under statute there must be a receipt of money or some other thing of value.²

Promissory Note. — It has been held under statute in *Massachusetts* that receiving a negotiable promissory note by an officer for fees not due will not support an indictment for extortion, since the note, when made, was *ipso facto* void, the consideration of it being illegal, and it was consequently of no value.³

b. RECEIVING HIGHER FEES THAN ALLOWED BY LAW. — It is well settled that it is extortion at common law for an officer to receive higher fees than are allowed by law,⁴ and the offense may arise in the same way under statute.⁵

Also it has been held that where a constable who is not bound by law to go out of his county to arrest one charged with crime makes a special agreement with one to do so for an amount in excess of his statutory fees allowed, he is not liable to the penalty given by statute for taking illegal fees when such sum is voluntarily paid; but it was intimated that the rule would be otherwise if he made a return of his charges as official fees, and by virtue thereof coerced their payment. *People v. Rainey*, 89 Ill. 34.

Under Statute in Alabama it has been held that, to constitute the offense of extortion, the officer must have demanded or accepted, under color of his office, fees to which he was not entitled from a person for whom he had rendered official services, or from whom he had a right to demand a fee. *Collier v. State*, 55 Ala. 125. In this case the court said: "A taking under color of office is of the essence of the offense. The money or thing received must have been claimed or accepted in right of office, and the person paying must have been yielding to official authority."

Under Statute in Pennsylvania it has been held not to be a misdemeanor in office for an officer to receive a compensation for services which are not within his official duties. *Dutton v. Philadelphia*, 9 Phila. (Pa.) 597, 29 Leg. Int. (Pa.) 364; *Com. v. Ache*, 2 Northam L. Rep. (Pa.) 370.

Official Services Enumerated by Statute. — Under a statute providing that "if any of the officers herein named shall demand and receive any other or higher fees than prescribed in this act for any of the services herein mentioned, he shall be liable to the party aggrieved for fourfold the fees so unlawfully demanded and received," etc., it has been held that where it appears that the money was not received for any of his services mentioned in the act, the receipt thereof did not constitute the offense created by the statute. *Orton v. Engledow*, 8 Tex. 206. See also *Aechternacht v. Watmough*, 8 W. & S. (Pa.) 162; *Overholtzer v. McMichael*, 10 Pa. St. 139.

Officer Prohibited from Acting in Unofficial Capacity. — Under Rev. Stat. U. S., providing that every officer of the United States who is guilty of extortion under color of his office shall be punished by fine, etc., it has been held that, since the registrar of a land office is prohibited by statute from acting as an attorney for any applicant for a patent for mineral land,

if such registrar undertakes to act as attorney for an applicant and receive from him a gross sum, and this sum is taken as well for the execution of his official duties as for performing other services in regard to procuring the patent, no specified portion of it being taken as compensation for the one or the other, and the sum so taken exceeds the fees allowed him by law, the taking will amount to extortion. *U. S. v. Waitz*, 3 Sawy. (U. S.) 473.

1. Taking Fees from Third Person Not Liable. — *Dunlap v. Curtis*, 10 Mass. 210. See also *infra*, this title *Remedies and Punishment — Civil Action — For Penalty — Who May Sue for Penalty*.

2. The Thing Extorted in General. — *Com. v. Cony*, 2 Mass. 524. See also *supra*, this title, *Definition*.

It has been held to be extortion for a churchwarden to obtain a silver cup or other valuable thing by color of office. *Roy v. Eyres*, 1 Sid. 307.

Money Belonging to County. — It has been held that a county is a body politic organized by statute and may be the owner of money, and if money so owned is extorted on a pretended claim against the county by an officer from another officer having the care of money, it is extortion. *State v. Moore*, 1 Ind. 548.

3. Receiving Promissory Note for Illegal Fees Not Extortion. — *Com. v. Cony*, 2 Mass. 524; *Com. v. Pease*, 16 Mass. 91; *Com. v. Dennie*, Thach. Cr. Cas. (Mass.) 165. See also *Rex v. Burdett*, 1 Ld. Raym. 148; *Preston v. Bacon*, 4 Conn. 472; *Jackson v. Siglin*, 10 Oregon 93.

Effect of Payment of Note. — But in *Rex v. Higgins*, 4 C. & P. 247, 19 E. C. L. 368, it was held that where a collector of post-horse duty demanded of A. a sum of money, alleging that A. had let out horses for hire without payment of the duty, and A. denied that he had done so, but gave the collector a promissory note for five pounds, the amount of which, after it became due, was paid by A. to the collector, who handed it over to his principal, the farmer of the post-horse duties, this was extortion in the collector, and his having paid the money over to his principal made no difference.

4. Receiving Higher Fees than Allowed by Law. — *People v. Whaley*, 6 Cow. (N. Y.) 661; *Gilmore v. Lewis*, 12 Ohio 281. See also *supra*, this title, *Definition*.

5. Taking Higher Fees — Extortion under Statute. — *Woodgate v. Knatchbull*, 2 T. R. 148; *State Bank v. Brennan*, 7 Colo. App. 427; *Stod-*

c. RECEIVING FEES WHERE NONE ARE DUE. — An officer may be guilty of extortion for demanding and receiving fees which are not due him, and is liable therefor to a civil action for the sum illegally collected¹ or to indictment at common law.² But in some jurisdictions, under statutes prescribing penalties for the benefit of the injured party against the officer, it has been held that, to constitute the statutory extortion, there must have been some official service rendered for which more pay is demanded or received than is allowed by law, and the statutory offense does not extend to cases where no services have been performed, or where no fees whatever are allowed by law.³ But a different rule prevails under statute in other jurisdictions.⁴

d. PREMATURE EXACTION. — It is extortion at common law to receive by color of office a fee before it is due, though no more is taken than will in all probability soon become due.⁵

e. WHETHER TAKING MUST HAVE BEEN FOR OFFICER'S BENEFIT. — It has been intimated that at common law the officer must receive the money or

dard *v.* Couch, 23 Conn. 238; Emory *v.* State, 6 Blackf. (Ind.) 107; Lydick *v.* Palmquist, 31 Neb. 300; Wilcox *v.* Bowers, 36 N. H. 372; State *v.* Bauer, 1 N. Dak. 277; Heinrich *v.* Venter, (Pa. 1885) 1 Atl. Rep. 598; Millar *v.* Douglass, 42 Tex. 288; Poole *v.* State, 22 Tex. App. 685; Henry *v.* Tilson, 17 Vt. 479.

1. Civil Action for Receiving Fees Where None Are Due. — Ogden *v.* Maxwell, 3 Blatchf. (U. S.) 319. See also Shattuck *v.* Woods, 1 Pick. (Mass.) 173; Irvin *v.* Northumberland County, 1 S. & R. (Pa.) 505; James *v.* Wilson, 7 Tex. 230.

2. Indictment for Receiving Fees Where None Are Due. — Com. *v.* Mitchell, 3 Bush (Ky.) 25, 96 Am. Dec. 192; Shattuck *v.* Woods, 1 Pick. (Mass.) 173; People *v.* Whaley, 6 Cow (N. Y.) 661; State *v.* Merritt, 5 Sneed (Tenn.) 67. See also Levy *v.* Inglish, 4 Ark. 65.

In Cross *v.* State, 1 Yerg. (Tenn.) 261, it was held that if an officer receives the fees due for collecting money upon an execution when, in fact, he did not collect it, the money being paid to the plaintiff by the defendant, it is extortion, although he had the execution in his hands previous to the payment.

By the Tennessee Act of 1856, c. 264, prescribing and regulating the fees of officers, a constable has been held to be entitled to no fee for levying an execution, and consequently if he demanded and received a fee for that service he was guilty of extortion. State *v.* Merritt, 5 Sneed (Tenn.) 67.

In U. S. *v.* Chenault, 2 Cranch (C. C.) 70, it was held that laboring to exact fees from the plaintiff after having received them from the defendant is not extortion.

Where an officer is indicted for extortion in receiving fees for the pretended execution of process, to which he was not entitled, his return on said process of its due and proper execution is not conclusive evidence of its truth. It may be contradicted by other testimony. Williams *v.* State, 2 Sneed (Tenn.) 160.

3. Statutes Not Allowing Penalty for Receiving Fees Where None Are Due. — Shattuck *v.* Woods, 1 Pick. (Mass.) 172; Walker *v.* Ham, 2 N. H. 240; Orton *v.* Engledow, 8 Tex. 206; Hays *v.* Stewart, 8 Tex. 358; Smith *v.* State, 10 Tex. App. 413.

In Hays *v.* Stewart, 8 Tex. 358, it was intimated that while the fourfold penalty could

not be recovered in cases where an officer receives fees where no services have been performed, yet the amount of fees illegally received by the officer might be.

But in Hirshfield *v.* Ft. Worth Nat. Bank, 83 Tex. 452, 29 Am. St. Rep. 660, it was held that where notarial fees were paid by a plaintiff to a notary voluntarily, with full knowledge of all the facts, and at most under a mistake of fact, the plaintiff could not recover back the fees he had paid the notary.

4. Statutes Prescribing Penalty for Receiving Fees Where None Are Due. — Jackson *v.* Purdue, 3 P. & W. (Pa.) 522; Dean *v.* Todd, 49 S. Car. 461.

In Jackson *v.* Purdue, 3 P. & W. (Pa.) 519, it was held that where a justice charges illegal fees, which are indorsed on the execution and collected by the constable, the justice is liable for the penalty, although they are not paid over to him.

5. Premature Demand as Constituting Extortion. — Hescott's Case, 1 Salk. 330; Empson *v.* Bathurst, Hutt. 52; Com. *v.* Bagley, 7 Pick. (Mass.) 279.

Premature Exaction of Compensation by Constable. — Under statute in Missouri it has been held that it belongs solely to the justice of the peace to determine the compensation to be allowed the constable for receiving and keeping property levied on, and until that question is determined by the justice the exaction of any money from the debtor by the constable for such services is extortion and a misdemeanor within the meaning of the statute. State *v.* Vasele, 47 Mo. 444, 47 Mo. 416.

Where a constable, by color of his office, took from another costs alleged to be due to a magistrate and to himself upon a peace warrant before the bond required thereon had been returned to the Superior Court, such constable was held to be guilty of the offense of extortion as defined in section 298 of the Penal Code of Georgia. Levar *v.* State, 103 Ga. 42.

Demand of Fee by Justice for Issuance of Complaint. — But in New Jersey it has been held that it is not extortion for a justice of the peace to ask or demand from the complainant in a criminal case at the time when the complaint is made the statutory fees for his service. Lane *v.* State, 49 N. J. L. 673, overruling State *v.* Maires, 33 N. J. L. 142.

article of value for his own benefit or advantage.¹ And under statute it has been held that to constitute the crime of extortion it must be shown that the sum demanded or received was claimed by the officer as due for services in his official capacity.² But according to some authorities at common law it would seem that if it is shown that an officer has made a wrongful collection under color of office, it need not appear whether the sum obtained was claimed to be due to the officer individually, or in his official capacity, or to any one else.³

f. VOLUNTARY PAYMENT TO OFFICER. — Extortion implies that the money or thing of value was surrendered to the officer unwillingly, and to subject him to indictment therefor it must appear that the party making payment did not act voluntarily with a knowledge that such payment was not due or was excessive.⁴ And the same rule has been applied in civil actions for the recovery of the sum extorted.⁵ But it seems that extortion may exist without the exercise of duress on the part of the officer, provided he makes a wrongful collection *colore officii*.⁶ And it has been held in *Montana* that the

1. *U. S. v. Deaver*, 14 Fed. Rep. 597.

2. **Statutes Requiring Thing Extorted to Have Been Claimed as Due for Official Services.** — *State v. Oden*, 10 Ind. App. 136; *Runnells v. Fletcher*, 15 Mass. 525. See also *White v. State*, 56 Ga. 385.

Under statute in *New Hampshire* it has been held that a magistrate who has rendered judgment in a criminal proceeding for costs is not liable to the penalty given by statute for demanding and taking illegal fees, although the bill of costs illegally included an attorney's fee, where it appeared that the fee was taxed and claimed by the attorney who conducted the prosecution as compensation for his services, and this though the costs were paid upon the order of the magistrate to hold the respondent in custody till they were paid, and the magistrate receipted to the respondent for the costs upon their being so paid. *Fox v. Whitney*, 33 N. H. 516. The court said: "Nor was it a fee demanded by him, in the sense contemplated by the statute. The penalty is given for demanding and taking an illegal fee. To demand a fee for a service, in the proper meaning of the word 'demand,' can be done only by the person claiming the right to the fee as compensation for the service, or by some other acting in his behalf, for it implies a calling for and claiming what belongs or is set up as belonging to the party demanding." To the same effect see *Wilcox v. Bowers*, 36 N. H. 379.

But in *Alabama* it has been held that the circumstance that illegal fees are collected by a succeeding sheriff as due to a preceding sheriff and paid over to him is no defense to the statutory action for extortion. *Spence v. Thompson*, 11 Ala. 746. The court said: "The sheriff has no authority, without the mandate of the court, to collect fees due to a preceding sheriff, even if such fees are legally due but not taxed, and certainly cannot be permitted to avoid the consequences of an illegal exaction by showing it was made for the benefit of another." See also *supra*, this title, *Essential Elements — Color of Office*.

3. **Common-law Rule that Taking Need Not Be for Officer's Benefit.** — In *State v. Oden*, 10 Ind. App. 136, the court said: "There are some earlier cases which impliedly recognize that an indictment would be good which charges a

wrongful collection by an officer by color of his office of more than was due, without specifying whether the sum thus obtained was claimed to be due the officer individually, or in his official capacity, or to any one else. *State v. Cogswell*, 3 Blackf. (Ind.) 54, 23 Am. Dec. 379; *State v. Stotts*, 5 Blackf. (Ind.) 460; *Seany v. State*, 6 Blackf. (Ind.) 403, *vide*, also *People v. Whaley*, 6 Cow. (N. Y.) 661. These cases, however, refer to extortion as defined by the common law, which embraced a much wider scope than our statutory extortion. Extortion, at common law, was 'any officer's unlawfully taking, by color of his office, from any man, any money or thing of value that is not due to him, or is more than is due, or before it is due.' "

In Civil Action for Recovery of Sum Extorted. — It has been held that a collector of a port was liable to civil action for money wrongfully collected by his deputy, notwithstanding he received it for and paid it to the government. *Ogden v. Maxwell*, 3 Blatchf. (U. S.) 323. See also *Ripley v. Gelston*, 9 Johns. (N. Y.) 201, 6 Am. Dec. 271.

In *Snowdon v. Davis*, 1 Taunt. 359, it was held that an action for money had and received lies against a bailiff who takes an illegal fee, notwithstanding he has paid it over.

In *Steele v. Williams*, 8 Exch. 625, it was held that an action for money had and received lies against the parish clerk for an illegal fee, notwithstanding the fact that he was acting for another, and the money was not to go into his own pocket.

4. **Effect of Voluntary Payment upon Liability to Indictment.** — *U. S. v. Harned*, 43 Fed. Rep. 376, citing 7 AM. AND ENG. ENCYC. OF LAW (1st ed.) 591; *Com. v. Dennie*, Thach. Cr. Cas. (Mass.) 165.

5. **Effect of Voluntary Payment on Liability to Civil Action.** — *Hirshfield v. Ft. Worth Nat. Bank*, 83 Tex. 452, 29 Am. St. Rep. 660.

6. **Duress on Part of Officer Not Essential to Offense.** — *Steele v. Williams*, 8 Exch. 625. See also *Ogden v. Maxwell*, 3 Blatchf. (U. S.) 323.

In *Steele v. Williams*, 8 Exch. 625, Martin, B., said: "If a person who was occupied a considerable time in a search gave an additional fee to the parish clerk, saying 'I wish to make you some compensation for your time,' that would be a voluntary payment."

doctrine of voluntary payment is not applicable in actions for the statutory penalty for extortion.¹

g. EFFECT OF OMISSION OF LEGITIMATE CHARGES EQUAL TO OR GREATER THAN ILLEGAL CHARGE. — It has been held to be no defense to a civil action for a penalty for extortion that an officer's bill against the plaintiff would have amounted to as much or more if he had included certain other legitimate fees to which he was entitled.²

h. EFFECT OF TENDER BACK. — It has been held that an offer of restitution of the sum illegally charged has no effect in shielding an officer from an action to recover the penalty therefor.³

i. EFFECT OF ALLOWANCE OF ILLEGAL CHARGE BY COURT. — It has been held also that the fact that illegal fees charged by an officer were subsequently taxed and allowed by a justice or other judicial officer will be no defense to an action for the extortion.⁴

IV. REMEDIES AND PUNISHMENT — 1. Indictment. — The offense of extortion is a misdemeanor punishable at common law upon indictment or information by fine or imprisonment, and also by removal from the office in the execution of which it was committed.⁵ A similar rule is provided for by statute in several of the states.⁶

Effect at Common Law of Statutes Imposing Penalties. — In some jurisdictions it has been held that statutes giving a penalty for extortion for the benefit of the party injured do away with the right to proceed by indictment at common law.⁷

1. Voluntary Payment Immaterial in Action for Penalty. — *Leggatt v. Prideaux*, 16 Mont. 205. In this case the court said: "Finally, respondent says that the payment of the excessive fees by the appellant was a voluntary one, and for that reason he cannot prevail in this suit. We seriously doubt the correctness of the contention that a payment is voluntarily made where a judgment is rendered and costs are taxed against a party to a suit, and paid by him in obedience to a demand by the justice who rendered the judgment, and who alone could issue process to enforce its collection. * * * It is unnecessary to pass on the question, however, because we think the doctrine of voluntary payment is not properly applicable to this case. The statute of itself is too plain a guide. The respondent, a justice of the peace, demanded and received excessive fees. The law was explicit in fixing his compensation, but he violated it."

Duty to Notify Officer of Improper Charge. — In *Leggatt v. Prideaux*, 16 Mont. 205, it was held that where a magistrate's charges exceed the amount that the law allows him, he cannot escape the statutory responsibilities imposed, because his extortion was the result of his ignorance, or because the victim of his extortion was not so ignorant, but failed to inform the justice that his fees were excessive. The court said: "The very statement of the proposition that an unsuccessful litigant is bound to advise the justice who had decided against him what the law is illustrates the absurdity of the contention." See also *Ogden v. Maxwell*, 3 Blatchf. (U. S.) 324.

2. Effect of Omission of Legitimate Charge Commensurate with Illegal Charge. — *Turner v. Blount*, 49 Ark. 361; *Biggs v. Funk*, 5 Watts (Pa.) 478.

But under statute in *Alabama* providing that an officer "who knowingly takes for services not actually rendered other or greater fees

than are allowed by law for any services done by him is guilty of extortion," etc., it has been held that the fact that, in making out a bill of costs, the aggregate amount of costs charged by an officer is less than the full amount which he was entitled to charge, although some illegal items are included, is a strong circumstance to show the absence of the corrupt intent which the law was designed to punish. *Cleaveland v. State*, 34 Ala. 254.

3. Effect of Tender Back of Thing Extorted. — *Turner v. Blount*, 49 Ark. 361; *Leggatt v. Prideaux*, 16 Mont. 205. Compare *McConahy v. Courtney*, 7 Watts (Pa.) 491.

4. Subsequent Allowance of Illegal Charges by Court. — *Johnson v. Burnham*, 22 Vt. 639.

Under statute in *South Carolina* it has been held to be no defense to an action for a penalty for extortion that the illegal costs charged by a constable had been taxed by a trial justice and an execution therefor had been issued. *Tinsley v. Kirby*, 8 S. Car. 113.

5. Extortion a Misdemeanor at Common Law. — 1 Hawk. P. C., c. 68, § 5; 1 Russ. on Crimes 212.

6. Extortion a Misdemeanor under Statute. — *State v. Brown*, 12 Minn. 490; *State v. Lawrence*, 45 Mo. 492; *Cutter v. State*, 36 N. J. L. 125.

7. Statutes Making Extortion a Misdemeanor. — *Pankey v. People*, 2 Ill. 82. Compare *Ferkel v. People*, 16 Ill. App. 310.

In *Pennsylvania* the taking of illegal fees was indictable at common law until the passage of the Act of 1814, which gave a penalty to the party injured. *Com. v. Hagan*, 9 Phila. (Pa.) 577, 29 Leg. Int. (Pa.) 293; *Irons v. Allen*, 160 Pa. St. 634.

In *Com. v. Evans*, 13 S. & R. (Pa.) 426, it was held that an indictment cannot be sustained against a justice of the peace for taking excessive or illegal fees since the Act of 1814, which gives a penalty to the party injured, and

But this view does not seem to be sustained by the weight of authority.¹

2. Civil Action — *a.* FOR RECOVERY OF THING EXTORTED. — At common law an action will lie against an officer to recover back fees wrongfully collected as for money had and received.²

b. FOR PENALTY — (1) *In General.* — In addition to this common-law remedy, statutes exist in *England*³ and in most jurisdictions in the *United States*⁴ providing for the recovery of penalties in favor of the party aggrieved against officers making illegal collections.

that the only remedy was to recover the penalty. To the same effect see *Hevay v. Edmiston*, 1 Rawle (Pa.) 457.

The *Pennsylvania* Act of March 25, 1831, re-enacted the provisions of the common law. The Act of 1860 modified the Act of 1831 and the common law by taking away the criminality in the taking of fees before the services were rendered, but left the law the same in all other respects. *Com. v. Hagan*, 9 Phila. (Pa.) 577, 29 Leg. Int. (Pa.) 293; *Irons v. Allen*, 169 Pa. St. 635. See also *Ross v. Palmer*, 4 Pa. St. 517.

In *Com. v. Saulsbury*, 152 Pa. St. 554, it was held that if the evidence is sufficient to sustain an indictment for extortion at common law, the defendant might be convicted, though he was not liable under the statute of 1860.

1. Indictment Not Superseded by Statute Giving Penalty. — *U. S. v. Deaver*, 14 Fed. Rep. 595; *Com. v. Bagley*, 7 Pick. (Mass.) 279; *Shattuck v. Woods*, 1 Pick. (Mass.) 171.

2. Civil Action for Recovery of Thing Extorted. — *Stevenson v. Mortimer*, 2 Cowp. 805; *Steele v. Williams*, 8 Exch. 625; *Snowdon v. Davis*, 1 Taunt. 359; *Ogden v. Maxwell*, 3 Blatchf. (U. S.) 319; *Clinton v. Strong*, 9 Johns. (N. Y.) 370; *M'Intyre v. Trumbull*, 7 Johns. (N. Y.) 35; *Shattuck v. Woods*, 1 Pick. (Mass.) 171; *Walker v. Ham*, 2 N. H. 238; *American Steamship Co. v. Young*, 89 Pa. St. 186, 33 Am. Rep. 748.

3. English Statutes Prescribing Penalties. — By the statute of Westminster, I., c. 26, it was provided that "no sheriff nor other king's officer shall take any reward to do his office, but shall be paid of that which they take of the king, and that he who so doth shall yield twice as much and shall be punished at the king's pleasure." Hawk. P. C., bk. 1, c. 68, § 5. And an action lies to recover the double value. 3 Com. Dig. 323.

Also, under 29 Eliz., c. 4, it has been held that if it appear by the sheriff's return to a writ of execution that greater fees have been taken for the levy than are allowed by the statute, the sheriff is liable to an action on the statute for treble damages at the suit of the party aggrieved. *Woodgate v. Knatchbull*, 2 T. R. 148; *Buckle v. Bewes*, 4 B. & C. 154, 10 E. C. L. 298.

And it has been held that costs are due to the plaintiff who recovers treble damages in an action under 29 Eliz., c. 4, against a sheriff for taking more than the fee allowed by that statute on a levy under an execution against the plaintiff's goods. *Tyte v. Glode*, 7 T. R. 263. But the remedy against sheriffs in such case is now provided for under section 29 of the Sheriff's Act, 1887.

4. Action for Penalty under Statute in United States. — *Iler v. Cronin*, 34 Neb. 424; *Burnham*

v. Aiken, 6 N. H. 306; *Scammon v. Tilton*, 23 N. H. 434; *Dean v. Todd*, 49 S. Car. 461; *Hays v. Stewart*, 8 Tex. 358; *Wheelock v. Sears*, 19 Vt. 559.

Under Statute in Connecticut it has been held that an action for a penalty is to be had against an officer for the taking of unlawful fees in civil suits only. *Stoddard v. Couch*, 23 Conn. 238.

In the *Pennsylvania* Act of March 28, 1814, it was provided that "if any officer whatsoever shall take greater or other fees than are hereinbefore expressed and limited, for any service to be done by him in his office, or if any officer shall charge or demand and take any of the fees hereinbefore ascertained when the business for which such fees are chargeable shall not have been actually done or performed, or if any officer shall charge or demand any fee for any service or services other than those expressly provided for by this act, such officer shall forfeit and pay to the party injured fifty dollars, to be recovered as debts of the same amount are recoverable." See *Miller v. Lockwood*, 17 Pa. St. 248; *Evans v. Harney*, 17 Pa. St. 460; *Irons v. Allen*, 169 Pa. St. 634; *Aechternacht v. Waimough*, 8 W. & S. (Pa.) 162. See also *Heinrich v. Venter*, (Pa. 1885) 1 Atl. Rep. 598.

This section was re-enacted by section 15 of the Act of February 22, 1821, and again re-enacted by section 4 of the Act of April 18, 1857. *Irons v. Allen*, 169 Pa. St. 634.

In *Ross v. Palmer*, 4 Pa. St. 517, it was held that the Act of 1831, making the demand, charge, or taking of greater fees than are allowed by law an indictable offense, does not repeal the previous Act of March 28, 1814, giving a penalty recoverable by action.

But in *Irons v. Allen*, 169 Pa. St. 634, it was held that the Act of March 28, 1814, was not extended to, and made a part of, the Act of 1868, which is "an act to ascertain and appoint the fees to be received by the several officers of the commonwealth," and which contains no penal provision. Under this act it has been held that a justice of the peace who takes illegal fees is not subject to an action for a penalty, and that the only remedy against him is by indictment. See also *Baldwin v. Cash*, 7 W. & S. (Pa.) 427.

And it has been held that the later Act of June 12, 1878, fixing the fees of sheriffs, coroners, and other officers, but not including justices, and providing a penalty greater than that of the Act of 1814, is not applicable to justices of the peace. *Irons v. Allen*, 169 Pa. St. 634.

Under Rev. Stat. *South Carolina*, 1893, § 2570, it has been held that a recovery may be had in a civil action against a magistrate making improper charges for official service and a

(2) *Who May Sue for Penalty.* — Under these statutes it is the prevailing rule that the right to sue for the penalty is restricted to the party who is damaged by the taking of the illegal fees,¹ but it has been held that if fees are demanded of a person for whom no services have been rendered, although they are improperly and unjustly taken by the officer, the former is not entitled to recover the penalty from the latter.²

Action by Personal Representative. — Under statute in *Pennsylvania* it has been held that administrators cannot maintain an action to recover penalties for illegal fees taken by an officer from their intestate in his lifetime, though they may recover back the sums paid beyond what was due.³ And in *Texas* it has been held that a person from whom illegal fees have been demanded and received in his capacity as administrator cannot maintain an action in his personal capacity, either for the penalty or to recover back the amount paid.⁴

EXTRA. — The word "extra" signifies without or outside of.⁵

EXTRA ALLOWANCES. — See the title ADDITIONAL ALLOWANCES OF COSTS, 1 ENCYC. OF PL. AND PR. 211.

forfeiture of ten times the amount so improperly charged may be imposed. *Dean v. Todd*, 49 S. Car. 461.

Penalty for Separate Items of Fee Bill Not Recoverable. — Under statute in *Kentucky* it has been held that where a justice of the peace makes out a fee bill containing several illegal charges, he is liable to only one fine of \$15 for such offense, and not to a separate fine for each item. *Bristow v. Sullivan*, 6 B. Mon. (Ky.) 143. To the same effect see *Lydick v. Palmquist*, 31 Neb. 300; *Tanner v. Croxall*, 17 N. J. L. 332.

Commingleing of Legal and Illegal Fees. — In *Benson v. Christian*, 129 Ind. 335, it was held that where legal and illegal fees are so commingled by a public officer that no separation can be made, the plaintiff may recover all the fees exacted from him.

Prior Conviction under Indictment Unnecessary. — In *Ming v. Truett*, 1 Mont. 322, it was held not to be necessary, in order to recover in a civil action for a penalty for the collection of illegal fees, that the officer should have previously been convicted of the crime of extortion.

1. Party Damaged to Sue for Penalty. — See *v. Lide*, 111 Ala. 126; *Stoddard v. Couch*, 23 Conn. 238; *Iler v. Cronin*, 34 Neb. 424; *Johnson v. Burnham*, 22 Vt. 639. See also *Lincoln v. Shaw*, 17 Mass. 410.

In *Lee v. Lide*, 111 Ala. 126, it was held that the right of action against an officer for extortion is given by statute in *Alabama* only to the party aggrieved, and where there is no evidence to show that the plaintiff in a given case, either by himself or through another for him, paid an alleged overcharge, or was in any wise liable to pay it, or was in any wise aggrieved thereby, the action cannot be sustained.

2. When Fees Paid by Third Person Not Liable. — *Marshall v. Byram*, 1 Bibb (Ky.) 341; *Dunlap v. Curtis*, 10 Mass. 211. Thus, in the case first cited it was held that a fee bill issued by a clerk against "E. (B. to pay)" did not authorize a distress upon B. nor subject the clerk to a penalty at the suit of B. the services for E. having been actually rendered.

But in *Evans v. Harney*, 17 Pa. St. 460, it was held that an employer who voluntarily

paid to an alderman illegal fees charged by him in a criminal proceeding against persons in the employ of the former at the time of the commission of the act, such act having been done in obedience to his instructions in the course of his business, was, though a stranger to the record, the party injured, and entitled, under the 26th section of the Act of March 28, 1814, to recover the penalty for taking such fees. In this case the court said: "The party who pays is always the party injured, unless he pays as the mere agent or messenger of somebody else. And the presumption is that he pays out of his own pocket, unless the contrary is proved." To the same effect see *Miller v. Lockwood*, 17 Pa. St. 248. See also *supra*, this title, *Essential Elements — Color of Office*.

3. Action by Personal Representative for Fees Taken from Intestate Not Allowed. — *Reed v. Cist*, 7 S. & R. (Pa.) 183.

4. Orton v. Engledow, 8 Tex. 207.

5. Carpenter v. State, 39 Wis. 284.

Extra Services. (See generally the title PUBLIC OFFICERS.) — Under a statute providing that certain officers "shall be entitled to receive * * * reasonable allowance for extra services," by the term "extra services" are intended services incident to their offices for which compensation is not provided by law, but not services disconnected with their offices. *Miami County v. Blake*, 21 Ind. 32. See also *Morgan County v. Johnson*, 31 Ind. 467; *Vermillion County v. Potts*, 10 Ind. 286.

Same — Sessions Prolonged. — The Code of *California* provided that the compensation of certain employees of the legislature should be four dollars a day. At the end of the session the legislature voted these employees additional compensation for services rendered on days when the sessions were unusually long. This was held invalid under the constitutional provision prohibiting extra compensation for public officers "after service has been rendered." The court said: "The idea upon which the resolution rests is that the services were extra, or, in other words, something outside of the regular duties of the employment; and since it is not pretended that the services were different in kind from the regu-

EXTRACT. — I. An extract is anything drawn from a substance by heat, solution, distillation, or chemical process, as essences, tinctures, and the like.¹
 II. An extract is a selection, as from a book.²

lar duties, they are *extra* because they were for a longer time than seems to have been considered usual. But the compensation of the porters is fixed by law at \$4 per day. Pol. Code, § 268. They are not paid by the amount of work which they do, but by the day; and we think it too clear for discussion that the word 'day,' as used in the statute, covers whatever period of the twenty-four hours the legislators choose to remain in session. The language of the law fixing the compensation of the employees is similar to that fixing the compensation of the legislators themselves, who are allowed \$8 per day; and it would be as reasonable to say that *extra* compensation should be made for a long session in the one case as in the other. The services, therefore, were not *extra*, but were such as the employees were bound to render; and, this being the case, the sum voted to them must either have been a gift or *extra* compensation after service has been rendered, both of which are expressly forbidden by the constitution." Robinson v. Dunn, 77 Cal. 473.

Same — Contractors. — The Constitution of Wisconsin provided that the legislature should never grant any *extra* compensation to any public contractor after the contract should be entered into. In construing this provision the court said: "Therefore, as it appears to us, was the word *extra* chosen. The word is Latin, signifying without, or outside of. In its simple form it has been but lately admitted into English dictionaries, but its compound use is ancient. 'Extraordinary' gives a familiar instance of its use, signifying outside of the ordinary, not greater or less; for a thing may

be extraordinary for greatness, or for littleness, or for neither. So it is of *extra* compensation, which is also properly a compound phrase. *Extra* compensation is such, not merely for being greater or less than the contract, but properly because it is outside of the contract. A public contractor might doubtless agree to reduce the compensation of his contract; and the legislature could act on such voluntary reduction. But surely a statute, passed *in invitum*, expressly lessening the compensation fixed by a public contract, would be as plainly within the section as a statute so passed expressly lessening the compensation of a public officer during his term of office. In this sense the word of the constitution is of old and familiar use in legal terms; *extra* judicial, *extra* territorial, *extra* parochial, *extra* dotal, *extra* feudum, *extra* viam, *extra* quatuor maria." Carpenter v. State, 39 Wis. 284. And see Swift v. State, 26 Hun (N. Y.) 508, reversed 89 N. Y. 52.

Extra Conductor. — In an action upon an accident policy the court instructed that the insured did not lose his classification as an *extra* conductor because, while he was such a conductor, he also engaged in the work of a brakeman. Standard L., etc., Ins. Co. v. Koen, 11 Tex. Civ. App. 273.

1. Sykes v. Magone, 38 Fed. Rep. 497. This was a custom case. See generally the title REVENUE LAWS.

2. In McCracken v. Graham, 14 Pa. St. 210, the court held that the words "transcript or *extract*" were evidently used in the sense of abstract, or, in other words, a condensation of the substance.

EXTRADITION.

BY JOSEPH R. LONG.

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CROSS-REFERENCES.

For matters of *PROCEDURE*, see 8 *ENCYCLOPÆDIA OF PLEADING AND PRACTICE*, p. 798.

For other matters of *SUBSTANTIVE LAW* and *EVIDENCE* related to this subject, see the following titles in this work: *ARREST*, vol. 2, p. 832; *HABEAS CORPUS*; *INTERNATIONAL LAW*; *TREATIES*.

I. INTERNATIONAL EXTRADITION — 1. Definition. — International extradition is "the surrender by one sovereign state to another, on its demand, of persons charged with the commission of crime within its jurisdiction, that they may be dealt with according to its laws."¹

2. Federal Authority Exclusive. — The authority vested in the federal government to enter into extradition treaties, to enact laws upon the subject, and generally to regulate, provide for, and control the surrender of fugitives from justice from foreign countries is exclusive, and the several states or their officials have no authority whatever in matters of international extradition.²

Jurisdiction of State Courts. — But state as well as federal courts have authority to inquire into the legality of the restraint of persons held under extradition proceedings.³

3. In the Absence of Treaty — No Extradition in Absence of Treaty. — It is well settled in the *United States* that in the absence of treaties so providing there is no obligation resting upon one sovereign state to surrender to another upon its demand persons who have committed offenses within the jurisdiction of the latter state and have sought an asylum within the jurisdiction of the state upon which the demand for surrender is made.⁴

1. Bouv. L. Dict., tit. Extradition.

The Terms "Banishment," "Transportation," "Extradition," and "Deportation" are defined and distinguished by Mr. Justice Gray in *Fong Yue Ting v. U. S.*, 149 U. S. 709.

2. **No State Authority in Matters of International Extradition.** — *Holmes v. Jennison*, 14 Pet. (U. S.) 540, 12 Vt. 631; *U. S. v. Rauscher*, 119 U. S. 407; *People v. Curtis*, 50 N. Y. 321, 10 Am. Rep. 483.

In *People v. Curtis*, 50 N. Y. 321, 10 Am. Rep. 483, it was held that a statute of *New York* authorizing the surrender by the governor of fugitives from justice in certain cases was unconstitutional, and hence that a warrant of arrest in pursuance thereof was void.

Institution of Proceedings by Private Individuals. — Proceedings for the extradition of a fugitive from justice cannot be instituted by private persons who may have been affected by the crime, who have not been authorized by the executive of the foreign government to represent it in such proceedings. *In re Ferrelle*, 28 Fed. Rep. 878.

3. See *ENCYCLOPÆDIA OF PLEADING AND PRACTICE*, titles *EXTRADITION*, vol. 8, p. 798;

HABEAS CORPUS, vol. 9, p. 998. See also *Rev. Stat. U. S.*, § 5270.

Voluntary Return of Fugitive — Jurisdiction of Federal Court. — Where a person charged with a crime committed in the United States escaped to Canada, and an extradition warrant was issued for his surrender, but the accused voluntarily agreed to return to the United States with the understanding that he was to be tried only for the crimes for which the warrant was issued, it was held that no question arose under the Constitution, treaties, or laws of the United States, inasmuch as the accused was never extradited, but voluntarily returned, and hence the federal courts had no jurisdiction, and the accused, having been tried in strict conformity to his agreement, had nothing to complain of. *In re Cross*, 43 Fed. Rep. 517.

4. **No Obligation to Deliver Fugitive in Absence of Treaty — United States.** — *Sullivan's Case*, 1 Op. Att'y-Gen. 509; *Huggens's Case*, 2 Op. Att'y-Gen. 452; *Case of Two Portuguese Seamen*, 2 Op. Att'y-Gen. 559; *Dewitt's Case*, 3 Op. Att'y-Gen. 661; *Wing's Case*, 6 Op. Att'y-Gen. 85; *Hamilton's Case*, 6 Op. Att'y-Gen. 431; *Jose Ferreira dos Santos's Case*, 2 Brock.

Surrender of Fugitive as a Matter of Comity. — It has been frequently asserted by European writers, and by some authorities in the United States also, that, independently of any treaty stipulations upon the subject, it is the imperative duty of one nation to surrender fugitive criminals upon the demand of another state, especially in the case of the more heinous offenders, as a matter of international comity and convenience. By other writers the obligation is regarded as an imperfect one only, its performance resting entirely within the discretion of each nation.¹ In the United States it has never been the practice of the government to surrender fugitives from justice to other nations except in compliance with express treaty stipulations.² The question is now of little practical moment, as extradition treaties exist between most civilized nations.

4. Extradition Treaties — *a. GENERALLY.* — The first extradition treaty entered into by the United States was the treaty of 1794 with Great Britain, which remained in force for a period of twelve years only, when it expired by its own limitation.³ At present there are extradition treaties in force with most of the foreign powers, the oldest being the one made with Great Britain in 1842.⁴ These treaties, which are very similar in their terms, provide for the extradition of persons charged with certain enumerated crimes committed within the jurisdiction of the state making requisition for such surrender, upon such evidence of criminality as, according to the laws of the place where the fugitive or person charged shall be found, would justify his apprehension and commitment for trial if the crime or offense had been there committed.⁵

(U. S.) 493; *Matter of Sheazle*, 1 Woodb. & M. (U. S.) 66; *U. S. v. Davis*, 2 Sumn. (U. S.) 482; *U. S. v. Rauscher*, 119 U. S. 407; *U. S. v. Watts*, 8 Sawy. (U. S.) 370, 14 Fed. Rep. 130; *Ex p. McCabe*, 46 Fed. Rep. 363, citing 7 AM. AND ENG. ENCYC. OF LAW (1st ed.) 600.

Kentucky. — *Com. v. Hawes*, 13 Bush (Ky.) 697, 26 Am. Rep. 242.

New York. — *Adriance v. Lagrave*, 59 N. Y. 110, 17 Am. Rep. 317.

Pennsylvania. — *Com. v. Deacon*, 10 S. & R. (Pa.) 125. To the same effect see *Respublica v. De Longchamps*, 1 Dall. (Pa.) 111.

The surrender of fugitives from justice is a matter of conventional arrangement between states, as no such obligation is imposed by the law of nations. *Matter of Metzger*, 5 How. (U. S.) 176.

1. Surrender of Fugitives as a Matter of Comity. — Bouvier enumerates as being of the former opinion stated in the text Grotius, Heineccius, Burlamaqui, Vattel, Rutherford, Schmelzing, and Kent. Of the latter view are Puffendorf, Voet, Martens, Klüber, Leyser, Kluit, Saalfeld, Schmaltz, Mittermeyer, Heffter, and Wheaton. Bouv. L. Dict., tit. Extradition.

Chancellor Kent in *Matter of Washburn*, 4 Johns. Ch. (N. Y.) 106, 8 Am. Dec. 548, said: "It is the law and usage of nations, resting on the plainest principles of justice and public utility, to deliver up offenders charged with felony and other high crimes, and fleeing from the country in which the crime was committed, into a foreign and friendly jurisdiction." In this case the prisoner was discharged for want of proof sufficient to detain him. See also a dictum in *Matter of Clark*, 9 Wend. (N. Y.) 212.

In *Jones's Case*, 1 Op. Atty.-Gen. 68, the attorney-general was of opinion that the United States would be in duty bound to comply with a demand for the extradition of a fugitive, but in the absence of laws directing the mode of proceeding there was no way in

which the delivery of the offender could be effected.

2. No Surrender by United States as Matter of Comity. — See cases cited in note *supra*, *No Obligation to Deliver Fugitive in Absence of Treaty*.

It is believed that the only case in which the United States government has delivered a fugitive from justice upon the request of a foreign power with which no extradition treaty existed was the case of Arguelles, a Cuban officer charged with a violation of the Spanish laws against the slave trade, who had escaped to New York. Secretary Seward, upon the request of the Spanish government, under the authority of President Lincoln, caused the arrest and surrender of the fugitive. The legality of this proceeding was questioned in a resolution of the Senate, but was not passed upon by the courts, the prisoner having been delivered to the Spanish authorities before he had an opportunity to appeal to the courts. See this case stated in *Spear on Extradition*, 1; Wharton on *Conflict of Laws*, § 835, note.

Subsequently Tweed, when arrested in Cuba, was delivered to the United States government by Spain although there was no extradition treaty. See Wharton on *Conflict of Laws*, § 835, note.

3. 8 U. S. Stat. at L. 129, art. 27, 28. For a case in which a fugitive was surrendered under this treaty, see *U. S. v. Nash*, Whart. St. Tr. 392; *Bee Adm.* (U. S.) 266. See also 1 Op. Atty.-Gen. 83.

4. For the extradition treaties of the United States see 8 U. S. Stat. at L. and later volumes. For an account of all the treaties made up to 1870, see *In re Stupp*, 11 Blatchf. (U. S.) 124.

5. Consult the several treaties.

Treaty with Great Britain. — For illustrative purposes the treaty with Great Britain of Aug. 9, 1842, is here set forth: "It is agreed that

b. CONSTITUTIONALITY. — Treaties entered into by the United States with foreign powers providing for the extradition of fugitives from justice are clearly within the treaty-making power, and are constitutional.¹

5. Extradition Laws. — It was formerly a vexed question whether the surrender of fugitives from justice could lawfully be made to a foreign government under an extradition treaty without an act of Congress prescribing the means for making such delivery.² The question is now of no practical importance, as Congress, by virtue of the authority vested in it by the Constitution, has enacted laws prescribing the necessary steps to be taken for the surrender of the fugitive.³

6. Offenses for Which Fugitive May or May Not Be Extradited — *a. GENERALLY.* — The various extradition treaties contain an enumeration of the offenses to which they are intended to apply, and for a list of extraditable crimes under particular treaties the several treaties should be consulted.⁴

b. POLITICAL OFFENSES. — In many of the treaties between the United

the United States and her Britannic Majesty shall, upon mutual requisitions by them, or their ministers, officers, or authorities, respectively made, deliver up to justice all persons who, being charged with the crime of murder, or assault with intent to commit murder, or piracy, or arson, or robbery, or forgery, or the utterance of forged paper, committed within the jurisdiction of either, shall seek an asylum, or shall be found, within the territories of the other; provided that this shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial if the crime or offense had there been committed; and the respective judges and other magistrates of the two governments shall have power, jurisdiction, and authority, upon complaint made under oath, to issue a warrant for the apprehension of the fugitive or person so charged, that he may be brought before such judges or other magistrates respectively, to the end that the evidence of criminality may be heard and considered; and if, on such hearing, the evidence be deemed sufficient to sustain the charge, it shall be the duty of the examining judge or magistrate to certify the same to the proper executive authority, that a warrant may issue for the surrender of such fugitive. The expense of such apprehension and delivery shall be borne and defrayed by the party who makes the requisition and receives the fugitive." 8 U. S. Stat. at L. 576, art. 10. See *In re Levi*, Quebec L. R. 6 Q. B. 151; *In re Martin*, 33 Can. L. J. 253, 448; *In re Rosenbaum*, 20 L. C. Jur. 165, (Q. B. 1874); *In re Williams*, 7 Ont. Pr. Rep. 275; *Reg. v. Browne*, 6 Ont. App. 386; *In re Hall*, 3 Ont. Rep. 331; *In re Jarrard*, 4 Ont. Rep. 265; *Reg. v. Tubbee*, 1 Ont. Pr. Rep. 98; *In re Burley*, 1 U. C. L. J. N. S. 20; *Matter of Anderson*, 20 U. C. Q. B. 124; *In re Warner*, 1 U. C. L. J. N. S. 16; *In re Beebe*, 3 Ont. Pr. Rep. 273.

The most important articles of other treaties not contained in the foregoing are those providing for the exemption of political offenders, and of citizens or subjects of the asylum state, and also that the treaty shall not apply to the case of offenses committed before its date.

The Extradition Convention with Bavaria of 1853 (10 U. S. Stat. at L. 1022) was not abro-

gated by the absorption of Bavaria into the German empire under the German constitution of 1871. *In re Thomas*, 12 Blatchf. (U. S.) 370.

The Imperial Extradition Act of 1870, it was held in *Ex p. Worms*, 22 L. C. Jur. 109 (Q. B. 1876), applies to Canada, and is not inconsistent with section 132 of the B. N. A. Act.

In *Ex p. Phelan*, 6 Leg. N. (Quebec) 261 (Q. B. 1883), it was held that since the imperial Order in Council of Dec. 28, 1882, the operation of the above act has been suspended in Canada *quoad* the extradition of fugitive offenders from the United States, and the Dominion Act, 40 Vict., c. 25, is applicable in such case to the extent at least of the extradition arrangements in force with the United States. See also *Reg. v. Young*, 9 L. C. Jur. 29. *In re Rosenbaum*, 18 L. C. Jur. 200 (Q. B. 1874.)

1. Extradition Treaties Constitutional. — *In re De Giacomo*, 12 Blatchf. (U. S.) 391; *Holmes v. Jennison*, 14 Pet. (U. S.) 540.

2. Delivery of Fugitive Without Act of Congress. — In *Matter of Sheazle*, 1 Woodb. & M. (U. S.) 66, it was held that under the treaty with Great Britain of 1842 prisoners charged with piracy on board a British vessel might be arrested in the United States and surrendered without any special act of Congress to carry the treaty into effect. This decision was based on the ground that the acts to be done were chiefly ministerial, and the treaty contained full details.

The better doctrine seems to be that in the absence of legislative acts there can be no surrender under a treaty. See *Matter of Metzger*, 1 Edm. Sel. Cas. (N. Y.) 399, 5 How. (U. S.) 176, 1 Barb. (N. Y.) 248; *Spear on Extradition* (2d ed.) 57.

3. Rev. Stat. U. S., § 5270 et seq.; 22 U. S. Stat. at L. 215.

4. See the treaties.

As to the extradition of a person charged with embezzlement of public funds under the Cuban Penal Code, see *In re Cortes*, 42 Fed. Rep. 47.

The embezzlement of public funds is an extraditable crime under the treaty between the United States and Mexico. *People v. Gray*, 66 Cal. 271.

Extraditable Crimes under English Treaties and Statutes. — The statute of 6 & 7 Vict., c. 76, providing for the extradition of persons charged with certain crimes as specified in the

States and foreign powers it is expressly provided that the provisions of the treaty shall not apply to offenses of a political character.¹ In cases in which there is no treaty stipulation to this effect it seems that the same rule would obtain, on the ground that there can be no obligation to surrender fugitives for crimes not enumerated in the treaty, and political crimes are in no case expressly included.²

c. OFFENSES COMMITTED ANTERIOR TO TREATY. — It is expressly stipulated in some of the extradition treaties entered into by the United States with foreign powers that the provisions of the treaty shall not apply to crimes committed before the date of the treaty. In others certain anterior crimes only are excepted. In some others there is no provision excepting anterior crimes.³ It has been held that prior crimes are included within the operation of the treaty where its language will admit of such a construction, unless they are expressly excepted; and that consequently one who has committed a crime in a foreign state and fled to the United States before the making of a treaty between the two countries providing for the extradition of such offenders, and making no exception in their favor in case of anterior crimes, does not acquire a right to an asylum in the United States of which he cannot be deprived, but may be surrendered upon the demand of the foreign government.⁴ A treaty admitting of such a construction is not unconstitutional as being in contravention of the constitutional prohibition of the passing of any bill of attainder or *ex post facto* law.⁵

d. OFFENSES NOT ENUMERATED IN TREATY. — By the enumeration in the several extradition treaties of certain crimes for which the surrender of a fugitive may be demanded, it seems that all other offenses not included in such enumeration are, by necessary implication, excluded from the operation of the treaties, and that therefore one of the contracting nations cannot, by virtue of the provisions of the treaty and as a matter of right, demand of the other nation the surrender of a person charged with an offense not specified in the treaty between the two nations.

Surrender as an Act of Comity for Offense Not Enumerated. — It has been held, however, that the existence of a treaty providing for extradition for certain crimes

treaty between Great Britain and the United States, contemplates such acts as amount to any of these offenses according to the law of England and the general law of the United States, and not offenses that are such only by the local legislation of some particular state of the Union. *In re Windsor*, 6 B. & S. 522, 118 E. C. L. 522, 10 Cox C. C. 118.

See generally, as to extraditable crimes, *In re Tivnan*, 5 B. & S. 645, 117 E. C. L. 645, 9 Cox C. C. 522; *Matter of Counhaye*, L. R. 8 Q. B. 410, 28 L. T. N. S. 761; *Atty.-Gen. v. Kwok-a-Sing*, L. R. 5 P. C. 179, 12 Cox C. C. 505; *In re Arton*, [1896] 1 Q. B. 509, 18 Cox C. C. 277.

As to what constitutes forgery, see *In re Eno*, 10 Quebec L. Rep. 194 (S. C. 1884); *Ex p. Worms*, 22 L. C. Jur. 109 (Q. B. 1876); *In re Phipps*, 8 Ont. App. 77; *In re Lee*, 5 Ont. Rep. 583; *Reg. v. Hovey*, 8 Ont. Pr. Rep. 345; *Re Murphy*, 26 Ont. Rep. 163, 22 Ont. App. 386; *In re Smith*, 4 Ont. Pr. Rep. 215; *Ex p. Hoke*, 14 Rev. Lég. 705; *Ex p. Debaum*, 32 L. C. Jur. 281.

Judicial Notice. — In *Porter v. McMahon*, 25 New Bruns. 211, it was held that, murder being an extraditable offense under the treaty of Washington, entered into between Great Britain and the United States, and confirmed by Act of Parliament, the courts of the British

dominions will take notice that it is punishable as a crime in the United States.

1. See the several treaties. See *In re Arton*, [1896] 1 Q. B. 108, 73 L. T. N. S. 687.

What Constitutes an Offense of a Political Character. — To bring an offense within the provision of the English Extradition Act of 1870, § 3, (1), that fugitives shall not be surrendered for offenses "of a political character," it must be incidental to and form part of political disturbances. *In re Castioni*, [1891] 1 Q. B. 149, 64 L. T. N. S. 344, 17 Cox C. C. 225.

There must, in such case, be two parties in the state, each striving to impose its own government upon the other. An explosion caused by an anarchist is, therefore, not such an offense. *In re Meunier*, [1894] 2 Q. B. 475, 71 L. T. N. S. 403, 18 Cox C. C. 15.

For an example of offense of a political character see *In re Ezeta*, 62 Fed. Rep. 972.

2. See *infra*, this section, *Offenses for Which Fugitive May or May Not Be Extradited—Offenses Not Enumerated in Treaty*.

3. See the various treaties as found in the several volumes of the United States Statutes at Large. See also *In re De Giacomo*, 12 Blatchf. (U. S.) 391.

4. *In re De Giacomo*, 12 Blatchf. (U. S.) 391. And see *In re Stupp*, 12 Blatchf. (U. S.) 501.

5. *In re De Giacomo*, 12 Blatchf. (U. S.) 391.

does not deprive either contracting nation of the power and right to exercise its own discretion in cases not coming within the terms of the treaty. It is only to the extent that the treaty imposes an obligation to surrender persons charged with particular offenses that there is any restriction placed upon the sovereign right of the nation in which the fugitive is found either to permit or to refuse to permit his arrest and return to the country from which he has fled. In relation to persons charged with offenses not named in the treaty, each government, as an incident of its sovereignty, may either grant or deny to the fugitive an asylum within its jurisdiction.¹

e. OFFENSES COMMITTED IN A THIRD COUNTRY. — The question as to whether a treaty providing for the extradition of a fugitive from justice charged with the commission of an offense within the "jurisdiction" of the demanding state includes the case of a subject of the demanding state who has committed a crime within the territory of a third independent state and has escaped to the territory of the state upon which the demand is made, has been elaborately argued on both sides. The accepted doctrine seems to be that such a case is not included.²

7. Who May Be Extradited — *a.* GENERALLY. — The extradition treaties entered into by the United States with foreign nations provide, with some diversities of language, for the extradition of persons charged with certain specified crimes committed within the jurisdiction of either contracting nation who shall seek an asylum or be found within the territories of the other.³

1. Surrender as a Matter of Comity for Offense Not Enumerated. — *Ex p.* Foss, 102 Cal. 347, 41 Am. St. Rep. 182. In this case the prisoner was surrendered by the Hawaiian government to be tried in California for the crime of embezzlement alleged to have been committed there. The treaty with Hawaii did not include embezzlement as one of the crimes for which extradition might be demanded. The warrant issued by the Hawaiian government for the arrest and delivery of the prisoner did not refer to the treaty, but the preliminary proceedings were in accordance with the rules prescribed by the treaty for the extradition of persons for crimes mentioned therein. The prisoner sought to be discharged under the writ of habeas corpus on the ground that his extradition was illegal, but his right to a discharge was denied. In so holding, De Haven, J., said: "The crime with which the petitioner is charged not being an extraditable offense under the treaty between the United States and the government of the Hawaiian Islands, it must be presumed that the surrender of the petitioner was made by the latter in the exercise of its own sovereign discretion and as an act of comity. This violated no right secured to the petitioner by the treaty referred to, as that treaty does not in terms or by necessary implication deny to that government the right to surrender, or deprive the United States of the right upon such surrender to receive into its custody, fugitives charged with offenses not enumerated in the treaty. The cases * * * cited and relied upon by petitioner do not sustain his contention upon this point. Those cases simply declare that when a defendant has been surrendered in pursuance of a treaty for trial upon a specific charge named therein, he cannot be placed upon trial for any other than the particular offense named in the extradition proceeding. This rule is well settled, but it has no application whatever to the case presented by the petitioner here."

2. Surrender for Offense Committed in Third Country. — *Allsop's Case*, Forsyth's Cas. 368.

In *In re Stupp*, 11 Blatchf. (U. S.) 124, the facts were as follows: The Prussian government, pursuant to an extradition treaty with the United States, demanded the extradition of one Joseph Stupp, *alias* Carl Vogt, on the charge that he, being a subject of the king of Prussia, at Brussels, in Belgium, "and within the legal jurisdiction of Prussia," had committed murder, arson, and robbery, and had escaped to the United States. There was at the time no extradition treaty between the United States and Belgium. The accused was arrested in the United States. The question as to the legality of his arrest came up before Judge Blatchford of the United States Circuit Court, who, after an elaborate argument of the case, held that the case came within the treaty with Prussia. Afterwards, upon application to the secretary of state for a warrant for the surrender of the prisoner, the secretary submitted the question to the attorney-general, who decided that the surrender could not lawfully be made, and the prisoner was finally discharged. For further proceedings against the accused under a subsequent treaty with Belgium, see *In re Stupp*, 12 Blatchf. (U. S.) 501.

3. Consult the several treaties.

Fugitive Already in Custody. — Under section 8 of the English Extradition Act of 1870 a fugitive criminal who is already in custody may be detained for an offense coming within the act although he was originally arrested without any warrant, as the word "apprehension" in this section includes "detention." Reg. v. Weil, 9 Q. B. Div. 701, 47 L. T. N. S. 630, 15 Cox C. C. 189.

Arrest of British Subject on British Vessel in American Waters. — A British subject, a fugitive from justice, seeking an asylum in the United States, upon application for extradition on behalf of the British government, may be arrested on board a British vessel within the

Whether the actual presence of the accused in the country demanding his extradition at the time of the commission of the alleged offense is necessary, would seem to depend upon the nature of the offense charged, and also upon the language of the particular treaty describing the person to be surrendered as a fugitive or otherwise.¹

b. CITIZENS OF ASYLUM COUNTRY — No Exemption to Citizens in Absence of Treaty Stipulation. — In the absence of any treaty stipulation providing otherwise it is immaterial whether the person whose extradition is demanded is a citizen of the country upon which the demand is made or a foreigner. The fact of citizenship secures no exemption from extradition.²

Citizens of Asylum State Exempted by Treaty. — In a number of the treaties entered into by the United States with foreign powers it is expressly provided that neither of the contracting parties shall be bound to deliver up its own citizens or subjects under the treaty stipulations, and under these provisions the United States will not surrender one of its citizens accused of the commission of a crime in another country.³ Nor can the United States demand the surrender of a citizen of a foreign state for a crime committed in the Union.⁴ It has been held, however, in Great Britain, that a provision in an extradition treaty that neither of the contracting parties shall be bound to surrender its own subjects implies that it may do so, and that the surrender of a subject is within the discretion of the state upon which the demand is made.⁵ But where the treaty provides that no subject of the asylum state shall be delivered up there can be no such surrender.⁶

c. CITIZENS OF A THIRD COUNTRY. — Under a treaty between two nations providing that the two governments shall reciprocally deliver up to each other any persons who, being accused of any of certain specified crimes committed within the jurisdiction of the demanding government, shall be found within the territory of the other government, except that neither of the contracting governments shall be bound to deliver up its own subjects, the power of extradition is not limited to the case of criminals who are subjects of the demanding government, but includes the case of all persons, of whatever nationality, who have committed any of the specified crimes within the jurisdiction of the demanding state except subjects of the state from which extradition is required.⁷

8. Trial of Prisoner in Certain Cases — *a.* FOR OFFENSE OTHER THAN THAT FOR WHICH HE WAS EXTRADITED — No Trial for Different Offense. — It is settled

territorial limits of the United States. *In re Newman*, 79 Fed. Rep. 622.

1. Actual Presence of Accused in Demanding State — When Unnecessary. — A person may be extradited from the United States to Canada for murder by poisoning, where death occurs in the latter country, although the poison was administered in the former country. *Sternman v. Peck*, 83 Fed. Rep. 690. It will be observed that the treaty between the United States and Great Britain provides for the extradition of persons charged with crimes committed in one country who shall "seek an asylum, or shall be found, within the territories of the other."

Where a person in Southampton wrote and sent certain letters containing alleged false pretenses to persons carrying on business in the German empire, thereby inducing them to part with certain goods and to deliver them to his order to certain persons living in Hamburg, and also sent certain alleged forged checks in payment, it was held that he was a fugitive criminal within the English Extradition Act of 1870 (33 & 34 Vict., c. 52), § 26, and was rightly committed by the police mag-

istrate to await the warrant of the secretary of state for his extradition. *Reg. v. Nillins*, 53 L. J. M. C. 157.

Where A in Amsterdam, by means of false representations made to B in Mayence by means of letters, and to B's agent in Amsterdam, induced B to deliver certain goods in Amsterdam, then sent the goods to England without paying for them, and absconded to England, it was held that he might be extradited on the application of the German government. *Reg. v. Jacobi*, 46 L. T. N. S. 595, note.

2. *Spear on Extradition* (2d ed.) 31; *Robbins's Case*, Whart. St. Tr. 401.

3. Consult the several treaties; *Ex p. McCabe*, 46 Fed. Rep. 363, and decisions of the secretary of state stated in the opinion.

4. See decisions of the secretary of state stated in *Ex p. McCabe*, 46 Fed. Rep. 363.

5. *In re Galwey*, [1896] 1 Q. B. 230, 73 L. T. N. S. 756, 18 Cox C. C. 213.

6. *Reg. v. Wilson*, 3 Q. B. Div. 42.

7. *Reg. v. Ganz*, 9 (1) B. Div. 93, 46 L. T. N. S. 592.

in *Great Britain* by statute,¹ and now in the *United States* by the decision of the United States Supreme Court and other courts, that a person who has been brought within the jurisdiction of a court by virtue of proceedings under an extradition treaty can be tried only for one of the offenses enumerated in the treaty, and for the particular offense with which he is charged in the proceedings for his extradition, until a reasonable time and opportunity have been given him after his release or trial upon such charge to return to the country from which he has been extradited.²

Conviction of Lesser Offense Included in Offense Specified. — A person extradited upon a particular charge cannot be convicted of a lesser offense although it may be included in the offense for which he was extradited.³

Waiver of Exemption Privilege. — It has been held that a person illegally held on a charge other than that for which he was extradited cannot waive the privilege of exemption secured to him under the extradition treaty, this ruling being based upon the ground that an individual cannot release the government from the obligations with reference to fugitives from justice which it has assumed towards other nations with which it has entered into extradition treaties.⁴

No Exemption from Trial for Nonextraditable Crimes Where Prisoner Was Not Surrendered under Treaty. — The principle exempting a fugitive criminal brought under an extradition treaty into the jurisdiction of the state in which the offense was committed, from prosecution for offenses other than that for which he was extradited, does not apply to the case of a person brought forcibly into the jurisdiction without invoking the aid of any treaty.⁵

1. *England.* — Pooley v. Whetham, 43 L. T. N. S. 267; *In re Woodall*, 16 Cox C. C. 478; English Extradition Act 1870, § 3, subsec. 2.

Canada. — *Compare* Reg. v. Cunningham, 18 Nova Scotia 31; Reg. v. Waddell, 25 New Bruns. 93.

2. **Prisoner Cannot Be Tried for Offense Other than That for Which He Was Extradited.** — U. S. v. Rauscher, 119 U. S. 407; *Cosgrove v. Winney*, (U. S. Supreme Ct. 1899) 19 Supreme Ct. Rep. 598; U. S. v. Watts, 8 Sawy. (U. S.) 370, 14 Fed. Rep. 130; *Ex p. Hibbs*, 26 Fed. Rep. 421; *Ex p. Coy*, 32 Fed. Rep. 911; *Com. v. Hawes*, 13 Bush (Ky.) 697, 26 Am. Rep. 242; *People v. Hannan*, 9 Misc. Rep. (N. Y. Supreme Ct.) 600; *People v. Stout*, 81 Hun (N. Y.) 336; *State v. Vanderpool*, 39 Ohio St. 273, 48 Am. Rep. 431; *Blandford v. State*, 10 Tex. App. 627. See also *In re Woodall*, 16 Cox C. C. 478. *Compare* the early decisions, U. S. v. Caldwell, 8 Blatchf. (U. S.) 131; U. S. v. Lawrence, 13 Blatchf. (U. S.) 295; *In re Miller*, 23 Fed. Rep. 32.

Decision of United States Supreme Court in U. S. v. Rauscher. — The previously vexed question as to whether a person brought within the jurisdiction of a court under an extradition treaty may be tried for an offense other than the one for which he was extradited has been set at rest in the *United States* by the decision of the United States Supreme Court in U. S. v. Rauscher, 119 U. S. 407. This case came up before the court on a certificate of division of opinion between the judges of the United States Circuit Court for the Southern District of New York. The prisoner, an officer on an American vessel, having been extradited under the treaty with Great Britain of 1842, upon a charge of murder on the high seas of one of the ship's crew, the question was raised whether the Circuit Court had jurisdiction to

try him upon an indictment charging him with cruel and unusual punishment of the same man, such punishment consisting of the identical acts proved in the extradition proceedings. It was held (Waite, C. J., dissenting) that the prisoner could not lawfully be so tried.

The Supreme Court of *Ohio* held in 1883 that a person extradited under a treaty could not be detained or prosecuted for another crime, whether included in the treaty or not, than the one for which he was surrendered, and that the treaty, being a part of the law of the land, may be invoked in the courts by any person so detained or prosecuted. *State v. Vanderpool*, 39 Ohio St. 273, 48 Am. Rep. 431.

3. *People v. Stout*, 81 Hun (N. Y.) 336. In this case it was held that a person extradited for the offense of assault in the first degree could not be convicted of an assault in the second degree. See also *People v. Hannan*, 9 Misc. Rep. (N. Y. Supreme Ct.) 600. To the same effect see U. S. v. Rauscher, 119 U. S. 407.

Trial as Principal of Person Extradited as Accessory. — Where a person whose extradition was asked for upon an information charging that he had counseled and advised another to commit a crime was extradited as an "accomplice" in the commission of the crime, and was held for trial as principal, the distinction between principals and accessories before the fact having been abolished in the forum by statute, it was held that he was not held for trial for an offense different from that for which he was extradited. *In re Rowe*, 77 Fed. Rep. 161.

4. *Ex p. Coy*, 32 Fed. Rep. 911.

5. *Ker v. People*, 110 Ill. 627, 51 Am. Rep. 706; *Ker v. Illinois*, 119 U. S. 436.

b. IN A CIVIL PROSECUTION. — The exemption of a person extradited under a treaty for the commission of a crime, from arrest and trial on any other charge than that for which he was extradited, extends also to arrest in civil cases, and a prisoner who has been brought to the United States by extradition proceedings cannot be arrested in a civil action, after being acquitted of the offense for which he was extradited, until after he has had a reasonable time to return to the country from which he was taken.¹ In *England* the contrary rule obtains.²

c. WHEN BROUGHT INTO JURISDICTION WITHOUT AUTHORITY OF LAW — *Court Will Not Inquire into Legality of Arrest.* — A court trying a person for a crime committed within its jurisdiction will not investigate the manner of his capture, in case he has fled to a foreign country and has been brought back into the jurisdiction of the court, although his capture has been plainly without authority of law. That the accused is in court is sufficient to require him to answer the indictment against him.³

No Right of Asylum Secured by Treaty. — A person who commits a crime in the United States and flees to a foreign country to escape punishment therefor does not thereby acquire in the latter country a right of asylum in which he will be protected by virtue of an extradition treaty between the two countries. And hence if a fugitive criminal be abducted forcibly from a foreign country to which he has escaped, and brought back to the United States for trial, without invoking the aid of an extradition treaty under which he might have been extradited, he cannot set up a plea to the jurisdiction on the ground that he has been deprived, without due process of law, of a right of asylum secured to him by the treaty.⁴ Such forcible abduction may constitute an offense against the dignity of the government from whose territory the prisoner was taken, and may, moreover, render the persons guilty liable to the prisoner for the violation of his right of personal liberty; but the former wrong is one for which the foreign government alone can complain, and neither it nor the trespass against the prisoner's right of personal liberty can be set up by the prisoner as a defense in a prosecution in the court into whose jurisdiction he is thus forcibly brought.⁵

Irregularities in Mode of Surrender No Defense. — A fugitive who has been surrendered by a foreign country under extradition proceedings cannot set up irregularities in the mode of his surrender as a defense to a prosecution for his crime.⁶

II. INTERSTATE EXTRADITION — 1. Definition. — Interstate extradition, or,

1. *In re Reinitz*, 39 Fed. Rep. 204.

In *Bacharach v. Lagrave*, 1 Hun (N. Y.) 689, it was held unanimously by the New York Supreme Court that a person extradited for a crime could not, while being held for trial on that charge, be arrested in a civil action. In the Court of Appeals (59 N. Y. 110) this decision was reversed by a divided court. The decision of the Court of Appeals, rendered in 1874, was not based upon any grounds peculiar to an arrest in a civil suit, but upon grounds applicable alike to civil and criminal arrest, without distinction. As these grounds, so far as applying to arrest in criminal cases, have been disapproved since the case of *U. S. v. Rauscher*, 119 U. S. 407, the decision of the Court of Appeals in the *Lagrave* case cannot now be regarded as authority for a civil arrest. But see *Martin v. Woodhall*, 56 N. Y. Super. Ct. 439. See also *Benninghoff v. Os- well*, 37 How. Pr. (N. Y. Supreme Ct.) 235; *Lagrave's Case*, 14 Alb. Pr. N. S. (N. Y. Supreme Ct.) 333, note.

2. If a warrant under the Extradition Act is obtained not for the *bona fide* purpose of pun-

ishing a person for a crime, but with the indirect object of making him amenable to an attachment in a civil action, the court will relieve against such an abuse of process. *Pooley v. Whetham*, 15 Ch. Div. 435, 43 L. T. N. S. 267.

3. *Ex p. Scott*, 9 B. & C. 446, 17 E. C. L. 416; *Ker v. People*, 110 Ill. 627, 51 Am. Rep. 706.

4. *No Right of Asylum Secured by Treaty.* — *Ker v. People*, 110 Ill. 627, 51 Am. Rep. 706, 119 U. S. 436.

In *State v. Brawster*, 7 Vt. 118, it was held that an offender who had escaped to Canada and had been brought back against his will, and without the assent of the Canadian authorities, might be tried and punished for the offense committed in the United States. For a similar case see *People v. Rowe*, 4 Park. Cr. Rep. (N. Y. Super. Ct.) 253.

5. *Ker v. People*, 110 Ill. 627, 51 Am. Rep. 706, 119 U. S. 436; *People v. Rowe*, 4 Park. Cr. Rep. (N. Y. Super. Ct.) 253.

6. *Hall v. Patterson*, 45 Fed. Rep. 352. See also *Kelly v. State*, 13 Tex. App. 158.

as it is sometimes called, rendition,¹ is the surrender of fugitives from justice by one of the states of the Union to another, upon its demand, in pursuance of the provisions of the Constitution and laws of the United States.²

2. Extradition Prior to the Adoption of the Constitution. — The practice of delivering up fugitives from justice from one jurisdiction to another has obtained in this country from an early period. As early as 1643 the plantations under the government of Massachusetts, the plantation under the government of New Plymouth, the plantations under the government of Connecticut and the government of New Haven, and the plantations in combination therewith entered into a compact between themselves, recognizing the right of extradition, and agreeing to deliver up to each other, on certain terms, fugitives from justice.³

Under Articles of Confederation. — So also provision for the extradition of fugitives from justice was made in the articles of confederation adopted by the American colonies in 1777.⁴ It will thus be seen that the provision of the Federal Constitution for the interstate extradition of fugitives from justice does not assert a power not previously exercised by the states, but merely brings the regulation of a pre-existing right within the domain of national legislation.⁵

3. The Constitutional Provision. — The basis of interstate extradition is found in the provision of the United States Constitution that "a person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up to be removed to the state having jurisdiction of the crime."⁶ It has been held that the power of the chief executive of a state to extradite a person therefrom is derived solely from this clause of the Constitution and the act of Congress passed in pursuance thereof, and that he cannot exercise this power on the ground of public policy or of comity.⁷ As has been seen, however, this constitutional provision is not an assertion of a power not before exercised by the states, but merely regulates such right and renders obligatory upon the states that which was before merely a matter of discretion and comity.⁸

4. Extradition Laws — *a.* **THE ACT OF CONGRESS.** — The constitutional provision for interstate extradition is not self-executing, and the duty of providing by law the regulations necessary to carry it into effect devolved upon Congress,⁹ which in 1793 passed an act on the subject which is substantially

1. See *Lascelles v. Georgia*, 148 U. S. 537.

2. See *Bouvier L. Dict.*, tit. Extradition.

3. *Winthrop's History of Massachusetts*, vol. 2, pp. 121, 126, quoted in *Kentucky v. Dennison*, 24 How. (U. S.) 66; *Drinkall v. Spiegel*, 68 Conn. 441.

4. The Articles of Confederation, art. 4, provided that "if any person guilty of or charged with treason, felony, or other high misdemeanor in any state shall flee from justice and be found in any of the United States, he shall, upon demand of the governor or executive power of the state from which he fled, be delivered up and removed to the state having jurisdiction of his offense."

5. See *infra*, this section, *The Constitutional Provision*.

6. **Constitutional Provision Relating to Interstate Extradition.** — Const. U. S., art. 4, § 2. See *Matter of Romaine*, 23 Cal. 585.

The provision of the Constitution of the United States requiring the surrender of fugitives from justice is in the nature of a treaty stipulation between the states of the Union, and it is equally binding upon each state and all of the officers thereof for its faithful execu-

tion as though it were a part of the constitution of each state, whether Congress had passed laws relating thereto or not. *Hibler v. State*, 43 Tex. 197.

Without the constitutional provision the states would have sustained relations to each other with reference to the extradition of fugitives from justice analogous to those existing between independent nations. *State v. Hall*, 115 N. Car. 811, 44 Am. St. Rep. 501.

7. *Ex p. Morgan*, 20 Fed. Rep. 299.

8. *Matter of Fetter*, 23 N. J. L. 311; *Dows's Case*, 18 Pa. St. 37. See the preceding subdivision.

In *Matter of Fetter*, 23 N. J. L. 311, *Green, C. J.*, said: "This clause of the constitution does not contain a grant of power. It confers no right. It is the regulation of a previously existing right. It makes obligatory upon every member of the confederacy the performance of an act which previously was of doubtful obligation."

9. The duty of providing by law the regulations necessary to carry the provision into execution, from the nature of the duty and the object in view, devolved upon Congress, for

preserved in the Revised Statutes of the United States.¹

Statute Constitutional. — The constitutionality of this statute, in so far as it relates to the extradition of fugitives from the territories of the United States, has been questioned on the ground that, the territories not being designated in the Constitution, Congress had no authority to provide for and prescribe the manner of the delivery of fugitives from justice as to such territories.² It has been authoritatively decided, however, that the act is constitutional,³ and that Congress had power to enact such a law so far as the territories were concerned, if not under the provision of the Constitution for interstate extradition, clearly under the clause empowering Congress to make "all needful rules and regulations" in respect to the territories.⁴

b. STATE LEGISLATION. — That a state has the power to enact laws providing for the extradition of fugitives from justice to and from other states, where such laws are not inconsistent with the Constitution and laws of the United States, seems to be unquestionable, and such laws are to be found in the statutes of most if not all of the states of the Union.⁵

Arrest Before Demand Made. — Thus many of the states have provided by statute for the arrest and detention of a fugitive from justice, preceding a demand for his surrender by the executive authority of the state or territory where the offense was committed, and allowing a reasonable time in which his extradition may be demanded.⁶ And such laws have been held constitutional.⁷

5. Status of the Territories in Respect to Extradition. — Although the provision of the Constitution in reference to interstate extradition does not in terms include the case of fugitives to or from the territories of the United States, yet under the act of Congress states and territories stand upon the same footing in respect to extradition, and the governor of a territory has the same rights and is under the same obligations in respect to the demand and surrender of fugitives from justice as the governor of a state.⁸

Indian Nations, being neither states nor territories, do not come within the provisions of the extradition law.⁹

6. Extradition to and from the District of Columbia — Act of Congress Providing for Extradition from District. — Inasmuch as the District of Columbia is not a state, it

if it were left to the states, each state might require different proof to authenticate the judicial proceeding upon which the demand was founded, and the governor of a state where a fugitive was found, his duty being merely ministerial, could not lawfully issue a warrant of arrest without a law of the state or of Congress to authorize it. *Kentucky v. Denison*, 24 How. (U. S.) 66. See also *Roberts v. Reilly*, 116 U. S. 80.

1. Rev. Stat. U. S., §§ 5278, 5279.

2. *State v. Loper*, Ga. Dec. (pt. ii.) 33. See also *Matter of Romaine*, 23 Cal. 585.

3. *Prigg v. Com.*, 16 Pet. (U. S.) 539.

4. *Ex p. Morgan*, 20 Fed. Rep. 298.

5. *Ex p. State*, 73 Ala. 503, 49 Am. Rep. 63; *Robinson v. Flanders*, 29 Ind. 10; *Com. v. Tracy*, 5 Met. (Mass.) 536, *distinguishing Prigg v. Com.*, 16 Pet. (U. S.) 539; *Com. v. Hall*, 9 Gray (Mass.) 262; *Ex p. Ammons*, 34 Ohio St. 518; *Ex p. Butler*, (Pa. C. Pl. 1878) 18 Alb. L. J. 369. See *Ex p. McKean*, 3 Hughes (U. S.) 23. Compare, as to the constitutionality of such statutes, opinion in *Degant v. Michael*, 2 Ind. 396.

6. Consult the various state statutes.

7. **Statutes Providing for Arrest Before Demand Made Constitutional.** — *Ex p. Cubreth*, 49 Cal. 436; *Ex p. Rosenblat*, 51 Cal. 285; *Kurtz v. State*, 22 Fla. 36, 1 Am. St. Rep. 173. See also *Ex p. White*, 49 Cal. 433.

A legislature may authorize the arrest and detention of an alleged fugitive from the justice of another state, to await a requisition from the governor, and may impose any conditions, which must be strictly complied with. *Ex p. Rosenblat*, 51 Cal. 285.

8. Extradition to and from Territories. — *Ex p. Reggel*, 114 U. S. 642; *Ex p. Morgan*, 20 Fed. Rep. 298.

"Although the constitutional provision in question does not, in terms, refer to fugitives from the justice of any state who may be found in one of the territories of the United States, the Act of Congress has equal application to that class of cases, and the words 'treason, felony, or other crime' must receive the same interpretation when the demand for the fugitive is made, under that act, upon the governor of a territory as when made upon the executive authority of one of the states of the Union." *Ex p. Reggel*, 114 U. S. 642.

In *The Matter of Romaine*, 23 Cal. 585, the court held that power to surrender a fugitive upon the requisition of the governor of a territory was not conferred by the constitution, but that this power might be exercised under the act of the state legislature so providing.

9. The Cherokee Nation is neither a state nor a territory in the sense of the clause of the Constitution and the Act of Congress relating to interstate extradition, and hence the gov-

does not come within the article of the Constitution and the Act of Congress relating to interstate extradition, and Congress has therefore passed a separate law relating to the District, in which it is provided that "in all cases where the Constitution or laws of the United States provide that criminals and fugitives from justice * * * shall be delivered up, the chief justice of the said District shall * * * cause to be apprehended and delivered up such criminal [or] fugitive from justice * * * who shall be found within the District, in the same manner and under the same regulations as the executive authority of the several states are required to do" by the provisions of sections 5278 and 5279 of the Revised Statutes of the United States, and that "all executive and judicial officers are hereby required to obey all lawful precepts or other process issued for that purpose, and to be aiding and assisting in such delivery."¹

Extradition to District for Crimes Committed Therein. — It will be observed that this statute makes no provision for the return to the District of persons who have committed offenses there and have fled to other jurisdictions. It has been held, however, that such offenders may, under section 1014 of the Revised Statutes, be returned to the District for trial.²

7. Extraditable Crimes. — The constitutional provision for the surrender by one state to another of persons charged with "treason, felony, or other crimes" embraces all crimes and offenses of whatever grade made punishable by the laws of the state wherein the act was done,³ whether made so by common law or by statute.⁴ And when it appears that the fugitive is properly charged with a crime under the laws of the demanding state it is immaterial to inquire whether or not the offense charged is a crime under the laws of the state upon which the demand is made.⁵

8. Who May Be Extradited — *a. MUST BE A PERSON CHARGED WITH CRIME.* — Under the constitutional provision for the delivery up of "a person charged in any state" with an offense, it is necessary that a person whose extradition is demanded should be charged in the state in which the offense is alleged to have been committed with the commission of such offense; this charge to be made by some court, magistrate, or officer, in the form of an indictment, information, or other accusation known to the laws of that state.⁶

b. MUST BE A FUGITIVE FROM JUSTICE — (1) *Generally.* — The governor of a state or territory is not required to surrender a person charged with crime unless it be made to appear in some proper way that he is a fugitive from justice.⁷ The accused is entitled to insist upon proof that he was within the

error of a state is not authorized under the Constitution and laws of the United States to issue a warrant for the arrest of a fugitive upon the demand of the chief of the Cherokee nation. *Ex p. Morgan*, 20 Fed. Rep. 298.

1. Act of Mar. 3, 1801 (2 U. S. Stat. at L. 115); Rev. Stat. U. S., relating to Dist. of Columbia, § 843.

2. *In re Buell*, 3 Dill. (U. S.) 116. See *Matter of Dana*, 7 Ben. (U. S.) 1.

3. **Extraditable Crimes.** — *Kentucky v. Denison*, 24 How. (U. S.) 66; *Taylor v. Taintor*, 16 Wall. (U. S.) 366; *Ex p. Reggel*, 114 U. S. 642; *Lascelles v. Georgia*, 148 U. S. 537; *Morton v. Skinner*, 48 Ind. 123.

The Term "Other Crime" means any offense indictable by the laws of the demanding state. *Matter of Leary*, 10 Ben. (U. S.) 197; *Brown's Case*, 112 Mass. 409, 17 Am. Rep. 114; *Matter of Voorhees*, 32 N. J. L. 141; *Matter of Clark*, 9 Wend. (N. Y.) 212; *Leary's Case*, 6 Abb. N. Cas. (U. S. Dist. Ct.) 43; *People v. Brady*, 56 N. Y. 182; *People v. Donohue*, 34 N. Y. 438; *State v. Stewart*, 60 Wis. 587, 50 Am. Rep. 388. See also *State v. Hudson*, 2 Ohio N. P.

1, 2 Ohio Dec. 41; *In re Greenough*, 31 Vt. 279.

4. *Matter of Hughes*, Phil. L. (61 N. Car.) 57; *In re Greenough*, 31 Vt. 279.

5. *Johnston v. Riley*, 13 Ga. 97; *Matter of Hayward*, (N. Y. Super. Ct. 1848) 1 Am. L. J. N. S. 271. See also *Opinion of Judges of Maine Supreme Ct.*, 24 Am. Jur. 226.

6. *Ex p. McKean*, 3 Hughes (U. S.) 23; *State v. Hufford*, 28 Iowa 391; *Smith v. State*, 21 Neb. 552; *Forbes v. Hlicks*, 27 Neb. 111; *Ex p. Lorraine*, 16 Nev. 63; *People v. Brady*, 56 N. Y. 182.

An Unsatisfied Judgment of Conviction constitutes a "charge" within the meaning of the Constitution; thus a person who has been convicted of an offense and imprisoned and makes his escape before the expiration of his term is still charged with the crime. *Drinkall v. Spiegel*, 68 Conn. 441.

7. **Accused Must Be a Fugitive from Justice.** — *Ex p. Reggel*, 114 U. S. 642; *Roberts v. Reilly*, 116 U. S. 80; *Ex p. Smith*,³ McLean (U. S.) 121; *In re Jackson*, 2 Flipp. (U. S.) 183; *Ex p. McKean*, 3 Hughes (U. S.) 23; *Hartman*

demanding state at the time when he is alleged to have committed the crime charged, and subsequently withdrew from its jurisdiction so that he could not be reached by its criminal process.¹

(2) *Who Is a Fugitive from Justice* — *aa. GENERALLY.* — A fugitive from justice is a person who commits a crime within a state and withdraws himself from its jurisdiction without waiting to abide the consequences of his act.² To be a fugitive from justice in the sense of the federal law on the subject it is not necessary that the party charged should have left the state in which the crime is alleged to have been committed, after an indictment has been found against him, or for the purpose of avoiding a prosecution anticipated or begun; but it is sufficient if he has, within a state, committed an act which, by its laws, constitutes a crime, and if when he is sought to be subjected to its criminal processes to answer for his offense he has left its jurisdiction, and is found within the territory of another state.³

The Motives That Induced the Withdrawal from the State are immaterial where a person who has committed a crime therein departs without waiting to abide the consequences.⁴

But the Mere Fact that the Accused Has Left the Jurisdiction of the state in which the crime was committed and is found in another state would not, it seems, be of itself sufficient to constitute him a fugitive from justice. It must further appear that his removal from the state in which the act was done was for the purpose of avoiding prosecution therefor; and in order to determine the question whether he has fled in order to escape justice all the circumstances in relation to the commission of the offense, the subsequent conduct of the accused,

v. Aveline, 63 Ind. 344, 30 Am. Rep. 217; *State v. Hall*, 115 N. Car. 811, 44 Am. St. Rep. 501; *Ex p. Swearingen*, 13 S. Car. 74.

1. *Ex p. Reggel*, 114 U. S. 642.

2. *Who Is a Fugitive from Justice.* — *In re White*, 55 Fed. Rep. 54; *Matter of Voorhees*, 32 N. J. L. 141; *State v. Hall*, 115 N. Car. 811, 44 Am. St. Rep. 501; *Hibler v. State*, 43 Tex. 197.

A person is not a fugitive from justice in the sense of the *California* statutes unless at the time of his arrest in that state there is a pending prosecution against him for the alleged crime in the state having jurisdiction of the offense. *Ex p. White*, 49 Cal. 433.

A person who commits a crime in one state and goes into another state cannot be tried for the offense in the latter state, but is to be regarded as a fugitive from justice. *People v. Gardner*, 2 Johns. (N. Y.) 477; *Simmons v. Com.*, 5 Binn. (Pa.) 617.

Prisoner Released on Parole. — A person imprisoned for crime who is permitted to leave the place of confinement on parole, and breaks his parole and flees to another state, is a fugitive from justice, and may be extradited for the offense for which he was imprisoned. *Drinkall v. Spiegel*, 68 Conn. 441.

Presence of Accused in Asylum State Procured by Fraud. — Where a person committed a crime in Pennsylvania and went to Canada, and afterwards was induced by persons interested in his conviction to come into New York, without force or violence, but by means of false representations that Youngstown, N. Y., was in Canada, and he was there arrested, and a requisition for his surrender was made by the governor of Pennsylvania upon the governor of New York, who issued a warrant for his delivery to the agent of the former state, whereupon the prisoner asked for a

revocation of the warrant and a discharge on the ground that he was not a fugitive, his presence having been obtained by fraud, it was held that he was a fugitive, and should be surrendered. *Ex p. Brown*, 28 Fed. Rep. 653.

3. *Roberts v. Reilly*, 116 U. S. 80; *Ex p. Brown*, 28 Fed. Rep. 653; *In re White*, 55 Fed. Rep. 54; *In re Bloch*, 87 Fed. Rep. 981; *State v. Richter*, 37 Minn. 436; *In re Sultan*, 115 N. Car. 57, 44 Am. St. Rep. 433.

The fact that a person is charged with crime in one state and is afterwards found in another is *prima facie* evidence that he is a fugitive. *Drinkall v. Spiegel*, 68 Conn. 441. In *People v. Pinkerton*, 17 Hun (N. Y.) 199, *affirmed* 77 N. Y. 245, it was held that the evidence in such case was conclusive.

If a man within a state secretly commits a crime and suddenly departs, the crime not being discovered until months after his departure, though he may have left for purposes other than that of fleeing from the justice of the state against which he had offended, he may be proceeded against as a fugitive from justice. *Adams' Case*, (N. Y. Super. Ct. 1844) 7 Law Rep. 386.

4. *Motives in Leaving State Immaterial.* — *In re White*, 55 Fed. Rep. 54; *State v. Richter*, 37 Minn. 436; *In re Sultan*, 115 N. Car. 57, 44 Am. St. Rep. 433.

The motives or purposes of the party in leaving the state where the crime was committed are entirely immaterial; all that is necessary to constitute him a fugitive from justice is that, being within a state, he there committed a crime against its laws, and when required to answer its criminal process he has left its jurisdiction and is found in the territory of another state. *State v. Richter*, 37 Minn. 436.

the time and manner of his leaving the state, etc., should be inquired into.¹

Return of Accused to State of His Domicil. — A person who goes from the state in which he lives to another state where he commits a crime, and then returns to the state of his domicil before there has been a reasonable opportunity to prosecute him after the facts become known, is a fugitive from justice.²

bb. **MUST HAVE BEEN ACTUALLY PRESENT IN DEMANDING STATE.** — In order to be a fugitive from justice it is essential that the accused should have been actually present in the state in which the offense is alleged to have been committed, at the time of its commission, and to have afterwards withdrawn from the jurisdiction of the state. A mere constructive presence in the demanding state and constructive flight therefrom is not sufficient.³ Thus a resident of one state who defrauds persons living in another state by means of false pretenses and representations made in a letter,⁴ or in a state other than the demanding state, to an agent of the persons defrauded,⁵ cannot be delivered upon the demand of the state in which the persons injured reside, as a fugitive from the justice of that state. It is not necessary, however, that the accused should have been present in the demanding state at the time of the consummation of the alleged offense; departure from the jurisdiction after the commission of the act in furtherance of the crime subsequently consummated is a flight from

1. See opinion of Governor Fairfield in the case of Certain Fugitives, (Me.) 24 Am. Jur. 226, quoted in Spear on Extradition (3d ed.) 381; opinion of Governor Cullom in Goffigan & Merrick's Case, Spear on Extradition (3d ed.) 385, 713. See also Patterson's Case, Spear on Extradition (3d ed.) 384; Washington Post, Dec. 7, 1877.

2. *In re Keller*, 36 Fed. Rep. 681; *In re Roberts*, 24 Fed. Rep. 132; *Kingsburg's Case*, 106 Mass. 223; *In re Sultan*, 115 N. Car. 57, 44 Am. St. Rep. 433. See also Adams' Case, (N. Y. Super. Ct. 1844) 7 Law Rep. 386.

The Term "Flee from Justice" embraces not only a case where a person, after committing a crime, actually flees, in the literal sense of that term, from the state where such crime was committed, but also a case where a citizen of one state commits a crime in another state and then returns to his home. *Ex p. Swearingen*, 13 S. Car. 74; *In re Hess*, 5 Kan. App. 763, citing 7 AM. AND ENG. ENCYC. OF LAW (1st ed.) 646. In the case last cited the prisoners, who resided in Oklahoma, stole a calf in that territory and drove it over into Kansas, in which state bringing stolen property into the state is made larceny by statute. The prisoners then returned to Oklahoma, but upon the requisition of the governor of Kansas were taken back to that state. It was held that they were properly extradited as fugitives from justice.

3. **Actual Presence of Accused Necessary.** — *Ex p. Smith*, 3 McLean (U. S.) 121; *Ex p. State*, 73 Ala. 503, 49 Am. Rep. 63; *Hartman v. Aveline*, 63 Ind. 344, 30 Am. Rep. 217; *Jones v. Leonard*, 50 Iowa 106, 32 Am. Rep. 116; *Matter of Mitchell*, 4 N. Y. Crim. Rep. 596; *State v. Hall*, 115 N. Car. 811, 44 Am. St. Rep. 501, citing 7 AM. AND ENG. ENCYC. OF LAW (1st ed.) 646; *Wilcox v. Nolze*, 34 Ohio St. 520.

A person who while in one state shoots and kills another person across the line in another state cannot be extradited as a fugitive from the justice of the latter state. *State v. Hall*, 115 N. Car. 811, 44 Am. St. Rep. 501.

4. *Tennessee v. Jackson*, 36 Fed. Rep. 258; *Hartman v. Aveline*, 63 Ind. 344, 30 Am. Rep. 217; *Jones v. Leonard*, 50 Iowa 106, 32 Am. Rep. 116. In this case Seevers, J., said: "It is difficult to see how one can flee who stands still. That there must be an actual fleeing we think is clearly recognized by the Constitution of the United States. The words 'who shall flee' do not include a person who never was in the country from which he is said to have fled. * * * He must have been in the state, committed the crime, and fled."

5. *Ex p. State*, 73 Ala. 503, 49 Am. Rep. 63. In this case the governor of Pennsylvania demanded of the governor of Alabama the extradition of the accused as a fugitive from justice, the crime charged being that of obtaining goods by false pretenses. It appeared that the accused was not in Pennsylvania at the time of the commission of the alleged offense, and that the goods were obtained by purchase from an agent of the prosecutor in New York, to whom the false representations, if any, were made, and that he had never fled from Pennsylvania. It was held that the accused was not a fugitive from justice. In so holding Somerville, J., said: "It is clear to our mind that crimes which are not actually, but are only constructively, committed within the jurisdiction of the demanding state do not fall within the class of cases intended to be embraced by the Constitution or Act of Congress. Such at least is the rule unless the criminal afterwards goes into such state and departs from it, thus subjecting himself to the sovereignty of its jurisdiction. The reason is not that the jurisdiction to try the crime is lacking, but that no one can in any sense be alleged to have 'fled' from a state into the domain of whose territorial jurisdiction he has never been corporally present since the commission of the crime. And only this class of persons are embraced within either the letter or spirit of the Constitution, the purpose of which was to make the extradition of fugitive criminals a matter of duty, instead of mere comity between the states."

justice within the meaning of the law.¹

cc. PERSON BROUGHT INTO STATE UNDER EXTRADITION PROCEEDINGS AND DEMANDED BY THIRD STATE. — It has been held that where a person has been brought into a state from another state under extradition proceedings, and has been discharged, he may be rearrested and surrendered to a third state upon its demand as a fugitive from its justice, without being allowed an opportunity to leave the state to which he had been extradited.² The correctness of this decision has been questioned by high authority, chiefly upon the ground that in order to constitute a person a fugitive from justice it is necessary not only that he should have fled from the state demanding his surrender, but also that he should have fled to the state upon which the demand is made, and that a person brought into a state by legal process, as in the case above stated, cannot be said to have fled to that state.³

(3) *Whether Accused Is a Fugitive a Question for Executive.* — The governor upon whom the demand is made must determine for himself, at least in the first instance, whether the person charged is in fact a fugitive from justice. And he does not fail in duty if he makes it a condition precedent to the surrender of the accused that it be shown to him, by competent proof, that the accused is in fact a fugitive from the justice of the demanding state.⁴

No Particular Mode of Proof that the person whose extradition is demanded is a fugitive from justice is prescribed by the Act of Congress.⁵

c. PERSON IN CUSTODY OF ASYLUM STATE — **Postponement of Surrender.** — When the fugitive whose surrender is demanded is held in custody in the state upon which the demand is made, on account of an offense committed therein, the duty to surrender is postponed until the existing charges against the prisoner have been satisfied.⁶ And the rule is the same where the fugitive is held under civil process.⁷

Waiver of Jurisdiction by Asylum State. — The state upon which the demand is made may, however, waive its right to try the accused, and surrender him to the demanding state, thereby losing jurisdiction.⁸

d. EXTRADITION OF ESCAPED PRISONER TO SERVE OUT UNEXPIRED SENTENCE. — A person who has been convicted of crime and imprisoned and makes his escape to another state may be extradited to serve out his unexpired sentence.⁹

9. Duty and Authority of Executive in Respect to Arrest and Delivery of Fugitive — *a. GENERAL CHARACTER OF EXECUTIVE DUTY* — **No Discretion in**

1. *In re Cook*, 49 Fed. Rep. 833; *In re Sultan*, 115 N. Car. 57, 44 Am. St. Rep. 433.

A person who, while temporarily in one state, by means of false pretenses procures goods to be shipped to him in the state of his domicil, and returns home before the goods are shipped, is a fugitive from justice. *In re Sultan*, 115 N. Car. 57, 44 Am. St. Rep. 433.

2. *Hackney v. Welsh*, 107 Ind. 253, 57 Am. Rep. 101; *People v. Sennott*, (Ill. 1879) 20 Alb. L. J. 230; *Chicago Leg. N. Dec.* 13, 1879. Compare *Daniel's Case*, decided in the Court of Quarter Sessions in Philadelphia in 1848, reported in *Binns's Justices* (8th ed.) 439.

3. *Spear on Extradition* (3d ed.) 558 *et seq.*

4. *Ex p. Reggel*, 114 U. S. 642; *Roberts v. Reilly*, 116 U. S. 80; *Cook v. Hart*, 146 U. S. 183. See also *infra*, this section, *Duty and Authority of Executive in Respect to Arrest and Delivery of Fugitive*.

5. *Ex p. Reggel*, 114 U. S. 642; *Ex p. Sweeningen*, 13 S. Car. 74.

6. **Person Held in Custody of Asylum State.** — *Taylor v. Taintor*, 16 Wall. (U. S.) 366; *Matter of Briscoe*, 51 How. Pr. (N. Y. Supreme

Ct.) 422; *Matter of Troutman*, 24 N. J. L. 634; *State v. Allen*, 2 Humph. (Tenn.) 258; *Ex p. Hobbs*, 32 Tex. Crim. Rep. 312, 40 Am. St. Rep. 782, *citing* 7 AM. AND ENG. ENCYC. OF LAW (1st ed.) 643.

7. *Matter of Troutman*, 24 N. J. L. 634; *Matter of Briscoe*, 51 How. Pr. (N. Y. Supreme Ct.) 422.

The fugitive must be actually under arrest before the demand for extradition in order to come within the rule stated in the text. *Ex p. Rosenblat*, 51 Cal. 285; *Harriott's Petition*, 18 R. I. 12.

8. If the fugitive is surrendered, the state whence he is removed can no longer require his appearance before her tribunals, and all obligations which she has taken to secure that result thereupon at once, *ipso facto*, lose their binding effect. *Taylor v. Taintor*, 16 Wall. (U. S.) 366, *affirming* *Taintor v. Taylor*, 36 Conn. 242, 4 Am. Rep. 58; *In re Hess*, 5 Kan. App. 763, *citing* 7 AM. AND ENG. ENCYC. OF LAW (1st ed.) 643.

9. *Drinkall v. Spiegel*, 68 Conn. 441. See also *Dolan's Case*, 101 Mass. 219.

Executive. — The act of Congress in regard to interstate extradition provides that when a proper demand is made on the executive authority of any state or territory to which a fugitive from justice has fled, and upon the compliance with certain requirements therein specified, "it shall be the duty of the executive authority to cause the fugitive to be arrested and secured, and delivered to the agent of the demanding state."¹ And it has been held that interstate extradition is not a matter of comity or discretion on the part of the state upon which the demand is made, but is an absolute duty imposed by the Constitution and laws of the United States, leaving to the governor no right of discretion to refuse to issue his warrant when a proper requisition for the surrender of a fugitive is made upon him and the requisite evidence produced.²

Executive Duty an Imperfect Obligation. — But at the same time the duty to deliver is a mere moral obligation imposed upon the executive, and in case of his refusal to make the surrender there is no power in the federal government to compel him to perform that duty.³

b. REVOCATION OF EXECUTIVE WARRANT. — Where a warrant for the extradition of a fugitive from justice has been issued in an improper case it may be revoked by the governor, whether issued by himself or by his predecessor, although the fugitive may have been arrested and delivered into the custody of the demanding state.⁴

c. ISSUE OF SECOND WARRANT. — If after a fugitive has been delivered up to the demanding state, and released on bail, he forfeits his bond and becomes again a fugitive from justice, the governor by whom he was delivered up in the first instance may issue a second warrant for his arrest and delivery.⁵ So also where the fugitive is delivered to the agent of the demanding state and is taken by him into that state, and then escapes from the agent's custody and returns to the asylum state, the governor of the latter state may issue a

1. Rev. Stat. U. S., § 5278.

2. **Duty of Executive Absolute.** — *Lascelles v. Georgia*, 148 U. S. 537; *Johnston v. Riley*, 13 Ga. 97; *Lascelles v. State*, 90 Ga. 347, 35 Am. St. Rep. 216; *State v. Toole*, 69 Minn. 104; *Matter of Voorhees*, 32 N. J. L. 141; *Leary's Case*, 6 Abb. N. Cas. (U. S. Dist. Ct.) 43; *Work v. Corrington*, 34 Ohio St. 64, 32 Am. Rep. 345; *State v. Anderson*, 1 Hill L. (S. Car.) 327; *Ex p. Swearingen*, 13 S. Car. 74.

The duty of the governor of a state, upon proper demand, to cause the fugitive to be arrested and delivered to the demanding state, is not a discretionary but a mere ministerial duty. *Kentucky v. Dennison*, 24 How. (U. S.) 66; *Matter of Voorhees*, 32 N. J. L. 141.

"The governor of a state, in issuing his warrant of extradition of a fugitive from justice, acts in an executive and not in a judicial capacity. He is not permitted to try the question whether the accused is guilty or not guilty; he is not to regard a departure from the prescribed forms for making the application, or as to the manner of charging the crime, in any matter not of the substance; and he is not to be controlled by the question whether the offense is or is not a crime in his own state, the inquiry being whether the act is punishable as a crime in the demanding state. Nor have the courts larger powers, in any of these respects, than the governor." *Per* Okey, J., in *Wilcox v. Nolze*, 34 Ohio St. 520.

Mississippi. — In *Ex p. Devine*, 74 Miss. 715, it was held that the power of the executive to extradite fugitives from justice is conferred and the conditions of its exercise prescribed

by Code 1892, § 2162, and special statutory authority, even when applied to the acts of public officers, must be strictly followed and all the prescribed formalities observed. *Citing* 7 AM. AND ENG. ENCYC. OF LAW (1st ed.) 630.

3. **No Power to Compel Executive to Deliver Fugitive.** — *Kentucky v. Dennison*, 24 How. (U. S.) 66; *Taylor v. Taintor*, 16 Wall. (U. S.) 366; *Matter of Manchester*, 5 Cal. 237; *State v. Toole*, 69 Minn. 104. See also *Work v. Corrington*, 34 Ohio St. 64, 32 Am. Rep. 345.

A writ of certiorari will not be issued against a governor to compel the production of the papers on which he issued his warrant. *Matter of Leary*, 10 Ben. (U. S.) 197, 6 Abb. N. Cas. (N. Y.) 43.

4. **Executive Warrant May Be Revoked.** — *Work v. Corrington*, 34 Ohio St. 64, 32 Am. Rep. 345; *Carroll's Case*, Chicago Leg. N., Sept. 28, 1878; *Knowlton's Case*, (Colo. 1883) 5 Crim. L. Mag. 250; *Goffigan & Merrick's Case*, reported in *Spear on Extradition* (3d ed.) 440, 713. See also opinion of Gov. Fairfield, 24 Am. Jur. 226, *Spear on Extradition* (3d ed.) 381.

The governor of a state may revoke his warrant issued for the arrest and delivery of a fugitive at any time before he is removed from the state. *State v. Toole*, 69 Minn. 104.

5. *Matter of Hughes*, Phil. L. (61 N. Car.) 57.

Res Adjudicata. — The principle of *res adjudicata* cannot be applied to a case where a fugitive from justice is arrested a second time on a second warrant issued by the governor of a state, although the offense charged in the warrants is the same. *Kurtz v. State*, 22 Fla. 36, 1 Am. St. Rep. 173. See also *Com. v. Hall*, 9 Gray (Mass.) 262.

second warrant for his arrest without a second requisition by the executive of the demanding state.¹

d. POWER OF COURTS TO REVIEW ACTION OF EXECUTIVE. — The governor of a state is invested by law with a discretion to issue a warrant for the arrest of a fugitive from the justice of another state upon the requisition of the executive thereof, and to revoke it if in his opinion the warrant is improperly sought; and although the courts may review and control the action of the governor in regard to points of law involved in extradition proceedings, yet they will not inquire into the motive and purpose of such proceedings or interfere with any matter connected therewith which lies within the discretion of the governor.²

10. Trial of Prisoner in Certain Cases — *a. FOR OFFENSE OTHER THAN THAT FOR WHICH HE WAS EXTRADITED.* — Although there have been decisions sustaining the contrary doctrine,³ it may now be regarded as well settled by the decisions of state courts and a recent decision of the United States Supreme Court that a fugitive from justice surrendered by one state upon the demand of another is not protected from prosecution for offenses other than that for which he was surrendered, but may, after being restored to the demanding state, be lawfully tried and punished for any and all crimes committed by him within its territorial jurisdiction, either before or after extradition, and that by so trying him against his objection no right, privilege, or immunity secured to him by the Constitution and laws of the United States is denied.⁴

b. IN A CIVIL PROSECUTION. — There is some conflict of authority as to whether a person who has been brought into the jurisdiction under extradition proceedings from another state as a fugitive from justice and has been acquitted of the charge preferred against him can be immediately re-arrested and prosecuted in a civil action. It is held by some courts that there is no exemp-

1. *Ex p. Hobbs*, 32 Tex. Crim. Rep. 312, 40 Am. St. Rep. 782, citing 7 AM. AND ENG. ENCYC. OF LAW (1st ed.) 642.

2. *Executive Action Reviewable.* — *Ex p. Brown*, 28 Fed. Rep. 653; *In re Cook*, 49 Fed. Rep. 833; *Robb v. Connolly*, 111 U. S. 624; *Ex p. State*, 73 Ala. 503, 49 Am. Rep. 63; *Matter of Manchester*, 5 Cal. 237; *Hartman v. Aveline*, 63 Ind. 344, 30 Am. Rep. 217; *Jones v. Leonard*, 50 Iowa 106, 32 Am. Rep. 116; *People v. Brady*, 56 N. Y. 182; *In re Sultan*, 115 N. Car. 57, 44 Am. St. Rep. 433; *Work v. Corrington*, 34 Ohio St. 64, 32 Am. Rep. 345. See generally the title HABEAS CORPUS.

3. *In re Fitton*, 45 Fed. Rep. 471 (but see subsequent decision in this case, in 55 Fed. Rep. 271); *State v. Hall*, 40 Kan. 338, 10 Am. St. Rep. 200; *Matter of Cannon*, 47 Mich. 481.

A person surrendered for one crime cannot lawfully be tried for another unless he voluntarily waives his privilege of exemption. *Ex p. McKnight*, 48 Ohio St. 588.

For a case in which it was held that the accused was convicted of the offense for which he was extradited, see *State v. Meade*, 56 Kan. 690.

Trial of Fugitive for Different Offense upon His Voluntary Return to Jurisdiction. — Where a fugitive from the justice of one state, residing in another state, for whom a warrant of arrest has been issued in the former state, waives the necessity of requisition papers and voluntarily returns to the state from which he has fled, he may be at once prosecuted for a different offense from that described in the warrant. *State v. McNaspy*, 58 Kan. 691.

4. Fugitive May Be Tried for Different Offense from That for Which He Was Surrendered — *United States.* — *Lascelles v. Georgia*, 148 U. S. 537, affirming 90 Ga. 347; *Matter of Noyes*, (U. S. Dist. Ct. 1878) 17 Alb. L. J. 407.

Alabama. — *Carr v. State*, 104 Ala. 43.

Colorado. — *Williams v. Weber*, 1 Colo. App. 191.

Georgia. — *Lascelles v. State*, 90 Ga. 347, 35 Am. St. Rep. 216, affirmed 148 U. S. 537.

Iowa. — *State v. Kealy*, 89 Iowa 94, citing 7 AM. AND ENG. ENCYC. OF LAW (1st ed.) 648. See also *State v. Ross*, 21 Iowa 467.

Massachusetts. — *Com. v. Wright*, 158 Mass. 149, 35 Am. St. Rep. 475.

Missouri. — *State v. Patterson*, 116 Mo. 505, citing 7 AM. AND ENG. ENCYC. OF LAW (1st ed.) 648 et seq; *State v. Walker*, 119 Mo. 467.

Nebraska. — *State v. Leidigh*, 47 Neb. 126, distinguishing *In re Robinson*, 29 Neb. 135.

New York. — *People v. Cross*, 135 N. Y. 536, 31 Am. St. Rep. 850.

North Carolina. — *State v. Glover*, 112 N. Car. 806.

Ohio. — *In re Brophy*, (C. Pl.) 2 Ohio N. P. 230, 4 Ohio Dec. 391.

Pennsylvania. — *Com. v. Johnston*, 2 Pa. Dist. Rep. 673.

Texas. — *Ham v. State*, 4 Tex. App. 645.

Washington. — *Harland v. Territory*, 3 Wash. Ter. 131.

Wisconsin. — *State v. Stewart*, 60 Wis. 587, 50 Am. Rep. 388.

Offenses Arising Out of Same Transaction. — In *Musgrave v. State*, 133 Ind. 297, the court, without deciding the question whether a fugi-

tion in such case from such prosecution.¹ Other courts hold that when a person has been so brought into the jurisdiction and has been tried and discharged he cannot be arrested in a civil case until he has had a reasonable time and opportunity to return to the state from which he was taken.²

Extradition Procured as Pretext to Bring Accused into Jurisdiction. — It seems clear that when a person is brought into the jurisdiction under extradition proceedings as a mere pretext for the purpose of instituting civil suit against him he cannot be arrested in a civil case at the instance of any person concerned in so bringing him into the jurisdiction.³ Moreover, where it appears that extradition proceedings have been set in motion with this intent, the surrender of the accused will be refused in the first instance.⁴

C. WHEN BROUGHT INTO JURISDICTION BY FORCE OR UNDER INVALID PROCESS. — When a person is properly charged with a crime, the courts will not inquire into the circumstances under which he was brought into the state and within the jurisdiction of the court,⁵ and the fact that he was kidnapped or unlawfully abducted from the state to which he had escaped, and forcibly brought back to the state in which the crime was committed, does not affect the jurisdiction of the latter state to try him for crimes committed therein.⁶ And the same is true where the prisoner was illegally arrested or surrendered upon invalid extradition proceedings.⁷

11. Arrest of Fugitive Before Demand. — In some of the states statutes have been enacted providing for the arrest of a fugitive from justice before a demand for his surrender has been made by the executive of the state or territory in which the crime was committed, and for his detention until such requisition can be made.⁸ And the same power has been exercised in the absence of statute.⁹

12. Appointment and Character of Agent to Receive Fugitive — Appointment of Receiving Agent. — The Act of Congress makes no provision for the appointment of an agent to receive the fugitive on behalf of the demanding state, the appointment of such agent by the demanding state being clearly assumed. It is provided, however, that if no such agent appears within six months from the time of the arrest, the prisoner may be discharged. Further provision is made

tive extradited for one offense could be tried for another offense, held that, admitting that he could not be so tried, the rule did not apply where the cases, though different in form and incidents, arose out of the same transaction or occurrence. To the same effect see *Waterman v. State*, 116 Ind. 51.

1. No Exemption from Civil Prosecution. — *Reid v. Ham*, 54 Minn. 305; *Williams v. Bacon*, 10 Wend. (N. Y.) 636; *Browning v. Abrams*, 51 How. Pr. (N. Y. Supreme Ct.) 172.

2. Contrary Doctrine. — *Compton v. Wilder*, 40 Ohio St. 130; *Moletor v. State*, 76 Wis. 308, 20 Am. St. Rep. 71.

3. See *Browning v. Abrams*, 51 How. Pr. (N. Y. Supreme Ct.) 172; *Underwood v. Fetter*, 6 N. Y. Leg. Obs. 66; *Williams v. Bacon*, 10 Wend. (N. Y.) 636.

4. *Ex p. Stauson*, 73 Fed. Rep. 666.

5. *State v. Kealy*, 89 Iowa 94; *State v. Patterson*, 116 Mo. 505; and cases cited in notes immediately following.

6. Kidnapping Prisoner. — *Mahon v. Justice*, 127 U. S. 700; *State v. Smith*, 1 Bailey L. (S. Car.) 283, 19 Am. Dec. 679. But see *Norton's Case*, 31 Alb. L. J. 66; *Com. v. Shaw*, (Pa. C. Pl. 1885) 6 Crim. L. Mag. 245.

7. *Matter of Noyes*, (U. S. Dist. Ct. 1878) 17 Alb. L. J. 407; *Ex p. Barker*, 87 Ala. 4, 13 Am. S. Rep. 17 [citing 7 AM. AND ENG. ENCYC.

OF LAW (1st ed.) 643, 653]; *State v. Ross*, 21 Iowa 467; *Dows's Case*, 18 Pa. St. 37. See also *Cook v. Hart*, 146 U. S. 183; *In re Miles*, 52 Vt. 609.

In *In re Robinson*, 29 Neb. 135, it was held that a person arrested in another state and brought into the state without extradition proceedings to answer for an offense committed in the latter state could not be held for trial for such offense.

8. See *supra*, this section, *Extradition Laws — State Legislation*.

9. United States. — *Ex p. McKean*, 3 Hughes (U. S.) 23.

Alabama. — *Morrell v. Quarles*, 35 Ala. 544.

Delaware. — *State v. Buzine*, 4 Harr. (Del.) 572.

Georgia. — *State v. Loper*, Ga. Dec. (pt. ii.) 33; *State v. Howell*, R. M. Charl. (Ga.) 120.

New Jersey. — *Matter of Fetter*, 23 N. J. L. 311.

New York. — *People v. Schenck*, 2 Johns. (N. Y.) 479; *Matter of Goodhue*, 1 Wheel. Cr. Cas. (N. Y.) 427, 2 Johns. Ch. (N. Y.) 198, 1 C. H. Rec. 153. But see *People v. Wright*, 2 Cai. (N. Y.) 213.

Ohio. — *Rea v. Smith*, 2 Handy (Ohio) 193.

South Carolina. — *State v. Anderson*, 1 Hill L. (S. Car.) 327.

Utah. — *Ex p. Romanes*, 1 Utah 23.

empowering the agent to transport the fugitive to the state or territory from which he has fled, and providing a penalty in case any person, by force, sets at liberty or rescues the fugitive from such agent while so transporting him.¹ In several states the appointment of the receiving agent is expressly provided for by statute.²

Receiving Agent Not Officer of United States. — The person appointed to receive the fugitive is the agent of the demanding state, and not an officer of the United States.³

Liability to Fugitive for Causing His Arrest. — An agent appointed by the governor of a state demanding the surrender of a fugitive from justice to receive such fugitive, and who proceeds according to the authority conferred upon him to procure the arrest of the accused, acts in a ministerial capacity, and so long as the acts done by him are within the scope of his authority and justified by the laws of the United States he incurs no personal liability therefor. And it is immaterial in such case whether or not the feelings entertained by him towards the fugitive were malicious.⁴

EXTRA-DOTAL PROPERTY. (See also the title *COMMUNITY PROPERTY*, vol. 6, p. 293; and see *PARAPHERNAL*.) — Extra-dotal property, otherwise called "paraphernal property," is that property of the wife which forms no part of the dowry.⁵

EXTRA HAZARDOUS. — See the various insurance titles, such as *ACCIDENT INSURANCE*, vol. 1, p. 302; *FIRE INSURANCE*, etc.

EXTRA-JUDICIAL. (See also the titles *JUDGE*; *JURISDICTION*; and the definitions following.) — Outside of judicial proceedings; out of the proper court, or the ordinary course or scope of legal procedure.⁶

EXTRA-JUDICIAL ADMISSION, CONFESSION, OR DECLARATION. — See the titles *ADMISSIONS*, vol. 1, p. 670; *CONFESSIONS*, vol. 6, p. 523; *DECLARATIONS (IN EVIDENCE)*, vol. 9, p. 5; *HEARSAY EVIDENCE*.

EXTRA-JUDICIAL OATH. — See the titles *OATHS*; *PERJURY*.

EXTRA-JUDICIAL OPINION. (See the titles *OPINIONS OF THE JUSTICES*; *STARE DECISIS*. And see *DICTUM*, vol. 9, p. 452.) — An extrajudicial opinion is an opinion given on a question that it was not necessary to decide in the case in which it was given, or on a point which was not the point in issue, or a proposition generally expressed which the case and the circumstances of the case did not call for, or an opinion on a point which was not the point argued before the court but upon which the court pronounced its judgment, or an

1. Rev. Stat. U. S., §§ 5278, 5279.

2. Consult the various state statutes.

3. *Robb v. Connolly*, 111 U. S. 624; *Ex p.* State, 73 Ala. 503, 49 Am. Rep. 63.

In *Robb v. Connolly*, 111 U. S. 624, one Bailey was arrested in California upon a requisition by the governor of Oregon as a fugitive from the justice of that state, and was delivered to Robb, the agent appointed by the governor of Oregon to receive and convey him back to Oregon. Bailey sued out a writ of habeas corpus from the Superior Court of San Francisco, directed to Robb and commanding him to bring the prisoner before that court that the legality of his detention might be inquired into. Robb refused to honor the writ, on the ground that he held the prisoner under the authority of the United States, and that the San Francisco court had no jurisdiction. He was thereupon adjudged guilty of contempt of court and committed to jail, whereupon he sued out a writ of habeas corpus from the Supreme Court of California on the ground that his detention was illegal for the reasons

above stated. Upon hearing the writ was dismissed. The judgment of the California court was afterwards affirmed by the Supreme Court of the United States.

4. *Matter of Titus*, 8 Ben. (U. S.) 411. In this case it was held that an agent arrested at the instance of the fugitive on a charge of malicious prosecution was entitled to a writ of habeas corpus under Rev. Stat. U. S., § 753.

5. *Nalle v. Young*, 160 U. S. 624.

Extra-dotal Property. — In *Fleitas v. Richardson*, 147 U. S. 553, the court said: "The separate property of the wife is that which she 'brings into the marriage, or acquires during the marriage by inheritance, or by donation made to her particularly,' and 'is divided into dotal and *extra-dotal*. Dotal property is that which the wife brings to the husband to assist him in bearing the expenses of the marriage establishment. *Extra-dotal* property, otherwise called paraphernal property, is that which forms no part of the dowry."

6. *Century Dict.*

opinion not called for by the case and which it was unnecessary to give.¹

EXTRANEOUS. — See note 2.

EXTRAORDINARY. (See also **ORDINARY.**) — Extraordinary is defined to mean beyond or out of the common order or rule; not usual, regular, or of a customary kind; not ordinary; remarkable; uncommon; rare.³

1. Warner *v.* Steamship Uncle Sam, 9 Cal. 732. See also People *v.* Hays, 4 Cal. 157.

2. **Extraneous Influence.** (See also the title **JURY AND JURY TRIAL.**) — Within the rule that a juror may testify to *extraneous* influence, it has been held that by *extraneous* influence is not meant improper communication between jurors themselves, whether in the court room or out of it. Sharp *v.* Merriman, (Mich. 1896) 66 N. W. Rep. 376. See also Com. *v.* White, 147 Mass. 76.

3. Ten Eyck *v.* Albany, 65 Hun (N. Y.) 197; Carpenter *v.* State, 39 Wis. 284.

Extraordinary means exceeding the common degree or measure; hence, remarkable, rare, wonderful. Gadsden, etc., Union R. Co. *v.* Caulser, 97 Ala. 235, the court saying further that "of *extraordinary* prudence" is a much stronger term than "prudent" or "ordinarily prudent."

Lease — Extraordinary Assessment. — A lessee covenanted to pay the ordinary taxes and special assessments. It was held that an assessment to pay for the laying of a new and expensive pavement of a different material was an *extraordinary* assessment. Ten Eyck *v.* Albany, 65 Hun (N. Y.) 194, affirmed 141 N. Y. 588. See generally the titles **LANDLORD AND TENANT; LEASES; SPECIAL ASSESSMENTS.**

Extraordinary Expenditures. — A debt created by borrowing money to redeem outstanding obligations of the state is not in conflict with a constitutional provision limiting the power of the state to contract public debts to the "purpose of defraying *extraordinary* expenditures." The word *extraordinary* is not used in its popular sense, but in contradistinction to "ordinary," which is used in the sense of current or annual expenditures. Bond Debt Cases, 12 S. Car. 280.

Extraordinary Services. — As to allowances to executors and administrators, see the title **EXECUTORS AND ADMINISTRATORS**, vol. II, p. 1306, and see Wisner *v.* Mabley, 74 Mich. 143.

Extraordinary Motion or Case. — Under the Georgia Code a new trial may be granted on a second motion upon the ground that the cause was an "*extraordinary* motion or case." In considering this provision the court in Cox *v.* Hillyer, 65 Ga. 59, said: "The *extraordinary* motions or cases contemplated by the statute are such as do not ordinarily occur in the transaction of human affairs, as when a man has been convicted of murder, and it afterwards turns out that the man he was charged with having killed is still alive, or where a man has been convicted on the testimony of a witness who is afterwards found guilty of perjury in giving that testimony, or from some providential cause, and cases of like character. The newly discovered evidence relating to the physical condition of the defendant at the time of his trial, as well as that relating to the main issues involved in the case on that trial, is merely cumulative in its character, and would

hardly be sufficient of itself to have authorized the court to have set aside the verdict in an ordinary motion for a new trial — certainly not sufficient to authorize an *extraordinary* motion for a new trial to be made under the provisions of the code before cited."

Extraordinary Marine Risk. — In a charter-party by which a vessel was hired by the government it was stipulated that in case the vessel should be damaged or destroyed by being compelled to run any *extraordinary* marine risk the owner should be indemnified. In complying with the orders of a harbor master, the vessel struck upon a fluke of a sunken anchor in the harbor and was sunk. It was held that the risk which the vessel thus incurred was not an *extraordinary* marine risk within the meaning of the charter-party, but an ordinary risk run by every vessel that enters a harbor. Leary *v.* U. S., 14 Wall. (U. S.) 607.

Extraordinary Perils and Losses. (See also the title **MARINE INSURANCE.**) — In The *Titania*, 19 Fed. Rep. 105, it was said: "As between the shipowner and the insurer, the former is bound to provide against ordinary perils, while the latter undertakes to insure against *extraordinary* ones; 'although,' as Duer, J., observes in the case of Moses *v.* Sun Mut. Ins. Co., 1 Duer (N. Y.) 170, 'to discriminate between ordinary and *extraordinary* losses is, in some cases, a matter of great nicety and difficulty.' By *extraordinary* is not meant what has never been previously heard of, or within former experience, but only what is beyond the ordinary, usual, or common."

Legislature. (See also the titles **GOVERNOR; LEGISLATURE.**) — Where a constitution gives the governor the authority to convene the General Assembly on *extraordinary* occasions, he is sole judge of what are *extraordinary* occasions. Whiteman *v.* Wilmington, etc., R. Co., 2 Harr. (Del.) 514, 33 Am. Dec. 411.

Highways. (See generally the title **HIGHWAYS.**) — In Clark Civil Tp. *v.* Brookshire, 114 Ind. 437, it was said: "The difference between the work upon highways which is somewhat vaguely spoken of in the statute as 'ordinary' and *extraordinary* is more in degree than in character. In section 20 of the act (Rev. Stat. 1881, § 5083), it was provided that the officer might go upon adjoining land and remove therefrom gravel, stone, and timber, for the repair or preservation of highways, thus recognizing, as we think, the right to use such material in putting and keeping highways in 'good ordinary repair.' And so, in section 5071, there is mention of ditches, drains, grades, and embankments of an *extraordinary* character, thus showing that there may be drains, etc., which are not of an *extraordinary* character; in other words, that work upon a highway is not of an *extraordinary* character simply because in doing it drains, etc., may be constructed."

EXTRAORDINARY AVERAGE. — See the title GENERAL AVERAGE.

EXTRAORDINARY CARE. (See also CARE, vol. 5, p. 147, and the references there given; and see the title NEGLIGENCE.) — More than ordinary care; utmost care; the highest degree of care.¹

EXTRAORDINARY DILIGENCE. (See also the title NEGLIGENCE.) — Extraordinary diligence is that care and caution which very prudent and faithful persons use in securing and preserving their own property.²

EXTRAORDINARY FLOODS. (See also the title FLOODS.) — By ordinary floods are understood all usual and expectant freshets occurring in the stream, and by extraordinary floods freshets not occurring annually.³

EXTRAS. — See the title WORKING CONTRACTS; and see EXTRA, *ante*.

EXTRA SESSION. — See the titles LEGISLATURE; STATUTES; and see the title ADJOURNMENTS, 1 ENCYC. OF PL. AND PR. 238.

EXTRA-TERRITORIAL. — See the titles JURISDICTION; PRIVATE INTERNATIONAL LAW.

EXTREME. — See note 4.

EXTRINSIC EVIDENCE. (See also the titles EVIDENCE, vol. II, p. 484, and the references there given.) — Extrinsic evidence is that evidence which is not contained in a document, but is sought to be adduced from without, as for the purpose of interpreting its contents or qualifying its effect.⁵

FABRIC. — See note 6.

Same — English Statute as to Extraordinary Traffic. — An English highway act provided that whenever damage had been caused to a highway "by excessive weight passing along the same, or *extraordinary* traffic thereon," there might be a recovery against the person responsible for the *extraordinary* traffic for the expenses of repairing the highway. The words "*extraordinary* traffic" as here used have been construed in the following cases: *Aveland v. Lucas*, 5 C. P. Div. 211, 351; *Hill v. Thomas*, (1893) 2 Q. B. 333; *Pickering Lythe East Highway Board v. Barry*, 8 Q. B. Div. 59; *Savin v. Oswestry Highway Board*, 44 J. P. 766; *Williams v. Davies*, 44 J. P. 347; *Etherley Grange Coal Co. v. Auckland Dist. Highway Board*, (1894) 1 Q. B. 37; *Northumberland Whinstone Co. v. Alnwick Highway Board*, 44 J. P. 360; *Wallington v. Hoskins*, 6 Q. B. Div. 206; *Reg. v. Ellis*, 8 Q. B. Div. 466, 46 J. P. 295; *Whitebread v. Sevenoaks*, (1892) 1 Q. B. 8; *Reg. v. Williamson*, 45 J. P. 505; *Tunbridge Highway Board v. Sevenoaks Highway Board*, 33 W. R. 306; *Ragland Highway Board v. Monmouth Steam Co.*, 46 J. P. 598. See also Stroud's Judicial Dict.

Extraordinary Circumstances. — Poverty or financial embarrassment were held not to be *extraordinary* circumstances within the meaning of a statute excusing laches under such circumstances. *Whalen v. Sheridan*, 10 Fed. Rep. 661. See also *Muller v. Ehlers*, 91 U. S. 249. See generally the title LACHES.

1. It is not erroneous to use this phrase in a charge to a jury to express the highest degree of care. *Toledo, etc., R. Co. v. Baddeley*, 54 Ill. 19.

2. *Wallace v. Clayton*, 42 Ga. 447. See also *Georgia R. Co. v. Beatie*, 66 Ga. 440.

3. *Illinois Cent. R. Co. v. Bethel*, 11 Ill. App. 23; *Sprague v. Worcester*, 13 Gray (Mass.) 193; *Gulf, etc., R. Co. v. Pool*, 70 Tex. 717.

4. **Extreme Hazard.** — To constitute *extreme* hazard, which justifies the abandonment of a

vessel, her situation must be such that there is imminent danger of her being lost, notwithstanding all the means that can be applied to get her off, all the means within the power of the crew to use, and all the assistance within the power of the master to obtain. *King v. Hartford Ins. Co.*, 1 Conn. 422. See generally the title ABANDONMENT AND TOTAL LOSS, vol. I, p. 24.

Extreme Cruelty. — See the title DIVORCE, vol. 9, pp. 786, 791.

Same — Homicide. (See also the title HOMICIDE.) — A *Massachusetts* statute provided that murder committed with *extreme* atrocity or cruelty should be murder in the first degree. In construing this provision, the court in *Com. v. Gilbert*, 165 Mass. 45, said: "Knowledge that the crime was *extremely* atrocious or cruel is not required. If the prisoner was a responsible agent, the statute providing that murder committed with *extreme* atrocity or cruelty is murder in the first degree calls for no greater degree of knowledge than is required for a conviction of murder in the second degree. This is a separate and distinct ground from that of deliberately premeditated malice aforethought; the requirement of deliberate premeditation, clearly, is not attached to murder committed with *extreme* atrocity or cruelty, nor is any degree of purpose, intention, or knowledge, beyond what is involved in the commission of murder with malice aforethought. This of itself excludes an accidental homicide. A murder committed with malice aforethought may be found to have been committed with *extreme* atrocity or cruelty, even though the murderer did not know that his act was *extremely* atrocious or cruel."

5. *Century Dict.* See also *Baldwin v. Buffalo*, 35 N. Y. 382.

6. **Revenue Laws.** — See the title REVENUE LAWS; and see *In re Mills*, 49 Fed. Rep. 726; *Hartranft v. Meyer*, 135 U. S. 237.

FABRICATE. — See note 1.

FABRICATED EVIDENCE. — See the titles EVIDENCE, vol. II, pp. 484, 504, and references there given; FORGERY; PRESUMPTIONS.

FACE. — See note 2.

FACILITY. — See note 3.

1. **Fabricate—Elections.** (See generally the title ELECTIONS, vol. 10, p. 552.) — An English statute declared that it should be an offense "if any person *fabricates* in whole or in part, alters, defaces, destroys, abstracts, or purloins any voting paper," etc. It was held that the word *fabricate* as used in this statute imported a wrongful act; an act done with a *mens rea*. *Aberdare Local Board of Health v. Hammett*, L. R. 10 Q. B. 162. Quain, J., in this case, said: "*Fabricate* implies fraud or falsehood, a false or fraudulent concoction, knowing it to be wrong and contrary to the act."

2. **Face Value.** (See also VALUE.) — The value of a thing is its general power of purchasing; the command which its possession gives over purchasable commodities in general; and *face value* is the value expressed on the *face* of the writing in the commodity in which it is payable. *Marriner v. John L. Roper Co.*, 112 N. Car. 164.

Same — Bonds. — As to the *face* value of bonds, the court, in *Evans v. Tillman*, 38 S. Car. 238, said: "Now we suppose that there cannot be the least doubt that in both of these instances '*face value*' meant the arithmetical number printed on the *face* of the bonds and certificates, and nothing else."

On the Face — Insurance Policy. — A statute relating to actions on insurance policies dispensed with the setting forth of a portion of the matter which is sometimes written or printed upon such policies, but required that a copy of "what appears upon the *face* and in the body of the policy" should be attached to the declaration. In construing this provision the court, in *Southern Mut. Ins. Co. v. Turnley*, 100 Ga. 300, said: "We see no reason for supposing that the terms '*the face*' and '*the body*,' as applied to insurance policies, mean anything less than they would if applied to contracts other than insurance policies. If these words had been used with reference to a deed or other contract signed by the maker, they would be understood as covering what preceded the maker's signature; and we think the same is true as to insurance policies. We think they include all the stipulations embraced in that part of the policy which precedes the signatures of the officers by whom it is executed."

Void on its Face—Patent. — In *Poire v. Wells*, 6 Colo. 410, it was said: "It is further said that whenever the patent is absolutely void on its *face*, it may be impeached collaterally in a court of law. The expression '*void on its face*' is defined to mean 'that the patent is seen to be invalid, either when read in the light of existing law, or by reason of what the court must take judicial notice of; as, for instance, the land is reserved by statute from sale or otherwise appropriated, or that the patent is for an unauthorized amount, or is executed by officers who are not intrusted by law with the power to issue grants of portions of the public domain.'" See also the titles MINING AND

MINING CLAIMS; PUBLIC LANDS; VOID AND VOIDABLE.

Face of a Judgment. — An agreement to pay one-half the *face* of a judgment is an agreement to pay one-half the sum for which the judgment was rendered, and does not include accrued interest. *Osgood v. Bringolf*, 32 Iowa 265.

An Irregularity on the Face of the Process is not necessarily an irregularity stated in the writ. It may appear by reference to extrinsic circumstances. *Woodcock v. Bennet*, 1 Cow. (N. Y.) 711, 13 Am. Dec. 568.

Face au Fleuve. — In *Morgan v. Livingston*, 6 Martin (La.) 224, it was said: "From a very close examination of the books of the land office of the United States, which have been submitted to us, and the depositions of surveyors examined in this case, it is clear that in French and Spanish conveyances, both public and private, the words *face au fleuve*, *face*, *frente al rio*, *frente*, '*front to the river*,' or '*front*,' exclusively designate estates bounded by the river, which in the country are otherwise called riparious, bound to the repair of the road, its ditches, bridges, and levees, and to supply ground for either or the whole of these when that which they cover is carried away by the water. We are therefore bound to take the expression *frente al rio*, in the deed, as evidence of the intention of one of the parties to convey, and of the other to acquire, a riparious estate, unless by taking it in this sense we are led to an incongruous or absurd result." See also *La Branch v. Montegut*, 47 La. Ann. 674.

Face to Face. (See also the title WITNESSES.) — As to the constitutional provision that in all criminal prosecutions the accused has the right to meet the witnesses against him *face to face*, see the titles DEPOSITIONS, vol. 9, p. 314; DYING DECLARATIONS, vol. 10, p. 363; WITNESSES.

3. **Facilities** was the name given to certain banknotes in the state of Connecticut, payable two years after the close of the war of 1812. *Springfield Bank v. Merrick*, 14 Mass. 322.

Interstate Commerce. (See also the title INTERSTATE COMMERCE.) — It is provided by section 3 of the Interstate Commerce Act that all the common carriers subject to the provisions of the act "shall, according to their respective powers, afford all reasonable, proper, and equal *facilities* for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines; but this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal *facilities* to another carrier engaged in like business." This provision has been held to refer only to *facilities* between connecting lines at terminal points for the interchange of traffic and passengers; and the term *facilities* does

FACT. (See also the titles JUDICIAL NOTICE; QUESTIONS OF LAW AND FACT; and see CIRCUMSTANCES, vol. 6, p. 12. As to accessories before and after the fact, see the title ACCESSORY, vol. 1, p. 264; as to finding of fact, see FINDING, and see 8 ENCYC. OF PL. AND PR. 931; as to issue of fact, see ISSUE; as to material fact, see MATERIAL; as to mistake in fact, see MISTAKE; as to presumption of fact, see the title PRESUMPTIONS; as to legal conclusions, see 12 ENCYC. OF PL. AND PR. 1020). — A fact is defined to be "a thing done; reality, not supposition; action; deed."¹

not embrace car equipment for the transportation of freight over the carrier's own road. *Scofield v. Lake Shore, etc., R. Co.*, 2 Int. C. C. Rep. 90, 116. See also *U. S. v. Delaware, etc., R. Co.*, 40 Fed. Rep. 101.

English Statute. — An English statute required railroad companies to afford all reasonable *facilities* for the receiving, forwarding, and delivery of traffic. It was held that the term *facilities* did not include structural accommodation, such as stations, waiting rooms, etc. *Cockburn, C. J.*, said: "It does not appear to me to be of much avail in favor of the opposite view to say that the erection of structural buildings is within the term *facilities* as occurring in the Act of 1854. No one can deny that stations, platforms, warehouses, sheds, yards, afford *facilities* to traffic, though it may perhaps be doubted whether covered platforms, or luxurious waiting rooms, or arrangements for the benefit of invalids, though much to the convenience of the passengers, can be said to afford *facility* to the traffic, even though that term should be taken to include passengers. The question is not whether these things may come within the meaning of the term used in its widest and most general sense, but whether they come within its meaning as used in the statute — in other words, whether they come within the spirit and meaning of the enactment." *South Eastern R. Co. v. Railway Com'rs*, 5 Q. B. Div. 235, 6 Q. B. Div. 586. See also, upon the construction of this statute, *Great Western R. Co. v. Railway Com'rs*, 7 Q. B. Div. 182; *Brown v. Great Western R. Co.*, 9 Q. B. Div. 744; *Reg. v. Railway Com'rs*, 22 Q. B. Div. 642; *Nichol v. North Eastern R. Co.*, 4 Times Rep. 464; *Stroud's Jud. Dict.*

Booming Facilities. — A lease of the booming *facilities*, in connection with the water front, is a lease of the owner's right to erect booms to aid in storing logs and floating them to market. The lessee has no right to obstruct navigation, his rights being subject to those of the public. Nor has he a right to appropriate the soil under the water. *Sullivan v. Spottswood*, 82 Ala. 163. See generally the title BOOM COMPANIES, vol. 4, p. 707.

1. Fact and Truth. — *Walker's Dict.*, quoted in *Lackey v. Vanderbilt*, 10 How. Pr. (N. Y. Supreme Ct.) 155.

The word *facts*, however, as used in the expression "*facts* constituting a cause of action, or defense," means, not truths, but physical *facts* capable of being established by evidence, and from which, when established, the right to maintain the action, or the validity of the defense, is a necessary conclusion of law. *Lawrence v. Wright*, 2 Duer (N. Y.) 673.

And in *Drake v. Cockroft*, 10 How. Pr. (N. Y. C. Pl.) 379, 4 E. D. Smith (N. Y.) 34, it was said: "The defendant's counsel, on the argu-

ment of the appeal, insisted that a denial of the plaintiff's right to recover, or a statement that the plaintiff is not entitled to the money, is a statement of a *fact*. In this, I apprehend, he overlooks the distinction which often exists between the statement of a truth and an allegation of a *fact*. Indeed, the terms *fact* and 'truth' are often used in common parlance as synonymous; but as employed in reference to pleading they are widely different. A *fact* in pleading is a circumstance, act, event, or incident; a truth is the legal principle which declares or governs the *facts* and their operation and effects."

So in *Tutt v. Port Royal, etc., R. Co.*, 28 S. Car. 397, it was said that the terms *fact* and "truth" are not in pleading synonymous.

Facts and Evidence. (See generally the title EVIDENCE, vol. 11, p. 487.) — In *Gates v. Haw*, 150 Ind. 370, it was held that a bill of exceptions stating that the cause was submitted on an agreed statement of *facts*, and that such statement contained all the *facts*, sufficiently showed that such *facts* constituted all the evidence. The court said: "It is insisted by the appellees that this language does not show that the agreed statement of *facts* contains all the evidence given in the cause. It is true there is a broad distinction, as a general rule, between evidence and *facts*. Webster defines the word *fact* to be an effect produced or achieved, and he defines the word 'evidence' to mean that which is legally submitted to a competent tribunal as a means of ascertaining the truth of any alleged matter of *fact* under investigation before it. It is said in note 4, 7 AM. AND ENG. ENCYC. OF LAW (1st ed.) 658, that '*facts* constituting a cause of action are those *facts* which the evidence upon the trial will prove, and not the evidence which will be required to prove the existence of the *facts*.' To illustrate further the distinction between a *fact* and evidence, it is said by Ram on Facts, p. 5, that 'a *fact*, once in complete existence, once ended, admits of no addition, no subtraction; 'nothing can be put to it, nor anything taken from it;' once in existence, it is irrevocable.' Not so with evidence tending to prove a *fact*. It may be added to or subtracted from, weakened, strengthened, or destroyed. So that it may be conceded that a *fact* is one thing, and evidence is quite a different thing, as a general rule; that competent evidence always tends to prove or disprove an alleged *fact* in dispute. But it may sometimes happen that the *fact* in issue and the evidence of that *fact* are one and the same thing. *Louisville, etc., R. Co. v. Miller*, 141 Ind. 533. As to the distinction between the *facts* and the evidence, see *Boyer v. Robertson*, 144 Ind. 604. It is a common thing for members of the legal profession to use the words *facts* and 'evi-

FACTORIZING PROCESS. — See the title GARNISHMENT.

dence' as synonymous, and in some instances we have seen the *fact* and the evidence thereof is one and the same thing. In view of all this, and the whole of the language quoted from the bill of exceptions, it is apparent that the word *facts* was used for the purpose of conveying the same meaning as the word 'evidence,' and the court and counsel manifestly meant by the word *facts* the evidence; and in such a case it is our duty so to construe the language. *Harris v. Tomlinson*, 130 Ind. 426."

In *May v. Lewis*, 41 Ala. 317, it was held that a recital in a bill of exceptions that "under the *facts* stated within, the court held and ordered," etc., was not sufficient to show that all the evidence in the case was set out in the record, and this although it appeared that the *facts* were agreed on by consent.

"*Facts* constituting a cause of action" are "those *facts* which the evidence upon the trial will prove, and not the evidence which will be required to prove the existence of the *facts*." *Clay County v. Simonson*, 1 Dakota 413.

Instructions. — The lower court instructed the jury as follows: "You are further instructed that another essential *fact* in this case is that the defendant, if he received said body, knew at the time that the same had been removed from its grave for the purpose of dissection, without the consent of the near relatives" of the deceased. This was held no error. The appellate court said: "Instruction number ten is open to criticism for the loose use of the word *fact* to denote the thing or proposition requiring proof. But this use of the word is sanctioned by good authority, and in the connection in which it was given it could not have misled the jury." *State v. Johnson*, 6 Kan. App. 123.

Same — Fact and Allegation. — The lower court instructed the jury as follows: "To this charge the defendant pleads not guilty. This plea puts in issue every material *fact* involved in the crime charged, and before you can convict the defendant the state must establish beyond a reasonable doubt the guilt of the defendant." The appellate court said: "The appellant complains of this instruction for various reasons, the first of which is that it uses the word *fact* as the equivalent of 'allegation.' The use made of the word was not accurate, but the meaning which was intended to be conveyed is reasonably certain, and prejudice could not have resulted from the error." *State v. Harris*, 97 Iowa 407.

Statement of Fact. (See also the title DYING DECLARATIONS, vol. 10, p. 377.) — A dying statement made by the victim of a homicide that the defendant had no reason that he knew of for the perpetration of the crime was held to be a statement of *fact* which the declarant would have been allowed to make had he been a witness on the stand, and was therefore ad-

missible. *Boyle v. State*, 105 Ind. 494.

Error in Fact. (See generally 7 ENCYC. OF PL. AND PR. 817.) — A statute abolished writs of error *coram nobis*, and allowed errors in *fact* to be corrected upon motion within five years. In *Kihlholz v. Wolff*, 8 Ill. App. 373, the court said: "'Error in *fact*' is a phrase of rather definite legal meaning. Error in the judgment or decree itself cannot be regarded as error in *fact*. It is error in the process, such as nonage of the parties, and at common law coverture of the plaintiff. The writ of error returnable before the same court for the correction of errors in *fact* never proceeded upon error of the judge or court. Tomlin's Law Dict., tit. Error; 2 Sharswood's Blackstone, bk. 3, p. 407, note 5; 2 Bouv. Law Dict., tit. Writ of Error, p. 681."

Attorney in Fact. — An attorney in *fact* is one who is authorized by his principal, either for some particular purpose or to do a particular act not of a legal character. *Hall v. Sawyer*, 47 Barb. (N. Y.) 119. See also ATTORNEY, vol. 3, p. 276; and the titles AGENCY, vol. 1, p. 930; ATTORNEY AND CLIENT, vol. 3, p. 278.

Same — Agent Distinguished from. — In *Porter v. Hermann*, 8 Cal. 624, the court said: "But it is urged that the words 'or attorney in *fact*' are synonymous with the term 'agent,' and therefore mere surplusage. We do not so understand their import. All attorneys in *fact* are agents, but all agents are not necessarily attorneys in *fact*. 'Agent' is the general term which includes brokers, factors, consignees, shipmasters, and all other classes of agents. By attorneys in *fact* are meant persons who are acting under a special power, created by deed. It is true, in loose language the terms are applied to denote all agents employed in any kind of business, except attorneys at law, but in legal language they denote persons having a special authority by deed."

Matters. — The term *facts* in the jurat to an answer in equity was held equivalent to "matters." *Whelpley v. Van Epps*, 9 Paige (N. Y.) 332, 37 Am. Dec. 400.

Marriage in Fact is marriage established by direct evidence, as distinguished from marriage presumed from evidence of cohabitation and reputation. In criminal actions, as for adultery, marriage proved must be marriage in *fact*. *State v. Winkley*, 14 N. H. 494, 495. See also the titles ADULTERY, vol. 1, p. 756; BIGAMY, vol. 4, p. 42; INCEST; MARRIAGE.

Seizin. — A recital that one was seized in fee of certain land has been held to be a recital of a *fact*. *Bolton v. London School Board*, 7 Ch. Div. 771.

Seizin in Fact. — See the titles CURTESY, vol. 8, p. 510; DOWER, vol. 10, p. 131. And see SEIZIN.

Facts of the Case. — See CASE, vol. 5, p. 749.

Malice in Fact. — See the title MALICE.

FACTORS' ACTS.

BY BRISCOE B. CLARK.

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CROSS-REFERENCES.

For other matters of SUBSTANTIVE LAW and EVIDENCE related to this subject, see the titles AGENCY, vol. 1, p. 930; BILLS OF LADING, vol. 4, p. 507; FACTORS OR COMMISSION MERCHANTS, post; SALES.

I. IN GENERAL. — At common law it was a well-settled rule that a factor or agent for sale had no power to pledge the goods consigned to him, whether he was in possession of the goods themselves or of a document of title representing the goods, even though such document might bear on its face some evidence of the property being in the agent, as in case of a bill of lading in which he was consignee or indorsee. This was in accordance with the general rule of the common law that a person in possession of goods cannot, either by sale or by pledge, confer any better title than he himself has, and that if the person in possession is an agent it must be shown, in order to make a sale or pledge by him valid as against the true owner of the goods, that authority to sell or pledge was conferred upon the agent by the true owner.¹ This rule was found to bear hard on the interests of commerce, and to remedy some of the inconveniences caused by it the English Parliament, beginning with the year 1823, enacted a series of statutes known as the Factors' Acts.² In *New*

1. See *Cole v. North Western Bank*, L. R. 10 C. P. 362, *per* Blackburn, J. See also the titles *AGENCY*, vol. 1, p. 930; *FACTORS OR COMMISSION MERCHANTS, post*; *SALES*.

2. **English Factors' Acts.** — 4 Geo. IV., c. 83; 6 Geo. IV., c. 94; 5 & 6 Vict., c. 39; 40 & 41 Vict., c. 39; 52 & 53 Vict., c. 45. The last act, which is known as the "Factors' Act, 1889," repeals the former acts and consolidates their provisions.

Provisions of Statute 6 Geo. IV., c. 94. — Section 1 of this act provides in effect that the person in whose name goods are shipped is to be deemed the true owner thereof so far as to entitle the consignee to a lien thereon in respect to advances made by him to such person, if the consignee has not notice by the bill of lading or otherwise that such person is not the actual and *bona fide* owner, and such person is to be taken to have been intrusted with the goods for the purpose of consignment or sale, unless the contrary be made to appear. Section 2

provides that a person in possession of a bill of lading or of any of the warrants, certificates, or orders mentioned in the act is to be deemed the true owner of the goods described therein so far as to give validity to any contract or agreement made by him for the sale or pledge of the goods in favor of a buyer or pledgee without notice that such person is not the actual and *bona fide* owner. Section 3 limits the rights of a person taking goods from an agent in pledge for a pre-existing debt to the amount of the agent's interest in the goods. Section 4 provides that any one who acts in the usual course of business in good faith and without notice of an actual limitation on the agent's authority may contract for the purchase of goods with any agent intrusted with the goods or to whom they have been consigned, and may receive and pay for the same to the agent. Section 5 provides that a person may accept goods in pledge from a factor or agent, although he has knowledge that the

York, soon after the passage of the Act of 4 Geo. IV., c. 83, a statute (Act 1830, c. 179) was passed, which, with a few modifications, was a reproduction of the *English act*.¹ And similar statutes are now to be found in other states and in *Canada*.²

Statutes Have No Extraterritorial Force. — Factors' acts have no extraterritorial effect, but apply only to the transactions by factors or agents within the jurisdiction wherein they are enacted.³

The Factors' Acts Have No Retrospective Effect, but apply solely to transactions by

pledgor is a factor or agent, but in such case he shall acquire only the interests possessed by the pledgor.

The provisions of this act, as summarized by Lord Tenterden in the 5th edition of Abbott on Shipping, are quoted at length by Blackburn, J., in *Cole v. North Western Bank*, L. R. 10 C. P. 360.

The Statute 5 and 6 Vict., c. 39, extends the provisions of 6 Geo. IV., c. 94, by enacting, in section 1, that "any agent" intrusted with the possession of goods or of the documents of title to goods, may pledge the same, thus taking away the limitations established by 6 Geo. IV., c. 94, § 2, which protected only those who took pledges from agents without notice that such agents were not the owners. By section 2 a pledgee may exchange the securities held by him in pledge and receive others in lieu thereof from the factor, and the pledgee's rights in respect to the substituted securities will be the same as if the consideration therefor had been a *bona fide* present advance of money. This section changes the law as declared in *Taylor v. Kymer*, 3 B. & Ad. 320, 23 E. C. L. 81, and *Bonzi v. Stewart*, 4 M. & G. 295, 43 E. C. L. 158. By section 3 it is declared that the statute is to be construed to protect only *bona fide* transactions without notice that the agent pledging is acting without authority or *mala fide* against the owner. By section 4 the term "document of title" is defined, and it is declared that an agent in possession of the goods or documents of title is to be taken "to have been intrusted with the possession of the goods represented by such document of title" and "such agent shall be deemed to be possessed of such goods or documents, whether the same shall be in his actual custody or shall be held by any other person subject to his control or for him or on his behalf." The latter clauses, defining what is meant by a person intrusted with the possession of goods or documents of title, were rendered necessary by the interpretation given in the cases of *Phillips v. Huth*, 6 M. & W. 572, and *Hatfield v. Phillips*, 9 M. & W. 647, 12 Cl. & F. 343, to the phrase "persons intrusted with" documents of title found in the statute 6 Geo. IV., c. 94.

1. **New York Factors' Act.** — Session Laws 1830, c. 179, § 3 (2 Birds. Rev. Stat. N. Y., 1896, p. 1239), provides that "every factor or other agent intrusted with the possession of any bill of lading, custom-house permit, or warehouse keeper's receipt for the delivery of any such merchandise, and every such factor or agent not having the documentary evidence of title who shall be intrusted with the possession of any merchandise for the purpose of sale, or as a security for any advances to be made or obtained thereon, shall be deemed to

be the true owner thereof, so far as to give validity to any contract made by such agent with any other person for the sale or disposition of the whole or any part of such merchandise, for any money advanced, or negotiable instrument or other obligation in writing given by such other person upon the faith thereof."

Section 4 provides that "every person who shall hereafter accept or take any such merchandise in deposit from any such agent, as a security for any antecedent debt or demand, shall not acquire thereby or enforce any right or interest in or to such merchandise or document, other than was possessed or might have been enforced by such agent at the time of such deposit."

Section 5 provides that "nothing contained in the two last preceding sections of this act shall be construed to prevent the true owner of any merchandise so deposited from demanding or receiving the same, upon repayment of the money advanced, or on restoration of the security given, on the deposit of such merchandise, and upon satisfying such lien as may exist thereon in favor of the agent who may have deposited the same; nor from recovering any balance which may remain in the hand of the person with whom such merchandise shall have been deposited, as the produce of the sale thereof, after satisfying the amount justly due to such person by reason of such deposit."

2. See the local statutes.

Massachusetts Acts of 1845 and 1849. — Act 1845, c. 193, providing that every factor, etc., intrusted with the possession of any merchandise, etc., shall be deemed the true owner thereof, so far as to give validity to any *bona fide* contract made by such factor for the sale of the whole or any part of such merchandise, does not protect a pledge of such factor. *Michigan State Bank v. Gardner*, 15 Gray (Mass.) 362.

The subsequent Act of 1849, c. 216, § 3, extended the protection of the act to pledges by such factors or agents.

3. **Extraterritorial Effect of Statutes.** — In *Waltham v. Wetmore*, 1 E. D. Smith (N. Y.) 7, it was held that the Factors' Act of *New York* (Laws 1830, c. 179), had no application to a pledge in London, England, by a factor there, though the delivery of the goods in pursuance of the contract in London may have been consummated by agents of the parties in *New York*.

The Factors' Act of *New York*, Laws of 1830, c. 179, providing that the person in whose name goods are consigned shall be deemed the owner thereof, etc., applies to a disposition in *New York* by a consignee there of goods shipped from another state. *Bates v. Cunningham*, 12 Hun (N. Y.) 21.

factors after the enactment of such acts.¹

II. CONSTRUCTION OF THE STATUTES—1. General Rule.—These acts being in derogation of the common law, it has been held that they should be strictly construed.²

2. Who Are Agents Within the Meaning of the Statutes.—The statutes generally provide for the protection of persons dealing with factors or agents intrusted with the possession of goods, and in order that an unauthorized disposition of the goods by a person other than the owner should be brought within the effect of such statutes it is of course necessary that such person should have been the agent or factor of the owner.³

Statutes Applicable Only to Mercantile Transactions.—The term "any agent or factor intrusted with goods," as used in the Factors' Acts, is to be taken in a restricted sense, and has no application to any person except an agent acting in mercantile transactions.⁴

1. Retroactive Effect of Statute.—Michigan State Bank *v. Gardner*, 15 Gray (Mass.) 364; *Biggs v. Evans*, (1894) 1 Q. B. 88.

2. Statutes Strictly Construed.—*Victor Sewing Mach. Co. v. Heller*, 44 Wis. 265. See also *Lamb v. Attenborough*, 1 B. & S. 831, 101 E. C. L. 831; *Shaw v. North Pennsylvania R. Co.*, 101 U. S. 557; *Toledo First Nat. Bank v. Shaw*, 61 N. Y. 283.

Barter.—The *Wisconsin* Act of 1863, c. 91, § 3, providing that a factor or agent not having the documentary evidence of title who shall be intrusted with the possession of any merchandise for the purpose of sale shall be deemed the true owner thereof so far as to give validity to any contract made by him with any other person for the disposal thereof "for any money advanced, or negotiable instrument or other obligation in writing, given by such other person upon the faith thereof," does not protect a person receiving the goods from such an agent in barter. *Victor Sewing Mach. Co. v. Heller*, 44 Wis. 265.

Proof of Contract for Sale or Pledge.—Under statute 6 Geo. IV., c. 94, § 2, which gives validity to any contract or agreement for the sale or pledge of goods made by an agent intrusted with the possession thereof, it was held that a person who relied on such a contract was bound to produce it if it was proved to be in writing. *Evans v. Truman*, 2 B. & Ad. 886, 22 E. C. L. 205.

3. Essential that the Relation of Agency Exist.—*Van Casteel v. Booker*, 2 Exch. 691; *Stollenwerck v. Thacher*, 115 Mass. 224; *Yenni v. McNamee*, 45 N. Y. 614; *Mechanics', etc., Bank v. Farmers', etc.*, Nat. Bank, 60 N. Y. 40; *Toledo First Nat. Bank v. Shaw*, 61 N. Y. 283; *Farmers', etc., Nat. Bank v. Atkinson*, 74 N. Y. 587.

Where the owner of goods transmitted the bill of lading to his agent with power simply to receive and forward the property, and the agent issued and sent a new bill of lading to one not the consignee named in the original bill of lading, the court applied the rule that the *New York Factors' Act* (Laws 1830, c. 179, § 3), which provides that the factor or agent intrusted with the possession of a bill of lading, etc., shall be deemed the true owner thereof so far as to give validity to certain contracts made by such agent with any other person acting on the faith thereof, operated only where the relation of principal and factor or

agent exists between the real owner and the one having the bill of lading in his possession, and it was held, under the above circumstances, that the person so receiving such new bill of lading did not become the factor or agent of the owner within the meaning of such act, and that therefore the title of the owner was not affected by any contract made by the former with regard to the goods represented by the bill of lading. *Toledo First Nat. Bank v. Shaw*, 61 N. Y. 283.

In *George v. Louisville Fourth Nat. Bank*, 41 Fed. Rep. 257, an agent was intrusted with a bonded warehouse receipt for whiskey, to enable him to borrow money on it to pay the internal-revenue tax. Instead of borrowing the money on the receipt the agent advanced the money and afterwards secured the whiskey, which he subsequently stored in a private warehouse and pledged the warehouse receipt. It was held that the agent, after advancing the money, held the bonded warehouse receipt as a creditor of the owner, and not as an "agent or factor" within the meaning of the *Kentucky* Act of May 5, 1880, and therefore the pledge was not protected by the act.

The *English Factors' Act of 1889* does not use the term person or agent "intrusted with goods." Its provisions (section 2) apply to "a mercantile agent," "with the consent of the owner in possession of goods or of the documents of title to goods." A "mercantile agent" is defined in section 1 (1) as "a mercantile agent having in the customary course of his business as such agent authority either to sell goods, or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods." "A person in possession of goods," etc., is defined in section 1 (2), substantially as in 5 & 6 Vict., c. 39, § 4. See notes *supra*.

4. Statutes Apply to Mercantile Agents Only.—*Lamb v. Attenborough*, 1 B. & S. 831, 101 E. C. L. 831; *City Bank v. Barrow*, L. R. 5 App. 664; *Johnson v. Crédit Lyonnais*, 2 C. P. Div. 224, *affirmed* 3 C. P. Div. 32; *Cole v. North Western Bank*, L. R. 9 C. P. 470, L. R. 10 C. P. 369; *Heyman v. Flewker*, 13 C. B. N. S. 519, 106 E. C. L. 519; *Wood v. Rowcliffe*, 6 Hare 191; *Monk v. Whittenbury*, 2 B. & Ad. 484, 22 E. C. L. 127; *Bush v. Fry*, 15 Ont. Rep. 122; *Levi v. Booth*, 58 Md. 305, 42 Am. Rep. 332.

Possession Must Have Been Intrusted to Agent for Purpose of Sale. — In many jurisdictions in the *United States* where the possession of the goods is relied on to bring the transaction within the statute, it has been held that the goods must have been intrusted to the agent "for the purpose of sale," the statute so providing.¹

Statement of Rule. — In *Heyman v. Flewker*, 13 C. B. N. S. 519, 106 E. C. L. 519, Mr. Justice Willes, in delivering judgment, said that what the cases decide "may be stated thus — that the term 'agent' does not include a mere servant or caretaker, or one who has possession of goods for carriage, safe custody, or otherwise, as an independent contracting party; but only persons whose employment corresponds to that of some known kind of commercial agent like that class (factors) from which the act has taken its name."

Jeweler and Dealer in Jewelry. — The plaintiff, the owner of a diamond ring, intrusted it to a dealer in jewelry, for the purpose of obtaining a match for it, or, failing that, to get an offer for it. The jeweler sold it without authority to the defendant, a *bona fide* purchaser, who in turn disposed of it to an unknown party. In an action of trover it was held that the jeweler was not an agent or factor within the meaning of the code, art. 3, § 4, etc., and that the plaintiff was entitled to recover. *Levi v. Booth*, 58 Md. 305, 42 Am. Rep. 332.

In *Biggs v. Evans*, (1894) 1 Q. B. 88, the plaintiff was the owner of an opal table top, which he intrusted to an agent who was a dealer in jewels and gems, and as a known part of his business sold jewels and gems for other people in his own name, having them in his possession. The table top was intrusted on the terms that it should not be sold to any person, for any price, without the plaintiff's authority. It was held that the Factors' Act would apply so far as relates to the business which the jewelers were carrying on.

In *Hastings v. Pearson*, (1893) 1 Q. B. 62, it was held that one employed as a jeweler to sell jewelry at retail on commission was not a "mercantile agent" within the meaning of the Factors' Act 1839 (52 & 53 Vict., c. 45, § 2, subsec. 1), providing that where a mercantile agent is, with the consent of the owner, in possession of goods or documents of title to goods, any sale or pledge, etc., made by him, etc., shall be valid.

Person Caring for Furniture of Another. — In *Wood v. Rowcliffe*, 6 Hare 183, 8 Jur. 771, (consolidated) 5 & 6 Vict., c. 39) it was held that a person intrusted to keep in her own house furniture belonging to another was not the "agent" of the owner within the meaning of the act.

Master and Servant. — In *Lamb v. Attenborough*, 1 B. & S. 831, 101 E. C. L. 831, it was held that the Factors' Act 6 Geo. IV., c. 94, and 5 & 6 Vict., c. 39, providing for the protection of transactions by third persons with a factor or "any agent" intrusted with the possession of goods, did not apply to a disposition of goods by a servant intrusted with their possession. This was a case where a clerk was intrusted with delivery orders. See also *Zachrisson v. Ahman*, 2 Sandf. (N. Y.) 68.

Manager of a Store in Another's Name. — In *Florence Sewing Mach. Co. v. Warford*, 1 Sweeney (N. Y.) 436, it was held that the Fac-

ors' Act of New York did not protect a pledge of goods by the manager of a store carried on in the owner's name. See also *Sage v. Shepard*, etc., *Lumber Co.*, 4 N. Y. App. Div. 290.

Wharfinger. — The statute of 6 Geo. IV., c. 94, § 4, does not include the disposition of goods by a wharfinger. *Monk v. Whittenbury*, 2 B. & Ad. 484, 22 E. C. L. 127.

A Tobacco Broker and Merchant imported tobacco and placed it in bond, receiving the usual warrants therefor. Afterwards he sold the tobacco to a purchaser, who paid therefor, but left the warrants in the possession of the broker. It was held that the broker was not the factor or agent of the purchaser intrusted with such documents of title within the meaning of the statute of 6 Geo. IV., c. 94, § 2, and 5 & 6 Vict., c. 39, § 1, and that therefore a pledge of such tobacco to a person, acting in good faith, to whom the broker handed the warrants, was not protected by such act. *Johnson v. Credit Lyonnais Co.*, 3 C. P. Div. 32.

Vendee. — A vendee in possession of the documents of title to goods sold is not an "agent" of the vendor so that a sale by the former will defeat the latter's lien for the purchase price. *Jenkyns v. Osborne*, 7 M. & G. 678, 49 E. C. L. 678; *M'Ewan v. Smith*, 2 H. L. Cas. 309.

Warehouse Keeper. — A warehouse keeper who has goods deposited with him as such is not "an agent intrusted with the possession" of them, within the Factors' Act 5 & 6 Vict., c. 39, although he is also a broker, and is usually employed to sell the goods, but always upon specific instructions for that purpose received from the principal. *Cole v. North Western Bank*, L. R. 10 C. P. 354, 44 L. J. C. P. 233, 32 L. T. N. S. 733, *affirming* L. R. 9 C. P. 470, 43 L. J. C. P. 194, 22 W. R. 861, 30 L. T. N. S. 684.

Single Transaction May Constitute "Agent." — To constitute one an "agent," however, within the meaning of the statute 5 & 6 Vict., c. 39, it was not necessary that his ordinary business should be that of an agent to sell goods for third persons on commission, but an agent for the sale of goods might fall within the statute, though he acted merely in an isolated transaction. *Heyman v. Flewker*, 13 C. B. N. S. 519, 106 E. C. L. 519, wherein pictures were deposited with a person whose ordinary business was that of an insurance agent, and he was held an "agent" within the statute.

1. Agent Must Have Possession for Purpose of Sale. — *Nickerson v. Darrow*, 5 Allen (Mass.) 419; *Thacker v. Moors*, 134 Mass. 456; *Stollenwerck v. Thacher*, 115 Mass. 224; *H. A. Prentice Co. v. Page*, 164 Mass. 276; *Cook v. Beal*, 1 Bosw. (N. Y.) 497; *Frankenstein v. Thomas*, 4 Daly (N. Y.) 256; *Covill v. Hill*, 4 Den. (N. Y.) 323; *Soltau v. Gerdau*, 119 N. Y. 380. See also *Cartwright v. Wilmerding*, 24 N. Y. 528.

In *Cook v. Beal*, 1 Bosw. (N. Y.) 497, it was held, under the Factors' Act, Laws 1830, c. 179, § 3 (providing that every factor or other

And the same has been held in *England*, under the former Factors' Acts, which merely provided that an agent "intrusted with the possession of goods" should be deemed the owner, without containing the phrase "for the purpose of sale" used in the *New York Act*.¹

Conditional Vendee. — The English Factors' Act of 1889 provides that a sale by a person in possession of goods under an agreement of purchase shall have the same effect as if such vendee were a mercantile agent in possession of the goods.²

agent intrusted with the possession of any bill of lading, etc., and every such factor or agent "who shall be intrusted with the possession of any merchandise for the purpose of sale," shall be deemed to be the true owner thereof, so far as regards the protection of persons dealing with such factor or agent), that to bring an agent within the effect of this statute, where his possession of the goods is relied on to do so, it is necessary that the goods should have been intrusted to the factor or agent for the purpose of sale. This principle was applied in a case where the goods were intrusted to an agent for storage, and it was held that such agent was not within the act.

1. **English Rule.** — *Fuentes v. Montis*, L. R. 4 C. P. 93, 38 L. J. C. P. 95, 19 L. T. N. S. 364, 17 W. R. 208, *affirming* L. R. 3 C. P. 268, 37 L. J. C. P. 137, 18 L. T. N. S. 21, 16 W. R. 900; *Cole v. North Western Bank*, L. R. 9 C. P. 470. See also *Johnson v. Credit Lyonnais*, 3 C. P. Div. 224; *Baines v. Swainson*, 4 B. & C. 270, 116 E. C. L. 270, *per* Blackburn, J. *Compare* *Vickers v. Hertz*, L. R. 2 H. L. Sc. 113.

Illustrations. — In *Biggs v. Evans*, (1894) 1 Q. B. 88, decided under Stat. 6 Geo. IV., c. 94, the plaintiff was the owner of an opal table top, which he intrusted to an agent who was a dealer in jewels and gems and as a known part of his business sold jewels and gems for other people in his own name, having them in his possession. The table top was intrusted on the terms that it should not be sold to any person, for any price, without the plaintiff's authority. It was held that the table top was not intrusted to the agent for the purpose of sale; that this was essential under the statute; and therefore an unauthorized sale by the agent was not within the protection of the Factors' Act.

One Slee carried on the business of a sheep's-wool broker in Liverpool, and also that of a warehouse keeper. In his capacity of warehouse keeper he was in the habit of receiving from the plaintiffs, merchants in London, bills of lading for sheep's wool and goats' wool to arrive in Liverpool, which when landed was deposited in his warehouses under directions to send a report and valuation to the plaintiffs, but he was not authorized to sell without specific instructions. The sheep's wool so deposited with him was usually sold by Slee, and the proceeds received by him for the plaintiffs. The goats' wool Slee never sold, he not being a goats'-wool broker. Having wools of the plaintiffs of both descriptions in his warehouse, but not having received any instructions as to the sale of either, Slee professed to pledge the whole with the defendants, bankers in Liverpool, by a letter in which he undertook to hold them as trustees for the defendants, to

secure the sum advanced. It was held that Slee was not, as to any of the wools so agreed to be pledged, "an agent intrusted with the possession," within the Factors' Act 5 & 6 Vict., c. 39. *Cole v. North Western Bank*, L. R. 10 C. P. 354, *affirming* L. R. 9 C. P. 470.

In *Hellings v. Russell*, 33 L. T. N. S. 380, the plaintiffs, being silk manufacturers in Germany, appointed, in addition to other agents in London, F. to act as their agent. The course of business was as follows: It was F.'s duty to call upon certain named customers of the plaintiffs and get orders for silks. These orders he then transmitted to plaintiffs, giving a list of the buyers, and of the quantities ordered by each buyer. The goods ordered were then sent over together from Germany to F., whose duty it then was to forward to each buyer the amount purchased by him. It did not appear that F., in the usual course of business, was allowed to represent himself to buyers as principal in the transactions. F., in the course of the business, from time to time collected the money due from the customers, and accepted bills drawn upon him by the plaintiffs for the amount of the invoices of goods sent to him from Germany. F. pledged some of the goods so sent over to him with the defendant for advances. The pledging was in fraud of his instructions, but the defendant in making the advances acted *bona fide*, and without knowledge of the fraud. In an action to recover the goods so pledged or their value, it was held that F. was not an agent intrusted with the possession of the goods within the meaning of the Factors' Acts 4 Geo. IV., c. 83, 6 Geo. IV., c. 94, and 5 & 6 Vict., c. 39.

2. **Hire and Purchase Agreement.** — Section 9 of the English Factors' Act, 1889, provides that one who has "agreed to buy" goods and has obtained possession under such agreement may transfer a good title by sale or pledge to one who acts in good faith and without notice of any right of the original seller. Under this section it was held that one who had come into possession of furniture under a hire and purchase agreement under which the title to the furniture was to vest in the vendee when he had paid to the vendor certain agreed instalments which he was under an absolute obligation to pay was "a person having agreed to buy goods," and consequently that a sale by him to a purchaser in good faith and without notice was valid. *Lee v. Butler*, (1893) 2 Q. B. 318.

In *Helby v. Matthews*, (1895) App. 471, *reversing* (1894) 2 Q. B. 262, one who had obtained possession of furniture under an agreement by which he had the option of obtaining title by making a series of payments or of restoring the furniture at any time to the vendor, was

3. What Are Goods and Merchandise Within the Meaning of the Statutes. — It would seem that the word "goods" as used in the English Factors' Act and the word "merchandise" as used in the American statutes include all commodities of commerce,¹ but are intended to apply only to such commodities.²

4. What Documents of Title Are Within the Statute. — The question whether the documents of title are such as to bring the case within the effect of the statute must, of course, depend upon the wording of the respective statutes. The decisions construing the several acts in this regard will be found in the note below.³ Where the agent attempts to pledge or transfer goods of his principal by the transfer of any document of title not within the act, the transaction is, of course, governed by the common law.⁴

5. Character and Sufficiency of Agent's Possession — *a. IN GENERAL.* — Where the possession of goods, as distinguished from the possession of docu-

held not to have "agreed to buy" within the meaning of the act. The case was *distinguished* from *Lee v. Butler*, (1893) 2 Q. B. 318, on the ground that here the vendee was never under a legal obligation to buy.

Section 9 of the Factors' Act, 1889, protects an auctioneer who, in good faith and without notice of any lien or other right of the original seller, receives and sells goods delivered to him for that purpose by a person who had obtained possession of the goods under a hire and purchase agreement which provided for payment by instalments, but some of the instalments had not been paid. *Shenstone v. Hilton*, (1894) 2 Q. B. 452.

In the United States purchasers from conditional vendors are protected by acts requiring the regulation of all contracts of conditional sale. See the title *CONDITIONAL SALES*, vol. 6, p. 494.

1. What Are Goods and Merchandise. — In *Biggs v. Evans*, (1894) 1 Q. B. 88, an opal table top intrusted to an agent who was a dealer in jewels and gems and who as a known part of his business sold jewels and gems for other persons in his own name was, so far as regards the character of the article, included in the term "goods" within the meaning of the Factors' Act.

In *Heyman v. Flewker*, 13 C. B. N. S. 519, 106 E. C. L. 519, the act was applied to a pledge of pictures by an agent.

2. In *Freeman v. Appleyard*, 32 L. J. Exch. 175, 7 L. T. N. S. 282, it was held that certificates of railway stock were not "goods" within the meaning of the Factors' Act.

3. Warehouse Receipt — Bonded Warehouse. — It has been held that a receipt for whiskey stored in a bonded warehouse was not a "document of title" within the meaning of the *Kentucky Act* of May 5, 1880, providing for the protection of persons dealing with agents intrusted with the "documents of title" to property, and further providing that the term "documents of title" shall include custom-house permits, warehouse receipts, etc. The court said that it could not be presumed that the legislature of Kentucky undertook to regulate the duties and obligations of a bonded warehouse of the United States, created and established for the protection and security of its own revenues and in which free whiskey could not remain without the penalty of forfeiture, and further said that the act manifestly referred to warehouses and warehouse receipts and to principals and factors over

whom the state of Kentucky possessed authority and could exercise lawful jurisdiction. *George v. Louisville Fourth Nat. Bank*, 41 Fed. Rep. 257. See also *Price v. Wisconsin M. & F. Ins. Co.*, 43 Wis. 267.

In *Bonito v. Mosquera*, 2 Bosw. (N. Y.) 401, it was held that a "warehouse receipt," as that phrase is used in the *New York Factors' Act*, Laws 1830, c. 179, means the receipt of the keeper of a private warehouse in which the person named in the receipt has deposited the goods for safekeeping, and by its terms binds such warehouse keeper, upon the surrender of the receipt, to deliver the goods to the bearer of it or to the holder, if duly indorsed to him. It does not include such a receipt as the keeper of a bonded warehouse, on receiving for storage therein imported goods on which duties are not paid, is authorized by the Acts of Congress to give.

Weigher's Return. — In *Western Transp. Co. v. Barber*, 56 N. Y. 544, it was held that a weigher's return of grain received was not such a receipt as was contemplated by the Factor's Act of 1858, c. 326.

Delivery Order. — A delivery order is not such a document of title as is contemplated by the *New York Factors' Act*. *Soltau v. Gerdau*, 119 N. Y. 380. Compare *Vickers v. Hertz*, L. R. 2 H. L. Sc. 113.

Order for the Delivery of Goods. — Under the statute 5 & 6 Vict., c. 39, § 4, providing that any "order for the delivery of goods, or any other document used in the ordinary course of business as proof of the possession or control of goods, * * * shall be deemed and taken to be a document of title," it was held that an order for the delivery of a specific quantity of goods was within the terms of the act, although no specific goods to which the order was applicable were mentioned. *Vickers v. Hertz*, L. R. 2 H. L. Sc. 113.

Receipt for the Payment of Money. — A mere receipt for the payment of money for goods is not a delivery order or document of title within the meaning of the statute 40 & 41 Vict., c. 39, § 5. *Kemp v. Falk*, L. R. 7 App. 573.

Wharfinger's Certificate. — In *Gunn v. Bolckow*, L. R. 10 Ch. 491, it was held that a wharfinger's certificate that goods were lying ready for shipment was not a document of title within the English Factors' Act, and that no custom of trade could give to such a certificate the effect of a warrant or document of title as against the vendor.

4. *Bonito v. Mosquera*, 2 Bosw. (N. Y.) 401.

mentary evidence of title, is relied on to bring the case within the statute providing for the protection of persons dealing with agents intrusted with the "possession" of goods, it has been held that the possession must be actual as distinguished from constructive.¹

Repledge. — A factor or agent, by pledging goods in his possession for an amount which does not exhaust their value, has not thereby parted with his control over the goods so as to preclude himself from making a further pledge for the balance of their value which shall be valid as against the principal under the Factors' Act.²

b. INTRUSTED WITH. — In order that the possession of the goods or the documents of title shall satisfy the words "intrusted with," it is necessary that the document of title or the goods should have been transmitted to the agent by the owner personally or by his authority, or should have been acquired by the agent in the proper and ordinary mode of discharging his duties.³

1. Actual Possession by Agent Required. — *Howland v. Woodruff*, 60 N. Y. 73, 16 Abb. Pr. N. S. (N. Y.) 411; *Bonito v. Mosquera*, 2 Bosw. (N. Y.) 401; *Cook v. Beal*, 1 Bosw. (N. Y.) 497. Compare *Pegram v. Carson*, 10 Bosw. (N. Y.) 505.

In *Howland v. Woodruff*, 60 N. Y. 73, this principle was applied in a case where a factor obtained an advance on goods while in the possession of the carrier by whom they were shipped by the principal, the goods being delivered by the carrier directly to the pledgee.

In *Bonito v. Mosquera*, 2 Bosw. (N. Y.) 401, it was held that imported goods shipped to a factor were not, while in a United States bonded warehouse, in the "possession of" the factor. See, however, *Cartwright v. Wilmerding*, 24 N. Y. 521.

In *Pegram v. Carson*, 10 Bosw. (N. Y.) 505, the court said that the word "possession" in the Factors' Act means "such control or dominion over merchandise as to enable a factor rightfully to take possession of it without the aid of any new authority or document furnished by the owners, as in contradistinction to a right derived from documentary evidence furnished by owners, or obtained by factors by means of their right of possession of the goods." And it was held that where factors to whom merchandise is consigned by the owner, for sale, with bills of lading making it deliverable to them, receive the merchandise and store it, according to the usage of business, with a storekeeper employed by themselves, taking his receipts in their own name, both the virtual control of the factors over the merchandise and the documentary evidence of such control, title, or right of possession held by them with the owner's assent are such as to enable them to make a valid pledge of the merchandise.

Under the English Factors' Act, 1889, § 1, subsec. 2, it is provided that "a person shall be deemed to be in possession of goods, or of the documents of title to goods, where the goods or documents are in his actual custody or are held by any other person subject to his control, or for him, or on his behalf." This provision is taken from section 4 of the act 5 & 6 Vict., c. 39.

2. Repledge. — In *Portalis v. Tetley*, L. R. 5 Eq. 140 (decided under 5 & 6 Vict., c. 39), it was held where cotton was consigned for sale by A to B, and B pledged the goods to C, a

broker, depositing with him the bill of lading, and authorizing him to receive and sell the cotton, and subsequently made a further pledge to D for the balance of the net proceeds of the cotton, by an order in writing communicated to and assented to by C, that the pledge to D was valid as against A.

3. Intrusted With. — *Bonito v. Mosquera*, 2 Bosw. (N. Y.) 401.

Identical Documents of Title Need Not Have Been Intrusted to Agent. — In *New York* it has been held unnecessary that the principal should have intrusted the factor with the identical document of title on the faith of which he procured the loan. Intrusting him with the primary document is equivalent to intrusting him with all others which in ordinary uses of trade grow out of it. This rule was laid down in *Cartwright v. Wilmerding*, 24 N. Y. 521, and applied in a case where the factor of a foreign principal was intrusted with a bill of lading and thereby enabled to secure the bonded warehouse receipt in his own name, on which the advance was made to him. See also *Pegram v. Carson*, 10 Bosw. (N. Y.) 505.

English Doctrine Contrary. — Under the English decisions based on 6 Geo. IV., c. 94, however, the identical documents of title on which the advance was secured by the factor must have been intrusted to the factor by his principal. In *Phillips v. Huth*, 6 M. & W. 573, this principle was first stated and applied in a case where a factor intrusted with the bill of lading was thereby enabled to secure dock warrants which were customarily issued to the holders of the bill of lading, and it was held that the factor was not "intrusted with" the dock warrants, within the meaning of section 2 of the act. To the same effect is *Hatfield v. Phillips*, 12 Cl. & F. 343, 14 M. & W. 665. See also *Close v. Holmes*, 2 M. & Rob. 22.

Statutory Change. — Immediately upon these English decisions an Act of Parliament was passed for the purpose of preventing the force of these decisions on the point of "intrusting" documents, which act expressly provided that the term should include an agent possessed of any of the documents of title mentioned in the act, "whether derived immediately from the owner of such goods, or obtained by reason of such agent having been intrusted with the possession of the goods, or of any other document of title thereto." Stat.

Possession of Agent Must Be with Consent of Owner. — To render the possession by the agent such as to bring the case within the operation of the statutes it is also essential that possession should have been acquired with the consent of the principal.¹ The same rule also applies as regards the section of the Factors' Act providing that the person in whose name goods are shipped shall be deemed the true owner so far as to secure consignees for advances thereon, and it is held necessary in order to bring a shipment within the provision of such section that the goods must have been shipped with the consent of the owner.²

Possession Obtained by Fraud. — Though the possession is obtained by the agent with the consent of the principal, yet where his consent was obtained by fraud, and under such circumstances as would amount to larceny, the agent's possession is not such as is contemplated by the act.³

5 & 6 Vict., c. 39, § 4. And a similar provision is found in some of the statutes in the *United States*, but not in the *New York Act*. *George v. Louisville Fourth Nat. Bank*, 41 Fed. Rep. 257.

1. Possession Must Be With Consent of Owner. — *Vaughan v. Moffat*, 38 L. J. Ch. 144; *Hazard v. Fiske*, 18 Hun (N. Y.) 277; *Soltau v. Gerdau*, 119 N. Y. 380; *Sage v. Shepard*, etc., *Lumber Co.*, 4 N. Y. App. Div. 290; *Barnard v. Campbell*, 55 N. Y. 456; *Austin v. Dye*, 46 N. Y. 500; *Dows v. Perrin*, 16 N. Y. 325; *Bonito v. Mosquera*, 2 Bosw. (N. Y.) 401; *Bal-land v. Burgett*, 40 N. Y. 314; *Florence Sewing Mach. Co. v. Warford*, 1 Sweeny (N. Y.) 436.

Illustrations. — In *H. A. Prentice Co. v. Page*, 164 Mass. 276, it was held that where a factor procures goods to be intrusted to him for delivery to a third person by means of forged conditional contracts of sale, the goods are not intrusted to him for sale within the meaning of Pub. Stat., c. 71.

In *George v. Louisville Fourth Nat. Bank*, 41 Fed. Rep. 257, it was held that where an agent intrusted with the warehouse receipts for the purpose of negotiating a loan for his principal negotiates the loan by pledge of the receipts, and afterwards repays the loan and thereby regains possession of the receipts, he is not intrusted with them again within the meaning of the Kentucky Factors' Act.

Demand on Factor for Return of Goods — Effect. — In *Fuentes v. Montis*, L. R. 4 C. P. 93, affirming L. R. 3 C. P. 268, it was held that an agent originally intrusted with goods for sale ceases to be "intrusted" with them within the meaning of the Factors' Act after a demand upon him by his principal for their return and a revocation of his authority to sell. This decision called for the modification by 40 & 41 Vict., c. 39, § 2, which provided that a *bona fide* pledge or purchase shall not be defeated by a secret revocation of the agent's authority.

Neglect of Owner. — Negligence on the part of the owner which thereby enabled the agent to acquire possession is insufficient to bring the case within the operation of the statute. *Hazard v. Fiske*, 18 Hun (N. Y.) 277; *Sage v. Shepard*, etc., *Lumber Co.*, 4 N. Y. App. Div. 290. See also *Toledo First Nat. Bank v. Shaw*, 61 N. Y. 283.

2. Consignments Must Be With Consent of Owner. — *Covill v. Hill*, 4 Den. (N. Y.) 323; *Hazard v. Fiske*, 18 Hun (N. Y.) 277; *Toledo First Nat. Bank v. Shaw*, 61 N. Y. 283; *Saltus*

v. Everett, 20 Wend. (N. Y.) 267, 32 Am. Dec. 541. See also *Mechanics*, etc., *Bank v. Farmers*, etc., Nat. Bank, 60 N. Y. 40.

One of two persons who were dealing on joint account in the purchase by the one of merchandise shipped to and sold by the other bought a lot from a seller who had been accustomed to supply them, and who sold this, saying nothing as to credit, upon the false representation of the buyer that the money to pay for it was on the way. The buyer then, by deceiving the carrier, shipped it in the name of his insolvent firm as consignors, to whom the consignee advanced money; and the consignee, on the seller claiming the goods, denied having any interest, and claimed that he had sold them on account of the firm to whom he had made such advances. It was held that the Factor's Act (Laws 1830, c. 179) had no application. It applies only where the shipment is made with the consent of the real owner, in the name of another, not where the property is wrongfully taken. *Kinsey v. Leggett*, 71 N. Y. 387.

Consignment of Stolen Goods. — An auctioneer or commission merchant selling a consignment of stolen goods without knowledge of their true character cannot have a set-off of the amount paid to the consignor by reason of the Factors' Act (see 1 S. & C. 420; Bates's Annot. Stat. Ohio, 1897, § 3214 *et seq.*). That act, providing that the consignees shall, for certain purposes, be deemed the true owners, was not intended to apply to stolen goods. *Miller v. Laws*, 4 Cinc. Wkly. L. Bul. 123, 7 Ohio Dec. (Reprint) 602, 7 Am. L. Rec. 606, 6 Ohio Dec. (Reprint) 736.

3. Possession Obtained by Fraud. — *H. A. Prentice Co. v. Page*, 164 Mass. 276; *Hentz v. Miller*, 94 N. Y. 64; *Frankinstein v. Thomas*, 4 Daly (N. Y.) 256; *Soltau v. Loewenthal*, (Supreme Ct.) 1 N. Y. Supp. 168; *Soltau v. Gerdau*, 119 N. Y. 380, affirming 48 Hun (N. Y.) 537. Compare *Sheppard v. Union Bank*, 7 H. & N. 661; *Vickers v. Hertz*, L. R. 2 H. L. Sc. 113; *Baines v. Swainson*, 4 B. & S. 270, 116 E. C. L. 270.

In *Baines v. Swainson*, 4 B. & S. 270, 116 E. C. L. 270, a factor, by falsely representing to a manufacturer of cloths that he had procured an order for a quantity of the cloths from A, induced the manufacturer to ship cloths to the factor. The factor thereupon warehoused the goods in his own warehouse and sold them to B at a price less than that at which he repre-

6. Persons Within the Protection of the Statutes — Must Act in Good Faith. — It is expressly provided in a number of jurisdictions that the protection of the Factors' Acts shall extend only to *bona fide* purchasers and pledgees; and even in the absence of such a provision the protection of the acts will not be extended to a person who receives the goods from an agent with notice of the true ownership and want of authority on the part of the agent,¹ or where its protection would secure to a wrongdoer the fruits of a fraud.² In some jurisdictions the right of the person to protection depends upon his want of notice of the *mala fides* of the agent and the latter's want of authority,³

sented to the manufacturer that he had secured an order from A. B bought the goods *bona fide* and without notice. It was held that he was protected by the Factors' Acts 6 Geo. IV., c. 94, and 5 & 6 Vict., c. 39. In delivering judgment, Wightman, J., referred to Phillips v. Huth, 6 M. & W. 572, and recognized the distinction between intrusting the goods and merely enabling a person to become possessed of them, but said: "Here the goods were actually in the possession of Emsley, the agent, being in his warehouse, and therefore, according to the authority of that case, he was intrusted with them." Blackburn, J., was of opinion that the agent, being in possession of the goods, was, according to 5 & 6 Vict., c. 39, § 4, to be presumed to have been intrusted with them by the owner, unless the contrary was shown, and that was a question for the jury.

1. Good Faith on Part of Person Dealing with Agent Required — *England*, — Phillips v. Huth, 6 M. & W. 572.

Maryland. — Levi v. Booth, 58 Md. 305, 42 Am. Rep. 332.

New York. — Florence Sewing Mach. Co. v. Warford, 1 Sweeny (N. Y.) 433; Stevens v. Wilson, 3 Den. (N. Y.) 472, affirming 6 Hill (N. Y.) 512; Bonito v. Mosquera, 2 Bosw. (N. Y.) 401; Pegram v. Carson, 10 Bosw. (N. Y.) 505; Covell v. Hill, 6 N. Y. 374; Wilson v. Nason, 4 Bosw. (N. Y.) 155; Cartwright v. Wilmerding, 24 N. Y. 521; Toledo First Nat. Bank v. Shaw, 61 N. Y. 283; Zachrisson v. Ahman, 2 Sandf. (N. Y.) 68; Walther v. Wetmore, 1 E. D. Smith (N. Y.) 7.

Ohio. — Cleveland v. Shoeman, 40 Ohio St. 183.

Pennsylvania. — Macky v. Dillinger, 73 Pa. St. 85.

Wisconsin. — Price v. Wisconsin M. & F. Ins. Co., 43 Wis. 267.

In Stevens v. Wilson, 3 Den. (N. Y.) 472, it was held under the *New York* Act of 1830, c. 179, providing that one intrusted with the possession of the goods of another, for the purpose of sale, shall be deemed the true owner so far as to give validity to a disposition thereof for money advanced, that a person was not protected who made advances to a factor on goods knowing that he was not the owner.

Ownership Shown by Bill of Lading. — A purchase, though in good faith, from an agent who sells his principal's property as his own, without authority, does not confer title upon the purchaser against such principal if the bill of lading under which the agent held the property showed that it did not belong to him. Such a purchase is not protected by the Factors' Act, as the bill of lading is constructive notice

of the true ownership. (1 Rev. Stat. 774.) Wilson v. Nason, 4 Bosw. (N. Y.) 155. See also Toledo First Nat. Bank v. Shaw, 61 N. Y. 283.

Duty to Inquire as to True Ownership. — Where the factor has possession of all the documents evidencing title which would ordinarily be in the hands of the true owner, the vendee or pledgee is not bound to examine the warehousing entry retained at the custom house and is not chargeable with notice of the true ownership because it is disclosed in such custom-house entry. Cartwright v. Wilmerding, 24 N. Y. 521.

2. Dorrance v. Dean, 106 N. Y. 203.

3. Notice of Want of Authority. — Under 5 & 6 Vict., c. 39, a contract with an agent for the pledge of goods will be valid as against the principal, though the person dealing with the agent knows him to be only an agent in respect of the goods pledged, provided that the person so dealing acts *bona fide* and without notice that the agent is acting *mala fide* and beyond his authority. Navulshaw v. Brownrigg, 2 De G. M. & G. 441, 13 Eng. L. & Eq. 262. See also Gobind Chunder Sein v. Administrator-Gen., 8 Jur. N. S. 343; Douglas v. Ewing, 6 Ir. C. L. Rep. 395.

Under Laws Wisconsin, 1863, c. 91, a factor intrusted with power to purchase and retain a negotiable warehouse receipt had power to pledge, as well as to sell, the same to any one dealing with him in good faith; and notice that he holds as factor is not notice of any limitation of his power; but a sale or pledge to one who knows that it is in violation of the principal's instructions does not bind the latter. Price v. Wisconsin M. & F. Ins. Co., 43 Wis. 267.

Sufficiency of Notice. — Where goods are pledged by a factor, to deprive the pledgee of the protection of 5 & 6 Vict., c. 39, he must be fixed with knowledge that the agent is so acting without authority, and no mere suspicion will amount to notice; nor will the knowledge that the agent has power to sell the goods constitute notice that he has not power to pledge them. Navulshaw v. Brownrigg, 2 De G. M. & G. 441, 13 Eng. L. & Eq. 262.

To prove such notice it is sufficient, however, to show that the circumstances attending the transaction were such that a reasonable man and a man of business applying his understanding to them would certainly infer that the agent had not authority to make the pledge, or that he was acting *mala fide* in respect thereof against his principal. Douglas v. Ewing, 6 Ir. C. L. Rep. 395. See also Gobind Chunder Sein v. Administrator-Gen., 8 Jur. N. S. 343.

whereas in *New York* the mere notice that the agent holds the goods as such has been held sufficient to take the case out of the protection of the acts.¹

Must Correspond to Purchaser for Value. — To enable a person to claim the protection of the Factors' Acts, it is also generally necessary that he should be a purchaser or *quasi* purchaser for value;² and a person receiving the goods in payment of or as security for an antecedent debt is not within the protection of the act.³

1. Notice that the Factor Holds as Agent. — *Stevens v. Wilson*, 6 Hill (N. Y.) 512. And see cases cited in the second note preceding.

The mere notoriety of the agent's employment as a factor will not of itself constitute notice to persons dealing with him that he holds the goods as factor. *Pegram v. Carson*, 10 Bosw. (N. Y.) 505.

By 6 Geo. IV., c. 94, § 2, a purchaser or a pledgee could acquire a complete title by pledge or sale from an agent only where the purchaser or pledgee had no notice that the agent was not the actual and *bona fide* owner of the goods. But by section 5 of the same act it was provided that a person might take goods in pledge from an agent, notwithstanding notice that the pledgor was an agent; but in such case he secured no further rights than were possessed by the agent at the time of the pledge. These provisions were enforced in *Fletcher v. Heath*, 7 B. & C. 517, 14 E. C. L. 94. The statute 5 & 6 Vict., c. 39, which recited that under "the present state of the law, advances cannot safely be made upon goods or documents of title to persons known to have possession as agents only," changed the law in this respect, so that one buying *bona fide* from one whom he knew to be an agent might acquire a good title, unless he was aware of the agent's actual want of authority. See *Code v. North Western Bank*, L. R. 10 C. P. 369.

2. Purchaser for Value. — A, a manufacturer, having consigned goods to C, who had acted as his agent, C, being liable, together with B, on a bill of exchange which had become due, obtained from B three hundred pounds for the purpose of taking up the bill, and at the same time deposited A's goods with B. A having brought an action to recover back the goods, the judge told the jurors that if they thought the transaction was only a circuitous mode of paying the bill, on which B was liable, it was not within the protection of 5 & 6 Vict., c. 39, § 1. It was held that the direction was right, and that the transaction was not protected by the statute. *Learoyd v. Robinson*, 12 M. & W. 745.

Purchase with Knowledge of Insolvency of Factor. — A sale by an insolvent factor of goods of his principal, to a party knowing the insolvency of the factor, but ignorant of the ownership of the goods, is not protected by the *New York Factors' Act* (Acts 1830, c. 179). *Warner v. Martin*, 11 How. (U. S.) 209.

Pledge for Future Indorsements. — In *Jennings v. Merrill*, 20 Wend. (N. Y.) 9, it was held that the *New York Factors' Act* (Laws 1830, c. 179), providing that a factor or other agent intrusted with the possession of merchandise, etc., shall be deemed the true owner so far as to give validity to any contract made by such person for the sale or disposition of such merchandise, or "any money advanced or negotiable

security or other obligation in writing given by such other person upon the faith thereof," protected a pledge by such a factor or agent given as security for future indorsements.

3. Receiving Goods as Security for Antecedent Debt. — *Bonzi v. Stewart*, 4 M. & G. 205, 43 E. C. L. 158; *In re Coleman*, 36 U. C. Q. B. 559; *Brooks v. Hanover Nat. Bank*, 26 Fed. Rep. 301; *Warner v. Martin*, 11 How. (U. S.) 209 [*construing* Act N. Y., 1830, c. 179]; *Moors v. Kidder*, 34 Hun (N. Y.) 534; *New York Security, etc., Co. v. Lipman*, 91 Hun (N. Y.) 554; *Macky v. Dillinger*, 73 Pa. St. 85, *construing* Act Pa., 1834.

Most of the statutes contain special provisions to this effect. See, for instance, the English Factors' Act, 1889, § 4.

In *Macnee v. Gorst*, L. R. 4 Eq. 315 (*explaining* *Jewan v. Whitworth*, L. R. 2 Eq. 602), decided under 5 & 6 Vict., c. 39, it was held that the act did not protect one who, having become surety for the agent, received the goods as security for money paid by him upon his liability as surety.

In *Bonito v. Mosquera*, 2 Bosw. (N. Y.) 401, it was held that in the case of pledges by an agent, the advances and the delivery of the documents of title must be simultaneous.

What Constitute Antecedent Debts. — H. requested W. to purchase cotton for him to be delivered and paid for on a future day. W. made such purchase in his own name through C., a broker. When the cotton was ready for delivery, the price had fallen, and C. refused to pay for it, unless he was secured from loss. H. accordingly indorsed and deposited with W., who indorsed and deposited with C., a bill of lading of goods consigned to H., and C. thereupon completed the purchase of the cotton. Such goods were in fact consigned to H. as the plaintiff's factor. It was held that the deposit of the bill of lading was valid as against the plaintiff, and that it was not made in respect of an antecedent debt due from H. to W. *Jewan v. Whitworth*, 36 L. J. Ch. 127, L. R. 2 Eq. 602. See also *Learoyd v. Robinson*, 12 M. & W. 745.

The appellants, merchants at Singapore, employed M. in London as agent to sell, without authority to pledge, cargoes which they from time to time consigned to him. M. employed the respondents, London brokers, to sell the appellant's consignments, and also in speculative purchases on his own account. The respondents purchased shellac for M. without disclosing that they were buying as agents, and therefore were personally liable to the vendors on the contracts. Subsequently they made advances to M. to enable him to pay deposit on the shellac, and took as security bills of lading of some of the appellants' cargoes. They had no notice that M. was acting improperly in pledging the cargoes. On obtain-

Transaction Must Be in Ordinary Course of Business. — And the transaction must be in the usual and ordinary course of business by such agent.¹

ing the advances M. gave the respondents checks for the amount of the deposits, which were then paid by the respondents. It was held that the obligation under which M. lay to the respondents to pay the deposits and thus prevent their being called upon to pay them did not constitute an antecedent debt within the meaning of the Factors' Act, 5 & 6 Vict., c. 39, § 3, and that the pledges were made in respect of *bona fide* advances, and not of antecedent debts, and were valid against the appellants. *Kaltenbach v. Lewis*, L. R. 10 App. 617, *affirming* in part, and in part *reversing* 24 Ch. Div. 54, which *varied* 45 L. T. N. S. 666, 30 W. R. 356. In this case the court *distinguished* *New Zealand, etc., Land Co. v. Watson*, 7 Q. B. Div. 374.

A factor, after depositing dock warrants with the defendant, as a security for the advances of money, withdrew them from his hands and substituted other dock warrants for silk belonging to the plaintiffs, the defendant having no notice that the factor was not the true owner. It was held that this transaction was not protected by 6 Geo. IV., c. 94, there being no advance of money on the faith of such warrants. *Bonzi v. Stewart*, 4 M. & G. 295, 43 E. C. L. 158, 5 Scott N. R. 1. See also *Tremouille v. Christie*, 69 L. T. N. S. 338.

Bankers having, at the request of I. L., made advances to S. L., and having a lien on certain goods in their possession in respect thereof, it was agreed between the bankers and I. L. that in consideration of the delivery of those goods to I. L. the latter should deliver to the banker certain other goods intrusted to I. L. by the plaintiff, his principal, to be held as a lien by the bankers in place of the other goods, and also in respect of any future advances to be made to S. L., in pursuance of such request. It was held that, the bankers having no notice of the plaintiff's title, the transaction was protected by 5 & 6 Vict., c. 39. *Sheppard v. Union Bank of London*, 7 H. & N. 661.

A factor secured a loan by pledging a warehouse receipt for certain bales of cotton. Sub-

sequently he substituted other bales for those originally pledged, and the pledgee surrendered the latter. It was held that the surrender of the original bales by the pledgee constituted a valuable consideration for the pledge of the new bales in substitution therefor, and that the pledge was protected by the *New York Factors' Act*. *New York Security, etc., Co. v. Lipman*, 91 Hun (N. Y.) 554.

1. Transactions in Ordinary Course of Business.

— A purchaser of an opal table top from a factor to whom it has been intrusted by the owner upon the conditions that it should not be sold at any price without the latter's authority, and that a check received in payment should be handed to the latter intact, was held not to be protected by 6 Geo. IV., c. 94, § 4, providing that a purchaser from a factor in the ordinary course of business shall acquire a good title, where such purchaser paid the price by satisfying a judgment against the factor by giving the judgment creditor a diamond and paying the balance of the judgment, and by paying to the factor the remainder of the purchase price, since the table top was not intrusted for sale to the factor, and the sale was not in the ordinary course of business. *Biggs v. Evans*, (1894) 1 Q. B. 88.

In determining whether, under *Code Maryland*, art. 3, § 4, a *bona fide* purchaser from a factor or agent intrusted by the owner with the possession of goods acquires a good title, the question whether the contract of sale was made in the usual and ordinary course of business by such agent must be considered. *Levi v. Booth*, 58 Md. 305, 42 Am. Rep. 332.

Goods Pledged with Pawnbroker. — Where a person intrusted with goods for the purpose of sale only pledges them with a pawnbroker, he is not a mercantile agent "acting in the ordinary course of business of a mercantile agent," within the meaning of section 2 of the Factors' Act, 1889, and the pawnbroker is not protected by that section from an action by the owner to recover the value of the goods. *Hastings v. Pearson*, (1893) 1 Q. B. 62.

FACTORS OR COMMISSION MERCHANTS.

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CROSS-REFERENCES.

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For other matters of *SUBSTANTIVE LAW* and *EVIDENCE* related to this subject see in this work the titles *AGENCY*, vol. 1, p. 930; *BILLS OF LADING*, vol. 4, p. 507; *BOUGHT AND SOLD NOTES*, vol. 4, p. 751; *BROKERS*, vol. 4, p. 959; *COMMERCIAL TRAVELERS OR DRUMMERS*, vol. 6, p. 223; *CROPS*, vol. 8, p. 301; *DELCREDERE AGENCY*, vol. 9, p. 182; *ILLEGAL CONTRACTS*; *INSOLVENCY AND BANKRUPTCY*; *INSURANCE*; *LIENS*; *OCCUPATION, BUSINESS, AND PRIVILEGE TAXES*; *SALES*; *SUPERCARGO*; *TROVER AND CONVERSION*; *USAGES AND CUSTOMS*.

I. DEFINITIONS AND EXISTENCE OF RELATIONSHIP — Definition of Factor. —

A factor is a commercial agent to whom the possession of personal property is intrusted by or for the owner, to be sold for a compensation, in pursuance of the agent's usual trade or business.¹

1. **Definition** — *England*. — *Ex p.* Dixon, 4 Ch. Div. 137; *Baring v. Corrie*, 2 B. & Ald. 143.

United States. — *Hopkirk v. Bell*, 3 Cranch (U. S.) 454.

Connecticut. — *Lawrence v. Stonington Bank*, 6 Conn. 527.

Kentucky. — *Graham v. Duckwall*, 8 Bush (Ky.) 12.

Louisiana. — *Ward v. Brandt*, 11 Martin (La.) 423, 13 Am. Dec. 352.

Maine. — *Blood v. Palmer*, 11 Me. 418, 26 Am. Dec. 547.

Mississippi. — *Denney v. Wheelwright*, 60 Miss. 733.

Missouri. — *State v. Thompson*, 120 Mo. 12.

New Hampshire. — *Bromley v. Elliot*, 38 N. H. 287, 75 Am. Dec. 182.

New York. — *Higgins v. Moore*, 34 N. Y. 418; *Ladd v. Arkell*, 37 N. Y. Super. Ct. 35; *Duquid v. Edwards*, 50 Barb. (N. Y.) 295.

Tennessee. — *Thompson v. Woodruff*, 7 Coldw. (Tenn.) 401.

Texas. — *Milburn Mfg. Co. v. Peak*, 89 Tex. 209.

Wisconsin. — *Edgerton v. Michels*, 66 Wis. 124; *McGraft v. Rugee*, 60 Wis. 406, 50 Am. Rep. 378.

"A factor is a person to whom goods are consigned for sale by a merchant, residing abroad, or at a distance from the place of sale." *Baring v. Corrie*, 2 B. & Ald. 143.

"Briefly stated, the distinguishing mark of a factor is that the goods which he is empowered to sell are placed at his disposal either by actual possession or by means of the documents which, in a mercantile sense, are said to represent the goods." *Campbell on Commercial Agency* 54.

A person employed to sell goods at a distance from the place of the employer, under an agreement that he shall receive a certain sum

Commission Merchant. — The term "commission merchant" is generally used in commercial parlance to designate a factor, and is synonymous with the legal term "factor."¹

Factorage or Commission is the allowance given to a factor as compensation for his services. This term, however, is also used to designate the business of or dealings with a factor.²

Other Terms used sometimes, the one as a general equivalent for "factor," and the others as indicating special classes of factors, are "consignee,"³ "supercargo,"⁴ and *del credere* agents or factors.⁵

yearly and a portion of the profits, and who is required to pay the expenses of the sale, that is, the store rent, clerk hire, etc., is a factor. *Winn v. Hammond*, 37 Ill. 99. See also *Burton v. Goodspeed*, 69 Ill. 237.

Factor Distinguished from Broker. — The chief distinction between a factor and a broker, aside from their relative powers, rights, and duties, is that the factor is intrusted with the possession of the property to be sold, whereas the broker has not such possession. See the title *BROKERS*, vol. 4, p. 961, note.

From Collection Agent. — An agent employed for the collection of a bill or note is not a factor, so as to entitle him to a lien on funds collected for a general balance of his accounts with the principal. *Hopkirk v. Bell*, 3 Cranch (U. S.) 454; *Lawrence v. Stonington Bank*, 6 Conn. 521. In the first of these cases it was also held that an agent for collecting debts merely was not a factor within the meaning of the *Virginia* act of limitations, § 13.

From Forwarding Agent. — One who ships cotton for a number of persons to a firm in another state and receives a return commission on the cotton shipped is merely a shipping or forwarding agent and does not carry on the business of a factor or commission merchant. *Perkins v. State*, 50 Ala. 154. See also the title *FORWARDING MERCHANTS*.

From Agent to Sell. — One employed at a salary as business manager of a warehouse, where the business is carried on and sales are made under the name of the employer, is not a factor within the meaning of the *Factors' Act*. *Florence Sewing Mach. Co. v. Warford*, 1 Sweeny (N. Y.) 433. See also *Haebler v. Luttgen*, 2 N. Y. App. Div. 390.

From Traveling Salesman. — A traveling salesman with power to sell goods, fix prices, and direct shipments is not a factor. *Sage v. Shepard*, etc., *Lumber Co.*, 4 N. Y. App. Div. 290.

From Employee. — A general clerk of a merchant who transacts the out-of-door business of the merchant, negotiating purchases, and presenting bills of lading for signature on shipment by the merchant, is not a factor. *Zachrisson v. Ahman*, 2 Sandf. (N. Y.) 63.

Consignment to Factor Distinguished from Sale. — Where property is delivered to be sold for the consignor at a price named and by a specific time, and if not sold, to be returned to the owner, the transaction is a bailment, and not a sale. *Bridgeport Organ Co. v. Guldin*, 3 Pa. Dist. Rep. 649. See also the title *BAILMENT*, vol. 3, p. 739.

Where goods are consigned for sale, the consignor reserving the right to demand a redelivery of the goods, and retaining title, the contract creates the relation of factor and

principal, and is not a contract of sale. *Milburn Mfg. Co. v. Peak*, 89 Tex. 209.

Where the goods are consigned for sale to one who is at liberty to sell at any price and on any terms he pleases, paying a fixed price to the owner, the consignee is not a factor and the contract is one of sale. *Kellam v. Brown*, 112 N. Car. 451.

See also the titles *CONDITIONAL SALES*, vol. 6, p. 450; *SALES*.

1. Factor and Commission Merchant Synonymous. — *Perkins v. State*, 50 Ala. 154; *Thompson v. Woodruff*, 7 Coldw. (Tenn.) 401; 1 Bouv. L. Dict. 570; *Century Dict.*

In *Perkins v. State*, 50 Ala. 154, the term "commission merchant," as used in the revenue law of 1868, was held to be synonymous with the term "factor," and to mean one who receives goods, chattels, or merchandise for sale, exchange, or other disposition and who is to receive a compensation for his services, to be paid by the owner or derived from the sale, etc., of the goods.

2. Factorage or Commission. — *Thompson v. Woodruff*, 7 Coldw. (Tenn.) 401; *Edgerton v. Michels*, 66 Wis. 124; *Century Dict.*

3. Consignee. — The term "consignee" is sometimes used to designate one to whom merchandise or personal property of any kind is committed for the purpose of sale. *Com. v. Harris*, 168 Pa. St. 619; *M'Pherson v. Neuffer*, 11 Rich. L. (S. Car.) 267. But it is properly much broader in meaning. See *CONSIGNEE*, vol. 6, p. 798.

4. Supercargo. — A supercargo is a quasi factor who accompanies a shipment of goods by a vessel and is intrusted with its sale. The *Waldo, Davies* (U. S.) 161; *Stone v. Waitt*, 31 Me. 409, 52 Am. Dec. 621; *Williams v. Nichols*, 13 Wend. (N. Y.) 58; *Taylor v. Wells*, 3 Watts (Pa.) 65; *McGraft v. Rugee*, 60 Wis. 406, 50 Am. Rep. 378. See also *SUPERCARGO*.

If a supercargo is not to sell or to receive a commission for the sale he has not the proper distinguishing feature of a factor. *Matchless*, 1 Hagg. Adm. 101.

The Master of a Vessel has not implied power, however, to act as factor, unless such power is implied by the usages of trade. *Taylor v. Wells*, 3 Watts (Pa.) 65; *Rapp v. Palmer*, 3 Watts (Pa.) 178. See also *Lecky v. McDermott*, 8 S. & R. (Pa.) 500. See the title *MASTERS OF VESSELS*.

5. Del Credere Agency is fully treated elsewhere. See the title *DEL CREDERE AGENCY*, vol. 9, p. 182.

Consignment on Del Credere Commission and on Sale Distinguished. — A contract for the consignment of goods to be sold on commission for prices fixed by the consignor and returns at

Form of Compensation. — It is immaterial in what the compensation is paid, although commissions constitute the ordinary method in which the remuneration of factors is provided.¹

Effect of Bestowing Labor on Goods before Sale. — A person to whom goods are consigned for sale is no less a factor because he bestows labor upon them before they are ready for sale;² and this is true though the property be entirely changed, as where milk is converted into butter and cheese,³ or where hogs are slaughtered and manufactured into meat.⁴

Business Transacted in Premises Leased in Principal's Name. — The fact that the house in which the factor transacts business is leased in the name of the principal is also immaterial.⁵

Sufficiency of Possession. — It has been held that one need not have the actual possession of goods to render him a factor; it is sufficient for him to have the invoices and bills of lading representing the goods, so that he has the power to acquire and deliver possession to the purchaser.⁶

Joint Owner as Factor. — A person having a joint interest in the property to be sold may occupy in relation to the other owners the position of a factor.⁷

Common Carrier as Factor. — A common carrier may sometimes be a factor, as where he transports goods to a distant place and undertakes to sell them there. In such a case he acts in a dual capacity, the one as a carrier in the transportation of the goods, the other as a factor while engaged in the sale of the goods.⁸

II. APPOINTMENT. — To constitute one the factor of another there must, as

stated periods creates the relation of a *del credere* factor, and is not a contract of sale. *National Cordage Co. v. Sims*, 44 Neb. 148.

Where, however, the consignee gives his acceptance for the value of the goods when received, payable partly at sight and partly at a future day, guarantees the sale, and enters into other stipulations making him primarily liable for the price, the consignment is one of sale as distinguished from a *del credere* commission. *In re Chamberlaines*, 12 Nat. Bankr. Reg. 230, 14 Am. L. Reg. N. S. 688. See also *Ex p. White*, L. R. 6 Ch. 403, wherein the distinction between a consignment on sale and on a *del credere* commission is clearly drawn.

1. Compensation — Monthly Salary. — The fact that the compensation is paid by way of a fixed monthly salary will not prevent the relation of factor and principal from existing. *Winne v. Hammond*, 37 Ill. 99; *State v. Thompson*, 120 Mo. 12. See also *Foxcraft v. Wood*, 4 Russ. 487, as explained in *Knapp v. Alvord*, 10 Paige (N. Y.) 210, 40 Am. Dec. 241.

Retaining Excess over Invoice Price. — The compensation may be provided for by allowing the factor to retain the excess of the proceeds over a specified price. *Bridgeport Organ Co. v. Guldin*, 3 Pa. Dist. Rep. 649.

Share in Profits. — The fact that the agent is to receive in compensation a percentage of the net profits will not prevent his being a factor. *Burton v. Goodspeed*, 69 Ill. 237.

2. Goods Changed in Form. — A entered into a contract with B whereby he was to manufacture into barrels materials furnished by B and to sell them in his own name, for a fixed monthly salary, the materials to remain the property of B. It was held that A acted as the factor of B. *State v. Thompson*, 120 Mo. 12.

3. Elgin First Nat. Bank v. Schween, 127 Ill. 573.

4. Shaw v. Ferguson, 78 Ind. 547.

5. Lease in Name of Principal. — *Winne v. Hammond*, 37 Ill. 99.

6. Actual Possession Unnecessary. — In *Standard Sugar Refinery v. Dayton*, 70 N. Y. 486, it was held that one who by false representations as to the terms of the sale of a quantity of sugar induced the seller to intrust him with the invoices and bills of lading, by which he obtained the power of making an effectual delivery of the sugar, which was shipped directly to the purchaser, occupied the position of a factor and not that of a broker. See also *infra*, this title, *Extent of Authority*, subdiv. 2. a. *To Sell and to Buy Generally*, the paragraph *Possession Necessary to Implied Power to Sell*.

One Holding Bills of Lading for Special Purpose Only. — But see *Stollenwerck v. Thacher*, 115 Mass. 224, distinguishing the position of an agent who is intrusted with the bill of lading, not as representing goods to be sold, but with positive and restrictive instructions to hold the bill until the consignee paid certain charges, and who looks not to the goods, but to his principal, for payment. Possession of this character gives no title or lien on the goods themselves and does not constitute a factor.

7. Joint Owner as Factor. — In *Bradford v. Kimberly*, 3 Johns. Ch. (N. Y.) 431, it was held that where several joint owners of a cargo appoint one of the part owners their agent to receive and sell the cargo and distribute the proceeds, he is entitled to compensation as a factor and may retain the goods as security, not only for his advances in regard to the particular property, but also for his general balance of accounts.

8. Common Carrier as Factor. — The *Waldo, Davies (U. S.)* 161; *Emery v. Hersey*, 4 Me. 407, 16 Am. Dec. 268; *Stone v. Waitt*, 31 Me. 409, 52 Am. Dec. 621; *Williams v. Nichols*, 13 Wend. (N. Y.) 58; *Kemp v. Coughtry*, 11 Johns. (N. Y.) 107; *Taylor v. Wells*, 3 Watts

in cases of the creation of any agency, be an appointment by the principal and an acceptance of the appointment by the factor.¹

III. EXTENT OF AUTHORITY — 1. In General — Express and Implied Authority.

— The authority of a factor, like that of any other agent, may be either express or implied. The extent of his express authority depends, of course, upon the contract between himself and his principal, and is resolved into a mere matter of interpretation and construction.

2. Implied Powers — *a.* **TO SELL AND TO BUY GENERALLY.** — Aside from the express powers which may be conferred on the factor he has, in the absence of express restrictions, certain implied powers, which are to be determined by the law of the place where the sale or contract of disposition is made.²

Power to Sell Implied. — The object and business of a factor being to sell goods consigned to him, the factor has, of course, implied power to do so,³ and has also by implication such powers as are necessary for the accomplishment of this object.⁴

Possession Necessary to Implied Power to Sell. — The factor has, however, implied power to sell only goods which are in his possession.⁵

(Pa.) 65; *Harrington v. McShane*, 2 Watts 443, 27 Am. Dec. 321.

1. Appointment and Acceptance Essential. — In *Rapp v. Livingston*, 14 Daly (N. Y.) 402, the defendants offered to the plaintiff a commission to sell goods, and sent him a warehouse order for the goods; the plaintiff rejected the order, but subsequently procured the goods by means of the order and sold them; and the defendants accepted payment from the purchaser. It was held that the rejected offer was not revocable, and that the plaintiff was not entitled to the stipulated commission.

Appointment and Acceptance Implied. — The appointment and acceptance thereof may be implied, and it has been held that where one sends goods to a person whose sole business is to sell that kind, or that and other kinds of goods, the presumption is that the goods were sent to be sold, no instructions having been given, and he has implied authority to sell them. *Dows v. McCleary*, 14 Ill. App. 137.

Evidence that Goods Not Consigned for Sale. — It has been held that the mere possession of the goods by the commission merchant does not preclude the principal from showing, as against a purchaser, that they were not entrusted to the commission merchant for sale. *Cook v. Beal*, 1 Bosw. (N. Y.) 497. See also *Covill v. Hill*, 4 Den. (N. Y.) 323. Compare *Pickering v. Busk*, 15 East 38; *Saltus v. Everett*, 20 Wend. (N. Y.) 281, 32 Am. Dec. 541.

Tortious Possession — Waiver of Tort. — A factor who obtains the goods of another, though wrongfully, may be held liable to the owner as a factor. *Lubert v. Chauviteau*, 3 Cal. 458. And where the factor receives the goods from a third person with knowledge of the true ownership, he may be held liable by the true owner as a factor. *Buckley v. Packard*, 20 Johns. (N. Y.) 421.

Parol Appointment. — The appointment of a factor may be by parol. *Deshler v. Beers*, 32 Ill. 368, 83 Am. Dec. 274.

2. Lex Loci of Sale Governs. — *Frank v. Jenkins*, 22 Ohio St. 597; *Harbert v. Neill*, 49 Tex.

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3. Implied Power to Sell. — In *Dows v. Mc-*

Cleary, 14 Ill. App. 137, it was held that where the owner of goods puts them in the custody of another whose ordinary business it is to sell such goods, he confers authority to sell them, there being no express limitations upon the authority of such custodian. See also *In Ex p. Dixon*, 4 Ch. Div. 133; *Nixon v. Brown*, 57 N. H. 34; *Smith v. Clews*, 105 N. Y. 283, 59 Am. Rep. 502.

4. Powers Necessary to Accomplish Sale. — *Grieff v. Cowguill*, 2 Disney (Ohio) 58. See also the title *AGENCY*, vol. 1, pp. 997, 1013.

General Average Bond. — Where goods are shipped to a factor, and on account of an accident to the vessel carrying the goods it becomes necessary to execute a general average bond, in order to carry out the instructions of the principal in regard to the goods, the factor has authority to execute the bond. *Hardee v. Hall*, 12 Bush (Ky.) 327.

A Factor May Employ Counsel to defend actions concerning the goods consigned, and is entitled to be reimbursed for expenses so incurred. *Monnett v. Merz*, 127 N. Y. 153.

Cannot Compromise Action. — In *Monnet v. Merz*, 61 N. Y. Super. Ct. 120, 127 N. Y. 153, it was held, in an action by a foreign principal against a domestic factor for an accounting, that the factor was not entitled to a credit for a sum paid to the government in compromise of a suit by the government to recover the penalty for an undervaluation of the goods consigned.

Selling Debt. — A factor who has received a consignment of goods and who has made advancements thereon to the consignor, and has sold a portion of such goods, has no power to sell a debt arising from such sale so as to transfer a good title to the claim before the maturity of the debt, and when the principal is not in default, has not been called upon to repay the advances, and there are no special circumstances. *Commercial Nat. Bank v. Heilbronner*, 108 N. Y. 439, reversing 52 N. Y. Super. Ct. 388. "The transaction," said the court, "was not a sale of goods or a collection of a debt."

5. Power Limited to Sale of Goods in Possession. — *Wright v. Campbell*, 4 Burr 2046; *Walter v.*

Sale in Ordinary Course of Business. — As a general rule, a factor cannot bind his principal by the disposition of goods except in the ordinary course of business.¹ Thus he has no authority to use for his own benefit goods consigned to him.²

Power to Buy Goods. — A factor employed to sell goods has not power to buy goods for his principal, so as to render the latter liable to the seller.³

b. USAGE AS AFFECTING POWERS OF FACTOR — (1) *In General.* — It is a well-settled rule that if there is, at a particular place, an established usage or custom in the manner of dealing and making contracts, a person who is employed to deal or make a contract there has implied authority to act in accordance with such usage or custom;⁴ and this rule is especially applicable to the business of factors, whose powers are to a large extent the outgrowth of usages and customs.⁵

(2) *Principal's Ignorance of Usage.* — That the principal was in fact ignorant of the existence of a usage or custom at a particular market is immaterial.⁶

(3) *Usage Contrary to Established Principle of Law.* — A usage contrary to an established principle of law is ineffectual to confer authority.⁷

Ross, 2 Wash. (U. S.) 283; Harbert v. Neill, 49 Tex. 143.

Constructive Possession. — It is not necessary, however, that the factor have the actual possession of the goods, and it has been held that if a factor *bona fide* sells the goods of his principal by assigning over the bill of lading, the sale is valid against the principal. Dick v. Lumsden, 1 Peake N. P. (ed. 1795) 189; Wright v. Campbell, 4 Burr 2046; Walter v. Ross, 2 Wash. (U. S.) 283; Ryberg v. Snell, 2 Wash. (U. S.) 403; Conard v. Atlantic Ins. Co., 1 Pet. (U. S.) 386. See also the title **BILLS OF LADING**, vol. 4, p. 551.

1. **Sale in Ordinary Course of Business.** — Commercial Nat. Bank v. Heilbronner, 108 N. Y. 439; Easton v. Clark, 35 N. Y. 225; Neill v. Billingsly, 49 Tex. 161.

2. Wootters v. Kaufman, 73 Tex. 395.

3. Becherer v. Asher, 23 Ont. App. 202.

4. **Usage and Custom as Affecting Power of Agent.** — Bayliffe v. Butterworth, 1 Exch. 425; Sutton v. Tatham, 10 Ad. & El. 27, 37 E. C. L. 25; U. S. Life Ins. Co. v. Advance Co., 80 Ill. 549. See the titles **AGENCY**, vol. 1, p. 996; **USAGES AND CUSTOMS**.

5. **Rule Applied to Factors — England.** — Johnston v. Usborne, 11 Ad. & El. 549, 39 E. C. L. 164.

United States. — Forrestier v. Bordman, 1 Story (U. S.) 43; Evans v. Potter, 2 Gall. (U. S.) 13.

Georgia. — Hatcher v. Comer, 73 Ga. 418.

Illinois. — Phillips v. Moir, 69 Ill. 155; Bailey v. Bensley, 87 Ill. 556.

Kentucky. — Byrne v. Schwing, 6 B. Mon. (Ky.) 199; Wallace v. Bradshaw, 6 Dana (Ky.) 382.

Maine. — Randall v. Kehlor, 60 Me. 37, 11 Am. Rep. 169.

Massachusetts. — Hapgood v. Batcheller, 4 Met. (Mass.) 577; Chesterfield Mfg. Co. v. Dehon, 5 Pick. (Mass.) 7, 16 Am. Dec. 367; West Boylston Mfg. Co. v. Searle, 15 Pick. (Mass.) 225; Dwight v. Whitney, 15 Pick. (Mass.) 179; Roosevelt v. Doherty, 129 Mass. 303, 37 Am. Rep. 356; Upton v. Suffolk County Mills, 11 Cush. (Mass.) 586, 59 Am. Dec. 163; Goodenow v. Tyler, 7 Mass. 36, 5

Am. Dec. 22; Darling v. Stanwood, 14 Allen (Mass.) 504.

Mississippi. — Cotton v. Hiller, 52 Miss. 7.

Missouri. — Given v. Lemoine, 35 Mo. 110.

Nebraska. — Burke v. Frye, 44 Neb. 223.

North Carolina. — Golden v. Levy, 1 Law Repos. (4 N. Car.) 527, 6 Am. Dec. 555; Symington v. M'Lin, 1 Dev. & B. L. (18 N. Car.) 291.

Ohio. — Frank v. Jenkins, 22 Ohio St. 597.

Texas. — Neill v. Billingsley, 49 Tex. 161; Harbert v. Neill, 49 Tex. 143; Kauffman v. Beasley, 54 Tex. 563.

Virginia. — M'Connico v. Curzen, 2 Call (Va.) 358, 1 Am. Dec. 540.

Excluding Usage by Particular Contract. — The parties may exclude the operation of a custom or usage by their contract in regard to the business. Dashler v. Beers, 32 Ill. 368, 83 Am. Dec. 274.

The principal may, at the time of the shipment or afterwards, if before the sale, impose restrictions upon the factor, different from the usages of the trade, to which the factor must conform. Cotton v. Hiller, 52 Miss. 7; Bliss v. Arnold, 8 Vt. 252, 30 Am. Dec. 467. See *infra*, this title, *Duties and Liabilities of Parties Inter Se* — *Of Factor to Principal* — *Fidelity to Instructions*.

Existence of Usage Question of Fact. — The question as to the existence or nonexistence of a usage is a question of fact. Randall v. Kehlor, 60 Me. 37, 11 Am. Rep. 169; Forrestier v. Bordman, 1 Story (U. S.) 43.

6. **Principal's Ignorance of Usage.** — Bailey v. Bensley, 87 Ill. 556; Goodenow v. Tyler, 7 Mass. 36, 5 Am. Dec. 22; Dwight v. Whitney, 15 Pick. (Mass.) 179; Robertson v. Livingston, 5 Cow. (N. Y.) 473. Compare *Farmers'*, etc., Nat. Bank v. Sprague, 52 N. Y. 605. See also the titles **AGENCY**, vol. 1, p. 996; **USAGES AND CUSTOMS**.

7. **Usage Contrary to Established Law.** — Duguid v. Edwards, 50 Barb. (N. Y.) 288. See the title **USAGES AND CUSTOMS**.

Illustrations. — In Newbold v. Wright, 4 Rawle (Pa.) 213, it was held that a local usage could not confer power upon a factor to pledge the goods of his principal for his own benefit.

(4) *Usage Must Be General.* — The usage or custom, to confer authority, must also have been uniformly acquiesced in by the merchants of the place.¹

c. TO SELL IN NAME OF FACTOR. — A factor to whom goods are consigned for sale may, in the absence of any usage or instructions to the contrary, sell in his own name, and the principal will be bound by such sale.²

d. TO SELL ON CREDIT. — In the absence of instructions or usage to the contrary, it has been held that a factor has by the law merchant implied authority to sell the goods of his principal upon a reasonable credit,³ without

In *Grieff v. Cowguill*, 2 Disney (Ohio) 58, it was stated that a usage permitting a factor to reship, or delegate his authority, was not binding on the principal, being in conflict with the general principle of law that an agent cannot delegate his authority. See, however, *Wallace v. Bradshaw*, 6 Dana (Ky.) 383.

In *Harbert v. Neill*, 49 Tex. 143, it was held that usage cannot authorize sales by a factor on credit. See, however, *infra*, this section, *To Sell on Credit*.

Knowledge of Custom Departing from Law. — If, however, the principal has actual knowledge of a custom among factors in regard to the transaction of their business, it seems that he will be bound thereby even though it differs from the settled obligations and duties established by law. It must not, however, be positively unlawful. *Duguid v. Edwards*, 50 Barb. (N. Y.) 288. See also *Neill v. Billingsley*, 49 Tex. 161.

1. **Usage Must Be General.** — *Lyon v. Culbertson*, 83 Ill. 33; *Farmers', etc., Nat. Bank v. Sprague*, 52 N. Y. 605; *Wootters v. Kaufman*, 73 Tex. 395.

In *Wootters v. Kaufman*, 73 Tex. 395, it was held that where it was shown that the general custom of certain factors in the city of Galveston was to sell only in the Galveston market, evidence that in times of financial straits some factors shipped cotton for sale to foreign markets was inadmissible.

Custom of Particular House. — In *Neill v. Billingsley*, 49 Tex. 161, it was held not error to exclude testimony as to a private custom in the business of a particular house different from the general usage of the trade, unless such custom was known to the party sought to be affected thereby.

2. **Factor May Sell in His Own Name** — *England* — *Ex p. Dixon*, 4 Ch. Div. 133, explained in *Semenza v. Brinsley*, 18 C. B. N. S. 467, 114 E. C. L. 467; *Baring v. Corrie*, 2 B. & Ald. 137.

United States. — *Slack v. Tucker*, 23 Wall. (U. S.) 321.

Illinois. — *Burton v. Goodspeed*, 69 Ill. 238; *Wheeler v. Reed*, 36 Ill. 81.

Kentucky. — *Graham v. Duckwall*, 8 Bush (Ky.) 12.

Maine. — *Blood v. Palmer*, 11 Me. 414, 26 Am. Dec. 547; *Pinkham v. Crocker*, 77 Me. 563.

Tennessee. — *Campbell v. Reeves*, 3 Head (Tenn.) 226.

In *Ex p. Dixon*, 4 Ch. Div. 133, Brett, J. A., said: "The ordinary course of business is for factors * * * to sell in their own name. Now the rule of law is that the extent of an agent's authority as between himself and third parties is to be measured by the extent of his usual employment. That being so, the very

fact of intrusting your goods to a man as a factor, with right to sell them, is *prima facie* authority from you to him to sell in his own name."

Del Credere Commission. — The rule permitting factors to sell in their own names of course applies to sales by *del credere* factors as well as by other factors. *Miller v. Lea*, 35 Md. 396, 6 Am. Rep. 417.

Failure to Disclose Principal — Liability of Factor. — The well-settled rule of agency that if an agent does not disclose his agency and name his principal he binds himself and becomes subject to all liabilities, express and implied, created by the contract, in the same manner as if he were the principal in interest, applies equally to sales by factors in their own names. *Wheeler v. Reed*, 36 Ill. 81. See *infra*, this title, *Relation of Factor to Third Persons — Liability of Factor to Third Persons*.

3. **Sales on Credit** — *England.* — *Scott v. Surman*, Willes 406; *Russell v. Hankey*, 6 T. R. 12; *Houghton v. Matthews*, 3 B. & P. 489; *Varden v. Parker*, 2 Esp. N. P. 710; *Alsop v. Silvester*, 1 C. & P. 107, 11 E. C. L. 333. Compare *Barton v. Sadock*, 1 Bulst. 103, cited in *Anonymous*, 2 Mod. 100.

United States. — *Marshall v. Williams*, 2 Biss. (U. S.) 255; *Gerbier v. Emery*, 2 Wash. (U. S.) 413.

Alabama. — *Goldthwaite v. M'Whorter*, 5 Stew. & P. (Ala.) 284.

Illinois. — *Burton v. Goodspeed*, 69 Ill. 238.

Louisiana. — *Fisk v. Offit*, 3 Martin N. S. (La.) 555; *Bird v. Dix*, 4 Martin N. S. (La.) 254; *Hosmer v. Beebe*, 2 Martin N. S. (La.) 368.

Compare *Bonham v. Overton*, 6 La. Ann. 765.

Maine. — *Greely v. Bartlett*, 1 Me. 178, 10 Am. Dec. 54; *Pinkham v. Crocker*, 77 Me. 563.

Massachusetts. — *Dwight v. Whitney*, 15 Pick. (Mass.) 184; *West Boylston Mfg. Co. v. Searle*, 15 Pick. (Mass.) 225; *Roosevelt v. Doherty*, 129 Mass. 301, 37 Am. Rep. 356; *Goodenow v. Tyler*, 7 Mass. 36, 5 Am. Dec. 22; *Gorman v. Wheeler*, 10 Gray (Mass.) 362.

New Hampshire. — *Daylight Burner Co. v. Odlin*, 51 N. H. 59, 12 Am. Rep. 45.

New York. — *Rich v. Monroe*, 14 Barb. (N. Y.) 602; *M'Kinstry v. Pearsall*, 3 Johns. (N. Y.) 310; *Van Alen v. Vanderpool*, 6 Johns. (N. Y.) 69, 5 Am. Dec. 192; *Leland v. Douglass*, 1 Wend. (N. Y.) 490; *Robertson v. Livingston*, 5 Cow. (N. Y.) 473.

Pennsylvania. — *Laussatt v. Lippincott*, 6 S. & R. (Pa.) 386, 9 Am. Dec. 440; *Percival v. Cooper*, 6 Phila. (Pa.) 48, 22 Leg. Int. (Pa.) 237. See also *Brown v. Delk*, 132 Pa. St. 152.

Virginia. — *M'Connico v. Curzen*, 2 Call (Va.) 358, 1 Am. Dec. 540.

Illustrations. — In *Jennings v. Merrill*, 20

incurring thereby any personal liability to his principal, provided he exercises due care as to the responsibility of the purchaser and in the collection of the price.¹

Effect of Usage. — This is especially the case where the usage of the market in which the goods are sold authorizes sales on credit.² In some jurisdictions, indeed, it is held that a factor cannot sell on credit unless a usage empowering him to do so exists at the market where the goods are sold.³

c. TO TRANSFER GOODS IN PAYMENT OF FACTOR'S DEBT. — At common law a factor could not transfer the goods in payment of his own debts so as to confer on the purchaser title as against the principal.⁴

Wend. (N. Y.) 9, it was held that under the third section of the *New York Act of 1830*, a contract for sale by a factor is valid although no money or obligation is given at the time of the contract; it is enough if an obligation be subsequently entered into on the faith of the contract at any time while it remains unrescinded.

In *Joslin v. Cowee*, 52 N. Y. 90, it was held that where a factor has been induced by fraud to part with the property of his principal to an insolvent purchaser who, before discovery of the fraud, has placed it in such a condition that it is difficult if not impossible to follow it, and where the factor acting in good faith obtains security for the price, he must be regarded as acting within the scope of his powers; his act becomes the act of his principal and entails the same legal consequences which would have ensued if performed by the principal in person.

Direction to Sell to Best Advantage gives implied authority to sell on credit. *Gerbier v. Emery*, 2 Wash. (U. S.) 413.

Instructions to Sell for Cash. — Of course where the factor is instructed to sell for cash only, he has no authority to sell on credit. *Leland v. Douglass*, 1 Wend. (N. Y.) 490; *Bliss v. Arnold*, 8 Vt. 252, 30 Am. Dec. 467; *Hall v. Storrs*, 7 Wis. 253. See the section *Duties and Liabilities of Parties Inter Se*, subdiv. 1. c. *Fidelity to Instructions*.

In *Sheffield v. Linn*, 62 Mich. 151, it was held that under a contract for the sale of shingles on commission for the best price obtainable, the proceeds to be sent to the consignee in cash, the factor had no authority to sell on credit.

Usage Against Sales on Credit. — Where the usage of the market where the goods are sold authorizes sales for cash only, a factor cannot sell on credit. *Johnson v. Totten*, 3 Cal. 343, 58 Am. Dec. 412; *Burton v. Goodspeed*, 69 Ill. 237; *Pinkham v. Crocker*, 77 Me. 563; *Ewalt v. Harding*, 16 Md. 160; *Harbert v. Neill*, 49 Tex. 143; *Kauffman v. Beasley*, 54 Tex. 563.

1. See *infra*, this title, *Duties and Liabilities of Parties Inter Se*, subdiv. 1. g. *Duty in Regard to the Sale*.

Assumption by Factor of Debt of Purchaser. — Where goods are sold on credit, the factor may by his dealings with the purchaser render himself personally liable to his principal for the payment of the price. See the subdivision of this title above referred to.

2. Usage Authorizing Credit Sales — United States. — *Forrestier v. Bordman*, 1 Story (U. S.) 43.

Illinois. — *Foster v. Waller*, 75 Ill. 464.

Iowa. — *Payne v. Potter*, 9 Iowa 549.

Kentucky. — *De Lazard v. Hewitt*, 7 B. Mon. (Ky.) 698; *Byrne v. Schwing*, 6 B. Mon. (Ky.) 201.

Louisiana. — *Reano v. Mager*, 11 Martin (La.) 637.

Massachusetts. — *Hapgood v. Batcheller*, 4 Met. (Mass.) 576; *Goodenow v. Tyler*, 7 Mass. 36, 5 Am. Dec. 22; *Etheridge v. Binney*, 9 Pick. (Mass.) 272; *Dwight v. Whitney*, 15 Pick. (Mass.) 179; *Clark v. Van Northwick*, 1 Pick. (Mass.) 343.

New York. — *M'Kinstry v. Pearsall*, 3 Johns. (N. Y.) 319.

South Carolina. — *James v. M'Credie*, 1 Bay (S. Car.) 294, 1 Am. Dec. 617.

Tennessee. — *May v. Mitchell*, 5 Humph. (Tenn.) 365.

Virginia. — *M'Connico v. Curzen*, 2 Call (Va.) 358, 1 Am. Dec. 540.

But see *Harbert v. Neill*, 49 Tex. 143, where it was said that even usage could not legalize sales on credit.

Time of Credit. — In *Van Alen v. Vanderpool*, 6 Johns. (N. Y.) 69, 5 Am. Dec. 192, it was held that the factor may sell on credit for the period usual in the market.

Title to Securities for Price. — All securities taken by a factor in payment of the goods sold, though taken in his own name, belong in equity to the principal, and do not pass to the factor's assignee in case of the insolvency of the factor. *Thompson v. Perkins*, 3 Mason (U. S.) 232; *Goodenow v. Tyler*, 7 Mass. 36, 5 Am. Dec. 22; *Kip v. State Bank*, 10 Johns. (N. Y.) 63; *Messier v. Amery*, 1 Yeates (Pa.) 533, 1 Am. Dec. 316. See *infra*, this title, *Duties and Liabilities of Parties Inter Se*, subdiv. 1. g. *Duty in Regard to the Sale*.

3. Indiana. — *Babcock v. Orbison*, 25 Ind. 75. *Iowa.* — *Durant v. Fish*, 40 Iowa 559; *Payne v. Potter*, 9 Iowa 549.

Missouri. — *Furth v. Miller*, 67 Mo. App. 241.

South Carolina. — *James v. M'Credie*, 1 Bay (S. Car.) 294, 1 Am. Dec. 617.

Texas. — *Harbert v. Neill*, 49 Tex. 143; *Kauffman v. Beasley*, 54 Tex. 563.

Perishable Goods. — In *Anonymous*, 2 Mod. 100, it was held that, in the absence of special authority, a factor could not even sell on credit goods about to perish.

Burden of Proof as to Usage. — In *Payne v. Potter*, 9 Iowa 549, it was held that a person relying on the authority of a factor to sell on credit, based on a commercial custom, has the burden of proof as to the existence of such custom.

4. Transfer in Payment of His Own Debt. — *Kuckein v. Wilson*, 4 B. & Ald. 443, 6 E. C. L.

f. TO BARTER. — The rule of agency that an agent empowered to sell goods cannot barter or exchange them applies equally to factors.¹

g. TO SELL TO HIMSELF. — The general rule of agency that an agent authorized to sell goods cannot himself become the purchaser, applies equally to factors. This rule is based on the principle requiring good faith between the principal and the factor and will be discussed elsewhere.²

h. TO WARRANT. — A factor employed to sell goods has authority to warrant the present condition and quality of the goods,³ but has not authority to warrant that the goods will remain sound under conditions which endanger their soundness.⁴

i. TO INSURE. — A factor has the power to insure the goods consigned to him, and as a general rule has such an interest in the goods that he may insure

553; *Warner v. Martin*, 11 How. (U. S.) 226; *Thompson v. Barnum*, 49 Iowa 392; *Hadwin v. Fisk*, 1 La. Ann. 74; *Miller v. Schneider*, 19 La. Ann. 300, 92 Am. Dec. 535; *Benny v. Rhodes*, 18 Mo. 147, 59 Am. Dec. 293; *Benny v. Pegram*, 18 Mo. 191, 59 Am. Dec. 298; *Holton v. Smith*, 7 N. H. 446. See also *Parsons v. Webb*, 8 Me. 38, 22 Am. Dec. 220.

In *Warner v. Martin*, 11 How. (U. S.) 226, Wayne, J., delivering the opinion of the court, said: "When a contract is proposed between factors, or between a factor and any other creditor, to pass property for an antecedent debt, it is not a sale in the legal sense of that word, or in any sense in which it is used in reference to the commission which a factor has to sell. * * * It is not according to the usage of trade. It is a naked transfer of property in payment of a debt."

Principal Indebted to Factor. — The fact that the state of accounts between the principal and the factor is in favor of the latter will not enable the factor to transfer the goods in payment of his own debt. *Benny v. Pegram*, 18 Mo. 191, 59 Am. Dec. 298. Nor is it material that the factor had a lien upon the goods, as the factor must in all cases sell in the usual course of business. *Benny v. Pegram*, 18 Mo. 191, 59 Am. Dec. 298.

A Distinction is to be made between a transfer of the goods in payment of the factor's debt and the case where the purchaser, without knowledge of the principal's title, is induced to make the purchase because of the existence of his claim against the factor, and an action is brought by the principal against the purchaser for the recovery of the price. See *infra*, this title, *Relation of Principal to Third Persons*, subdiv. 1. a. (3) *Defenses to Action by Principal*.

1. Power to Barter Not Implied — *England*, — *Guereiro v. Peile*, 3 B. & Ald. 616, 5 E. C. L. 399.

Illinois. — *Potter v. Dennison*, 10 Ill. 599.

Iowa. — *Haas v. Damon*, 9 Iowa 589; *Hampden v. Moorhead*, 62 Iowa 91.

Maine. — *Wing v. Neal*, (Me. 1886) 2 Atl. Rep. 881.

Massachusetts. — *Kent v. Bornstein*, 12 Allen (Mass.) 342.

Michigan. — *Trudo v. Anderson*, 10 Mich. 357, 81 Am. Dec. 795.

Missouri. — *Wheeler, etc., Mfg. Co. v. Givan*, 65 Mo. 89.

New Hampshire. — *Holton v. Smith*, 7 N. H. 449.

Ohio. — *Grover v. Clark*, *Wright* (Ohio) 350.

Texas. — *Kauffman v. Beasley*, 54 Tex. 563.

Wisconsin. — *Victor Sewing Mach. Co. v. Heller*, 44 Wis. 265.

See also *Lumpkin v. Wilson*, 5 Heisk. (Tenn.) 555, and the title AGENCY, vol. 1, p. 1004.

Where a factor exchanges his principal's goods he becomes personally liable to account to the principal for their value. *Wing v. Neal*, (Me. 1886) 2 Atl. Rep. 881.

2. See *infra*, this title, *Duties and Liabilities of Parties Inter Se*, subdiv. 1. b. (3) *Sales by Factor to Himself*.

3. Power to Warrant. — *Brooks v. Hassell*, 49 L. T. N. S. 568; *Schuchardt v. Allens*, 1 Wall. (U. S.) 359; *Flash v. American Glucose Co.*, 38 La. Ann. 4; *Randall v. Kehler*, 60 Me. 37, 11 Am. Rep. 169; *Palmer v. Hatch*, 46 Mo. 585; *Nelson v. Cowing*, 6 Hill (N. Y.) 336. See, however, *Argersinger v. Macnaughton*, 114 N. Y. 535, 11 Am. St. Rep. 687.

See also the title WARRANTY.

Perishable Goods. — In *Flash v. American Glucose Co.*, 38 La. Ann. 4, it was held that a factor had implied authority to warrant that syrup sold would keep good for a certain period of time.

Power Dependent on Usage. — A factor cannot give a warranty of the quality of the goods unless the sale is one which according to usage is usually attended with a warranty. *Pickert v. Marston*, 68 Wis. 465, 60 Am. Rep. 877.

4. Warranty Against Future Events. — In *Upton v. Suffolk County Mills*, 11 Cush. (Mass.) 586, 59 Am. Dec. 163, it was held that a factor for the sale of flour did not have implied authority to warrant that the flour would continue sweet during a sea voyage.

In *Palmer v. Hatch*, 46 Mo. 585, it was held that a general agent to sell whiskey did not have authority to warrant against any seizure of the whiskey for violation of the revenue laws prior to the sale.

Personal Liability of Factor — **Failure to Disclose Principal.** — The factor must, by his failure to disclose his principal, become personally liable on his warranty of the quality of the goods. *Argersinger v. Macnaughton*, 114 N. Y. 535, 11 Am. St. Rep. 687.

Ratification of Unauthorized Warranty. — The mere receipt of the price by the principal is not a ratification of the factor's unauthorized warranty of the goods, if he had no knowledge of such warranty. *Smith v. Tracy*, 36 N. Y. 79.

them to their full value in his own name.¹

j. TO RESHIP TO OTHER MARKETS. — As a general rule, goods consigned to a factor for sale are to be sold in the market to which they are shipped and where the factor transacts his business, and the factor has no implied authority to reship the goods to another market.²

k. TO RECEIVE PAYMENT — (1) *In General.* — Factors to whom goods are consigned for sale have implied power to receive payment and discharge the purchaser from liability; and this rule applies not only where the goods are sold for cash, but also where the sale is on credit.³

1. **Factor May Insure in His Own Name.** — *Waters v. Monarch F., etc., Assur. Co.*, 5 El. & Bl. 870, 85 E. C. L. 870; *Shoenfeld v. Fleisher*, 73 Ill. 404; *Ætna Ins. Co. v. Jackson*, 16 B. Mon. (Ky.) 242; *Johnson v. Campbell*, 120 Mass. 449; *De Forest v. Fulton F. Ins. Co.*, 1 Hall (N. Y.) 84; *Brisban v. Boyd*, 4 Paige (N. Y.) 17; *Lee v. Adsit*, 37 N. Y. 90. See also *Lucena v. Crauford*, 3 B. & P. 75; *Franklin F. Ins. Co. v. Hewitt*, 3 B. Mon. (Ky.) 231, and the title **INSURANCE**.

As to the **Factor's Duty to Insure**, see *infra*, this title, **Duties and Liabilities of Parties Inter Se**, subdiv. 1. *f.* **Duty to Insure Goods Consigned**.

Statement of Rule. — In *De Forest v. Fulton F. Ins. Co.*, 1 Hall (N. Y.) 110, Jones, C. J., said: "It is not denied that a factor has a special property in the goods held by him on consignment for sale and may maintain trover for them if wrongfully withheld from him. And that species of ownership is vested in him, I apprehend, by the consignment itself, notwithstanding that there should not be any bill of lading or other formal transfer in writing to vest the legal title in him. And it would be strange that an interest which authorizes an action for the goods as his own should not be capable of being insured, or that the duty of guarding the property from danger should not give the corresponding right to insure it."

Construction of Policy. — A policy effected by a factor upon goods "as well the property of the assured as held by them in trust or on commission" covers the whole value of the property, and not merely the interest of the factor. *De Forest v. Fulton F. Ins. Co.*, 1 Hall (N. Y.) 84. See also *Waters v. Monarch F., etc., Assur. Co.*, 5 El. & Bl. 870, 85 E. C. L. 870; *Johnson v. Campbell*, 120 Mass. 449; *Lee v. Adsit*, 37 N. Y. 90.

Reimbursement for Premiums. — A factor cannot charge insurance premiums on insurance in conformity with the custom of the place, unless the custom was intended for the security of the owner of the goods. *Kingston v. Wilson*, 4 Wash. (U. S.) 310.

2. **Power to Reship Not Implied** — *England.* — *Catlin v. Bell*, 4 Campb. 183.

Alabama. — *Comer v. Way*, 107 Ala. 300, citing 3 AM. AND ENG. ENCYC. OF LAW (1st ed.) 326.

California. — *Pugh v. Porter Bros. Co.*, 118 Cal. 628.

Illinois. — *Phy v. Clark*, 35 Ill. 377.

Kentucky. — *Wallace v. Bradshaw*, 6 Dana (Ky.) 382.

Maine. — *Marr v. Barrett*, 41 Me. 403. See also *Williams v. White*, 70 Me. 138.

Missouri. — *Phillips v. Scott*, 43 Mo. 86, 97 Am. Dec. 369.

Nebraska. — *Burke v. Frye*, 44 Neb. 223; *Housel v. Thrall*, 18 Neb. 484.

Ohio. — *Grieff v. Cowguill*, 2 Disney (Ohio) 58.

Texas. — *Wootters v. Kaufman*, 73 Tex. 395; *Wootters v. Kauffman*, 67 Tex. 488; *Kaufman v. Edwards*, 2 Tex. Unrep. Cas. 132; *Kauffman v. Beasley*, 54 Tex. 563.

See also *Kingston v. Wilson*, 4 Wash. (U. S.) 310. Compare *Strong v. Stewart*, 9 Heisk. (Tenn.) 137.

The Mere Fact that the Factor Has Made Advances upon the goods will not give him implied authority to sell them in another market. *Phillips v. Scott*, 43 Mo. 86, 97 Am. Dec. 369.

Reshipment Sanctioned by Custom. — A custom or usage in the market when goods are consigned to a factor for sale may authorize a reshipment by him of the goods to another market. *Wallace v. Bradshaw*, 6 Dana (Ky.) 382. Compare *Grieff v. Cowguill*, 2 Disney (Ohio) 58.

Measure of Damages for Unauthorized Reshipment. — The measure of damages in case goods are shipped by the factor to another market is the actual loss to the principal, that is, the difference between the market value at the place where the goods should have been sold and the amount received from the sale in the foreign market. *Comer v. Way*, 107 Ala. 300; *Phy v. Clark*, 35 Ill. 377. See also *Grieff v. Cowguill*, 2 Disney (Ohio) 58.

Reshipment as a Conversion. — In *Marr v. Barrett*, 41 Me. 403, it was held that trover would lie against a factor who had shipped the goods to another market without authority.

Liability of Forwarding Merchant. — A forwarding merchant who, acting for his principal at a foreign port, obtains from commission merchants goods consigned to them and reships such goods to his principal for sale, even though he makes advances on the goods, acquires no interest therein; for the law charges him with knowledge of the limitations of the powers of the commission merchants. Such a proceeding renders him guilty of conversion and liable for the value of the goods, and it is no defense that he was acting for another and was without personal interest in the goods. *Kauffman v. Beasley*, 54 Tex. 563. See also *Wootters v. Kaufman*, 73 Tex. 395, 67 Tex. 488.

3. **Factor May Receive Payment** — *England.* — *Coates v. Lewes*, 1 Campb. 444; *Blackburn v. Scholes*, 2 Campb. 343; *Townsend v. Inglis*, Holt 278, 3 E. C. L. 116; *Campbell v. Hassell*, 1 Stark. 233, 2 E. C. L. 95; *Thornton v. Meux*, M. & M. 43, 22 E. C. L. 243; *Pickering v. Busk*, 15 East 38; *Baring v. Corrie*, 2 B. & Ald. 137; *Golden v. Levy*, 1 Law Repos. (4 N. Car.) 527, 6 Am. Dec. 555; *Drinkwater v. Goodwin*, 1 Cowp. 256.

(2) *Payment Otherwise than in Money.* — The factor has no authority to receive in payment anything except money;¹ but in case the principal is not disclosed, and the sale is in the name of the factor, it has been held that a part payment by way of the surrender of the factor's own check was good as against the principal.²

(3) *To Indorse Purchase-price Notes.* — Though a factor can receive payment of notes taken for the price of goods sold, yet he cannot bind his principal by indorsing and negotiating such notes.³

l. TO EXTEND TIME OF PAYMENT. — A factor has not implied power after a sale of goods on credit to extend the time of payment.⁴

m. TO SUBMIT CLAIMS TO ARBITRATION. — A factor has not implied

United States. — *Adams v. Fraser*, 82 Fed. Rep. 211.

Kansas. — *Kane v. Barstow*, 42 Kan. 465, 16 Am. St. Rep. 490.

Kentucky. — *Graham v. Duckwall*, 8 Bush (Ky.) 18.

Maine. — *Traub v. Milliken*, 57 Me. 63, 2 Am. Rep. 14.

Massachusetts. — *Van Staphorst v. Pearce*, 4 Mass. 258; *Goodenow v. Tyler*, 7 Mass. 36, 5 Am. Dec. 22; *West Boylston Mfg. Co. v. Searle*, 15 Pick. (Mass.) 225; *Allen v. Pierce*, 1 Dane's Abr. 612; *Clark v. Murphy*, 164 Mass. 490.

Missouri. — *Butler v. Dorman*, 68 Mo. 298, 30 Am. Rep. 795; *Rice v. Groffmann*, 56 Mo. 434.

New York. — *Higgins v. Moore*, 34 N. Y. 417; *Corlies v. Cumming*, 6 Cow. (N. Y.) 181.

North Carolina. — *Golden v. Levy*, 1 Law Repos. (4 N. Car.) 527, 6 Am. Dec. 555.

Pennsylvania. — *Seiple v. Irwin*, 30 Pa. St. 513.

As to the Power to Receive Payment of Agents to Sell Generally, see the title AGENCY, vol. 1, p. 1014.

Discharge of Note Given by Purchaser. — In *West Boylston Mfg. Co. v. Searle*, 15 Pick. (Mass.) 225, it was held that a factor could receive payment for and discharge a note given for goods sold on credit.

Misapplication of Funds by Factor. — A payment to the factor is good though the factor misappropriates the funds. *Allen v. Pierce*, 1 Dane's Abr. 612.

Payment to Factor Forbidden. — Where the principal has forbidden the purchaser to make payment to the factor, if the purchaser does so it does not relieve him from liability to the principal. *Kinder v. Shaw*, 2 Mass. 398. See *infra*, this title, *Relation of Principal to Third Persons*, subdiv. 1. a. (1) *In General*.

Mode of Payment — Principal Not Disclosed. — If the goods are sold without disclosing the principal, the purchaser is justified in making payment to the factor in a different manner from that stipulated for by the contract of sale. *Blackburn v. Scholes*, 2 Campb. 343. But not where the purchaser knew that the factor was selling as a factor, though the name of the principal was undisclosed. *Campbell v. Hassell*, 1 Stark. 233, 2 E. C. L. 94. See also *Thornton v. Meux*, M. & M. 43, 22 E. C. L. 243.

Principal Disclosed. — And where the principal is disclosed, the purchaser is justified in paying to the factor only in accordance with

the terms in the contract. *Blackburn v. Scholes*, 2 Campb. 343.

1. Medium of Payment Must Be Money. — In *Sangston v. Maitland*, 11 Gill & J. (Md.) 286, it was held in an action by the principals for the price of goods sold by a factor that the purchasers could not discharge the debt in whole or in part by showing an agreement on the part of the factor to receive in payment their own notes. See also the title AGENCY, vol. 1, pp. 1003, 1027.

Payment in Depreciated Currency. — In *Dunnell v. Mason*, 1 Story (U. S.) 543, it was held that where a factor on a *del credere* commission sells goods for his principal at a certain price, and afterwards, upon the suspension of specie payments in the state, receives payment in banknotes of the state banks at a depreciated value, he must account for the full price at the specie or par value.

Taking Note of Third Person. — In *Symington v. M'Lin*, 1 Dev. & B. L. (18 N. Car.) 291, a factor was held liable for payment of the debt where he took in payment the note of a third person. See, however, *Hamilton v. Cunningham*, 2 Brock. (U. S.) 350, wherein a factor took in payment a note of a previous date, having three months to run, drawn and indorsed by parties then in good credit, but not indorsed by the purchaser, and it was held that the factor was not liable for a loss due to the insolvency of the makers and indorsers. See this case explained in *American Express Co. v. Parsons*, 44 Ill. 312.

2. Traub v. Milliken, 57 Me. 63, 2 Am. Rep. 14. See also *infra*, this title, *Relation of Principal to Third Persons*, subdiv. 1. a. (3) *Defenses to Action by Principal*.

Payment by the surrender of the factor's check would not be good, however, if the purchaser knew that the factor was acting as agent. *Underwood v. Nicholls*, 17 C. B. 239, 84 E. C. L. 239.

3. Indorsing Purchase-price Notes. — *Hogg v. Snaith*, 1 Taunt. 347; *Murray v. East India Co.*, 5 B. & Ald. 204, 7 E. C. L. 66. See the title AGENCY, vol. 1, p. 1030.

4. Extension of Time of Payment. — In *Douglas v. Bernard*, Anth. N. P. (N. Y.) 278, it was held that a factor, by extending the time of payment where goods are sold on credit, becomes personally liable for the debt, notwithstanding the fact that the factor, on renewing the original note, retained it, and on dishonor of the renewal note recovered judgment on the original. See also *Hairston v. Medley*, 1 Gratt. (Va.) 96, and the title AGENCY, vol. 1, p. 1029.

authority to submit to arbitration claims arising out of the sale of the goods.¹

n. TO COMPROMISE CLAIMS. — The general rule of agency which refuses to an agent, authorized to collect a debt, the power to compromise such debt² applies, it would seem, equally to factors.³

o. TO RESCIND SALE. — The general rule of agency that an agent, authorized to sell goods, has no authority to rescind a sale after it has been completed applies equally to factors.⁴

p. TO DELEGATE AUTHORITY. — As a factor is generally employed on account of his superior knowledge in the special branch of business in which he is engaged, he cannot, as a general rule, delegate his authority.⁵

1. Power to Arbitrate. — In *Carnochan v. Gould*, 1 Bailey L. (S. Car.) 179, 19 Am. Dec. 668, it was held that a factor had no implied power to submit to arbitration a claim for damages arising out of an alleged breach of an implied warranty of the quality of the goods sold. See also *Curtis v. Barclay*, 5 B. & C. 141, 11 E. C. L. 181; *Ingraham v. Whitmore*, 75 Ill. 24. See the title ARBITRATION AND AWARD, vol. 2, p. 622.

2. Power to Compromise Claims. — *Swinfen v. Swinfen*, 24 Beav. 549; *McHany v. Schenk*, 88 Ill. 367; *Baird v. Randall*, 58 Mich. 175; *Brown v. Massachusetts Mut. L. Ins. Co.*, 59 N. H. 298, 47 Am. Rep. 205; *Herring v. Hottendorf*, 74 N. Car. 588. See the title AGENCY, vol. 1, p. 1028.

3. Factors Have No Power to Compromise. — *Greenleaf v. Moody*, 13 Allen (Mass.) 363.

In *Blackman v. Green*, 24 Vt. 17, where a factor had sold his principal's goods upon credit, it was held that he could not bind his principal by the presentation of the claim and the allowance thereof in insolvency proceedings, although he had a lien upon the claim for his commissions, without at least giving to the principal notice of his lien and an opportunity to discharge it.

In *Gorman v. Wheeler*, 10 Gray (Mass.) 362, it was held that a factor did not become personally liable for the debt by proving a note taken for the purchase price under the insolvent laws, where he had given the principal reasonable notice of the insolvency of the purchaser and used reasonable care and skill in the matter, though the consignor was a non-resident and his claim therefore would not have been barred by the discharge in insolvency.

4. Rescission of Sale. — In *Smith v. Rice*, 1 Bailey L. (S. Car.) 648, it was held that an agent authorized to sell a slave had no authority to rescind the sale.

Inability to Complete Sale. — Cotton was sold by factors on condition that they obtain a permit from the military authorities to remove the cotton, which was never obtained. The purchaser paid the price, and the agents deposited it with a third person in accordance with the orders of the principal. It was held that on failure to secure the permit the agents had the right to rescind the sale and repay the price to the purchaser. *Macaulay v. Palmer*, 125 N. Y. 742.

5. Delegation of Authority — *England*. — *Catlin v. Bell*, 4 Campb. 183; *Solly v. Rathbone*, 2 M. & S. 298; *Cockran v. Irlam*, 2 M. & S. 301.

United States. — *Read v. Bertrand*, 4 Wash.

(U. S.) 514; *Warner v. Martin*, 11 How. (U. S.) 209.

Alabama. — *Desha v. Holland*, 12 Ala. 513, 46 Am. Dec. 261. See also *Leach v. Bush*, 57 Ala. 145.

Connecticut. — *Terry v. Bamberger*, 44 Conn. 561.

Iowa. — *Loomis v. Simpson*, 13 Iowa 532.

Louisiana. — *Reynolds v. Kirkman*, 8 Martin N. S. (La.) 464; *Mark v. Bowers*, 4 Martin N. S. (La.) 95.

Nebraska. — *Burke v. Frye*, 44 Neb. 223.

New Hampshire. — *Phelps v. Sinclair*, 2 N. H. 554.

New York. — *McMorris v. Simpson*, 21 Wend. (N. Y.) 610; *Ladd v. Arkell*, 40 N. Y. Super. Ct. 150.

Ohio. — *Grieff v. Cowguill*, 2 Disney (Ohio) 58.

Tennessee. — *Merchants' Nat. Bank v. Trenholm*, 12 Heisk. (Tenn.) 520; *Campbell v. Reeves*, 3 Head (Tenn.) 226.

Texas. — *Kauffman v. Beasley*, 54 Tex. 563.

See also *Gooderham v. Hyde*, 6 U. C. C. P. 341. And the title AGENCY, vol. 1, p. 978.

In *Harralson v. Stein*, 50 Ala. 347, it was said that the principle that an agent could not delegate his authority did not universally apply to factors and could only be invoked by the principal when sought to be charged by the subagent.

In *Housel v. Thrall*, 18 Neb. 484, it was held that the factor was liable for reshipping the goods to his agent in another city, with whom the principal had told the factor he would have no dealings, though the principal knew that the goods were so dealt with.

Death of Factor. — The death of the factor terminates his authority, and it does not pass to his executors or administrators. *Gage v. Allison*, 1 Brev. (S. Car.) 495, 2 Am. Dec. 682; *Jackson Ins. Co. v. Partee*, 9 Heisk. (Tenn.) 296.

Sale by Subagent as a Conversion. — Where a factor disposes of the goods of his principal by a delegation of his authority to a third person, without the sanction of his principal or the usage of trade, it constitutes a conversion by the factor, and the principal may sue the factor in trover. *Campbell v. Reeves*, 3 Head (Tenn.) 226. See, however, *Bromley v. Coxwell*, 2 B. & P. 438.

Responsibility of Factor for Acts of Subagent. — Where a factor, without authority, employs an agent to sell the goods, he is responsible for the acts of the agent. *Reynolds v. Kirkman*, 8 Martin N. S. (La.) 464.

Liability of Subagent to Principal. — The subagent is also liable to the principal as for a conversion by reason of his sale of the goods.

Ministerial Acts. — The rule prohibiting a factor from delegating his authority does not prevent him from employing clerks to perform purely ministerial acts.¹

Usage. — The factor may also, by usage or custom, be authorized to employ subagents.² And where such is the case the subagent is liable to account directly to the principal.³

g. TO PLEDGE — (1) *General Rule.* — It is a well settled and universal rule of the common law that a factor has no power to pledge the goods of his principal for a debt of the factor or for a loan made to him, irrespective of whether or not the pledgee had notice that the factor was acting as such, and the pledgee would acquire no interest in or lien upon the goods as against the principal.⁴ But as against the factor himself it has been held that the pledge was

Solly v. Rathbone, 2 M. & S. 298; *Merchants' Nat. Bank v. Trenholm*, 12 Heisk. (Tenn.) 520. Compare *Strong v. Stewart*, 9 Heisk. (Tenn.) 147.

Waiver of Conversion. — The principal may affirm the sale through the subagent and sue the factor in assumpsit for the value of the goods, waiving the tort. *Campbell v. Reeves*, 3 Head (Tenn.) 226.

Insolvency of Factor. — The rule prohibiting a factor from delegating his authority applies in case of the insolvency of the factor, and it is held that the assignee of the factor has no authority to sell the goods consigned to the factor. *Terry v. Bamberger*, 44 Conn. 558.

Right of Subagent. — If a factor delivers the goods to a third person to sell, the latter has no lien on the goods as against a third person. *Phelps v. Sinclair*, 2 N. H. 554. Nor can he, in an action against him by the principal to recover the proceeds of the goods, which had been sold by him, set off an individual indebtedness due from the factor to him. *Ladd v. Arkell*, 40 N. Y. Super. Ct. 150. See, however, *New Zealand, etc., Land Co. v. Watson*, 7 Q. B. Div. 374, 50 L. J. Q. B. Div. 433, reversing 5 Q. B. Div. 474.

Delegation in Emergency. — In *Stone v. Waitt*, 31 Me. 409, 52 Am. Dec. 621, it was held that a supercargo, when compelled to leave port without having been able to effect a sale, may intrust the sale of the goods to another.

Del Credere Commission. — Factors receiving goods under a *del credere* commission may, it seems, sell through agents. *Miller v. Lea*, 35 Md. 396, 6 Am. Rep. 417.

1. **Ministerial Acts.** — *McMorris v. Simpson*, 21 Wend. (N. Y.) 610. See also the title AGENCY, vol. 1, p. 978.

2. **Usage Sanctioning Employment of Subagents.** — *Trueman v. Loder*, 11 Ad. & El. 589, 39 E. C. L. 178; *Warner v. Martin*, 11 How. (U. S.) 209; *Terry v. Bamberger*, 44 Conn. 561; *Darling v. Stanwood*, 14 Allen (Mass.) 504; *Jackson Ins. Co. v. Partee*, 9 Heisk. (Tenn.) 296; *Strong v. Stewart*, 9 Heisk. (Tenn.) 147. And see the title AGENCY, vol. 1, p. 979.

In *Darling v. Stanwood*, 14 Allen (Mass.) 504, it was held that if a commission merchant is employed to buy goods in a distant market, and the custom of that market is for commission merchants to employ brokers to make such purchases, and this custom is understood by the principal, the commission merchant may properly employ a broker of experience

and good reputation to make the purchases, and if he does so he will not be liable for such broker's error or misconduct.

Factor Must Impart His Instructions to Subagent. — In *Strong v. Stewart*, 9 Heisk. (Tenn.) 137, it was held that if a factor employs a subagent, who sells goods for less than the amount of the factor's advances and expenses, the factor, when he seeks to recover the deficiency from the principal, must show that he faithfully imparted to his subagent the instructions under which he himself had authority to sell.

3. **Accountability of Subagent to Principal.** — A subagent is directly accountable to the principal for the proceeds of goods which have been sold by him. *Ladd v. Arkell*, 40 N. Y. Super. Ct. 150. See, however, *New Zealand, etc., Land Co. v. Watson*, 7 Q. B. Div. 374, 50 L. J. Q. B. Div. 433, reversing 5 Q. B. Div. 474.

In *Jackson Ins. Co. v. Partee*, 9 Heisk. (Tenn.) 296, it was held that the factor's death revokes the authority of the subagent, and the funds in the latter's hands belong to the principal and not to the administrator of the factor, and the subagent cannot pay them over to the administrator of the factor against the will of the principal.

4. **Factor Cannot Pledge** — *England.* — *Martini v. Coles*, 1 M. & S. 140; *Boyson v. Coles*, 6 M. & S. 14; *Fielding v. Kymer*, 2 Brod. & B. 639, 6 E. C. L. 309; *Paterson v. Tash*, 2 Stra. 1178; *Queiroz v. Trueman*, 3 B. & C. 340, 10 E. C. L. 107; *Guichard v. Morgan*, 4 Moo. 36, 16 E. C. L. 360; *Gill v. Kymer*, 5 Moo. 503; *Daubigny v. Duval*, 5 T. R. 604; *Newsom v. Thornton*, 6 East 17; *M'Combie v. Davies*, 6 East 538, 7 East 5; *Pickering v. Busk*, 15 East 38.

United States. — *Kelly v. Smith*, 1 Blatchf. (U. S.) 290; *Van Amringe v. Peabody*, 1 Mason (U. S.) 440; *Evans v. Potter*, 2 Gall. (U. S.) 13; *Warner v. Martin*, 11 How. (U. S.) 209; *Mechanics*, etc., Ins. Co. v. Kiger, 103 U. S. 352; *Allen v. St. Louis Nat. Bank*, 120 U. S. 37.

Alabama. — *Bott v. McCoy*, 20 Ala. 578, 56 Am. Dec. 223; *Commercial Bank v. Hurt*, 99 Ala. 130, 42 Am. St. Rep. 38.

California. — *Wright v. Solomon*, 19 Cal. 64, 79 Am. Dec. 196; *Hayes v. Campbell*, 55 Cal. 424, 36 Am. Rep. 43; *Chase v. Whitmore*, 68 Cal. 547. See, however, *Hutchinson v. Bours*, 6 Cal. 383; *Horr v. Barker*, 11 Cal. 402, 70 Am. Dec. 791; *Wisp v. Hazard*, 66 Cal. 459.

Connecticut. — *Terry v. Bamberger*, 44 Conn. 561.

Georgia. — *Macon First Nat. Bank v. Nel-*

valid and that the factor or a purchaser from him could not himself recover the goods or their value.¹

Attempt to Limit Rule to Technical Factors.—While the hardship of this rule has been recognized by a number of the courts, no departure was made therefrom² except in *California*, where the application of the rule was at one time restricted to technical factors, when the rights of third persons were involved.³ These decisions were, however, subsequently overruled.⁴

(2) *Qualifications of General Rule.*—It has been held, however, that a factor may pledge the goods to secure money for the payment of duties or

son, 38 Ga. 391; *National Exch. Bank v. Graniteville Mfg. Co.*, 79 Ga. 22.

Illinois.—*Potter v. Dennison*, 10 Ill. 590; *Gray v. Agnew*, 95 Ill. 315; *Elgin First Nat. Bank v. Schween*, 127 Ill. 573; *Ludden v. Buffalo Batting Co.*, 22 Ill. App. 415; *Trumbull v. Union Trust Co.*, 33 Ill. App. 319; *Berry v. Allen*, 59 Ill. App. 149.

Kentucky.—*Louisville First Nat. Bank v. Boyce*, 78 Ky. 42.

Louisiana.—*Hadwin v. Fisk*, 1 La. Ann. 74; *Bonriot v. Fuentes*, 10 La. Ann. 70; *Miller v. Schneider*, 19 La. Ann. 300, 92 Am. Dec. 535; *Young v. Scott*, 25 La. Ann. 313; *Allen v. Steers*, 39 La. Ann. 586; *Lallande v. His Creditors*, 42 La. Ann. 705; *Holton v. Hubbard*, 49 La. Ann. 715. See, however, *Davidson v. Bodley*, 27 La. Ann. 150.

Massachusetts.—*Kinder v. Shaw*, 2 Mass. 398; *Chickering v. Hosmer*, 12 Mass. 183; *Odiorne v. Maxcy*, 13 Mass. 178; *Jarvis v. Rogers*, 15 Mass. 389; *Peters v. Ballistier*, 3 Pick. (Mass.) 495; *Nowell v. Pratt*, 5 Cush. (Mass.) 111; *Hoffman v. Noble*, 6 Met. (Mass.) 74, 39 Am. Dec. 711; *Michigan State Bank v. Gardner*, 15 Gray (Mass.) 374.

Mississippi.—*Wesling v. Noonan*, 31 Miss. 599.

Missouri.—*Benny v. Rhodes*, 18 Mo. 147, 59 Am. Dec. 293; *Benny v. Pegram*, 18 Mo. 191, 59 Am. Dec. 298; *Wheeler, etc., Mfg. Co. v. Givan*, 65 Mo. 89; *Singer Mfg. Co. v. Hudson*, 4 Mo. App. 145; *St. Louis Nat. Bank v. Ross*, 9 Mo. App. 399.

New Hampshire.—*Holton v. Smith*, 7 N. H. 449; *Martin v. Moulton*, 8 N. H. 504; *Bailey v. Colby*, 34 N. H. 36, 66 Am. Dec. 752.

New York.—*Commercial Nat. Bank v. Heilbronner*, 108 N. Y. 439; *Bonito v. Mosquera*, 2 Bosw. (N. Y.) 401; *Stevens v. Wilson*, 3 Den. (N. Y.) 476; *Urquhart v. M'Iver*, 4 Johns. (N. Y.) 103; *Rodriguez v. Heffernan*, 5 Johns. Ch. (N. Y.) 417; *Buckley v. Packard*, 20 Johns. (N. Y.) 421; *Stevens v. Wilson*, 6 Hill (N. Y.) 512; *Dorrance v. Dean*, 106 N. Y. 203.

Oregon.—*Merchants' Nat. Bank v. Pope*, 19 Oregon 35.

Pennsylvania.—*Newbold v. Wright*, 4 Rawle (Pa.) 195; *Laussatt v. Lippincott*, 6 S. & R. (Pa.) 386, 9 Am. Dec. 440.

South Carolina.—*Bowie v. Napier*, 1 McCord L. (S. Car.) 1, 10 Am. Dec. 641.

Tennessee.—*Blair v. Childs*, 10 Heisk. (Tenn.) 199; *Merchants' Nat. Bank v. Trenholm*, 12 Heisk. (Tenn.) 520.

Texas.—*McCreary v. Gaines*, 55 Tex. 485, 40 Am. Rep. 818; *Wootters v. Kaufman*, 73 Tex. 395.

Virginia.—*Skinner v. Dodge*, 4 Hen. & M. (Va.) 432; *Hewes v. Doddridge*, 1 Rob. (Va.) 152.

Where goods were consigned to a factor on account of the consignor, and the bill of lading directed the delivery of the goods to the factor or his assigns, and, after being indorsed by the factor, the bill of lading together with the goods was sent to the defendant as broker, and he made advances to the factor on the credit of those and other goods, without knowing that the factor was not the owner of them, it was held that the defendant could not retain the goods as against the consignor until payment of the debt due to him from the factor on account of such advances. *Martini v. Coles*, 1 M. & S. 140.

Effect of Principal's Conduct After Learning of Factor's Embarrassment.—In *Wootters v. Kaufman*, 73 Tex. 395, it was held that the fact that the principal continued to consign to the factors after learning of their financial embarrassment, and that he offered to assist them financially, and did so assist them, does not prove that the principal had authorized the factors to pledge the goods consigned for advances to them.

Pledge by Indorsing Bill of Lading.—The rule denying the factor power to pledge the goods applies not only to a pledge by the actual delivery of the goods, but also to pledges by indorsing over the bill of lading. *Newsom v. Thorton*, 6 East 17; *Lallande v. His Creditors*, 42 La. Ann. 705.

Usage.—A local usage cannot confer on factors the power to pledge the goods of their principals. *Newbold v. Wright*, 4 Rawle (Pa.) 195.

1. No Recovery by Factor of Goods Pledged.—*Bott v. McCoy*, 20 Ala. 578, 56 Am. Dec. 223.

In *Nowell v. Pratt*, 5 Cush. (Mass.) 111, it was held, however, that a pledge of the goods by the factor did not affect his power to sell them, and when he did sell them, and the pledgee afterwards resold them, the pledgee was liable to the purchaser from the factor for the amount of the proceeds received by him.

2. See *McCreary v. Gaines*, 55 Tex. 485, 40 Am. Rep. 818; *Martini v. Coles*, 1 M. & S. 145.

3. California—Rule Limited to Technical Factors.—*Hutchinson v. Bours*, 6 Cal. 383; *Horr v. Barker*, 11 Cal. 393, 70 Am. Dec. 791.

4. Wright v. Solomon, 19 Cal. 64, 79 Am. Dec. 196, wherein it was held that the rule applied not only to technical factors, that is, those whose only business is to sell goods consigned to them for that purpose, but also to a factor who at the same time does business on his own account.

other charges justified by the usage of trade,¹ and also to raise money to meet drafts drawn upon the factor by the principal before the sale of the goods.²

Pledge to Extent of Factor's Lien. — Though a factor cannot pledge the goods of his principal as his own, still he may deliver the goods to a third person as security with notice of his lien, and as his agent to keep possession for him in order to preserve that lien; and in such case the principal, to be entitled to a return of the goods, must tender the amount of the lien.³ In some jurisdictions the right of the factor to pledge the goods to the extent of his advances and charges is expressly conferred by statute.⁴

Estoppel. — The principal may be estopped to deny the authority of his factor to pledge the goods, by arming him with the indicia of ownership.⁵

1. Pledge to Secure Money for Payment of Duties. — *Evans v. Potter*, 2 Gall. (U. S.) 13.

2. To Meet Draft Drawn by Consignor. — *Citizens' State Bank v. Abbott*, 80 Iowa 646; *Boyce v. Bank of Commerce*, 22 Fed. Rep. 53. See also *Martini v. Coles*, 1 M. & S. 149.

In *Gill v. Kymer*, 5 Moo. 503, it was held, however, that the mere fact of the principal's drawing bills on his factor, to be provided for out of the proceeds of the goods, did not authorize the factor to pledge them for the purpose of raising money to meet the bills.

In *Citizens' State Bank v. Abbott*, 80 Iowa 646, it was held that where cattle are shipped to a consignee and the contract is for their sale on a commission for half the profits, after deducting the cost price, and the consignee pays a draft by the consignor for the cost price of the cattle, he thereby becomes the owner of the cattle, subject to the right of the shipper to have them sold and the profits divided, and may, therefore, mortgage the cattle to the bank which advanced the money to meet the draft.

Sight Draft. — In *Boyce v. Bank of Commerce*, 22 Fed. Rep. 53, it was held that when, in the ordinary course of dealings between the principal and his factor, drafts payable at sight are drawn by the former against the latter, the factor, having no funds to meet the drafts, may make a valid pledge of the goods in the ordinary course of business to obtain funds for that purpose.

Instruction to Obtain Advances. — A supercargo who is instructed to obtain advances on the goods may pledge them; and where various shipments are consigned with such instructions, and the supercargo pledges the entire cargo to secure a general average, it must be borne *pro rata* by his several principals. *Newbold v. Wright*, 4 Rawle (Pa.) 195.

3. Pledge to Extent of Lien. — *Warner v. Martin*, 11 How. (U. S.) 209; *Mechanics', etc., Ins. Co. v. Kiger*, 103 U. S. 352; *Steiger v. Third Nat. Bank*, 6 Fed. Rep. 569; *Terry v. Bamberger*, 44 Conn. 561; *Silverman v. Bush*, 16 Ill. App. 437; *Ludden v. Buffalo Batting Co.*, 22 Ill. App. 415; *Bailey v. Colby*, 34 N. H. 36, 66 Am. Dec. 752; *Urquhart v. M'Iver*, 4 Johns. (N. Y.) 103; *Merchants' Nat. Bank v. Pope*, 19 Oregon 35. See also *M'Combie v. Davies*, 7 East 5. Compare *Daubigny v. Duval*, 5 T. R. 604.

Demand on Principal. — In *Merchants' Nat. Bank v. Trenholm*, 12 Heisk. (Tenn.) 520, it was held that a factor must demand from his principal the amount of his charges before he can pledge the goods to that extent.

Pledgee's Right Waived. — Where goods have been pledged by a factor having a lien thereon for advances, and the pledgee refuses to deliver possession thereof to the principal unless the amount of his loan is paid, saying nothing of such advances, he waives his right to detain the goods until the amount of the advances by the factor is paid. *Macky v. Dillinger*, 73 Pa. St. 85.

Pledge for More than Amount of Lien. — If in making a pledge for advances the factor overstates the amount of his advances and pledges the goods for more than that sum, he converts the goods and determines his lien so that trover may be brought against either the factor or the pledgee. *Ludden v. Buffalo Batting Co.*, 22 Ill. App. 415.

4. Statute. — *Steiger v. Third Nat. Bank*, 6 Fed. Rep. 569.

5. Estoppel. — *Vickers v. Hertz*, L. R. 2 H. L. Sc. 113; *Boyson v. Coles*, 6 M. & S. 14; *Amann v. Lowell*, 66 Cal. 306; *Glidden v. Lucas*, 7 Cal. 26; *Wisp v. Hazard*, 66 Cal. 459; *Gray v. Agnew*, 95 Ill. 315; *Davidson v. Bodley*, 27 La. Ann. 150.

Bill of Lading in Name of Factor. — A factor cannot pledge the goods of his principal for his own debt though bills of lading have been issued to him therefor. *Newsom v. Thorton*, 6 East 17; *Guichard v. Morgan*, 4 Moo. 36, 16 E. C. L. 360; *Lallande v. His Creditors*, 42 La. Ann. 705, 45 Am. & Eng. R. Cas. 301.

The invoicing of goods to a factor as purchaser, to conceal from an association of which the principal was a member the fact that the goods were sold on commission, the rules of the association forbidding such sale, does not estop the principal to claim the goods as against the pledgee from the factor, the pledgee having no knowledge of the facts and his conduct being in no way influenced thereby. *Gray v. Agnew*, 95 Ill. 315.

In *Glidden v. Lucas*, 7 Cal. 26, it was held that where goods were shipped by the principals on their own boat, and the bill of lading issued to the factor stated that the goods were "shipped by order" and were to be delivered "to order or assigns," he or they paying freight, and further showed on its margin that the principals had regular agents at the place of destination, a pledge by the factor to a *lena fide* pledgee is good as against the principal.

In *Leet v. Wadsworth*, 5 Cal. 404, it was held that a purchase by a factor in his own name makes him as to all the world the apparent owner, and that a pledge of the goods by him to a person taking them in good faith would be sustained.

(3) *Statutory Modifications.* — On account of the hardship of the rule invalidating pledges by factors to persons acting in good faith, the statute known as the Factors' Act was passed in England for the protection of persons dealing in good faith with factors, and similar statutes have been passed by the legislatures of a number of the states of the Union. The effect of these statutes will be found discussed in another place.¹

(4) *Remedy of Principal.* — Where the factor pledges the goods of his principal, the principal may sue either the factor² or the pledgee³ in trover for a conversion, or he may pursue and recover the goods from the pledgee,⁴ without payment of the charges and advances by the factor;⁵ or the principal is entitled, in the settlement of accounts with the factor, to an adjustment of any claim he may have for loss or damages resulting from such unlawful pledge.⁶

Assumpsit. — And it seems that a pledge of the goods by the factor will enable the principal to recover from the factor in an action of indebitatus assumpsit the value of the goods, on the ground that a sale will be implied;⁷ and assumpsit will lie against the pledgee for money had and received if he has sold the goods.⁸

r. RATIFICATION. — The doctrine of ratification as applied generally to the law of agency applies equally to the relation of principal and factor, and will result as effectively to establish the duties, rights, and liabilities of all persons concerned as if the acts ratified had been fully authorized in the beginning.⁹ The question of ratification arises most frequently where the

1. See the title **FACTORS' ACTS**, *ante*.

2. **Trover Against Factor.** — *Kelly v. Smith*, 1 Blatchf. (U. S.) 290; *Bott v. McCoy*, 25 Ala. 678, 56 Am. Dec. 223; *Merchants' Nat. Bank v. Trenholm*, 12 Heisk. (Tenn.) 520.

Demand. — It is not necessary that a demand be made upon the factor after he has pledged the goods, in order that trover may be maintained against him. *Merchants' Nat. Bank v. Trenholm*, 12 Heisk. (Tenn.) 520.

3. **Trover Against Pledgee.** — *Martini v. Coles*, 1 M. & S. 140; *Daubigny v. Duval*, 5 T. R. 604; *Van Amringe v. Peabody*, 1 Mason (U. S.) 440; *Bott v. McCoy*, 20 Ala. 584, 56 Am. Dec. 223; *Ludden v. Buffalo Batting Co.*, 22 Ill. App. 415; *Louisville First Nat. Bank v. Boyce*, 78 Ky. 42; *Kinder v. Shaw*, 2 Mass. 398; *Peters v. Ballistier*, 3 Pick. (Mass.) 495; *Merchants' Nat. Bank v. Trenholm*, 12 Heisk. (Tenn.) 520.

Tender of Factor's Charges. — In *Daubigny v. Duval*, 5 T. R. 604, it was held that the principal could recover in trover from the pledgee on tendering to the factor what was due him, without any tender to the pledgee. See also *M'Combie v. Davies*, 7 East 5; *Merchants' Nat. Bank v. Trenholm*, 12 Heisk. (Tenn.) 520.

In *Ludden v. Buffalo Batting Co.*, 22 Ill. App. 415, it was held that where the factor pledges the goods for more than his lien, trover will lie without any tender of the factor's charges and advances either to the factor or the pledgee. See, however, *Steiger v. Third Nat. Bank*, 6 Fed. Rep. 569.

Pledgee's Right to Recoup. — In trover against the pledgee, the pledgee may recoup the amount of the factor's charges and advances. *Ludden v. Buffalo Batting Co.*, 22 Ill. App. 415; *Louisville First Nat. Bank v. Boyce*, 78 Ky. 42; *Macky v. Dillinger*, 73 Pa. St. 85. See also *Donald v. Suckling*, L. R. 1 Q. B. 597; *Whitney v. Beckford*, 105 Mass. 267. See,

however, *Daubigny v. Duval*, 5 T. R. 604; *Bonito v. Mosquera*, 2 Bosw. (N. Y.) 401; *Newbold v. Wright*, 4 Rawle (Pa.) 195.

In *M'Combie v. Davies*, 7 East 5, wherein it was held that where the goods are pledged by the factor as his own, the pawnee cannot retain, in trover by the principal, the amount of the charges, etc., of the factor, it was intimated that it would be otherwise where the goods were delivered by the factor to the pawnee with notice of his lien and he was appointed by the factor as his agent to hold possession for the preservation of the lien.

Demand on Pledgee. — Where the goods have been sold by the pledgee no demand upon him is necessary to enable the principal to recover in trover. *Merchants' Nat. Bank v. Trenholm*, 12 Heisk. (Tenn.) 520.

4. **Recovery of Goods from Pledgee.** — *Bott v. McCoy*, 20 Ala. 578, 56 Am. Dec. 223; *Lal-lande v. His Creditors*, 42 La. Ann. 705; *Macky v. Dillinger*, 73 Pa. St. 85.

5. *Gray v. Agnew*, 95 Ill. 315; *Macky v. Dillinger*, 73 Pa. St. 85 (decided under Factors' Act).

Damages on Replevin Bond. — Where, in replevin against the pledgee, the pledgee executes a replevin bond, he may recoup from the damages recoverable on the bond the amount of the charges and advances by the factor. *Macky v. Dillinger*, 73 Pa. St. 85.

6. *Kelly v. Smith*, 1 Blatchf. (U. S.) 290.

7. **Assumpsit Against Factor.** — *Lee v. Shore*, 1 B. & C. 94, 8 E. C. L. 41; *Kelly v. Smith*, 1 Blatchf. (U. S.) 290.

8. **Assumpsit Against Pledgee.** — *Nowell v. Pratt*, 5 Cush. (Mass.) 111; *Chickering v. Hosmer*, 12 Mass. 183.

9. **Ratification.** — *Rice v. Brook*, 20 Fed. Rep. 611; *Bott v. McCoy*, 20 Ala. 578, 56 Am. Dec. 223; *Byrne v. Doughty*, 13 Ga. 46; *Meyer v. Morgan*, 51 Miss. 21, 24 Am. Rep. 617; *Rogers*

factor has disobeyed the instruction of his principal. This branch of the subject will be discussed later.¹

IV. DUTIES AND LIABILITIES OF PARTIES INTER SE — 1. Of Factor to Principal
— a. USAGE AS AFFECTING DUTIES AND LIABILITIES OF FACTOR. — As a corollary of the rule that a factor has implied power to transact the business of his principal in accordance with the general usage and custom of the market in which he acts,² his duties and liabilities to his principal are also governed by such usages or customs, and the factor incurs no liability to his principal by proceeding according to the usual course of dealings among factors.³ And, on the other hand, there is an implied contract on the part of the factor that the business shall be done according to such usages and customs.⁴

b. GOOD FAITH — (1) General Rule. — The paramount and vital duty of the agent to act in good faith applies with full force to factors, and so sedulously is this principle guarded that all departures from it are deemed frauds

v. Kneeland, 10 Wend. (N. Y.) 219; *Frank v. Jenkins*, 22 Ohio St. 597. See generally the title AGENCY, vol. 1, p. 1181.

Delegation of Authority — Action by Principal for Price. — In *Frank v. Jenkins*, 22 Ohio St. 597, it was held that an action by the owner of goods to recover their price and value from his factor, who, without proper authority, had consigned them to a third person, was *prima facie* evidence of a ratification of the consignment, and estopped the principal to deny the authority of his factor to make the consignment, in an action by the consignee against the principal to recover possession of the goods consigned, of which the principal had in the meantime secured possession.

Implied Ratification. — In *Byrne v. Doughty*, 13 Ga. 46, it was held that the ratification might be by implication from the acts and doings of the principal, and that his acts, etc., are construed liberally in favor of the agent.

In *Rice v. Brook*, 20 Fed. Rep. 611, it was held that where, after a long delay on the part of the factor in the sale of the goods consigned, the principal with full knowledge of the facts authorized the factor to sell at his discretion, he thereby ratified the action of the factor in not having sold before.

Acquiescence. — Where the principal has knowledge that the factor has exceeded his authority and has done an unauthorized act, the principal will be deemed to have ratified the act unless within a reasonable time he notifies the factor that the latter will be held responsible for his unauthorized act. *Norris v. Cook*, 1 Curt. (U. S.) 464; *Dunbar v. Miller*, 1 Brock. (U. S.) 85; *Courcier v. Ritter*, 4 Wash. (U. S.) 549; *Eichel v. Sawyer*, 44 Fed. Rep. 845; *Comer v. Way*, 107 Ala. 300 [citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 439, 440]; *Byrne v. Doughty*, 13 Ga. 46; *Flower v. Downs*, 6 La. Ann. 539; *Starr v. Zacharie*, 18 La. 517; *Meyer v. Morgan*, 51 Miss. 21, 24 Am. Rep. 617.

A Delay on the Part of the Principal to notify the factor that his act was unauthorized, where the factor did not inform the principal of the act until an election to approve or disapprove it would be attended with no advantage to the principal, gives the factor no right to construe the silence of the principal as a ratification. *Amory v. Hamilton*, 17 Mass. 108. See also *Von v. Blanchard*, 75 Ga. 519.

Knowledge of Circumstances. — In *Smith v. Tracy*, 36 N. Y. 79, it was held that the mere

receipt of the price by the principal was not a ratification of the factor's unauthorized warranty of the quality of the goods, if the principal had no knowledge of such warranty. See also *Vincent v. Rather*, 31 Tex. 77, 98 Am. Dec. 516.

1. See *infra*, this title, *Duties and Liabilities of Parties Inter Se*, subdv. 1. c. (5) (c) *Ratification or Waiver of Departure from Instructions*.

2. See *supra*, this title, *Extent of Authority*, subdv. 2. b. *Usage as Affecting Powers of Factor*.

3. **Usage as Affecting Duties and Liabilities of Factor.** — *Dunbar v. Miller*, 1 Brock. (U. S.) 85; *Phillips v. Moir*, 69 Ill. 155; *Bailey v. Bensley*, 87 Ill. 556; *Blandford v. Wing Flour Mill Co.*, 24 Ill. App. 596; *Byrne v. Schwing*, 6 B. Mon. (Ky.) 199; *Clark v. Van Northwick*, 1 Pick. (Mass.) 343; *Potter v. Morland*, 3 Cush. (Mass.) 384; *Greenleaf v. Moody*, 13 Allen (Mass.) 363; *Goldsmith v. Manheim*, 109 Mass. 187; *Davis v. Kobe*, 36 Minn. 214, 1 Am. St. Rep. 663; *Farmers', etc., Nat. Bank v. Sprague*, 52 N. Y. 605; *Vincent v. Rather*, 31 Tex. 77, 98 Am. Dec. 516. See also *Goldsmith v. Manheim*, 109 Mass. 187.

See further the title USAGES AND CUSTOMS.

In *Davis v. Kobe*, 36 Minn. 214, 1 Am. St. Rep. 663, it was held that a factor was not responsible to his principal by reason of the established grade of grain being different in the market where he was to sell from the grades at other places. See also *Blandford v. Wing Flour Mill Co.*, 24 Ill. App. 596.

Remittances According to Usual Course of Dealing. — Where the proceeds are remitted according to the usual course of dealing among factors, the factor is not liable in case of their loss. *Potter v. Moreland*, 3 Cush. (Mass.) 384. See *infra*, this section, *Remitting Proceeds*.

A Usage Contrary to the General Law is insufficient to vary the duty of a factor and to relieve him from the liability created by an express contract or assumed by general advertisement. *Vincent v. Rather*, 31 Tex. 77, 98 Am. Dec. 516.

Positive Instructions Control Usage. — Whatever usage or custom may exist to the contrary, a factor must, of course, obey the instructions of his principal. *Bliss v. Arnold*, 8 Vt. 252, 30 Am. Dec. 467.

4. In *Brink v. Dolsen*, 8 Barb. (N. Y.) 338, it was held that it was the duty of the factor to remit without demand from the principal where such was the usage of trade.

upon the confidence bestowed upon the factor.¹

(2) *Making Profit Out of Agency.* — In the enforcement of this principle it is universally held that the factor cannot make a profit out of the agency or deal in the business thereof for his own benefit, but must give the principal the advantage of any benefit he may obtain.²

(3) *Sales by Factor to Himself.* — The general rule of agency prohibiting an agent authorized to sell from purchasing for himself applies with full force to factors, and it is held that a factor cannot make a valid purchase of the goods

1. **Good Faith.** — *Evans v. Potter*, 2 Gall. (U. S.) 13; *Rice v. Brook*, 20 Fed. Rep. 611; *Eichel v. Sawyer*, 44 Fed. Rep. 847; *Babcock v. Orison*, 25 Ind. 75; *Lesesne v. Cook*, 16 La. 62; *Keighler v. Savage Mfg. Co.*, 12 Md. 416, 71 Am. Dec. 600.

In *Govan v. Cushing*, 111 N. Car. 458; *MacRae, J.*, said, *quoting* 3 AM. AND ENG. ENCYC. OF LAW (1st ed.) 330: "A factor is required to act with the utmost good faith toward his principal in the discharge of his duties."

Disputing Principal's Title. — A factor cannot dispute the title of his principal to the goods. *Marvin v. Ellwood*, 11 Paige (N. Y.) 365; *Barnard v. Kobbe*, 54 N. Y. 516; *Floyd v. Bovard*, 6 W. & S. (Pa.) 75. See also *Kennedy v. Strong*, 14 Johns. (N. Y.) 128; *Graff v. Caldwell*, 7 Rich. L. (S. Car.) 130; *Bevan v. Cullen*, 7 Pa. St. 281.

And he is bound to his principal unless the true owner appears and establishes his right to the proceeds. *Bain v. Clark*, 39 Mo. 252.

Where, however, goods not belonging to the principal are consigned to the factor, the latter may on demand of the true owner account to him therefor and escape liability to his principal. *Pinson v. Schmalz*, 94 Cal. 651; *Rotan v. Fletcher*, 15 Johns. (N. Y.) 207.

The factor cannot detain the proceeds of the sale on account of claims of a third person against the principal in which the factor has no interest. *Aubrey v. Fiske*, 36 N. Y. 47. See also *Fisher v. Shenandoah First Nat. Bank*, 37 Ill. App. 333.

In *Tucker v. Utley*, 168 Mass. 415, it was held that the consignor of goods could not be deprived of his right to the proceeds because the factor suspected, from the fact that the accompanying drafts were made payable to the same person in whose favor drafts were drawn the previous year by another consignor, that the consignor was the same person under a different name.

Illegal Contracts. — In *Alvord v. Latham*, 31 Barb. (N. Y.) 294 it was held that the fact that the property was obtained by the factor from his principal under an illegal contract, as in restraint of trade, does not relieve the factor from liability to account for its proceeds. See also *Baldwin v. Potter*, 46 Vt. 403.

And it has been held that an agent cannot refuse to account for the proceeds of the sale on the ground that there is a state law prohibiting such sales, as where fertilizers are sold without a label thereon, stating their constituent elements, as required by statute. *Tate v. Pegues*, 28 S. Car. 463.

And so when the contract of agency was illegal, as in case of an agent for a foreign corporation not authorized to do business in the state, it would seem that the agent can be com-

pelled to account; but there is a conflict of authority on the point. See the title FOREIGN CORPORATIONS.

Acting in Dual Capacity. — A factor cannot act for both his principal and the buyer in the same transaction, *Bensley v. Moon*, 7 Ill. App. 415; unless it is clearly understood between the parties that he shall do so, *Talcott v. Chew*, 27 Fed. Rep. 273.

2. **Factor Cannot Make Profit Out of Agency.** — *Hammond v. Olmstead*, 10 Fed. Rep. 223; *Thayer v. Hoffman*, 53 Kan. 723; *Brander v. Lum*, 11 La. Ann. 217; *Denson v. Stewart*, 15 La. Ann. 456; *Payne v. Waterston*, 16 La. Ann. 241; *Poindexter v. King*, 21 La. Ann. 697; *Vandyke v. Brown*, 8 N. J. Eq. 657; *Hidden v. Waldo*, 55 N. Y. 294; *Mealor v. Kimble*, 1 Law Repos. (4 N. Car.) 254; *Alexander v. Morris*, 3 Call (Va.) 89. See also the title AGENCY, vol. 1, p. 1072.

In *Merchants' Nat. Bank v. Pope*, 19 Oregon 35, however, it was held that the interest received by a firm of commission merchants on the negotiation of drafts upon their own credit did not constitute a proper debit against them in the account with their principal, though the factors were enabled to negotiate the drafts only by pledging the goods.

Illustrations. — In *Mealor v. Kimble*, 2 Murph. (6 N. Car.) 272, where a factor instructed to sell tobacco which was inferior to his own sold instead his own at a higher price than he could then have gotten for that of his principal, saying that he would let his principal have the benefit of the sale, and subsequently sold the tobacco of his principal at a still higher price, it was held that he was bound to account for the latter price, though he acted in good faith.

Draft Drawn by Principal — Payment in Goods. — In *Hidden v. Waldo*, 55 N. Y. 294, it was held that where a factor discharges a bill drawn by the principal upon him by the delivery of goods for more than their value, the principal is entitled to the benefit of the transaction, and the factor is entitled only to credit for the difference between the amount of the bills and the actual value of the merchandise.

Buying Up Debts Against Principal. — In *Alexander v. Morris*, 3 Call (Va.) 89, it was held that the factor could not buy up debts due by the principal at a discount and claim credit in his account for their nominal value; and it was further held that the fact that the factorage had ceased was immaterial.

Sale at Higher Price than Fixed by Principal. — Where the factor sells goods at a higher price than that fixed by his principal, the surplus will belong to the principal. *Denson v. Stewart*, 15 La. Ann. 456.

Bounty Money. — If a factor receives bounty

left with him for sale, unless the principal is fully informed of the purchase and of all the facts relating thereto within the knowledge of the factor.¹

c. FIDELITY TO INSTRUCTIONS — (1) *General Rule*. — It is a well-settled and universal rule that a factor is bound faithfully to follow the directions and instructions of his principal,² and will be liable to his principal in damages for

money given by the government to the im-
poster, the principal will be entitled to it.
Scott v. Surman, Willes 400.

1. **Factor Cannot Purchase for Himself.** —
Keighler v. Savage Mfg. Co., 12 Md. 383, 71
Am. Dec. 600; *Wadsworth v. Gay*, 118 Mass.
44; *Tilleny v. Wolverton*, 46 Minn. 256; *Martin*
v. Moulton, 8 N. H. 504; *Sims v. Miller*, 37
S. Car. 402, 34 Am. St. Rep. 762. See also the
title AGENCY, vol. 1, pp. 1075, 1077.

Presumption as to Invalidity of Sale. — A sale
by a factor to himself is *prima facie* voidable
by his principal. *Tilleny v. Wolverton*, 46
Minn. 256.

Purchase to Secure Advances. — The factor
cannot become the purchaser even in order to
save himself from loss on advances made upon
the consignment. *Sims v. Miller*, 37 S. Car.
402, 34 Am. St. Rep. 762.

Price Fixed by Principal. — The fact that the
purchase by the factor was at the price fixed
by the principal will not render the sale valid.
Tilleny v. Wolverton, 46 Minn. 256; *Porter v.*
Woodruff, 36 N. J. Eq. 174. See also *Webb v.*
Paxton, 36 Minn. 532.

Partnership of Which Factor Is a Member. — A
factor cannot sell the goods to a partnership of
which he is a member. *Martin v. Moulton*, 8
N. H. 504.

Ratification of Purchase — Principal's Election.
— Where a factor sells to himself the principal
may either ratify the sale or recover from the
factor the actual value of the goods. *Sims v.*
Miller, 37 S. Car. 402, 34 Am. St. Rep. 762;
Wadsworth v. Gay, 118 Mass. 44.

Resale by Factor at Increased Price. — Where
the factor sells to himself, and then resells at
an increased price, the principal may require
him to account for what he received on the
resale. *Tilleny v. Wolverton*, 46 Minn. 256.

2. **Fidelity to Instructions Required — England.**
— *Stearine Kaarsen Fabrick Gonda Co. v.*
Heintzmann, 17 C. B. N. S. 56, 112 E. C. L.
56.

United States. — *Dunbar v. Miller*, 1 Brock.
(U. S.) 85; *Kingston v. Kincaid*, 1 Wash. (U.
S.) 454; *Marshall v. Williams*, 2 Biss. (U. S.)
255; *Bell v. Cunningham*, 3 Pet. (U. S.) 69,
affirming 5 Mason (U. S.) 161; *Chapin v. Siger*,
4 McLean (U. S.) 378; *Courcier v. Ritter*, 4
Wash. (U. S.) 549; *Hall v. Leigh*, 8 Cranch (U.
S.) 50; *Feild v. Farrington*, 10 Wall. (U. S.)
141; *Brown v. McGran*, 14 Pet. (U. S.) 479;
Eichel v. Sawyer, 44 Fed. Rep. 850; *Levison v.*
Balfour, 34 Fed. Rep. 382.

Connecticut. — *Weed v. Adams*, 37 Conn. 380.
Georgia. — *Hardeman v. Ford*, 12 Ga. 205;
Day v. Crawford, 13 Ga. 508; *Heinkin v. Bar-*
brey, 40 Ga. 249; *Gray v. Bass*, 42 Ga. 270;
Hatcher v. Comer, 73 Ga. 418.

Illinois. — *Jones v. Marks*, 40 Ill. 313; *Lar-*
minie v. Carley, 114 Ill. 198; *Rollins v. Duffy*,
18 Ill. App. 398.

Indiana. — *Rapp v. Grayson*, 2 Blackf. (Ind.)
130.

Louisiana. — *Maggoffin v. Cowan*, 11 La.

Ann. 554; *Poindexter v. King*, 21 La. Ann.
697; *Copes v. Phelps*, 24 La. Ann. 562.

Maryland. — *Curtis v. Gibney*, 59 Md. 131.
Massachusetts. — *Maynard v. Pease*, 99 Mass.
555; *Dwight v. Whitney*, 15 Pick. (Mass.) 179.
Mississippi. — *Cotton v. Hiller*, 52 Miss. 7.

Missouri. — *Switzer v. Connett*, 11 Mo. 88;
Sigerson v. Pomeroy, 13 Mo. 620.

New Hampshire. — *Frothingham v. Everton*,
12 N. H. 239.

New York. — *Leverick v. Meigs*, 1 Cow. (N.
Y.) 645; *Le Guen v. Gouverneur*, 1 Johns. Cas.
(N. Y.) 437; *Marfield v. Douglass*, 1 Sandf. (N.
Y.) 350; *Jervis v. Hoyt*, 2 Hun (N. Y.) 637;
Blot v. Boiceau, 3 N. Y. 78, 51 Am. Dec. 345;
Bell v. Palmer, 6 Cow. (N. Y.) 128; *Evans v.*
Root, 7 N. Y. 185, 57 Am. Dec. 512; *Williams*
v. Littlefield, 12 Wend. (N. Y.) 362; *Guy v.*
Oakley, 13 Johns. (N. Y.) 332; *Milbank v.*
Dennistoun, 21 N. Y. 386; *Scott v. Rogers*, 31
N. Y. 676; *Hilton v. Vanderbilt*, 82 N. Y. 591.
Pennsylvania. — *Geyer v. Decker*, 1 Yeates
(Pa.) 486.

South Carolina. — *Barksdale v. Brown*, 1
Nott & M. (S. Car.) 517, 9 Am. Dec. 720; *Wil-*
kinson v. Campbell, 1 Bay (S. Car.) 160.

Tennessee. — *Johnson v. Wade*, 2 Baxt.
(Tenn.) 480; *Strong v. Stewart*, 9 Heisk. (Tenn.)
137.

Vermont. — *Bliss v. Arnold*, 8 Vt. 252, 30
Am. Dec. 467; *Bigelow v. Walker*, 24 Vt. 149,
58 Am. Dec. 156.

Virginia. — *Howatt v. Davis*, 5 Munf. (Va.)
34, 7 Am. Dec. 681; *George Campbell Co. v.*
Angus, 91 Va. 438.

Wisconsin. — *Hall v. Storrs*, 7 Wis. 253.

See also the title AGENCY, vol. 1, p. 1058.

In *Wilkinson v. Campbell*, 1 Bay (S. Car.)
169, *Rutledge, C. J.*, said: "The trust between
principal and factor is a great and important
one, especially in mercantile transactions, and
were this court to permit factors to deviate
from the instructions of their employers, there
could be no such thing as confidence between
them."

Factors of Foreign Principals. — The factors of
foreign principals are under the same duty to
obey the instructions of their principals. *Lor-*
raine v. Cartwright, 3 Wash. (U. S.) 151.

Motive in Disregarding Instructions. — If the
orders of the principal are free from am-
biguity, the factor is bound to strict compli-
ance, and no motive connected with the
interest of the principal, however honestly en-
tertained or wisely adopted, can excuse a de-
parture from the instructions. *Courcier v.*
Ritter, 4 Wash. (U. S.) 549. See also *Ernest v.*
Stoller, 5 Dill. (U. S.) 442; *Hardeman v. Ford*,
12 Ga. 205; *Hatcher v. Comer*, 73 Ga. 418; *Guy*
v. Oakley, 13 Johns. (N. Y.) 332; *Scott v. Rog-*
er, 31 N. Y. 676; *Porter v. Patterson*, 15 Pa.
St. 220.

Departure by Mistake. — In *Rundle v. Moore*,
3 Johns. Cas. (N. Y.) 37, a factor was held
liable for a departure from instructions though
his departure therefrom was through mistake.

failure to do so. This rule applies not only to instructions accompanying the consignment,¹ but also to all subsequent instructions.²

Instructions Faithfully Followed Loss Falls on Principal. — If the factor shall, with proper care and diligence, faithfully and *bona fide* carry out the instructions of his principal, and a loss results, such loss must fall on the principal.³

Instructions Requiring Acts Outside of Scope of Employment. — The principal cannot, by instructions, require the factor to perform acts not within the usual scope of his agency, unless the factor undertakes by agreement to do so.⁴

Consignment under Express Agreement. — Where the consignment is made under an express agreement, the factor of course is not bound to follow subsequent instructions inconsistent with such agreement.⁵

Gratuitous Service. — The fact that the factor is acting without remuneration will not prevent him from incurring liability for a departure from instructions.⁶

(2) *Instructions Must Be Express.* — In order that the instructions of the principal shall be binding upon the factor, it is necessary that they shall be express; the mere communication of an expectation as to the price to be received, or a wish as to the manner, mode, or terms of the sale, is insufficient to constitute an instruction which will be binding upon the factor.⁷

(3) *Ambiguous Instructions.* — In order that instructions shall be binding upon the factor, it is also necessary that they be clear and distinct, as it is only a reasonable and just rule that the factor shall not be liable for a departure

To Take Security for Price. — A factor is liable to his principal for failure to take security for the purchase money when directed to do so by his principal. *Wilkinson v. Campbell*, 1 Bay (S. Car.) 169.

Remittance of Proceeds. — The factor must comply with the directions of the principal as regards the remittance of proceeds. *Leverick v. Meigs*, 1 Cow. (N. Y.) 645.

Instructions as to Shipment of Goods. — The duty to obey instructions extends to instructions regarding the shipment of the goods. *Jolly v. Blanchard*, 1 Wash. (U. S.) 252; *Ferguson v. Porter*, 3 Fla. 27; *Ryder v. Thayer*, 3 La. Ann. 149; *Bessent v. Harris*, 63 N. Car. 542. And though the factor has a lien on the goods, he can retain only sufficient of the goods to cover the amount of his claim, and must ship the balance in accordance with his instructions. *Jolly v. Blanchard*, 1 Wash. (U. S.) 252.

Departure a Question of Fact. — The question whether there was a departure from the instructions is a question of fact. *Sigerson v. Pomeroy*, 13 Mo. 620.

Burden of Proof. — And the burden of proof as to a departure from instructions is upon the principal. *Milbank v. Dennistoun*, 21 N. Y. 391.

1. Instructions Accompanying Consignment. — *Loraine v. Cartwright*, 3 Wash. (U. S.) 151; *Walker v. Smith*, 4 Dall. (U. S.) 389; *Capron v. Adams*, 23 Md. 529; *Evans v. Root*, 7 N. Y. 186, 57 Am. Dec. 512.

2. Subsequent Instructions. — *Pulsifer v. Shepard*, 36 Ill. 513; *Marfield v. Douglass*, 1 Sandf. (N. Y.) 360; *Bell v. Palmer*, 6 Cow. (N. Y.) 128; *Guy v. Oakley*, 13 Johns. (N. Y.) 332; *Spruill v. Davenport*, 116 N. Car. 34.

3. Sigerson v. Pomeroy, 13 Mo. 620.

4. Instructions Requiring Acts Outside of Scope of Employment. — In *Thompson v. Woodruff*, 7 Coldw. (Tenn.) 401, it was held that as it is no part of the general duty of cotton factors to purchase gold or other money and to ship it to

a foreign country, they are not liable for refusal to do so when ordered by their principal.

5. Instructions Inconsistent with Agreement. — *Ferguson v. Porter*, 3 Fla. 27.

6. Gratuitous Service. — In *Walker v. Smith*, 4 Dall. (U. S.) 389, it was held that a factor who sells goods on credit, contrary to the instructions of his principal, becomes personally liable for the price of the goods though his services were gratuitously rendered. See also *Ferguson v. Porter*, 3 Fla. 27; and the title AGENCY, vol. 1, p. 1060.

7. Instructions Must Be Express. — *Jervis v. Hoyt*, 2 Hun (N. Y.) 637; *Harper v. Kean*, 11 S. & R. (Pa.) 280.

In *La Farge v. Kneeland*, 7 Cow. (N. Y.) 456, it was held that the expression of a hope and a request that there might be no loss on the invoice was insufficient to constitute instructions limiting the price at which the goods were to be sold. See also *Mann v. Laws*, 117 Mass. 293; *Smedley v. Williams*, 1 Pars. Eq. Cas. (Pa.) 359.

In *Vianna v. Barclay*, 3 Cow. (N. Y.) 281, it was held that merely communicating a belief that the excellent quality of the goods would command a certain price, and the statement that such price was confidently expected, did not fix such price as the minimum price.

Imperative Language Unnecessary. — It is not necessary, however, that the instructions be couched in imperious or abrupt language; it is sufficient if language such as one courteous man would use to another, expressing a decisive wish and conclusion, is used. *Marfield v. Douglass*, 1 Sandf. (N. Y.) 360. See also *Brown v. M'Gran*, 14 Pet. (U. S.) 494; *Blot v. Boiceau*, 3 N. Y. 78, 51 Am. Dec. 345.

In *Beadles v. Hartmus*, 7 Baxt. (Tenn.) 476, the court said, in speaking of instructions by the principal, that "the expression of a wish or desire may, under certain circumstances, amount to a positive command."

from instructions which lack these characteristics.¹

(4) *Particular Instructions* — (a) *Instructions as to Time of Sale.* — Where the factor receives instructions as to the time of sale, he must comply therewith,²

1. *Ambiguous Instructions* — *United States.* — *Courcier v. Ritter*, 4 Wash. (U. S.) 549; *De Tastett v. Crousillat*, 2 Wash. (U. S.) 137; *Lorraine v. Cartwright*, 3 Wash. (U. S.) 151; *Marsh v. Whitmore*, 21 Wall. (U. S.) 178.

Massachusetts. — *Mann v. Laws*, 117 Mass. 293; *Foster v. Rockwell*, 104 Mass. 167.

New York. — *Jervis v. Hoyt*, 2 Hun (N. Y.) 637; *Evans v. Root*, 7 N. Y. 186, 57 Am. Dec. 512; *Russell v. Wetmore*, 3 N. Y. Leg. Obs. 318.

North Carolina. — *Long v. Pool*, 68 N. Car. 479; *Bessent v. Harris*, 63 N. Car. 542.

Pennsylvania. — *Geyer v. Decker*, 1 Yeates (Pa.) 486.

See also the title *AGENCY*, vol. I, p. 1062.

In *Courcier v. Ritter*, 4 Wash. (U. S.) 549, the court said that if instructions are "so ambiguous that two constructions may fairly be given to them, every principle of justice demands that the want of precision in the writer should fix the loss, if any, upon him, rather than upon his correspondent."

Written Instructions. — A factor may be justified in departing from the written instructions of his principal where in such instructions the factor is also referred to inconsistent verbal communications. *Manella v. Barry*, 3 Cranch (U. S.) 415.

Sale on Arrival. — An instruction to sell on arrival is not ambiguous. *Evans v. Root*, 7 N. Y. 186, 57 Am. Dec. 512.

Constructions of Instructions — *Province of Court and Jury.* — It seems that the construction to be put upon written instructions is generally a question for the court. *Symington v. M'Lin*, 1 Dev. & B. L. (18 N. Car.) 291; *Scanlan v. Hodges*, 10 U. S. App. 352.

But if the instruction is capable of two interpretations the question should be submitted to the jury to determine in what sense the instruction was understood by the factor. *Evans v. Root*, 7 N. Y. 186, 57 Am. Dec. 512.

In *Brown v. M'Gran*, 14 Pet. (U. S.) 493, the court, while recognizing the general rule that the construction of written instruments properly belonged to the court, said that "certainly there are cases in which, from the different senses of the words used or their obscure and indeterminate reference to unexplained circumstances, the true interpretation of the language may be left to the consideration of the jury for the purpose of carrying into effect the real intention of the parties. This is especially applicable to cases of commercial correspondence, where the real objects and intentions and agreements of the parties are often to be arrived at only by allusions to circumstances which are but imperfectly developed."

2. *Instructions as to Time of Sale* — *United States.* — *Courcier v. Ritter*, 4 Wash. (U. S.) 549.

Georgia. — *Day v. Crawford*, 13 Ga. 508.

Illinois. — *Pulsifer v. Shepard*, 36 Ill. 513.

Louisiana. — *Maggoffin v. Cowan*, 11 La. Ann. 554.

New York. — *Bell v. Palmer*, 6 Cow. (N. Y.)

128; *Evans v. Root*, 7 N. Y. 186, 57 Am. Dec. 512; *Scott v. Rogers*, 4 Abb. App. Dec. (N. Y.) 157.

North Carolina. — *Golden v. Levy*, 1 Law Repos. (4 N. Car.) 527, 6 Am. Dec. 555; *Spruill v. Davenport*, 116 N. Car. 34; *Symington v. M'Lin*, 1 Dev. & B. L. (18 N. Car.) 291.

Ohio. — *Burnard v. Voss*, 6 Cinc. Wkly. L. Bul. 339, 8 Ohio Dec. (Reprint) 221.

Tennessee. — *Johnson v. Wade*, 2 Baxt. (Tenn.) 480; *Strong v. Stewart*, 9 Heisk. (Tenn.) 137; *Johnson v. Wade*, 2 Baxt. (Tenn.) 480.

A factor or commission merchant receiving instructions to sell his principal's cotton is not liable for a failure to sell within the prescribed time, or within a reasonable time, unless he has the possession, actual or constructive, so that he can make a valid sale and delivery; and if factors are engaged also in business as warehousemen under a different firm name, and the cotton is stored in their warehouse, warehouse receipts having been given for it, they cannot make a valid sale, unless the receipts are delivered to them. (Code Ala., 1886, §§ 1174-1178; Code 1896, §§ 4218-4222.) *Lehman v. Pritchett*, 84 Ala. 512.

In *Pulsifer v. Shepard*, 36 Ill. 513, it was held that where grain is delivered to be sold on commission when the owner shall direct, the factor is liable for neglect to sell when directed. In *Johnson v. Wade*, 2 Baxt. (Tenn.) 480, a factor was held liable for damages resulting from his failure to obey an instruction to sell on or before the maturity of a bill drawn against the consignment.

Instruction to Sell on Arrival. — An instruction to sell immediately on arrival has been held to require the factor to sell as soon as possible, no matter at what loss. *Courcier v. Ritter*, 4 Wash. (U. S.) 549. See also *Evans v. Root*, 7 N. Y. 186, 57 Am. Dec. 512.

In *Burnard v. Voss*, 6 Cinc. Wkly. L. Bul. 339, 8 Ohio Dec. (Reprint) 221, it was held that an instruction to sell on arrival required a sale as soon as possible without manifest loss.

In *Strong v. Stewart*, 9 Heisk. (Tenn.) 137, it was held that a delay of thirty days was a breach of an instruction to sell on arrival.

To Sell Immediately. — In *Golden v. Levy*, 1 Law Repos. (4 N. Car.) 527, 6 Am. Dec. 555, it was held that a delay of fifteen days did not show a breach of an instruction to sell immediately, when nothing was proved as to the state of the market.

In *Bell v. Palmer*, 6 Cow. (N. Y.) 128, it was held that where a factor instructed to sell immediately refuses the first offer, in expectation of a more favorable market, and is afterwards forced to sell at a lower price, he is liable though he acted in good faith.

In *Spruill v. Davenport*, 116 N. Car. 34, it was held that a factor directed to sell "at once" should sell immediately, or, if a sale cannot be made, it is his duty to report such fact to his principal and receive further directions.

On Specified Day. — A factor instructed to sell

but of course he is not responsible for a nonsale where he uses all reasonable diligence to effect a sale.¹

(b) **Instructions Limiting Price.** — The instructions of the principal limiting the price at which the goods are to be sold are equally binding upon the factor, and their violation will render him liable to the principal in damages.²

(c) **Instructions to Sell for Cash.** — Instructions to sell for cash are, of course, binding upon the factor, and a violation thereof will render him personally liable for the payment of the price for which the goods are sold.³

the goods on a specified day, and if not sold on that day to reship them, will be liable as for a conversion of the goods if, on the day when he is required to sell, he gives a refusal until the following day and accordingly effects the sale. *Scott v. Rogers*, 31 N. Y. 676.

A factor in Liverpool, instructed to hold flour consigned until an expected Act of Parliament produced its effect upon the market, waited a considerable time after the passage of the act and then sold in good faith and with reasonable prudence, and it was held that he was not chargeable with a breach of instructions in selling prematurely. *Milbank v. Dennistoun*, 21 N. Y. 386.

Proximate Damages. — A failure to sell within the time specified by the principal will not render the factor liable for a subsequent loss by fire, if such failure is not the proximate cause of the loss. *Lehman v. Pritchett*, 84 Ala. 512.

1. *Burnard v. Voss*, 6 Cinc. Wkly. L. Bul. 339, 8 Ohio Dec. (Reprint) 221.

2. **Instructions Limiting Price.** — *Levison v. Balfour*, 34 Fed. Rep. 382; *Lorraine v. Cartwright*, 3 Wash. (U. S.) 151; *Poindexter v. King*, 21 La. Ann. 607; *Mann v. Laws*, 117 Mass. 293; *Switzer v. Connett*, 11 Mo. 88; *Vianna v. Barclay*, 3 Cow. (N. Y.) 281; *Guy v. Oakley*, 13 Johns. (N. Y.) 332; *Casson v. Field*, 52 N. Y. Super. Ct. 196; *Comley v. Dazian*, 114 N. Y. 161; *Porter v. Patterson*, 15 Pa. St. 229.

In *Guy v. Oakley*, 13 Johns. (N. Y.) 332, it was held that a factor violates an instruction not to sell under a certain price where he sells under an agreement, without the principal's consent, that the price should be set off against a debt due from the principal.

Average Price. — In *Levison v. Balfour*, 34 Fed. Rep. 382, it was held that where goods of different grades are consigned, and the factor is instructed to "sell the total shipment not under eighty-five pounds per ton," he violates his instructions where he sells a part of average quality above the price limited, but does not sell the balance.

Instructions to Sell for Gold. — Where the factor is instructed to sell the goods for gold, he cannot discharge his liability by accounting for the net proceeds in a depreciated currency, though such currency is legal tender. *Poindexter v. King*, 21 La. Ann. 607.

"Fair Profit to Be Obtained." — A factor instructed not to sell "unless a fair profit can be realized," is liable in damages in case he sells at a loss. *Porter v. Patterson*, 15 Pa. St. 229.

Submission of Price to Principal. — Where a factor is instructed to submit the price to the principal before sale, he is guilty of conversion where he sells without submitting the price. *Comley v. Dazian*, 114 N. Y. 161.

Invoice. — Where a manufacturer consigns goods to a factor, accompanying the invoice

with a statement of the prices, this does not itself establish such prices as the minimum at which the goods are to be sold. *Smedley v. Williams*, 1 Pars. Eq. Cas. (Pa.) 359. See also *Mann v. Laws*, 117 Mass. 293; *Vianna v. Barclay*, 3 Cow. (N. Y.) 281.

In *Lorraine v. Cartwright*, 3 Wash. (U. S.) 151, it was held that where a factor is instructed not to sell less than the "first cost and charges," and an invoice accompanies the letter, pricing the articles and stating the amount of the charges, such price is the minimum price irrespective of the actual cost of the goods.

To Sell for Best Price. — An instruction to sell for the best price means no more than the law requires, when the principal is silent. *Golden v. Levy*, 1 Law Repos. (4 N. Car.) 527, 6 Am. Dec. 555.

3. **Instructions to Sell for Cash.** — *Walker v. Smith*, 1 Wash. (U. S.) 152; *Johnson v. Totten*, 3 Cal. 343, 58 Am. Dec. 412; *Montgomery v. Wood*, 4 La. Ann. 298; *Bonham v. Overton*, 6 La. Ann. 765; *Dodge v. Tileston*, 12 Pick. (Mass.) 328; *Barksdale v. Brown*, 1 Nott & M. (S. Car.) 517, 9 Am. Dec. 720; *Bliss v. Arnold*, 8 Vt. 252, 30 Am. Dec. 467; *Catlin v. Smith*, 24 Vt. 85; *Jackson v. Bissonette*, 24 Vt. 611; *Chapman v. Devereux*, 32 Vt. 616; *Hall v. Storrs*, 7 Wis. 253. See also *Scanlan v. Hodges*, 10 U. S. App. 352.

In *Walker v. Smith*, 1 Wash. (U. S.) 152, a factor was held liable for a loss through the insolvency of the purchaser, where he sold in violation of an instruction to sell for cash.

Inconvenience of Compliance with Instructions. — In *Hall v. Storrs*, 7 Wis. 253, *Cole, J.*, in speaking of the inconvenience which would result from holding that, in the grain trade in Milwaukee on cash sales, the money must be paid at the time the property is delivered, said: "But with the practical inconvenience of the business we have nothing to do. Our duty is to hold parties to their contracts and to the measure of liability which the law imposes upon them. But we suppose if factors should find it impracticable or impossible in cash sales in the grain trade to have the purchase money paid down before a delivery of the property, they can refuse to receive grain consigned to them to be sold for cash."

To Sell for Best Price. — An instruction to sell "for the best price" does not require the factor to sell for cash. *Symington v. M'Lin*, 1 Dev. & B. L. (18 N. Car.) 291.

Remedy of Principal. — In *Johnson v. Totten*, 3 Cal. 343, 58 Am. Dec. 412, it was held that an action for money had and received would lie against a factor who sells on credit in violation of an instruction to sell for cash, as the sale, as regards the right of the principal, must be taken as having been for cash.

What Are Cash Sales. — To comply with such an instruction the factor should require the payment of the price on delivery of the goods.¹

(d) **Instructions to Insure.** — A factor who is entitled to a commission will be liable for not executing an order to insure.²

(5) **Qualifications and Exceptions** — (a) **Inability to Comply with Instructions.** — Where the factor uses reasonable diligence to comply with the instructions of his principal, and is still unable to do so, he is not liable to his principal for noncompliance therewith.³ Inability to comply with instructions will not, however, justify a departure therefrom.⁴

(b) **Effect of Established Usage or Custom.** — A usage or custom in a particular market will not justify a departure by the factor from the instructions of his principal,⁵ and it is held by the weight of authority that the meaning of explicit instructions cannot be varied by a usage or custom.⁶

(c) **Change of Circumstances and Emergencies.** — If by some sudden emergency or intervening necessity, or other unexpected event, it becomes impossible for the factor to comply with the exact terms of his instructions, he is not liable

In *Dodge v. Tileston*, 12 Pick. (Mass.) 328, it was held that in an action by the factor for a general balance, a loss arising from a sale on credit in violation of an instruction to sell for cash could be given in evidence to bar the charges for commission, etc.

1. **What Are Cash Sales.** — *Barksdale v. Brown*, 1 Nott & M. (S. Car.) 517, 9 Am. Dec. 720; *Catlin v. Smith*, 24 Vt. 85.

In *Bliss v. Arnold*, 8 Vt. 252, 30 Am. Dec. 467, *Williams, C. J.*, said that "in all sales for cash the money must be paid when the property is delivered. It is wholly inconsistent to claim that a sale for cash means a sale on a credit for a week or ten days."

In *Clark v. Van Northwick*, 1 Pick. (Mass.) 343, however, it was held that a sale might by usage be deemed a cash sale though payment was not demanded on delivery of the goods.

Payment by Check. — The receipt of the purchaser's check in payment is a violation of an instruction to sell for cash. *Hall v. Storrs*, 7 Wis. 253.

2. **Instructions to Insure.** — *De Tastett v. Crousillat*, 2 Wash. (U. S.) 132; *Gordon v. Wright*, 29 La. Ann. 812; *Thorne v. Deas*, 4 Johns. (N. Y.) 84. See also *Shoenfeld v. Fleisher*, 73 Ill. 404; *De Forest v. Fulton F. Ins. Co.*, 1 Hall (N. Y.) 84; *Huguenin v. Legare*, 11 Rich. L. (S. Car.) 215.

3. **Inability to Comply with Instructions.** — In *Evans v. Root*, 7 N. Y. 186, 57 Am. Dec. 512, it was held that if the factor could not in fact sell the goods on their arrival as directed by the principal, he was not liable for a disobedience of such instructions. See also *Dunbar v. Gregg*, 44 Ill. App. 527; *Durant v. Fish*, 40 Iowa 559.

In *Hagan v. Paine*, 1 Hayw. (2 N. Car.) 272, a factor was instructed to exchange the cargo for the products of Surinam, but found it impossible to exchange for anything but sugar and coffee, which were contraband of war by the law of that country; though such traffic was usual, as no attempt to enforce the law had been made for many years. Owing to an attempt then made to enforce the law, he relanded the sugars taken in exchange for the consigned products, and took them in again secretly, whereby a large portion be-

came damaged and lost. It was held that the factor was not liable for the loss.

Where the factor uses reasonable diligence to comply with his instruction, when directed by his principal to insure, he is not liable for failure to effect insurance. *De Tastett v. Crousillat*, 2 Wash. (U. S.) 132.

4. **Departure from Instructions Not Justified.** — *Pomeroy v. Sigerson*, 22 Mo. 177. Compare *Hagan v. Paine*, 1 Hayw. (2 N. Car.) 272.

5. **Usage Does Not Overcome Instructions.** — *Hatcher v. Comer*, 73 Ga. 418; *Porter v. Patterson*, 15 Pa. St. 229; *Barksdale v. Brown*, 1 Nott & M. (S. Car.) 517, 9 Am. Dec. 720; *Hall v. Storrs*, 7 Wis. 253. See also *Bonham v. Overton*, 6 La. Ann. 765; *Montgomery v. Wood*, 4 La. Ann. 298; *Johnston v. Osborne*, 11 Ad. & El. 549, 39 E. C. L. 164; *Magee v. Atkinson*, 2 M. & W. 440; *Jones v. Littledale*, 6 Ad. & El. 486, 33 E. C. L. 122. And see the title AGENCY, vol. 1, p. 1062.

6. **Usage to Vary Explicit Instructions.** — A factor instructed to sell for cash is not authorized in delivering the goods without payment of the price, though a custom to do so exists. *Leland v. Douglass*, 1 Wend. (N. Y.) 490; *Barksdale v. Brown*, 1 Nott & M. (S. Car.) 517, 9 Am. Dec. 720; *Bliss v. Arnold*, 8 Vt. 252, 30 Am. Dec. 467; *Catlin v. Smith*, 24 Vt. 85; *Chapman v. Devereux*, 32 Vt. 616. See also *Jackson v. Bissonette*, 24 Vt. 611; *Bonham v. Overton*, 6 La. Ann. 765.

Evidence of Custom "Most Clear and Satisfactory." — In *Hall v. Storrs*, 7 Wis. 253, the court, while doubting the soundness of a rule permitting a usage or custom to vary explicit instructions, stated that if it were so, the evidence in support of it "should be most clear and satisfactory," and held that the delivery of grain without payment of the price was not sanctioned by the Milwaukee market.

Evidence of Usage Admitted. — In *Clark v. Van Northwick*, 1 Pick. (Mass.) 343, however, it was held that the terms of an instruction were to be considered in the light of the usage of the market, and where by the custom of the market a delivery of the goods without the payment of the price is considered a cash sale, the right to demand payment not being postponed, such a sale was not a violation of an instruction to sell for cash.

for departing therefrom.¹ The agent cannot, however, be allowed lightly or unadvisedly to depart from his instructions.²

(d) **Advances by Factor** — *aa. IN GENERAL.* — The decisions of the courts as to the rights of factors to sell in violation of instructions, for the purpose of reimbursement, are in conflict, and are best reconciled by dividing the decisions into two divisions, the one where the instructions accompany the consignment, the other where advances are made before the instructions are given.

In America, however, the broad rule has been laid down in a great number of jurisdictions that the factor may sell in violation of instructions, for the purpose of reimbursing himself, where the principal after reasonable notice and demand fails to repay the advances.³

In England, however, the power of a factor to sell is not treated as irrevocable as being coupled with an interest, even after he has made advances, and it is held that he has no authority to sell the goods in violation of instructions, on the principal's neglecting on request to repay the advances.⁴

bb. CONSIGNMENTS WITH INSTRUCTIONS. — Where a consignment made to a factor is accompanied with instructions, the factor accepting it must obey such instructions, whether they relate to the time of sale, its manner, or the price of the goods, and whether he has made or agreed to make advances or has accepted bills or otherwise subjected himself to liability on the faith of the consignment.⁵ But in cases where the factor has given reasonable notice to

1. **Deviation from Instructions in Case of Emergencies.** — *Forrestier v. Bordman*, 1 Story (U. S.) 43; *Greenleaf v. Moody*, 13 Allen (Mass.) 363; *Jervis v. Hoyt*, 2 Hun (N. Y.) 637. *Lawler v. Keaquick*, 1 Johns. Cas. (N. Y.) 174; *Drummond v. Wood*, 2 Cai. (N. Y.) 310; *Dusar v. Perit*, 4 Binn. (Pa.) 361. See also the title AGENCY, vol. 1, p. 1061.

Illustrations. — In *Frothingham v. Everton*, 12 N. H. 239, *Parker, C. J.*, citing *Story* on Agency 133, said that a factor might sell goods of a perishable nature, to prevent a total loss, below the price limited, if there were no opportunity to consult the principal. Compare *Anonymous*, 2 Mod. 100.

A supercargo was directed to proceed to a certain port, and if a certain price could not be obtained for the goods he was directed to continue his voyage to other ports. As the result of an accident to the vessel he was forced to unload the cargo at the first port where he sold the goods below the price limited. It was held that he was justified in so doing. *Dusar v. Perit*, 4 Binn. (Pa.) 361.

In *Lawler v. Keaquick*, 1 Johns. Cas. (N. Y.) 174, a supercargo directed to sell the goods on reaching his destination was held justified in leaving the goods with an agent, where he was unable to find a purchaser before his vessel sailed.

2. *Greenleaf v. Moody*, 13 Allen (Mass.) 363.

3. **Rule Allowing Factors to Sell to Reimburse for Charges** — *United States*. — *Chapin v. Siger*, 4 McLean (U. S.) 378; *Feild v. Farrington*, 10 Wall. (U. S.) 141; *Brown v. M'Gran*, 14 Pet. (U. S.) 479; *Fordyce v. Peper*, 16 Fed. Rep. 518.

Massachusetts. — *Parker v. Brancker*, 22 Pick. (Mass.) 40.

Minnesota. — *Davis v. Kobe*, 36 Minn. 214, 1 Am. St. Rep. 663.

Missouri. — *Benny v. Rhodes*, 18 Mo. 147, 59 Am. Dec. 293; *Given v. Lemoine*, 35 Mo. 110; *Phillips v. Scott*, 43 Mo. 93, 97 Am. Dec. 369.

Pennsylvania. — *Watson v. Beatty*, (Pa. 1888) 13 Atl. Rep. 521.

Tennessee. — *Beadles v. Hartmus*, 7 Baxt. (Tenn.) 476.

Virginia. — *George Campbell Co. v. Angus*, 91 Va. 438.

See also *Sims v. Miller*, 37 S. Car. 402, 34 Am. St. Rep. 762; *Villalonga's Case*, 8 Ct. of Cl. 452.

"As a general rule," said *Cady, J.*, in *Marfield v. Goodhue*, 3 N. Y. 75, "the principal has a right to revoke the authority which the law implies from the fact that the goods were delivered to the factor for sale; but that revocation will leave untouched the authority to sell which the factor, if he has made advances, has to sell as pledgee."

The summoning in of a factor as trustee will not deprive him of the right to sell the goods to reimburse himself for advances. *White Mountain Bank v. West*, 46 Me. 15.

A factor, while indebted to his principal, cannot sell the property to pay obligations on account of the factorage. *Alexander v. Morris*, 3 Call (Va.) 89.

4. **Authority Not Coupled with Interest After Advance.** — *Smart v. Sandars*, 5 C. B. 895, 57 E. C. L. 895; *Raleigh v. Atkinson*, 6 M. & W. 676; *De Comas v. Prost*, 2 Moo. P. C. N. S. 158, 11 Jur. N. S. 417.

In *Smart v. Sandars*, 5 C. B. 895, 57 E. C. L. 895, it was held that the fact that the consignment was without instructions did not authorize the factor to sell after notice to reimburse himself for advances. Compare *Mitchell v. Sykes*, 4 Ont. Rep. 501.

5. **Advances by Factor — Consignments with Instructions.** — *Raleigh v. Atkinson*, 6 M. & W. 676; *Loraine v. Cartwright*, 3 Wash. (U. S.) 151; *Bell v. Palmer*, 6 Cow. (N. Y.) 128; *La Farge v. Kneeland*, 7 Cow. (N. Y.) 456; *Beadles v. Hartmus*, 7 Baxt. (Tenn.) 476; *Strong v. Stewart*, 9 Heisk. (Tenn.) 137; *Hoensby v. Fielding, etc., Co.*, 10 Heisk. (Tenn.) 367. See also *George v. McNeill*, 7

his principal to repay advances made by him, and such repayment has been refused, the factor has been held entitled to sell, even though the sale is in violation of instructions which accompanied the consignment of the goods to him.¹

cc. CONSIGNMENTS WITHOUT INSTRUCTIONS — General Rule. — Where, however, the consignment is made without instructions, and the factor has made advances or incurred liabilities, either before or at the time of receiving the consignment, he is clothed with the right to sell in the exercise of a sound discretion at such time and in such mode as the usage of trade and general duty require, and the consignor has no power by any subsequent orders to suspend or control this right of sale except in regard to the surplus not necessary for the factor's reimbursement.² And the right of the factor in such case to sell after

La. Ann. 130, 26 Am. Dec. 498; *Lesesne v. Cook*, 16 La. 58; *Bell v. Hannah*, 3 Baxt. (Tenn.) 47.

In *Bell v. Palmer*, 6 Cow. (N. Y.) 128, a factor was held liable for failure to comply with an instruction accompanying the consignment and directing him to sell immediately on arrival, though he had made advances on the goods.

In *Howland v. Davis*, 40 Mich. 545, it was held that factors making advances on a consignment with instructions to sell according to their judgment "unless otherwise advised" were not justified in refusing to sell immediately, on being ordered to do so, unless the sale was directed on terms which would prejudice them.

In *Loraine v. Cartwright*, 3 Wash. (U. S.) 151, the court said that a factor cannot, after accepting a consignment, refuse a compliance with the orders which accompany it, and held that the fact that the factor had given his acceptance of the principal's bills did not entitle him to sell below the minimum price fixed by the principal, in order to obtain funds to take up the bill.

1. Sale Permitted After Reasonable Notice and Refusal to Repay. — *Parker v. Brancker*, 22 Pick. (Mass.) 40; *Columbian Nat. Bank v. White*, 65 Mo. App. 677; *Blot v. Boiceau*, 3 N. Y. 78, 51 Am. Dec. 345; *Frothingham v. Everton*, 12 N. H. 239. See also *Hilton v. Vanderbilt*, 82 N. Y. 591; *Commercial Nat. Bank v. Heilbronner*, 108 N. Y. 439.

In *Parker v. Brancker*, 22 Pick. (Mass.) 40, it was held that a factor receiving goods with instructions not to sell below a certain price could still sell below such price, to pay his advances, after the principal had refused on reasonable notice to pay such advances.

In *Phillips v. Scott*, 43 Mo. 86, 97 Am. Dec. 369, it was held that a factor who has made advances upon the goods consigned to him acquires a special property in the goods, and for the purpose of reimbursing himself may, in his discretion, sell in any market, even though he has received express instructions as to the place of sale. The court said: "There can be no doubt of the proposition that in a case where the protection of the factor himself against loss becomes necessary, his discretion as to time, price, and place of sale would be complete, and unlimited even by positive instructions." See also *Howard v. Smith*, 56 Mo. 314.

Notice Essential. — Notice to the principal of

the amount of the advances and a demand for repayment are, however, in such cases, essential to the right of the factor to sell. *Hallowell v. Fawcett*, 30 Iowa 491; *Greenleaf v. Moody*, 13 Allen (Mass.) 363; *Frothingham v. Everton*, 12 N. H. 239; *Blot v. Boiceau*, 3 N. Y. 78, 51 Am. Dec. 345, *reversing* 1 Sandf. (N. Y.) 111; *Casson v. Field*, 52 N. Y. Super. Ct. 196; *Porter v. Patterson*, 15 Pa. St. 229.

The existence of a usage to sell in such cases without notice will not authorize sales without notice. *Porter v. Patterson*, 15 Pa. St. 229.

Reasonable Time for Sale. — A reasonable time for a sale in the due course of business must, however, have elapsed, before the factor is entitled to sell in violation of instructions, for the purpose of reimbursing himself. *Frothingham v. Everton*, 12 N. H. 239.

2. Consignments Without Instructions — United States. — *Brown v. M'Gran*, 14 Pet. (U. S.) 479; *Eichel v. Sawyer*, 44 Fed. Rep. 845; *Feild v. Farrington*, 10 Wall. (U. S.) 141; *Brander v. Phillips*, 16 Pet. (U. S.) 121; *Rice v. Brook*, 20 Fed. Rep. 611.

Illinois. — *Nelson v. Chicago, etc., R. Co.*, 2 Ill. App. 180.

Indiana. — *Mooney v. Musser*, 45 Ind. 115.

Iowa. — *Butterfield v. Stephens*, 59 Iowa 596.

Maryland. — *Whitney v. Wyman*, 24 Md. 131; *Capron v. Adams*, 28 Md. 529.

Mississippi. — *Cotton v. Hiller*, 52 Miss. 7.

Missouri. — *Phillips v. Scott*, 43 Mo. 92, 97 Am. Dec. 369; *Howard v. Smith*, 56 Mo. 314.

Pennsylvania. — *Gill v. Beattie*, 29 W. N. C. (Pa.) 459; *Smedley v. Williams*, 1 Pars. Eq. Cas. (Pa.) 359.

Tennessee. — *Blair v. Childs*, 10 Heisk. (Tenn.) 199; *Bell v. Hannah*, 3 Baxt. (Tenn.) 47; *Beadles v. Hartmus*, 7 Baxt. (Tenn.) 476.

Washington. — *Lockett v. Baxter*, 3 Wash. Ter. 350.

In *Howard v. Smith*, 56 Mo. 314, it was held, where the factor made advances on a consignment unaccompanied with instructions, that he was authorized in selling below the price subsequently fixed by the principal as the minimum price, where the principal, after a demand, refused indemnity or to protect the factor from a decline in the market.

Instructions to Sell. — In *Weed v. Adams*, 37 Conn. 331, it was held that a factor would not be bound to obey an instruction to sell if obedience to such instruction would manifestly impair the factor's security; for instance, if the present prices were insufficient to pay the

notice and demand for repayment is, in *America*, universally recognized.¹ In *England*, however, the contrary doctrine prevails.²

Modified Rule. — In some jurisdictions, however, it is held that even where the consignment is made without instructions, and the factor makes advances thereon, he cannot sell in violation of subsequent instructions not to sell, without first giving reasonable notice to his principal and demanding repayment of the advances;³ and if instructed to sell immediately he will be held liable for any loss resulting from his failure to do so.⁴

dd. **SPECIAL AGREEMENTS AS TO SALE FOR REIMBURSEMENT.** — The factor may, by an express agreement to comply with the instructions of his principal, deprive himself of the right to sell the goods in violation of instructions, to reimburse himself for advances.⁵ And, on the other hand, the factor may by contract be given an irrevocable power to sell without notice to the principal.⁶

advances and the goods were on a rising market. See also *Blair v. Childs*, 10 Heisk. (Tenn.) 199. Compare *Spruill v. Davenport*, 116 N. Car. 34.

In *Eichel v. Sawyer*, 44 Fed. Rep. 845, it was held that a factor who had made advances upon the goods was not bound to sacrifice the goods at a forced sale, especially where the principal was insolvent.

If, however, the failure of the factor to sell was because he was negligent, and not because he had made advances, he cannot relieve himself from liability on the ground that he had made advances. *Butterfield v. Stephens*, 59 Iowa 596.

1. *Davis v. Kobe*, 36 Minn. 214, 1 Am. St. Rep. 663. See also cases cited in preceding notes.

2. **English Authorities.** — *Smart v. Sandars*, 5 C. B. 895, 57 E. C. L. 895; *Raleigh v. Atkinson*, 6 M. & W. 676.

In *De Comas v. Prost*, 2 Moo. P. C. N. S. 158, 11 Jur. N. S. 417, the judicial committee of the Privy Council observed that "mere advances made by a factor, whether at the time of his employment as such, or subsequently, cannot, according to the doctrine of that case [*Smart v. Sandars*, 5 C. B. 895, 57 E. C. L. 895], have the effect of altering the revocable nature of the authority to sell, unless such advances are accompanied by, and made the consideration for, an agreement that the authority shall not be revocable."

An English text writer, discussing the cases cited at the beginning of this note, says: "The decisions here cited do not in any way apply to the ordinary case where advances have been obtained on the factor's credit pledged by him on the faith of goods from time to time consigned to him for sale. It seems clear that in such a case the factor's authority to sell could not be recalled against his will, except on the terms of placing him in funds to meet all advances made and liabilities incurred by him in respect of all consignments made in that course of dealing." *Campbell on Commercial Agency* 54.

3. **Notice to Principal Essential — Instruction Not to Sell.** — *Marfield v. Goodhue*, 3 N. Y. 62, reversing 1 Sandf. (N. Y.) 360; *Hilton v. Vanderbilt*, 82 N. Y. 591; *Casson v. Field*, 52 N. Y. Super. Ct. 196; *Maxwell v. Audinwood*, 15 Hun (N. Y.) 111.

In *Marfield v. Goodhue*, 3 N. Y. 62, reversing 1 Sandf. (N. Y.) 360, it was held that the fac-

tor, though he had made advances, could not sell in violation of instructions not to sell, without notice to the principal and a demand for a repayment of his advances. The court, however, intimated that probably special circumstances, such as the insolvency of the principal, impracticability of communicating with him, etc., might authorize a sale without notice.

Instruction Not to Sell Below Limited Price. — In *Greenleaf v. Moody*, 13 Allen (Mass.) 363, notice to the principal was held necessary to authorize the factor in selling below the price limited by the principal.

4. **Instruction to Sell.** — In *Bell v. Palmer*, 6 Cow. (N. Y.) 128, it was held that a factor making advances on the goods of his principal, even beyond their value, is bound to obey the instructions of his principal to sell immediately, and if he refuses the first offer, in the expectation of a more favorable market, and afterwards sells at less than the first offer, he is liable, though he acted in good faith.

5. **Agreement to Withhold Goods from Market.** — *Eichel v. Sawyer*, 44 Fed. Rep. 850; *Gray v. Bass*, 42 Ga. 270.

In *Fordyce v. Peper*, 16 Fed. Rep. 516, it was held that where the factor, in consideration of the consignment of cotton and the execution of deeds of trust to secure advances, agrees to hold the cotton for a certain length of time unless the principal orders it sold before that time, he is bound to hold the cotton.

Consideration for Promise to Obey Instructions. — In *Marfield v. Goodhue*, 3 N. Y. 62, the factor had made advances upon the goods and was entitled to sell them after a reasonable notice to the principal to repay such advances. The principal instructed him not to sell, and the factor promised to obey such instructions. It was held that the promise was supported by a sufficient consideration and was binding upon him.

6. *Smart v. Sandars*, 5 C. B. 895, 57 E. C. L. 895; *De Comas v. Prost*, 2 Moo. P. C. N. S. 158, 11 Jur. N. S. 417.

In *Milliken v. Dehon*, 27 N. Y. 364, the factor made advances on a consignment under an agreement that if there should be a decline in the market the principal should on demand deposit cash sufficient to cover such decline, and it was held that on the principal's failure to do so the factor could sell without giving notice of his intention or of the time and place of sale.

ee. LIMITATION AS TO AMOUNT TO BE SOLD. — In no case can the factor, when instructed not to sell or not to sell below a certain price, sell, in violation of such instructions, more of the goods than is necessary to repay his advances.¹

(e) **Ratification or Waiver of Departure from Instructions — By Acquiescence.** — Where a principal is notified by his factor of a departure from his instructions, he should, within a reasonable time, express his disapproval of such departure, otherwise he will be held to have ratified or waived it.²

Further Consignments No Ratification. — Where the principal notifies the factor that the latter will be held liable for a departure from instructions, subsequent consignments alone will not be a ratification of his departure from such instructions.³

Acceptance of Proceeds of Sale. — If the principal, without objection, accepts the proceeds of a sale made by his factor in violation of instructions, he will be held to have ratified the sale, and cannot hold the factor liable in damages for a violation of such instructions.⁴

1. **Right of Sale Limited to Amount Sufficient to Repay Advances.** — *Brown v. M'Gran*, 14 Pet. (U. S.) 479; *Nelson v. Chicago, etc., R. Co.*, 2 Ill. App. 180; *Whitney v. Wyman*, 24 Md. 131; *Howard v. Smith*, 56 Mo. 314; *Bell v. Hannah*, 3 Baxt. (Tenn.) 47.

2. **Acquiescence — United States.** — *Norris v. Cook*, 1 Curt. (U. S.) 464; *Courcier v. Ritter*, 4 Wash. (U. S.) 549; *Dunbar v. Miller*, 1 Brock. (U. S.) 85; *Marshall v. Williams*, 2 Biss. (U. S.) 255; *Feild v. Farrington*, 10 Wall. (U. S.) 141.

California. — *Kendall v. Earl*, (Cal. 1896) 44 Pac. Rep. 791.

Illinois. — *McGeoch v. Hooker*, 11 Ill. App. 649; *Searing v. Butler*, 69 Ill. 575.

Louisiana. — *Howland v. Fosdick*, 4 La. Ann. 556; *Flower v. Downs*, 6 La. Ann. 539; *Starr v. Zacharie*, 18 La. 517.

Massachusetts. — *Mann v. Laws*, 117 Mass. 293.

Mississippi. — *Cotton v. Hiller*, 52 Miss. 7; *Meyer v. Morgan*, 51 Miss. 21, 24 Am. Rep. 617.

New Hampshire. — *Austin v. Ricker*, 61 N. H. 97.

New York. — *Russell v. Wetmore*, 3 N. Y. Leg. Obs. 318; *Vianna v. Barclay*, 3 Cow. (N. Y.) 281; *Jervis v. Hoyt*, 2 Hun (N. Y.) 637.

Ohio. — *Woodward v. Suydam*, 11 Ohio 360. See also the title AGENCY, vol. 1, p. 1203.

What Acts Amount to Ratification. — In *Cunningham v. Bell*, 5 Mason (U. S.) 161, it was held that the omission to answer a letter from the factor acknowledging a breach of orders, or the omission to state to the factor, in a letter of complaint, that he will be held responsible, is not *per se* a ratification of his conduct, but the question whether under such circumstances a ratification ought to be presumed was a question of fact for the jury.

In *Russell v. Wetmore*, 3 N. Y. Leg. Obs. 318, it was said that a ratification by the principal of the acts of his factor as being a commission with his instructions may be inferred from slight circumstances.

Ratification of Sale Contrary to Instructions. — In *Meyer v. Morgan*, 51 Miss. 21, 24 Am. Rep. 617, a factor sold the goods in violation of an instruction not to sell, and it was held that a delay of nearly three months on the part of the principal to object to the sale was a ratifica-

tion of such sale. In this case the principal also received the proceeds of the sale.

In *Blackmar v. Thomas*, 28 N. Y. 67, it was held that a promise by the principal to pay the balance of the advances over the price obtained for the goods was a ratification of the sale in violation of an instruction not to sell.

Ratification of Delay in Sale. — In *Howland v. Fosdick*, 4 La. Ann. 556, it was held that a ratification of a delay in the sale was shown by the fact that the principals, in answer to a letter from the factor relative to the sale, wrote that "the sale leaves us a very serious loss, but we suppose you acted for the best. We should have preferred holding on to selling at such low figures."

In *Rice v. Brook*, 20 Fed. Rep. 611, it was held that if the principal, after a long delay in the sale of the goods, with full knowledge of the facts, authorizes the factor to sell at his discretion, he ratifies the delay.

Ratification of Sale on Credit. — In *Marshall v. Williams*, 2 Biss. (U. S.) 255, it was held that a ratification of a sale in violation of an instruction to sell for cash was shown by the receipt by the principal, without objection, of accounts of sales made on credit.

Ratification of Sale for Less than Price Fixed. — In *Searing v. Butler*, 69 Ill. 575, it was held that where a factor directed to sell wheat at \$1.05 per bushel sold at \$1.02½ per bushel, and immediately notified the principal, a ratification of such sale was properly inferred from the latter's failure to express any dissatisfaction with the sale until after about a month, when wheat had considerably advanced.

In *Kendall v. Earl*, (Cal. 1896) 44 Pac. Rep. 791, goods were consigned to a factor with instructions not to sell below a fixed price, and the factor, without consulting the principal, sold below the price, but immediately notified the principal. The principal was absent from home when the factor's letter arrived, but after his return made no objection to the sale until after the lapse of several months. The court held that the failure of the principal immediately to disavow the factor's act on learning the facts of the sale was a ratification.

3. **Subsequent Consignments.** — *Maggoffin v. Cowan*, 11 La. Ann. 554.

4. **Receipt of Proceeds of Sale.** — *Richmond*

Knowledge of Material Facts Essential for Ratification. — In order that the subsequent conduct of the principal shall constitute a ratification of the factor's departure from his instructions, it is necessary that the principal should have had at the time knowledge of all the material facts.¹

(f) **Remedy for Violation of Instructions.** — Where the agent is guilty of a breach of instructions, the remedy of the principal is generally an action on the case for damages.² He may, however, in some cases, as where the factor sells below the price limited, have his damages allowed in a suit by the factor to recover his advances.³ And where the sale is made on credit in violation of an instruction to sell for cash, an action for money had and received has been held to lie against the factor.⁴

Factor Liable for Conversion. — In other cases where the factor parts with the property in an unauthorized manner, he may be held liable as for a conversion of the property.⁵

d. DUTY TO INFORM PRINCIPAL. — It is the duty of the factor to keep the principal informed of all facts or circumstances, relating to the consignment, which may make it necessary for the principal to take measures for his security; and the failure of the factor to do so will render him liable to his principal in damages.⁶

Mfg. Co. v. Starks, 4 Mason (U. S.) 296; *Meyer v. Morgan*, 51 Miss. 21, 24 Am. Rep. 617; *Woodward v. Suydam*, 11 Ohio 360; *Boyce v. Smith*, Dudley L. (S. Car.) 249. See also the title AGENCY, vol. 1, p. 1106.

By Action — Instruction to Sell for Cash. — The commencement of an action to recover the proceeds of the sale is equivalent to the receipt of such proceeds; and where a factor instructed to sell for cash sells on credit, it has been held that an action by the principal against the purchaser to recover the price is a ratification of the sale on credit. *Surgat v. Potter*, 12 Martin (La.) 365.

Acceptance upon Condition that Right of Action Continues. — The acceptance of the proceeds does not, however, effect a ratification of the unauthorized sale if it is the express agreement or tacit understanding of the principal and the factor at the time of such acceptance that the payment leaves the principal's right of action still subsisting and that it is to be taken only as an advance *pro tanto* on account of the principal's damages. *Bovce v. Smith*, Dudley L. (S. Car.) 248. See also *Meyer v. Morgan*, 51 Miss. 25, 24 Am. Rep. 617.

1. Knowledge of Material Facts. — *Loraine v. Cartwright*, 3 Wash. (U. S.) 151; *Courcier v. Ritter*, 4 Wash. (U. S.) 549; *Hardeman v. Ford*, 12 Ga. 205. See also the title AGENCY, vol. 1, p. 1189.

Illustrations. — In *Loraine v. Cartwright*, 3 Wash. (U. S.) 151, it was held that where a factor sold below the price limited, the fact that the principal drew upon the factor for a part of the proceeds did not show a ratification of the sale, where the principal had no knowledge of the price for which the goods were sold.

Ignorance of Facts of General Nature. — In *Norris v. Cook*, 1 Curt. (U. S.) 464, the court, though recognizing the rule as to the necessity for the factor to disclose all material facts relating to his departure from his instructions, in order that the silence of the principal shall constitute a ratification of his act, held that he need not detail facts of a general nature of

which he may reasonably presume that the principal had knowledge.

2. Action on Case. — *Dufresne v. Hutchinson*, 3 Taunt. 117; *Frothingham v. Everton*, 12 N. H. 239; *Guy v. Oakley*, 13 Johns. (N. Y.) 332.

Consignment by Joint Owners. — In *Hall v. Leigh*, 8 Cranch (U. S.) 50, it was held that if two joint owners of merchandise consign it to a factor, each giving him separate instructions in regard to his own moiety, either may maintain a separate action against the factor for the breach of the instructions he had given.

3. Recoupment. — *Frothingham v. Everton*, 12 N. H. 239.

In *Dodge v. Tileston*, 12 Pick. (Mass.) 328, it was held in an action by the factor for a general balance that the principal could set up a loss arising from the factor's breach of instructions to sell for cash.

In *Hatcher v. Comer*, 73 Ga. 418, where a factor violated instructions to sell and apply the proceeds on a debt due the factor, it was held that the principal could recoup damages for the violation of such instruction in an action by the factor to recover the debt.

4. Unauthorized Sale on Credit — Action for Money Had and Received. — *Johnson v. Totten*, 3 Cal. 343, 58 Am. Dec. 412.

5. Conversion. — In *Scott v. Rogers*, 31 N. Y. 676, it was held that where a factor instructed to sell the goods on a certain day, and if not then sold to reship the goods, sells after the time so fixed, he is liable to the principal as for a conversion of the property.

Sale Below Limited Price. — Trover, however, will not lie against a factor who sells the goods below the price limited by the principal. *Dufresne v. Hutchinson*, 3 Taunt. 117.

6. Informing Principal — England. — *Smith v. Lascelles*, 2 T. R. 187. See also *Jameson v. Swainstone*, 2 Campb. 546, note; *Callander v. Oelrichs*, 5 Bing. N. Cas. 58, 35 E. C. L. 29.

United States. — *Forrestier v. Bordman*, 1 Story (U. S.) 43; *De Tastett v. Crousillat*, 2 Wash. (U. S.) 132.

Georgia. — *Beach v. Branch*, 57 Ga. 362.

Iowa. — *Howe v. Sutherland*, 39 Iowa 484.

c. DUTY IN REGARD TO THE CARE OF GOODS — *Injuries to Goods.* — Factors are not liable for loss of or injury to the goods while in their possession where such loss or injury was not due to negligence on their part.¹ Thus the question as to a factor's liability for the loss of goods involves the question of prudence, diligence, and good faith on his part.²

Kentucky. — *De Lazardi v. Hewitt*, 7 B. Mon. (Ky.) 698.

Louisiana. — *Barron v. Blanchard*, 2 Martin N. S. (La.) 662; *Area v. Milliken*, 35 La. Ann. 1150.

Maine. — *Greely v. Bartlett*, 1 Me. 172, 10 Am. Dec. 57; *Pinkham v. Crocker*, 77 Me. 563.

Massachusetts. — *Amory v. Hamilton*, 17 Mass. 108.

Missouri. — *Given v. Lemoine*, 35 Mo. 119. See also *Railey v. Porter*, 32 Mo. 471, 82 Am. Dec. 141.

North Carolina. — *Spruill v. Davenport*, 116 N. Car. 34.

Pennsylvania. — *Harvey v. Turner*, 4 Rawle (Pa.) 223; *Arrot v. Brown*, 6 Whart. (Pa.) 9; *Moore v. Thompson*, 9 Phila. (Pa.) 164, 30 Leg. Int. (Pa.) 4. See also *Devall v. Burbridge*, 4 W. & S. (Pa.) 305; *Clark v. Wheeling Bank*, 17 Pa. St. 322.

Attachment Proceedings. — In *Moore v. Thompson*, 9 Phila. (Pa.) 164, 30 Leg. Int. (Pa.) 4, it was held that the factor should notify the principal of the seizure of the goods under attachment proceedings against the principal.

Notice of Terms of Sale. — It does not seem that, where goods are sold on credit, the mere failure of the factor to notify the principal of the terms of the sale will render him liable for the price of the goods. *Greely v. Bartlett*, 1 Me. 172, 10 Am. Dec. 54. Compare *Simpson v. Swan*, 3 Campb. 292; *De Lazardi v. Hewitt*, 7 B. Mon. (Ky.) 698.

Nonpayment of Price of Goods Sold on Credit. — A factor sold goods on credit, taking a note for the price, notified the principal of the sale, and gave him credit for the price in his account. It was held that on failure of the factor to notify the principal of the nonpayment of the note, he himself became liable therefor. *Harvey v. Turner*, 4 Rawle (Pa.) 223.

It has been held, however, that the mere failure to notify the principal of the nonpayment of the price will not render the factor liable for the debt where the principal has suffered no specific damages by reason of such failure. *Dwight v. Whitney*, 15 Pick. (Mass.) 184. See also *Hamilton v. Cunningham*, 2 Brock. (U. S.) 359.

Notice of Insolvency of Purchaser. — Where goods are sold on credit and the purchaser subsequently becomes insolvent, the failure of the factor, within a reasonable time, to notify the principal of the insolvency of the purchaser will render him liable for whatever damages the principal incurs in consequence of his not receiving notice. *Forrestier v. Bordman*, 1 Story (U. S.) 43. See also *Gorman v. Wheeler*, 10 Gray (Mass.) 362.

Inability to Effect Insurance. — In *De Tastett v. Crousillat*, 2 Wash. (U. S.) 132, it was held that it was the duty of a factor, instructed to

insure goods, to notify the principal of his inability to effect the insurance, and that his failure to do so would render him liable as insurer. See also *Callander v. Oelrichs*, 5 Bing. N. Cas. 58, 35 E. C. L. 29; *Smith v. Lascelles*, 2 T. R. 187.

Inability to Sell as Instructed. — It is the duty of the factor to notify his principal of his inability to sell the goods on arrival as instructed. *Spruill v. Davenport*, 116 N. Car. 34.

To Advise Principal of the State of the Market. — A factor authorized to sell the goods whenever he, in the exercise of a sound discretion, should think it advantageous to do so should, during the time he retains the goods, keep the principal advised of the state of the market. *Given v. Lemoine*, 35 Mo. 119.

Departure from Usual Course of Dealing. — In *Area v. Milliken*, 35 La. Ann. 1150, it was held that where a factor is in the habit of insuring the goods of his principal he should, in case of a departure from such habit, notify his principal to that effect. See also *Smith v. Lascelles*, 2 T. R. 187.

Depreciation of Goods. — Where the consignment is without instructions and with authority to the factor to sell in his discretion, he is not required to notify the principal of a depreciation in the value of the goods. *Adams v. Capron*, 21 Md. 186, 83 Am. Dec. 566.

1. Care in Regard to Goods Consigned. — *Weaver v. Poyer*, 70 Ill. 567; *Dunbar v. Gregg*, 44 Ill. App. 527; *Huguénin v. Legare*, 11 Rich. L. (S. Car.) 204.

Loss Caused by Act of God. — In *Dunbar v. Gregg*, 44 Ill. App. 527, it was held that a factor was not liable for injury to the goods occurring through an act of God, though he had been guilty of delay in selling the goods.

Loss of Goods After Voidable Sale by Factor. — In *Huguénin v. Legare*, 11 Rich. L. (S. Car.) 204, it was held that the factor, in the absence of negligence on his part, was not liable for the loss of goods destroyed by fire, though he had sold the goods, the contract of sale being unenforceable on account of the statute of frauds. See also *Gunn v. Knoop*, 73 Ga. 510.

2. Vincent v. Rather, 31 Tex. 77, 98 Am. Dec. 516.

Contract as to Storage of Goods. — Where factors advertise to store goods in a fireproof warehouse, they are liable for the loss of the goods by fire arising from their failure so to store them. *Vincent v. Rather*, 31 Tex. 77, 98 Am. Dec. 516. See *infra*, this section, *Degree of Skill and Diligence Required of Factor*.

Cannot Substitute Other Goods for Consignor's. — In *Seymour v. Wyckoff*, 10 N. Y. 213, it was held that a factor could not substitute for the goods consigned other goods of the same kind. Such a substitution, if allowed, would give every factor "the right of converting the property to his own use, and, instead of bailee, to assume the character of debtor to the owner for his property, without his consent."

Intermingling Goods of Same Grade. — A factor may be authorized by usage or custom in storing the goods in a mass with other goods of the same grade.¹ He should, however, as a rule, keep the property of his principal unmixed with that of himself or of others.²

f. DUTY TO INSURE GOODS CONSIGNED. — Though a factor has power to insure the goods of his principal, and may even do so in his own name,³ still, as a general rule, he is under no obligation to do so.⁴ The obligation to insure may, however, be imposed upon the factor by a general usage or custom to that effect,⁵ or by the instructions of the principal,⁶ or by an agreement or course of dealings between himself and his principal imposing such duty upon him.⁷

Extent of Duty to Insure. — Where factors are under an obligation to insure, such obligation does not import that they shall be personally liable as insurers,

1. **Intermingling Goods of Same Grade.** — In *Davis v. Kobe*, 36 Minn. 214, 1 Am. St. Rep. 663, it was held that a factor to whom wheat is consigned for storage in an elevator and for sale may, in the absence of instructions, stow it in a mass with other wheat of the same grade; and the fact that the grain was of the grade "condemned" makes no exception to the rule.

In *Trumbull v. Union Trust Co.*, 33 Ill. App. 319, it was held that a custom for factors to intermingle goods of the same grade did not justify a factor in mixing certain grades of wool belonging to different consignors without keeping account of the property of the different shippers.

See also the title GRAIN ELEVATORS.

2. *Clarke v. Tipping*, 9 Beav. 284; *Pinckney v. Dunn*, 2 S. Car. 314. See the title AGENCY, vol. 1, p. 1089.

3. See *supra*, this title, *Extent of Authority* — *Implied Powers* — *To Insure*.

4. **Not Bound to Insure.** — *Randolph v. Ware*, 3 Cranch (U. S.) 503; *Walsh v. Frank*, 19 Ark. 270; *Schaeffer v. Kirk*, 49 Ill. 251; *Shoenfeld v. Fleisher*, 73 Ill. 404; *Duncan v. Boye*, 17 La. Ann. 273; *De Forest v. Fulton F. Ins. Co.*, 1 Hall (N. Y.) 84; *Brisban v. Boyd*, 4 Paige (N. Y.) 17; *Lee v. Adsit*, 37 N. Y. 78; *Huguenin v. Legare*, 11 Rich. L. (S. Car.) 204. See also *Patterson v. Leake*, 5 La. Ann. 547.

5. **Obligation to Insure Imposed by Usage.** — *Kingston v. Wilson*, 4 Wash. (U. S.) 310; *Shoenfeld v. Fleisher*, 73 Ill. 404; *Tonge v. Kennett*, 10 La. Ann. 800; *Burbridge v. Gumbel*, 72 Miss. 371; *Brisban v. Boyd*, 4 Paige (N. Y.) 17; *Lee v. Adsit*, 37 N. Y. 78. See also *supra*, this section, *Usage as Affecting Duties and Liabilities of Factor*.

Where a general usage imposes upon a factor the duty to insure, and the factor attempts to excuse his failure to do so on the ground that he was instructed not to insure goods consigned until further notice, evidence that after such instruction was given, and before the consignment in question, there was a settlement and discontinuance of business between the parties was held admissible to show that the instruction did not refer to the cotton in question. *Burbridge v. Gumbel*, 72 Miss. 371.

6. **Instructions to Insure.** — *Smith v. Lascelles*, 2 T. R. 187; *Schaeffer v. Kirk*, 49 Ill. 251; *Shoenfeld v. Fleisher*, 73 Ill. 404; *Gordon v. Wright*, 29 La. Ann. 812; *Duncan v. Boye*, 17 La. Ann. 273; *Brisban v. Boyd*, 4 Paige (N. Y.)

17; *Lee v. Adsit*, 37 N. Y. 78; *Thorne v. Deas*, 4 Johns. (N. Y.) 84. See also *Patterson v. Leake*, 5 La. Ann. 547. And see *supra*, this section, *Fidelity to Instructions*.

In *Randolph v. Ware*, 3 Cranch (U. S.) 503, it was held that a promise by the agent of a commission merchant that he would write to his principal to effect insurance did not bind the commission merchant to insure, where the agent failed so to notify him. The agent, in promising to write to the commission merchant, acted in so doing as the agent of the consignor, and not as the agent of the commission merchant.

7. **Duty Imposed by Course of Dealings.** — *Smith v. Lascelles*, 2 T. R. 187; *Shoenfeld v. Fleisher*, 73 Ill. 404; *Area v. Milliken*, 35 La. Ann. 1150; *Lee v. Adsit*, 37 N. Y. 78. See also *Morris v. Summerl*, 2 Wash. (U. S.) 203; *Berthoud v. Gordon*, 6 La. 579; *Strong v. High*, 2 Rob. (La.) 103, 38 Am. Dec. 195.

In *Area v. Milliken*, 35 La. Ann. 1150, where a factor's habit of insuring was known to the consignor by the uniform charges for insurance in the accounts rendered by the factor, it was held that the factor was liable for failure to insure.

In *Smith v. Lascelles*, 2 T. R. 187, it was held that if a merchant is led from previous transactions to expect that his correspondent will effect an insurance, he has a right to rely on his discharging that duty unless he receives a letter to the contrary.

If, however, the principal should write to a factor who was in the habit of insuring against fire without instructions, that he had requested a third person to insure, the factor would not be liable for not insuring against fire though in fact the principal had reference to marine insurance only. *Tonge v. Kennett*, 10 La. Ann. 800.

Contract to Insure for Principal's Benefit Constructed — How Long Insurance Must Be Maintained. — In *Milburn Wagon Co. v. Evans*, 30 Minn. 89, a contract by an agent with his principal respecting property delivered to the agent for sale, and requiring the latter to take out insurance for the benefit of the principal, and further providing that property unsold after eight months should be subject to the order of the principal, was held to require the agent to keep the property insured for only a reasonable time, not exceeding eight months, and therefore the agent was not liable for the value of such property destroyed without his fault, three years after its consignment.

but is fulfilled by their obtaining reasonable and proper insurance;¹ and if reasonable diligence was used by the factors to insure the goods, they are not liable in case they are unable to effect the insurance.² But if they do not use reasonable diligence to effect the insurance they become liable as insurers,³ as they do, also, if they insure in their own names and fail to collect the insurance.⁴

Duty to Account for Insurance Collected. — Where the factor insures the goods of his principal and collects the insurance, he is bound to account to the principal therefor though he was under no obligation to insure.⁵

g. DUTY IN REGARD TO THE SALE — (1) *In General* — **Errors of Judgment.** — It is a well-settled rule that a factor to whom goods are consigned for sale without instructions is at liberty to sell at such time and on such terms as he may deem proper in the exercise of a sound discretion, and will incur no liability, where he acts in good faith and without negligence, for losses arising from his errors of judgment.⁶

Should Sell Goods in Condition as Consigned. — The factor should, as a general rule, sell the goods in the condition in which they are consigned to him for sale.⁷

1. Duty to Insure Does Not Render Factors Insurers. — *Johnson v. Campbell*, 120 Mass. 449. In this case a letter has been issued by factors inviting consignments of goods and stating that they would be "covered by insurance" as soon as received in store.

2. Inability to Insure. — *De Tastett v. Crousillat*, 2 Wash. (U. S.) 132.

Duty to Inform Principal of Inability to Insure. — Where the factor is unable to insure it is his duty to inform his principal to that effect and on his failure to do so he is liable in damages. *De Tastett v. Crousillat*, 2 Wash. (U. S.) 132. See *supra*, this section, *Duty to Inform Principal*.

3. Liable as Insurers on Failure in Diligence to Insure. — *Kingston v. Wilson*, 4 Wash. (U. S.) 310; *Shoenfeld v. Fleisher*, 73 Ill. 404; *Gordon v. Wright*, 29 La. Ann. 812. See also *Morris v. Summerl*, 2 Wash. (U. S.) 203.

Factor Cannot Become Insurer. — A factor upon whom the duty to insure is imposed cannot become the insurer so as to entitle him to charge the principal with the premiums, without the previous consent of the principal. This rule is based on the general rule of agency prohibiting an agent from contracting with himself. *Keane v. Branden*, 12 La. Ann. 20. See also *Schaeffer v. Kirk*, 49 Ill. 251.

Where the factor fails to insure he is, however, in case of a loss, entitled to a credit for the premiums which should have been paid. *De Tastett v. Crousillat*, 2 Wash. (U. S.) 136; *Shoenfeld v. Fleisher*, 73 Ill. 404. See also *Morris v. Summerl*, 2 Wash. (U. S.) 203.

4. Failure to Collect Insurance. — *Gordon v. Wright*, 29 La. Ann. 812.

5. Duty to Account for Proceeds of Insurance. — *Fish v. Seeberger*, 154 Ill. 30, *affirming* 47 Ill. App. 580; *Stillwell v. Staples*, 19 N. Y. 401. See also *Waters v. Monarch F., etc., Assur. Co.*, 5 El. & Bl. 870, 85 E. C. L. 870; *Johnson v. Campbell*, 120 Mass. 449; *De Forest v. Fulton F. Ins. Co.*, 1 Hall (N. Y.) 84; *Lee v. Adsit*, 37 N. Y. 78.

Goods Not in Fact Damaged. — It is no defense to an action by the principal to recover from the factor insurance money collected by the factor that the goods on which the insurance

was collected were not in fact damaged. *Fish v. Seeberger*, 154 Ill. 30.

In *Gutman v. Rogers*, (City Ct.) 13 N. Y. Supp. 576, property belonging to several consignors was insured by the factor, the policy covering all the goods, and the insurance money was paid to the factor irrespective of the ownership of the goods. The total amount of the insurance was less than the value of the property, and it was held that one of the consignors could not sue to recover his share of the insurance money without making the other consignors parties to the action.

6. Errors of Judgment — *United States*. — *Evans v. Potter*, 2 Gall. (U. S.) 13.

Iowa. — *Payne v. Potter*, 9 Iowa 549.

Kentucky. — *Byrne v. Schwing*, 6 B. Mon. (Ky.) 199.

Louisiana. — *Lesesne v. Cook*, 16 La. 58.

Missouri. — *Given v. Lemoine*, 35 Mo. 110.

New York. — *Hilton v. Vanderbilt*, 82 N. Y. 591; *Liottard v. Graves*, 3 Cai. (N. Y.) 226; *Marfield v. Goodhue*, 3 N. Y. 62, 1 Sandf. (N. Y.) 360; *Jervis v. Hoyt*, 2 Hun (N. Y.) 637; *Milbank v. Dennistoun*, 1 Bosw. (N. Y.) 246, 21 N. Y. 386.

Pennsylvania. — *Geyer v. Decker*, 1 Yeates (Pa.) 486; *Conway v. Lewis*, 120 Pa. St. 215, 6 Am. St. Rep. 700.

Washington. — *Lockett v. Baxter*, 3 Wash. Ter. 350.

Sale While Market Is Rising. — In *Jervis v. Hoyt*, 2 Hun (N. Y.) 637, a factor acting in good faith was held not liable for selling the goods on a rising market.

In *Ward v. Bledsoe*, 32 Tex. 251, it was held that a sale by the factor at the lowest ebb in a fluctuating market does not render the factor liable, unless he purposely ignores all intelligence of a probable rise in the market.

Failure to Sell when Market Is Falling. — In *Lockett v. Baxter*, 3 Wash. Ter. 350, a factor who had made advances upon the goods was held not liable for failure to sell on a falling market. See also *Evans v. Potter*, 2 Gall. (U. S.) 13.

7. Should Sell Goods as Consigned. — A factor to whom cotton goods in their brown state were sent for sale sent them to a printing

Compliance with Revenue Laws. — In effecting the sale of goods consigned, a factor should comply with the revenue laws of the place of sale, and on his failure to do so he will, as a rule, be liable to his principal for the resulting damages.¹

Must Exercise Ordinary Care. — The factor is, of course, bound to exercise ordinary diligence as to the time and manner of the sale, and would be liable in case he was negligent in selling with knowledge of a certain event which would naturally cause a rise in the market.²

(2) *As to Time of Sale.* — In the absence of instructions on the part of the principal the time of sale is a matter within the sound discretion of the factor.³ He must, however, sell the goods within a reasonable time, and will be held liable for damages resulting from an unnecessary delay in their sale;⁴ and on the other hand, in case he sells, he will not be liable merely because he could have received an advanced price if he had held the goods.⁵

(3) *As to Place of Sale.* — As a corollary of the rule that a factor has not implied power to reship the goods to another market,⁶ it is his duty, in the absence of special instructions or usage to the contrary, to sell the goods at his place of business and where the goods are shipped to him.⁷

(4) *As to Price of Sale.* — It is the duty of the factor to sell the goods for

establishment to have them printed and then sold them. It was held that if the printing caused a loss the principal should be credited with the value of the goods in their brown state. *Vandyke v. Brown*, 8 N. J. Eq. 657.

1. **Observance of Revenue Laws.** — In *Wellman v. Nutting*, 3 Mass. 434, it was held that a foreign factor would be liable to his principal for a seizure of the goods for a breach by him of a revenue law in selling them, unless he could show special instructions to act as he did, or that he could not obey his instructions by a sale in any other way, and that his principal knew it when he consigned the goods. See also *Lewson v. Kirk*, Cro. Jac. 265.

2. **Must Exercise Ordinary Care in Sale.** — *Milbank v. Dennistoun*, 10 Bosw. (N. Y.) 382. See also *Spruill v. Davenport*, 116 N. Car. 34. And see *infra*, this section, *Degree of Skill and Diligence Required of Factor*.

3. **Time of Sale Within Sound Discretion of Factor.** — *Cotton v. Hiller*, 52 Miss. 13; *Given v. Lemoine*, 35 Mo. 110; *Milbank v. Dennistoun*, 21 N. Y. 386; *Spruill v. Davenport*, 116 N. Car. 34.

In *Lehman v. Pritchett*, 84 Ala. 512, it was held that a factor was not liable for the loss of goods destroyed by fire where he was not guilty of an unreasonable delay in the sale.

Time of Sale Where Factor Has Made Advances. — Where, at the time of a consignment, the balance of accounts between the principal and the factor was in favor of the latter by reason of his having made advances upon the goods and having accepted drafts drawn against consignments, it was held that the factor acquired a special property in the goods and was clothed with the right to sell at such time as, in the exercise of a sound discretion, and in accordance with the usages of trade, he deemed best to secure indemnity to himself and to promote the consignor's interests. *Lockett v. Baxter*, 3 Wash. Ter. 350.

4. **Unnecessary Delay in Sale.** — *Feild v. Farrington*, 10 Wall. (U. S.) 141; *Atkinson v. Burton*, 4 Bush (Ky.) 299; *Francis v. Castle-*

man, 4 Bibb (Ky.) 282; *Seibert v. Albritton*, (Ky. 1897) 40 S. W. Rep. 698; *Selden v. Beale*, 3 Me. 178; *Porter v. Blood*, 5 Pick. (Mass.) 54; *Merle v. Hascall*, 10 Mo. 406; *Bernet v. Hockaday*, 61 Mo. App. 627.

In *Eaton v. Welton*, 32 N. H. 352, it was held that after the lapse of a reasonable time from the receipt of goods by a factor abroad, and a neglect on his part to account for them in any way, the fair presumption is that the goods have been sold and an action for money had and received will lie.

See, however, *Elbourn v. Upjohn*, 1 C. & P. 572, 11 E. C. L. 476; *Selden v. Beale*, 3 Me. 178. In the latter case it was held that the factor would not be liable in an action for money had and received, but that the factor should be declared against as a factor for the proceeds of a sale.

In *Merle v. Hascall*, 10 Mo. 406, it was held that in an action against a factor for not selling at the best price, a recovery could not be had for an unreasonable delay in selling.

What Is Unreasonable Delay. — In *Atkinson v. Burton*, 4 Bush (Ky.) 299, a delay of over five months was held unreasonable. A delay of six years fixes the factor with liability. *Porter v. Blood*, 5 Pick. (Mass.) 54.

Market Composed of Single Purchaser. — In *Eichel v. Sawyer*, 44 Fed. Rep. 845, it was held that in order to charge a factor with negligence in not selling, where the market was composed of a single purchaser, it must be shown that such purchaser made a reasonable offer for the goods, sufficient to cover the advances of the factor.

5. **When Loss Results from Holding Instead of Selling.** — *Ward v. Bledsoe*, 32 Tex. 251.

6. See *supra*, this title, *Extent of Authority — Implied Powers — To Reship to Other Markets*.

7. **Place of Sale.** — *Catlin v. Bell*, 4 Campb. 183; *Pugh v. Porter Bros. Co.*, 118 Cal. 628; *Phy v. Clark*, 35 Ill. 377; *Williams v. White*, 70 Me. 138; *Phillips v. Scott*, 43 Mo. 86, 97 Am. Dec. 369; *Burke v. Frye*, 44 Neb. 223; *Grieff v. Cowguill*, 2 Disney (Ohio) 58; *Kauffman v. Beasley*, 54 Tex. 563.

at least the current market price, and if, in violation of this duty, he sells below such price he will be liable to the principal for the difference in price.¹ On the other hand, he cannot, of course, be held liable for failure to secure more than the current market price.²

Special Contract as to Price to Be Received. — The factor may, of course, by a guaranty as to the price to be received, or by an agreement not to sell below a certain price, render himself liable for a sale below such price, though the price received is the market price.³

(5) *In Regard to Credit Sales* — (a) *In General.* — As heretofore stated, the factor has, as a general rule, implied power to sell the goods upon a reasonable credit, and in the absence of negligence on his part he does not, of course, become liable thereby for losses occurring through the insolvency of the purchaser.⁴

Contractual Liability on Credit Sales. — The factor may, of course, by express contract, render himself liable for the payment of the purchase price of goods sold on credit.⁵ The most ordinary and common application of this principle arises in the case of factors selling on a *del credere* commission.⁶

Dealings with Parties Resulting in Liability. — The factor may, moreover, become liable personally by reason of his dealings with his principal or the purchaser.⁷

(b) **Taking Security.** — As a general rule the factor is not bound to take security from the purchaser to secure the payment of the purchase price.⁸

(c) **Ascertaining Responsibility of Purchaser.** — It is the duty of the factor to use reasonable diligence and care to ascertain the financial standing of a purchaser to whom he sells the goods on credit; and if through carelessness or a want

1. **Must Sell at Market Price.** — *Pugh v. Porter Bros. Co.*, 118 Cal. 628; *Merle v. Hascall*, 10 Mo. 406; *Milbank v. Dennistoun*, 10 Bosw. (N. Y.) 382; *Linsly v. Carpenter*, 4 Robt. (N. Y.) 200; *Govan v. Cushing*, 111 N. Car. 458; *Bigelow v. Walker*, 24 Vt. 149, 58 Am. Dec. 156.

In *Pugh v. Porter Bros. Co.*, 118 Cal. 628, it was held that the receipt of the proceeds of a sale made below the market price was not necessarily a bar to an action for not selling at the best price.

Evidence of Market Price. — *Milbank v. Dennistoun*, 10 Bosw. (N. Y.) 382, wherein it was held in an action against factors for selling below the market price that evidence of an expectation by the factors, after the sale in question, of hopes to do better with another cargo, which the principal had consigned about the same time, together with evidence of the price at which they afterwards sold such second consignment, was inadmissible to prove a sale below the market price. In this case it was further held that evidence of the original cost of the goods consigned would also be inadmissible to prove a sale below the market price. See also the title **MARKET VALUE**.

2. **No Liability for Failure to Sell Above Market Price.** — *Mann v. Laws*, 117 Mass. 293; *Conway v. Lewis*, 120 Pa. St. 215, 6 Am. St. Rep. 700; *Ward v. Bledsoe*, 32 Tex. 251.

3. **Special Contract as to Price to Be Received.** — *Lehmann v. Schmidt*, 87 Cal. 15; *Dalton v. Goddard*, 104 Mass. 497; *Harrison v. Glover*, 4 Hun (N. Y.) 121; *Holt's Estate*, 4 Del. Co. Rep. (Pa.) 363.

In *Harrison v. Glover*, 4 Hun (N. Y.) 121, it was held that, under a contract not to sell the goods for less than the price at which the goods of another firm were sold, the price was to be determined by what such other firm was will-

ing to accept for its goods, and not the price it had received on actual sales.

4. **Sales on Credit.** — *Varden v. Parker*, 2 Esp. N. P. 710; *Phillips v. Moir*, 69 Ill. 155; *Byrne v. Schwing*, 6 B. Mon. (Ky.) 199; *De Lazardi v. Hewitt*, 7 B. Mon. (Ky.) 699; *Greely v. Bartlett*, 1 Me. 172, 10 Am. Dec. 54. See *supra*, this title, *Extent of Authority — Implied Powers — To Sell on Credit*.

5. *Clark v. Roberts*, 26 Mich. 506.

6. See the title **DEL CREDERE AGENCY**, vol. 9, p. 182.

7. See *infra*, this section, *Assumption of Debt by Factor*.

8. **Requiring Security.** — See *supra*, this title, *Extent of Authority — Implied Powers — To Sell on Credit*.

Must Act in Good Faith for Principal's Benefit. — In *Burrill v. Phillips*, 1 Gall. (U. S.) 360, it was held that a factor would not be permitted to sell his own goods and take security and at the same time sell the goods of his principal without taking security, as he ought to exercise at least as much care and diligence in his agency as in his own private concerns.

Instruction to Take Security. — A factor must, of course, take security for the purchase price of the goods when directed by the principal to do so. *Wilkinson v. Campbell*, 1 Bay (S. Car.) 169. See *supra*, this section, *Fidelity to Instructions*.

Usage Requiring the Taking of Security. — And the duty to take security for the payment of the purchase price may be imposed by a usage or custom, and a factor who sells without taking the customary security for payment is personally liable if the vendee proves insolvent. *Chew v. Keane*, 2 La. 121. See *supra*, this section, *Usage as Affecting Duties and Liabilities of Factor*.

of proper examination and inquiry he gives credit to a purchaser who is insolvent or of doubtful financial standing, he will be liable to his principal for any loss resulting from the insolvency of the purchaser.¹

(d) **Disclosing Name of Purchaser.** — Where goods are sold on credit, the mere failure of the factor to disclose to the principal the name of the purchaser will not render him liable for the payment of the purchase price.²

(e) **The Collection of the Price.** — Where goods have been sold by the factor on credit, it becomes, as a general rule, his duty to use proper diligence and care in the collection of the purchase price, and where he fails to do so he will become liable to his principal for damages resulting to the latter from such neglect.³

The Factor Should Not Sue to Recover the Debt, however, unless he has reasonable grounds for believing that the action will be productive of benefit to the principal.⁴

1. Reasonable Diligence as to Responsibility of Purchaser — *United States*. — *Burrill v. Phillips*, 1 Gall. (U. S.) 360; *Forrestier v. Bordman*, 1 Story (U. S.) 43; *Marshall v. Williams*, 2 Biss. (U. S.) 255.

Illinois. — *Foster v. Waller*, 75 Ill. 464.

Iowa. — *Durant v. Fish*, 40 Iowa 559.

Louisiana. — *Bonham v. Overton*, 6 La. Ann. 765; *Fisk v. Offit*, 3 Martin N. S. (La.) 555.

Maine. — *Greely v. Bartlett*, 1 Me. 172, 10 Am. Dec. 54; *Pinkham v. Crocker*, 77 Me. 563.

Massachusetts. — *Hapgood v. Batcheller*, 4 Met. (Mass.) 573.

Nebraska. — *Housel v. Thrall*, 18 Neb. 484.

In *Smith v. Ward*, 3 La. Ann. 76, the factor was held bound to exercise the same degree of care which other persons in the same business and experienced and skilled therein would have exercised or did exercise.

High Degree of Diligence Required. — In *Foster v. Waller*, 75 Ill. 464, it was held that where a factor makes a sale on the board of exchange on credit, he will be held to a high degree of diligence in learning the pecuniary ability of the purchaser. He must, to be protected, resort to all sources of information that are accessible. Inattention or carelessness must be held to render him liable for loss thereby sustained.

Knowledge of Insolvency of Purchaser Unnecessary. — In *Burrill v. Phillips*, 1 Gall. (U. S.) 360, Story, J., said: "In order to affect the factor with the imputation of negligence, it is not necessary that he should absolutely know that the party was discredited. It is sufficient if he have notice of facts which ought to put a person of ordinary prudence on his guard. For, as in equity causes, the factor will be held affected with notice if the facts be such as ought to have put him upon farther inquiry. A sale, therefore, if made under circumstances of real or constructive notice, will be considered as made at the risk and on the account of the factor."

Instruction to Accept Offer. — In *Durant v. Fish*, 40 Iowa 559, it was held that an instruction from the principal to sell at once, accepting the offer of a certain person to buy the goods on credit, would not authorize the factor in selling upon credit if he knew that such purchaser was irresponsible, and therefore he would not, for failure to so sell, be responsible on account of the depreciation of the goods before another sale could be effected.

2. Duty to Disclose Name of Purchaser. — *Hamilton v. Cunningham*, 2 Brock. (U. S.) 350; *Greely v. Bartlett*, 1 Me. 172, 10 Am. Dec. 54; *Elliott v. Walker*, 1 Rawle (Pa.) 126. Compare *Simpson v. Swan*, 3 Campb. 292; *Alsop v. Silvester*, 1 C. & P. 107, 11 E. C. L. 333.

3. Diligence in Collecting Price Required — *England*. — *Varden v. Parker*, 2 Esp. N. P. 710.

United States. — *Forrestier v. Bordman*, 1 Story (U. S.) 43.

Alabama. — *Leach v. Bush*, 57 Ala. 145.

Louisiana. — *Skillman v. Leverich*, 11 La. 520; *Gilly v. Logan*, 2 Martin N. S. (La.) 197; *Kinney v. Crane*, 17 La. 417; *Barron v. Blanchard*, 2 Martin N. S. (La.) 662.

Maine. — *Greely v. Bartlett*, 1 Me. 172, 10 Am. Dec. 54; *Pinkham v. Crocker*, 77 Me. 563; *Folsom v. Mussey*, 8 Me. 400, 23 Am. Dec. 522.

Maryland. — *Ewalt v. Harding*, 16 Md. 160.

Massachusetts. — *Goodenow v. Tyler*, 7 Mass. 36, 5 Am. Dec. 22, *per* Parsons, C. J.; *Gorman v. Wheeler*, 10 Gray (Mass.) 362.

New York. — *Corlies v. Cumming*, 6 Cow. (N. Y.) 181.

Virginia. — *M'Connico v. Curzen*, 2 Call (Va.) 358, 1 Am. Dec. 540.

It is not incumbent upon the principal to give special instructions to the factor as to the course to be pursued in the collection of the price. *Folsom v. Mussey*, 8 Me. 400, 23 Am. Dec. 522.

The appointment of an agent of known ability to collect the price of goods sold on credit is *prima facie* evidence of due diligence, and the principal must afterward prove negligence on the part of the factor in order to hold him liable for a loss. *M'Connico v. Curzen*, 2 Call (Va.) 358, 1 Am. Dec. 540.

In *Gilly v. Logan*, 2 Martin N. S. (La.) 197, it was held that a factor who fails to demand payment at the expiration of the time of credit is liable for any loss. See also *Goodenow v. Tyler*, 7 Mass. 46, 5 Am. Dec. 22, *per* Parsons, C. J.

In *Skillman v. Leverich*, 11 La. 520, it was held that a factor was liable for notes taken for goods sold on credit unless an unsuccessful attempt to collect them was shown.

If the factor sells for cash he may become liable to the principal by allowing the purchaser to take possession of the goods without paying. *Deshler v. Beers*, 32 Ill. 369, 83 Am. Dec. 274.

4. Forrestier v. Bordman, 1 Story (U. S.) 43.

(6) *Assumption of Debt by Factor*—(a) *In General*.—Though the factor is not, as a general rule, liable for the price of goods sold on credit, he may, however, become so by reason of his dealings with the purchaser or principal,¹ and will be held liable therefor where he treats the original debt as his own.²

Closing Accounts.—Where the factor, for the purpose of closing his accounts with the principal, to whom he has made advances, pays the balance due from him, retaining notes taken for goods sold on credit, he will be held to have assumed such outstanding debts, and the principal is not bound to reimburse him in case such debts are not paid.³

(b) *Taking Note in Name of Factor*.—The factor does not render himself personally liable for the debt of the purchaser merely by taking a note for the purchase price in his own name.⁴

1. *Assumption of Debt by Factor*.—In *Urquhart v. M'Iver*, 4 Johns. (N. Y.) 103, where a factor sold goods upon terms that payment should be made in either of two countries, at the factor's option, it was held that the factor made himself liable in the purchaser's place on his refusal at the request of the principal to elect to have payment made in the country specified by the principal and to give the principal authority to receive payment there.

In *Deanes v. Scriba*, 2 Call (Va.) 415, the factor's failure for five years to render an account to his principal of outstanding indebtedness on his account was held to render him chargeable with the amount of such outstanding indebtedness.

Taking Bond for Debt.—In *Jackson v. Baker*, 1 Wash. (U. S.) 394, it was held that a factor who takes a bond for a simple contract debt due for goods sold, and includes therein a debt due to himself, makes himself answerable to his principal for the amount of the goods, as he has deprived the principal of his means of pursuing the purchaser.

Extending Credit.—The factor, by extending the time of credit without the consent of his principal, becomes personally liable to his principal for any resulting loss. *Hosmer v. Beebe*, 2 Martin N. S. (La.) 368; *Richardson v. Weston*, 4 Martin N. S. (La.) 244; *Douglas v. Bernard*, Anth. N. P. (N. Y.) 278; *Hairston v. Medley*, 1 Gratt. (Va.) 96. See also, *supra*, this title, *Extent of Authority—Implied Powers—To Extend Time of Payment*.

Taking Note of Third Persons.—In *Symington v. M'Lin*, 1 Dev. & B. L. (18 N. Car.) 291, it was held that a factor became personally liable for the debt where he took in payment the note of a third person. See, however, *Hamilton v. Cunningham*, 2 Brock. (U. S.) 350.

Exchanging Purchaser's Note.—In *Corlies v. Cumming*, 6 Cow. (N. Y.) 181, it was held that in exchanging the purchaser's note, by taking the note of a third person, indorsed by the purchaser, which fell due earlier, the factor did not become liable for the debt, as this was a mere improvement of the security.

2. *Factor's Liability Arising from Treating Debt as His Own*.—*Le Fevre v. Lloyd*, 5 Taunt. 749, 1 E. C. L. 250; *Myers v. Enriken*, 6 W & S. (Pa.) 46, 40 Am. Dec. 538.

In *Simpson v. Swan*, 3 Campb. 291, a factor who had taken security in his own name for the price of goods sold on credit, and who had given his own security to the principal, was held liable on it after the failure of the purchaser.

Intention to Assume Debt.—To throw this burden upon the factor a clear intention on his part to assume the debt should, in all cases, be shown. *Robertson v. Livingston*, 5 Cow. (N. Y.) 473.

3. *Settling with Principal*.—*Oakley v. Crenshaw*, 4 Cow. (N. Y.) 250. See also *Barron v. Blanchard*, 2 Martin N. S. (La.) 662; *Consequa v. Fanning*, 3 Johns. Ch. (N. Y.) 600.

Note by Factor for Debt Outstanding.—In *Hapgood v. Batcheller*, 4 Met. (Mass.) 573, it was held that the factor, by giving to his principal a note for a claim due from him and including therein the amount of an outstanding debt for goods sold on credit, did not assume such outstanding debt.

In *Robertson v. Livingston*, 5 Cow. (N. Y.) 473, *distinguishing* *Oakley v. Crenshaw*, 4 Cow. (N. Y.) 250, it was held that a factor, by giving his note for the amount which would be due to his principal if an outstanding debt for goods sold on credit were paid, such note being payable after the outstanding debt would fall due, did not assume such outstanding debt, as the transaction was a mere liquidation of the account.

4. *Note Payable to Factor*.—*Goldthwaite v. M'Whorter*, 5 Stew. & P. (Ala.) 284; *Leach v. Beardslee*, 22 Conn. 404; *Hosmer v. Beebe*, 2 Martin N. S. (La.) 368; *Greely v. Bartlett*, 1 Me. 172, 10 Am. Dec. 54; *Goodenow v. Tyler*, 7 Mass. 36, 5 Am. Dec. 22; *Gorman v. Wheeler*, 10 Gray (Mass.) 362; *West Boylston Mfg. Co. v. Searle*, 15 Pick. (Mass.) 225; *Porter v. Zeiting*, 1 Penny. (Pa.) 505; *Johnson v. O'Hara*, 5 Leigh (Va.) 456. See, however, *Indianapolis Rolling Mill Co. v. Addy*, 3 Cinc. Wkly. L. Bul. (Ohio) 293, 5 Ohio Dec. (Reprint) 588, wherein it was held that where a factor takes from a purchaser a note in his own name for the amount of his commissions, advances, etc., and remits the balance to his principal, he cannot recover the amount of such note from the principal in case of the subsequent insolvency of the purchaser.

Illustrations.—In *Gorman v. Wheeler*, 10 Gray (Mass.) 362, it was held that a factor taking a note for goods sold on account of his principal, and giving the principal reasonable notice of the insolvency of the purchaser, does not become personally liable for the debt by proving the note under the insolvent laws and taking a dividend thereon, provided he uses reasonable care and skill, though the principal was a nonresident, and therefore his claim would not have been barred by the discharge in insolvency.

Note for Aggregate Amount of Goods of Several Owners. — Where, however, the factor sells the goods of several principals to the same purchaser, the decisions are conflicting as to whether the taking of one note payable to the factor for the purchase price of the whole lot renders the factor personally liable to each consignor for the purchase price of the goods belonging to such consignor.¹

(c) **Negotiating Note.** — The factor will become personally liable to his principal for the payment of goods sold on credit where he uses or negotiates for his own use a note taken in payment for the goods.² The rule, however, would be different where the factor negotiated the note for the use of the principal.³

Where the factor releases a note taken by him in his own name for goods sold on credit, though such release is by mistake, he will become liable for the debt. *Deland v. Amesbury Woollen, etc., Mfg. Co., 7 Pick. (Mass.) 244.*

In *Amory v. Hamilton, 17 Mass. 103*, a factor with authority from the principal delivered the goods for sale to a broker, who received payment therefor, and it was held that the factor, by taking the note of the broker for the amount, rendered himself personally liable for the debt.

And generally if a sale be made on credit without authority and a note taken for the price payable to the factor, the factor will be held personally liable for the debt. *Hemenway v. Hemenway, 5 Pick. (Mass.) 389.*

Burden of Proof as to Exceptions to General Rule. — Exceptions to the general rule that a factor selling goods on credit may take a note for payment in his own name must be shown by the principal if he wishes to charge the factor personally with the payment of the debt. *Goldthwaite v. M'Whorter, 5 Stew. & P. (Ala.) 284.*

1. Rule Holding Factor Not Liable — United States. — In *Hamilton v. Cunningham, 2 Brock. (U. S.) 350*, it was held that where bills are remitted by a merchant to his factor to be converted into available funds, and the factor mingles the property of the merchant with that of others, by selling the bills on credit and taking a joint note covering other sums than that stipulated to be paid for the bills, and this is in accordance with the general usage, the factor will not be personally responsible for the debt in case of the insolvency of the purchaser.

Connecticut. — In *Leach v. Beardslee, 22 Conn. 404*, it was held that a factor did not become personally liable for a debt by taking a note for the price of the principal's goods and including therein the price of his own goods, where such action was authorized by usage.

Massachusetts. — In *Hapgood v. Batcheller, 4 Met. (Mass.) 573*, Hubbard, J., said: "It is a practice well understood among all persons who consign goods for sale that the commission merchant, for convenience, takes the notes of vendees in his own name, often including the sales for different consignors; and that he holds such notes in trust for his principals. We see nothing in this case to lead to the conclusion that the defendants [by so doing] intended to assume the debt of Shipman & Co. [the purchasers]." See also *West Boylston Mfg. Co. v. Searle, 15 Pick. (Mass.) 225*; *Chesterfield Mfg. Co. v. Dehon, 5 Pick. (Mass.) 7, 16 Am. Dec. 367.*

New York. — In *Corlies v. Cumming, 6*

Cow. (N. Y.) 181, it was held that the sale to one person, by a factor, of several parcels of goods belonging to several of the factor's principals, and taking one note from the vendee for the whole, payable to himself, would not *per se* render the factor liable to his principals for the debt. In *Rich v. Monroe, 14 Barb. (N. Y.) 602*, the doctrine of *Corlies v. Cumming, 6 Cow. (N. Y.) 181*, was applied.

Virginia. — In *Johnson v. O'Hara, 5 Leigh (Va.) 456*, it was held that a factor, if authorized by usage, could take one note payable to himself, for the goods sold for different persons.

Rule Holding Factor Liable — North Carolina. — In *Symington v. M'Lin, 1 Dev. & B. L. (18 N. Car.) 291*, it was held that where a factor sells goods of his principal together with some of his own and takes in payment for the whole a promissory note made by another person, payable to himself, the purchaser is thereby discharged and the factor himself therefore becomes responsible for the price of the goods. In this case the court seemed inclined to think that the circumstances of taking the note of a third person and blending the claims of the principal and factor in such note, even if it had been the note of the purchaser himself, would have been sufficient to render the factor liable for the debt.

Pennsylvania. — In *Brown v. Delk, 132 Pa. St. 152*, a factor taking a note for the purchase price of goods sold in his own name and including therein the price of goods sold for other persons was held liable to his principal for the amount of the debt. In this case the court stated, however, that the note was taken with the obvious intention on the part of the factor of using it for his own purpose, and this, therefore, may have influenced the decision. See also *Brown v. Arrott, 6 W. & S. (Pa.) 402.*

2. Negotiating Note. — *Byrne v. Schwing, 6 B. Mon. (Ky.) 199*; *Goodenow v. Tyler, 7 Mass. 46, 5 Am. Dec. 22*; *Porter v. Zeiting, 1 Penny. (Pa.) 505*; *Myers v. Entringer, 6 W. & S. (Pa.) 44, 40 Am. Dec. 538*; *Johnson v. O'Hara, 5 Leigh (Va.) 456*. See also *Brown v. Delk, 132 Pa. St. 152.*

In *Porter v. Zeiting, 1 Penny. (Pa.) 505*, a factor took a note payable to himself, negotiated it, and credited his principal with the amount of it. It was held that the factor could not, where he was compelled to take up the note, charge the amount thereof back to his principal.

3. Negotiating Note for Benefit of Principal. — *Byrne v. Schwing, 6 B. Mon. (Ky.) 199*; *Greely v. Bartlett, 1 Me. 172, 10 Am. Dec. 54*. In the first of these cases the court, in speaking of

h. CARE OF FUNDS — In General. — It has been held that a factor, after the sale of the goods and the receipt of the proceeds, becomes, as regards the care of the funds, a mandatory of the principal;¹ and a factor holding and treating the proceeds, in whatever form they may be, as the property of his principal, apart from his own funds, is not chargeable with their loss, happening without his fault.²

Commingleing Funds. — The general rule of agency that an agent should keep the funds of his principal unmixed with his own or with the funds of others³ has been held equally applicable to factors.⁴

i. REMITTING PROCEEDS — (1) In General — When Unauthorized. — In the absence of any special agreement with the principal or instructions from him it is, as a general rule, the duty of the factor, on receipt of the proceeds of a sale, to retain them, notifying the principal to that effect, and if he remits the proceeds without instructions from the principal the remittance is at his own risk.⁵

Remittance When Authorized. — If, however, the factor has authority to remit, the remittance is at the risk of the principal, and the factor is bound only to exercise due diligence and good faith in regard to the matter,⁶ but he will, of

the right of a factor to negotiate purchase-price notes for the use of his principal, said: "Their attitude in that respect would, in effect, be that of sureties or guarantors, for the use of the consignors, and should they, upon the failure of the drawers, be liable and pay the notes, their right * * * to come upon the principals would be unquestionable."

1. Care of Funds. — *Thompson v. Woodruff*, 7 Coldw. (Tenn.) 407.

Funds Embezzled by Clerk. — On the ground that a factor has no power to delegate his authority, a factor has been held liable for funds embezzled by his clerk, to whom he had intrusted them. *Read v. Bertrand*, 4 Wash. (U. S.) 514.

2. Pinckney v. Dunn, 2 S. Car. 323.

3. See the title AGENCY, vol. 1, p. 1089.

4. Should Not Commingle Funds. — In *Pinckney v. Dunn*, 2 S. Car. 314, it was held that if a factor mixes the funds of his principal with his own, or uses them indiscriminately with his own funds, the principal may either seek satisfaction out of the whole estate with which his own has become undistinguishably commingled or may at his election treat his factor as a debtor for the amount thus used.

In *Vail v. Durant*, 7 Allen (Mass.) 408, 83 Am. Dec. 605, however, Merrick, J., said: "In the usual and ordinary course of business a factor does not and is not required to keep the money received upon the sale of goods of different consignors in separate and distinct parcels, but mingles all in a common mass, and with the like funds of his own, from whatever source derived."

Bank Deposits. — A factor depositing funds of his principal in a bank to his own credit is liable for the loss of the funds through the insolvency of the bank. *Cartmell v. Allard*, 7 Bush (Ky.) 483. See also *Wren v. Kirton*, 11 Ves. Jr. 382; *Farmers', etc., Nat. Bank v. Sprague*, 52 N. Y. 605; *Duguid v. Edwards*, 50 Barb. (N. Y.) 288.

5. Remittance Without Authority at Risk of Factor. — *Lucas v. Groning*, 1 Stark, 391, 2 E. C. L. 151, 2 Marsh 460, 7 Taunt. 164, 2 E. C. L. 164; *Johnson v. Martin*, 11 La. Ann. 27, 66

Am. Dec. 193; *Clark v. Moody*, 17 Mass. 145; *Leverick v. Meigs*, 1 Cow. (N. Y.) 668; *Heubach v. Rother*, 2 Duer (N. Y.) 227; *Halden v. Crafts*, 4 E. D. Smith (N. Y.) 490; *Kerr v. Cotton*, 23 Tex. 411. See also *Ferris v. Paris*, 10 Johns. (N. Y.) 285, wherein the court said that "the defendants, in the character of consignees or factors, were bound to pursue the directions of their principal, and, after apprising him of the sale, to wait for those directions."

Not Bound to Remit Without Instructions. — A factor apprising his principal of the sale of the goods may wait to receive directions as to the mode of remittance, and is not liable to an action until a default on his part in remitting or paying the proceeds according to the orders of his principal. *Ferris v. Paris*, 10 Johns. (N. Y.) 285; *Brink v. Dolsen*, 8 Barb. (N. Y.) 337.

In *Brown v. Arrott*, 6 W. & S. (Pa.) 402, it was held that where the principal is advised from time to time by his factor of the sales as they are made, and again of the receipt of the moneys as they are paid thereon, and, according to the understanding that exists between them, arising either from a special agreement or a previous course of dealing between them, or from the established usage or custom, if there be any, the principal is to call on the factor and receive his money or draw upon him for it, the latter may retain it until demanded. But where the factor is bound either by the agreement or previous course of dealing between them, or by the usage of trade in regard thereto, to forward the money to his principal, it is his duty to do so as he shall receive it, though it be only a part of what he expects, by the earliest opportunity, and no practice to the contrary will either justify or excuse his retaining it beyond such time unless the sum shall be so small as not to justify the expense of forwarding it.

6. Remittance when Authorized at Risk of Principal. — *Heubach v. Rother*, 2 Duer (N. Y.) 252; *Muller v. Bohlens*, 2 Wash. (U. S.) 378.

Dishonor of Bill Remitted. — If a factor purchases a bill of exchange from a person in good credit, pursuant to instructions, for the purpose of remitting the proceeds, he is not

course, be liable if he is guilty of negligence.¹

(2) *Liability on Indorsements.* — The question whether a factor who remits by note or bill of exchange becomes personally liable to his principal on his

responsible in case the bill is protested or dishonored. *Muller v. Bohlens*, 2 Wash. (U. S.) 378; *Chandler v. Hogle*, 58 Ill. 46; *Potter v. Morland*, 3 Cush. (Mass.) 384; *Leverick v. Meigs*, 1 Cow. (N. Y.) 645; *Heubach v. Rother*, 2 Duer (N. Y.) 252.

If, however, the factor, when directed to remit by bill, remits a bill which belongs to himself, instead of purchasing one for remittance, he is liable in case the bill is not paid. *Akin v. Bedford*, 5 Martin N. S. (La.) 502.

Duty to Inquire as to Credit of Drawee. — A factor remitting by bill of exchange need not, as a general rule, inquire into the credit of the drawee. *Leverick v. Meigs*, 1 Cow. (N. Y.) 645. In this case Woodworth, J., said: "As a general proposition, I apprehend that where a factor is directed to remit in bills, if he procure such as are drawn by persons of undoubted credit at the time, it is a compliance with the duty he has to perform. The person on whom the bill is drawn rests in the discretion of the drawer. The law presumes he has effects of the drawer in his hands. If the factor has no cause to doubt the fact, he may take the bill consistently with the duty he owes his principal, and will not be liable on the ground of negligence, although it should afterwards turn out that the drawee was not of known responsibility." But the factor must not be chargeable with negligence as to the standing of a drawee with regard to whom he has been put upon inquiry, or he may be held responsible. See the opinions of Woodworth, J., and Savage, C. J., in the case just cited.

Del Credere Commission. — The guaranty of a factor acting under a *del credere* commission extends, it has been said, only to the collection of the proceeds, and not to the remittance thereof. *Muller v. Bohlens*, 2 Wash. (U. S.) 378; *Heubach v. Rother*, 2 Duer (N. Y.) 227; *Leverick v. Meigs*, 1 Cow. (N. Y.) 645. In all these cases the rule was laid down with reference to a factor who had sold for cash and afterwards bought paper for transmission to the consignor. In *Leverick v. Meigs*, 1 Cow. (N. Y.) 645, the paper was payable directly to the consignor, and though the rule was laid down as stated the factor was held liable for want of care under the circumstances of the case in the selection of a solvent drawee for the paper. In *Heubach v. Rother*, 2 Duer (N. Y.) 227, the paper was payable to, and indorsed by, the factors, and the court considered them liable upon their indorsement, without regard to the general rule. In the report of *Muller v. Bohlens*, 2 Wash. (U. S.) 378, it does not appear to whom the paper was made payable. Part of the goods consigned were sold to I., and with the money received from them paper was bought by the factors, in accordance with their instructions, for transmission to their consignor. I. having become insolvent, the factors were held not liable, as they had bought a bill from a person in good credit in accordance with their principal's direction. Part of the goods were sold to W., and his bill was taken for the amount of the

purchase money. His insolvency was held to render the factor liable, the case coming within the guaranty created by their *del credere* commission.

Other cases have been supposed to lay down the stricter rule that the factor acting under a *del credere* commission is bound not only for the collection of the money, but for its safe transmission to his principal. *Lewis v. Brehme*, 33 Md. 412, 3 Am. Rep. 190; *M'Kenzie v. Scott*, 6 Bro. P. C. (Toml. ed.) 280. This latter case is discussed in the case preceding it. In both of them the factor was himself the indorser of the paper, and his liability was predicated thereon. As to the liability of a factor on such indorsement, see further *infra*, this subdivision, *Liability on Indorsements*.

General Instructions to Remit. — Where a factor is instructed generally to remit, without any instructions as to the mode of remittance, he will be discharged from liability if he remits in a mode usual in such business. *Ernest v. Stoller*, 5 Dill. (U. S.) 438; *Chandler v. Hogle*, 58 Ill. 46; *Potter v. Morland*, 3 Cush. (Mass.) 388. See also *Boyd v. Reed*, 6 Heisk. (Tenn.) 631; *Byers v. Harris*, 9 Heisk. (Tenn.) 652.

Special Instructions as to Remittance. — Where, however, special instructions are given the factor as to the manner in which the remittance shall be made, the factor must, of course, comply therewith. *Leverick v. Meigs*, 1 Cow. (N. Y.) 645; *Kerr v. Cotton*, 23 Tex. 411. See also *Foster v. Preston*, 8 Cow. (N. Y.) 198. See also *supra*, this section, *Fidelity to Instructions*.

In *Ernest v. Stoller*, 5 Dill. (U. S.) 438, factors at Kansas City were instructed to place the proceeds of a sale to the credit of the principal in the Exchange bank at Denver. The factors deposited the money in a bank at Kansas City for the credit of the Exchange bank. The Kansas City bank failed. It was held that it was the duty of the factors to have put the money in the Exchange bank, or to have adopted the usual and ordinary means to effect that end, and, having failed to do either, they were liable for the loss.

If a factor representing several foreign principals be instructed to remit in good bills of exchange, he is discharged on remitting the amount due to his several principals in one bill drawn by a house in good credit upon its agent, and giving his principals drafts upon such agent for their several amounts. *Schenkhous v. Gibbs*, 4 Dall. (Pa.) 136.

1. Negligence in Remitting Proceeds. — In *Smith v. Ward*, 3 La. Ann. 76, it was held that a shipment of specie by a factor to his principal without any letter of advice or other notice is not made with proper care, and if it is lost or stolen the loss must be borne by the factor.

In *Rourk v. Pegram*, 10 La. Ann. 394, a factor was held liable on a remittance by bill which was dishonored, where the bill was drawn payable at forty-five days after date, on

indorsement of the paper is to be decided by the principles of the law merchant. The liability of the factor is, of course, excluded by the making of an indorsement without recourse,¹ and several cases hold that the factor may prove that his indorsement with the knowledge and assent of his principal was made without intent to assume liability, but was for the sole purpose of facilitating collection.² These cases may be sustained upon the ground that such proof merely negatives the existence of consideration as between immediate parties,³ and there is authority for the proposition that the factor, if he receives no consideration for guaranteeing paper transmitted and does not undertake to do so by express contract, is not liable to his principal upon his indorsement.⁴ On the other hand, it has been held that a general indorsement without restrictive words renders the factor liable to the consignor upon paper transmitted to him.⁵

a place distant from the principal's residence, and by a house of doubtful credit, from which the factor had occasionally obtained accommodation.

Paying Proceeds to Wrong Persons.—A factor is bound to know his principal, and if he sells goods and pays or remits the proceeds to the wrong person, through mistake, he will be liable to his principal; and it has been held that where two persons of exactly the same name consigned goods to a factor, and he, in ignorance of the fact that there were two consignors, remitted the proceeds so that the whole amount came into the hands of one of them, the factor was liable to the other consignor for the proceeds of his consignment. *Yon v. Blanchard*, 75 Ga. 519.

But if the principal or his agent should so mark the goods as to mislead the factor as to the identity of the consignor, in consequence of which the proceeds were paid to the wrong person, the factor would not be liable. *Hays v. Warren*, 46 Mo. 189.

1. See *Goupy v. Harden*, 7 Taunt. 163, 2 E. C. L. 162, and the title **BILLS OF EXCHANGE AND PROMISSORY NOTES**, vol. 4, p. 276.

2. **Indorsement Merely to Facilitate Collection.**—*Kidson v. Dilworth*, 5 Price 564; *Lewis v. Brehme*, 33 Md. 412, 3 Am. Rep. 190. See also *Heubach v. Rother*, 2 Duer (N. Y.) 260; *Castrique v. Buttigieg*, 10 Moo. P. C. 94. In the last case the question was whether an agent who received money abroad for his principal, remitting to him by bill of exchange which he indorsed without reservation, was liable to his principal on such indorsements on failure of the acceptors to pay the bills. Upon the facts and correspondence it was found that the agent put his name on the bills, not intending his signature to operate as an indorsement in the ordinary way, but merely for the purpose of their more convenient and safe transmission. It was held that the agent was not liable upon his indorsement.

In *Lewis v. Brehme*, 33 Md. 412, 3 Am. Rep. 190, the rule was laid down that the indorsement by the agent in such a case imports *prima facie* liability on his part, but he is entitled to show as a matter of defense that it was not his intention that he should be personally charged by his indorsement, and if here was no intention to create personal liability none will exist as between himself and his principal.

3. See the title **BILLS OF EXCHANGE AND**

PROMISSORY NOTES, vol. 4, pp. 150, 199, 487, and the remarks of Bovill, C. J., in *Abrey v. Crux*, L. R. 5 C. P. 42, explaining *Castrique v. Buttigieg*, 10 Moo. P. C. 94.

4. **Factor Exempt in Absence of Consideration or Contract.**—*Sharp v. Emmet*, 5 Whart. (Pa.) 288, 34 Am. Dec. 554; *Byers v. Harris*, 9 Heisk. (Tenn.) 652. In these two cases the rule is laid down in the following terms: "It is now held that, between the agent and the principal, the agent remitting a bill for payment with his indorsement is not obliged, in order to exempt himself, to do so in express terms on the face of the indorsement. * * * The rule is that the indorsement of the factor must be construed by the circumstances under which it is made; and unless there be something to show that, in indorsing, he intended to render himself personally liable, or that he was bound to do so, it ought not to be so intended." In both cases stress is laid upon the fact that there is entire absence of consideration for the guaranty on the part of the factor. In the Maryland case above cited, *Lewis v. Brehme*, 33 Md. 412, 3 Am. Rep. 190, the agent was acting under a *del credere* commission, and so was in receipt of a consideration for his liability. Perhaps on this ground the presumption entertained in the Maryland case that the agent was liable may be reconciled with the presumption following from the doctrine of the two cases cited in this note that the agent is not liable.

5. **Liability Held to Be Created by Indorsement.**—*M'Kenzie v. Scott*, 6 Bro. P. C. (Toml. ed.) 280, where it was held that a *del credere* factor selling goods and taking an accepted bill from the purchaser which he exchanged for another bill payable to his own order, which he indorsed and transmitted to his principal, was personally liable for the amount of the bill, being, as the reporter observes, "personally liable under his commission *del credere* to satisfy his principal for the price of the goods sold." See the discussions of this case from opposite points of view in *Lewis v. Brehme*, 33 Md. 412, 3 Am. Rep. 190, and in *Leverick v. Meigs*, 1 Cow. (N. Y.) 645, (quoted under the title **DEL CREDERE AGENCY**, vol. 9, p. 187, note).

In *Le Fevre v. Lloyd*, 5 Taunt. 749, 1 E. C. L. 250, it was held that if a broker sells goods and draws on the buyer in favor of the principal, he will be liable as drawer upon the bill if it be dishonored, unless he use special

(3) *Cost of Remitting Proceeds.* — The cost of remitting the proceeds is, as a general rule, to be borne by the principal.¹

J. DUTY TO ACCEPT OR MEET DRAFTS DRAWN BY PRINCIPAL — General Rule. — As a general rule, a drawee of a bill of exchange is under no obligation to accept it unless he has, for a valuable consideration, expressly or impliedly agreed to do so;² and this rule applies as between principal and factor.³

Agreement to Accept Bill or Pay Draft. — The factor may, of course, by agreement, incur an obligation to pay drafts or accept bills drawn by his principal.⁴ And it is not necessary that the factor shall expressly undertake to do so; an obligation on his part may be inferred from the course of dealings or a usage of trade.⁵

K. DUTY TO ADVANCE FREIGHTS. — There is no unvarying rule of law which makes it the duty of the factor to advance from his own pocket moneys due for freight upon property consigned to him by his principals, and his duty to do so depends solely on the course of dealings between the parties.⁶

L. KEEPING AND RENDERING ACCOUNTS — Must Keep Regular Accounts. — The general rule of agency making it incumbent upon the agent to keep regular accounts of all his transactions and dealings in the subject-matter of the agency⁷ applies, of course, to factors.⁸

words to prevent it, and may be sued even by his principal, although he received no guaranty commission for incurring such personal responsibility.

In *Goupy v. Harden*, 7 Taunt. 159, 2 E. C. L. 159, 2 Marsh. 454, it was held that an agent purchasing foreign bills for his principal and indorsing them to him without qualification is liable to his principal on his indorsement, however small may be the commission which he gets upon the purchase.

That such a general indorsement creates a *prima facie* liability, which may be negatived by proof, see *Lewis v. Brehme*, 33 Md. 412, 3 Am. Rep. 190, set out in a preceding note to this paragraph.

1. *Cost of Remittance to Be Borne by Principal.* — In *Carter v. Cunningham*, 7 Met. (Mass.) 494, it was held that if it were prudent and according to the usual course of mercantile dealings to remit in specie, and if specie was above par, then the cost of obtaining specie with freight and insurance would be chargeable to the principal. So if it were prudent and usual to remit in exchange, then for the same reason the premium on exchange would be chargeable to the principal.

2. See the title *BILLS OF EXCHANGE AND PROMISSORY NOTES*, vol. 4, p. 469.

3. *Duty of Factor to Meet Drafts Drawn by His Principal.* — In *Moss v. Stokeley*, 95 Ga. 675, it was held that unless a factor has expressly or impliedly agreed to accept or pay a draft drawn by his principal, he is not liable in damages to the principal for failure to do so, though the principal had, at the time, funds in the factor's hands sufficient to meet the draft at the time when it was presented. See also *Kingston v. Wilson*, 4 Wash. (U. S.) 316; *Curtis v. Gibney*, 59 Md. 131; *Cowperthwaite v. Sheffield*, 1 Sandf. (N. Y.) 416, 3 N. Y. 243.

4. *Agreement to Accept Bill — Want of Funds.* — In *De Tastett v. Crousillat*, 2 Wash. (U. S.) 132, it was held that where a factor expressly agrees to accept bills drawn upon him, it is immaterial whether he had or had not funds in his hands, unless this had been made

a condition of the agreement to accept. *Washington, J.*, said: "A man may validly bind himself to accept bills without funds, and if the promise be general and the transactions fair he continues bound until a countermand is received."

5. *Implied Promise to Pay Draft.* — In *Moss v. Stokeley*, 95 Ga. 675, the declaration alleged that the plaintiff as a merchant shipped cotton to the defendants as factors with instructions to sell it and place the proceeds to his credit; that the plaintiff drew various drafts upon the defendants, which were promptly paid, and thereafter, having to his credit with them more than four hundred and fifty dollars, he drew upon them for four hundred dollars, but that the defendants refused to pay the draft. The declaration further alleged that this refusal was wanton and malicious and done for the purpose of injuring the plaintiff. It was held that an agreement by the defendants to pay the draft could be implied from such facts and therefore the declaration was sufficient after verdict.

Acceptance of Consignment with Notice of Draft. — In *Helm v. Meyer*, 30 La. Ann. 943, *Spencer, J.*, said: "There can be no doubt of the correctness of the general proposition that a consignee who accepts a consignment with the advice and notice that the consignor had drawn on him for a stated amount against the goods consigned, impliedly promises to accept and pay the draft and on refusal may be sued as for breach of contract." See also *Urquhart v. M'Iver*, 4 Johns. (N. Y.) 103.

Usage Imposing Obligation. — In *Schimmelpennich v. Bayard*, 1 Pet. (U. S.) 264, it was held that the principal has a right by the usage of trade to draw on effects in the hands of his factor, and that the factor must pay the draft if the shipment places funds in his hands.

6. *Duty to Advance Freight.* — *Cooper v. Hong Kong, etc., Banking Corp.*, 107 N. Y. 282, *reversing* 13 Daly (N. Y.) 183. *Compare The Ship Lavinia v. Barclay*, 1 Wash. (U. S.) 49.

7. See the title *AGENCY*, vol. 1, p. 1086.

8. *Must Keep Regular Accounts.* — *Clarke v.*

Must Render Account. — The factor should, without a demand from his principal, render an account within a reasonable time after the sale,¹ and he is, of course, bound to render an account when reasonably requested by his principal.²

m. DEGREE OF SKILL AND DILIGENCE REQUIRED OF FACTOR — General Rule. — A factor who receives a reward is required to use reasonable skill and diligence in his employment, that is, the degree of skill and diligence commonly employed by persons engaged in his line of business, and he is liable for losses incurred by reason of his failure to use such skill and diligence.³

Tipping, 9 Beav. 284; Keighler v. Savage Mfg. Co., 12 Md. 383, 71 Am. Dec. 600.

Lapse of Time — Disclosing Name of Purchaser. — Though it is a factor's duty to keep books in which shall be correctly entered all transactions on account of his principal, and though the latter is entitled to a correct copy of all entries, etc., still where a factor has rendered his accounts regularly and they were settled with full knowledge of all their items, and the names of the purchasers were not then required, it is unreasonable at any considerable distance of time thereafter to subject the factor to a demand for such names if his conduct has been honest and free from fraud. Keighler v. Savage Mfg. Co., 12 Md. 383, 71 Am. Dec. 600.

Book Entries. — Entries by a factor in his books of account are not conclusive upon the factor where they have not been communicated to the principal; but if they have been communicated to and acted on by the principal they cannot be impeached. Vantries v. Richey, 8 W. & S. (Pa.) 87. See the title DOCUMENTARY EVIDENCE, vol. 9, p. 877.

Failure to Enter Transactions Promptly — Books Discredited. — In Fordyce v. Peper, 16 Fed. Rep. 516, it was held that no credit would be given to the books of a factor who had transmitted false accounts of the sales, and did not enter the sales upon his books until months after they were made.

Unfavorable Presumption from Refusal to Account. — In Pope v. Barrett, 1 Mason (U. S.) 117, it was held that where the factor refuses to enter an account of sales the most unfavorable presumption of which the evidence admits ought to be made against him, in respect to the amount and value of the goods sold and unaccounted for. See also Clark v. Miller, 4 Wend. (N. Y.) 628.

Conclusiveness of Accounts — Current Accounts. — The current accounts between principal and factor are necessarily provisional and may be rectified for errors or omissions. Bloodworth v. Jacobs, 2 La. Ann. 25; Dunbar v. Bullard, 2 La. Ann. 810; William Anson Wood Mower, etc., Co. v. Thayer, 50 Hun (N. Y.) 516. Compare Walter v. Richardson, 11 Rich. L. (S. Car.) 466.

Account Stated. — A factor's account transmitted to his principal and retained beyond a reasonable time, without objection, becomes an account stated. Wittkowski v. Harris, 64 Fed. Rep. 712; Consequa v. Fanning, 3 Johns. Ch. (N. Y.) 587; Dows v. Durfee, 10 Barb. (N. Y.) 213; Bruen v. Hone, 2 Barb. (N. Y.) 586. See also the title ACCOUNTS, vol. 1, p. 448.

Opening Stated or Settled Accounts. — Settled or stated accounts between factor and principal are, as a general rule, conclusive between

the parties. Gore v. Campbell, 4 Ill. App. 661; Bruen v. Hone, 2 Barb. (N. Y.) 586; Vantries v. Richey, 8 W. & S. (Pa.) 87; Walter v. Richardson, 11 Rich. L. (S. Car.) 466.

On the ground of omission, fraud, mistake, accident, or undue advantage, an account, even after it has been settled or stated, may however be opened, surcharged, or falsified. Bloodworth v. Jacobs, 2 La. Ann. 25; Dunbar v. Bullard, 2 La. Ann. 810; Bruen v. Hone, 2 Barb. (N. Y.) 586.

See the title ACCOUNTS, vol. 1, p. 460 *et seq.*

1. Must Render Account Within Reasonable Time. — Tyree v. Parham, 66 Ala. 431; Haas v. Damon, 9 Iowa 589; Clark v. Moody, 17 Mass. 145; Dodge v. Perkins, 9 Pick. (Mass.) 387; Langley v. Sturtevant, 7 Pick. (Mass.) 214; Eaton v. Welton, 32 N. H. 352; Lyle v. Murray, 4 Sandf. (N. Y.) 590; Cooley v. Betts, 24 Wend. (N. Y.) 203; Pinckney v. Dunn, 2 S. Car. 314. See also Heubach v. Rother, 2 Duer (N. Y.) 252; Schee v. Hassinger, 2 Binn. (Pa.) 325.

In Dodge v. Perkins, 9 Pick. (Mass.) 387, Putnam, J., in speaking of the duty of the factor, said: "He would be held, according to the course of business, to give his principal information of his progress in the transaction, and if he should neglect unreasonably to forward his account to his employer, this negligence would be a breach of his contract and subject him to an action."

2. Must Render Account on Demand. — In Terwilliger v. Beals, 6 Lans. (N. Y.) 403, it was said that the rule that the factor, like other agents, is bound to render his account whenever reasonably requested to do so was too clear for discussion, and it was held that by failure to do so the factor lost his lien.

In Collyer v. Dudley, T. & R. 421, it was held that where an agent fails to render his accounts within a reasonable time he must bear the cost of a suit instituted to have the accounts taken, and it was no excuse that he offered to pay on account a gross sum which, it turned out, would have covered all that was due from him.

Refusal Must Have Been Unreasonable. — To render the factor liable for refusal to account, his refusal must have been unreasonable. Torrey v. Bryant, 16 Pick. (Mass.) 528.

3. Reasonable Skill and Diligence Required — United States. — Burrill v. Phillips, 1 Gall. (U. S.) 360; Evans v. Potter, 2 Gall. (U. S.) 13; Marshall v. Williams, 2 Biss. (U. S.) 255; Kingston v. Wilson, 4 Wash. (U. S.) 310; Rice v. Brook, 20 Fed. Rep. 614; Eichel v. Sawyer, 44 Fed. Rep. 847; National Bank v. City Bank, 103 U. S. 668.

Alabama. — Foster v. Bush, 104 Ala. 662.

Errors of Judgment. — Where the factor uses reasonable skill and diligence he will not be held liable for losses on account of errors of judgment.¹

Question of Law or Fact. — Whether or not a factor has acted with the skill and diligence which is required of an agent in his position depends usually upon the circumstances of each particular case and is a question of fact for the jury under proper instructions from the court.²

2. Of Principal to Factor — *a.* REMUNERATION FOR SERVICES — (1) *In General* — **Implied Promise for Compensation.** — To entitle the factor to compensation it is not necessary that there should have been an express contract therefor; as

Georgia. — *Brown v. Clayton*, 12 Ga. 564.

Illinois. — *Deshler v. Beers*, 32 Ill. 368, 83 Am. Dec. 274; *Phillips v. Moir*, 69 Ill. 155; *Weaver v. Poyer*, 70 Ill. 567; *Foster v. Waller*, 75 Ill. 464.

Indiana. — *Babcock v. Orbison*, 25 Ind. 75.

Iowa. — *Howe v. Sutherland*, 39 Iowa 484; *Bartle v. Phelps*, 39 Iowa 498; *Durant v. Fish*, 40 Iowa 559.

Kentucky. — *Atkinson v. Burton*, 4 Bush (Ky.) 299.

Louisiana. — *Smith v. Ward*, 3 La. Ann. 76; *Johnson v. Martin*, 11 La. Ann. 27, 66 Am. Dec. 193.

Maine. — *Greely v. Bartlett*, 1 Me. 172, 10 Am. Dec. 54; *Stone v. Waitt*, 31 Me. 413, 52 Am. Dec. 621.

Maryland. — *Ewalt v. Harding*, 16 Md. 160; *Adams v. Capron*, 21 Md. 186, 83 Am. Dec. 566.

Massachusetts. — *Savage v. Birkhead*, 20 Pick. (Mass.) 167.

Missouri. — *Bernet v. Hockaday*, 61 Mo. App. 627.

New York. — *Milbank v. Dennistoun*, 1 Bosw. (N. Y.) 246; *Leverick v. Meigs*, 1 Cow. (N. Y.) 645; *Drummond v. Wood*, 2 Cai. (N. Y.) 310; *Linsly v. Carpenter*, 4 Robt. (N. Y.) 200; *Jervis v. Hoyt*, 5 Thomp. & C. (N. Y.) 199; *Heinemann v. Heard*, 50 N. Y. 27.

North Carolina. — *Govan v. Cushing*, 111 N. Car. 458; *Spruill v. Davenport*, 116 N. Car. 34.

South Carolina. — *McCants v. Wells*, 3 S. Car. 569; *Dickson v. Screven*, 23 S. Car. 212.

Texas. — *Vincent v. Rather*, 31 Tex. 77, 98 Am. Dec. 516.

See also the title AGENCY, vol. 1, p. 1063; and as to the standard or degree of care, see also the titles BAILMENTS, vol. 3, p. 742; NEGLIGENCE.

Burden of Proof. — The factor will not be presumed to have been negligent, without proof. *Gaither v. Myrick*, 9 Md. 118, 66 Am. Dec. 316.

Termination of Agency. — Where, however, the factor terminates the relation between himself and his principal, and notifies the principal to remove the goods, it seems that he will be liable if the principal fails to remove the goods within a reasonable time only for gross negligence. *Barrows v. Cushway*, 37 Mich. 481.

Accidental Losses. — The factor is not liable for the loss or destruction of goods through accidental causes which could not have been prevented by the exercise of reasonable skill and diligence on his part. *Gunn v. Knoop*, 73 Ga. 510; *Lamoureux v. Fowler*, 2 La. 174; *Gillet v. Theall*, 16 La. 46; *Huguenin v. Legare*, 11 Rich. L. (S. Car.) 204.

In *Johnson v. Martin*, 11 La. Ann. 27, 66 Am. Dec. 193, it was held that a factor was not bound to provide against extraordinary risks.

In *Foster v. Bush*, 104 Ala. 662, it was held that where cotton consigned to a factor was put on a wharf because by reason of the destruction of several warehouses in the city it was impossible to secure storage room, the factor was not liable for damages to the cotton from exposure to the weather.

Negligence in Employment of Inspector. — In *Spruill v. Davenport*, 116 N. Car. 34, it was held that a factor was liable for negligence in the employment of an inspector to class the goods.

Negligence in Ascertaining Responsibility of Purchaser. — In *Foster v. Waller*, 75 Ill. 464, a factor was held liable for a loss due to the insolvency of a purchaser to whom he sold the goods on credit, where he might by reasonable effort and inquiry have learned of the purchaser's insolvency.

Inability to Obey Instructions. — Where a factor uses reasonable diligence to carry out the instructions of his principal and is unable to do so, he incurs no liability to his principal. *De Tastett v. Crousillat*, 2 Wash. (U. S.) 132; *Durant v. Fish*, 40 Iowa 559.

Failure to Await Instructions. — In *Conway v. Lewis*, 120 Pa. St. 215, 6 Am. St. Rep. 700, it was held that where a factor wrote to his principal for instructions it was not negligence to act without awaiting an answer.

Use of Due Diligence Relieves Factor from Liability. — Where the factor acts with due diligence and fidelity in discharging his duties he incurs no liability to his principal. *Chandler v. Hogle*, 58 Ill. 46; *Bogert v. Dorsey*, 14 La. 430; *Jervis v. Hoyt*, 2 Hun (N. Y.) 637; *Van Alen v. Vanderpool*, 6 Johns. (N. Y.) 69, 5 Am. Dec. 192.

1. Errors of Judgment. — *Moore v. Mourgue*, 2 Cowp. 480; *Leverick v. Meigs*, 1 Cow. (N. Y.) 645; *Lotard v. Graves*, 3 Cai. (N. Y.) 238; *Van Alen v. Vanderpool*, 6 Johns. (N. Y.) 72, 5 Am. Dec. 192. See *supra*, this section, *Duty in Regard to the Sale*.

In *Drummond v. Wood*, 2 Cai. (N. Y.) 310, the court said that where no fraud is charged upon a factor his conduct should receive a liberal and favorable construction.

2. Question for Jury or Court. — See *Eichel v. Sawyer*, 44 Fed. Rep. 845; *Heinemann v. Heard*, 50 N. Y. 27, 62 N. Y. 452.

In some jurisdictions it is a question of law for the court upon facts found by the jury. *Ewalt v. Harding*, 16 Md. 160.

See for a general treatment of this question the titles NEGLIGENCE; QUESTIONS OF LAW AND FACT.

a general rule the law will imply a promise on the part of the principal to pay for the services of the factor.¹

Services Not Completely Performed. — Where the service is begun and an important part performed, and the factor is prevented by some insurmountable obstacle from completing it, and is himself without fault, he is entitled to proportionate compensation.²

Amount of Compensation. — In the absence of a special agreement, a factor is entitled upon the performance of his services to the usual and customary commissions³ upon the amount of the goods sold.⁴

(2) *On What Transactions Commissions Allowable* — (a) **In General.** — The right to compensation is usually ascertained by a percentage on the value of the property sold.⁵

Sales. — The right of a factor to commissions on sales extends only to actual and unconditional sales,⁶ and, as a general rule, only to sales made by the

1. **Implied Promise for Compensation.** — *Turnbull v. Pomeroy*, 140 Mass. 117; *Trotter v. Curtis*, 19 Johns. (N. Y.) 160, 10 Am. Dec. 211; *Masterson v. Masterson*, 121 Pa. St. 605; *Mills v. Johnston*, 23 Tex. 308. See also *Foster Black Co. v. Fennessey*, 159 Mass. 538.

To entitle the factor to commissions on an implied contract it is not necessary that the factor should have been in the regular business of commission merchant. *Masterson v. Masterson*, 121 Pa. St. 605.

In *Brown v. Harrison*, 17 Ala. 774, it was held that proof of a custom among factors to charge a certain commission was evidence of an implied agreement for its payment.

Unauthorized Factor. — A person who acquires possession of goods and sells them without the consent of the owner is not entitled to a commission. *M'Kean v. Wagenblast*, 2 Grant's Cas. (Pa.) 462. Nor is a factor entitled to commissions for unauthorized sales afterwards rescinded by the principal. *Miller v. Price*, (Cal. 1895) 39 Pac. Rep. 781.

A ratification by the principal of sales previously unauthorized gives a right to commissions. *Lubert v. Chauviteau*, 3 Cal. 458.

Evidence of Contract to Pay Commission. — The receipt without objection of periodical reports of sales on which commissions are charged is evidence of an agreement to pay commissions. *Gore v. Campbell*, 4 Ill. App. 661.

Commissions Are Earned when the services are rendered. *Masterson v. Masterson*, 121 Pa. St. 605.

In the case of *del credere* factors it is held that the commissions are earned when the guaranty is made, and not when the account is collected. *Springville Mfg. Co. v. Lincoln*, 16 Daly (N. Y.) 318.

2. **Services Not Completely Performed.** — *Albion Phosphate Min. Co. v. Wyllie*, 77 Fed. Rep. 541.

3. *Masterson v. Masterson*, 121 Pa. St. 605.

4. *Sawyer v. Lorillard*, 48 Ala. 332.

In *Swilley v. Lyon*, 18 Ala. 552, the court held that a charge for advances by a factor of five per cent. in addition to legal interest, if intended as a fair compensation, is not illegal. See also *Brown v. Harrison*, 17 Ala. 774.

In *Mills v. Johnston*, 23 Tex. 308, the court held that, in a suit by a factor to recover commissions charged by him, the jury must be satisfied that the charge was a reasonable one.

Evidence of Reasonableness of Charge. — In

Brown v. Harrison, 17 Ala. 774, it was held that proof of a custom among factors to charge a certain commission was evidence of the reasonableness of such charges.

Double Commissions. — As heretofore stated, a factor cannot, as a rule, act for both the purchaser and the seller; still he may do so when it is clearly understood that it is to be done, and thereby be entitled to commissions from both purchaser and seller. *Talcott v. Chew*, 27 Fed. Rep. 273.

5. **On What Transactions Commissions Allowable.** — *Sawyer v. Lorillard*, 48 Ala. 332; *Stevenson v. Maxwell*, 2 Sandf. Ch. (N. Y.) 273.

A factor is not entitled to commission on the payment of his own debt to the principal. *Pavret v. Perot*, 2 Yeates (Pa.) 185. See also *Jelison v. Lee*, 3 Woodb. & M. (U. S.) 368. Nor will a usage sanction such a charge, as it is unreasonable. *Pavret v. Perot*, 2 Yeates (Pa.) 185; *Jelison v. Lee*, 3 Woodb. & M. (U. S.) 368.

Del Credere Commission. — A *del credere* commission is demandable only when the sale is made on credit. *Wittkowski v. Harris*, 64 Fed. Rep. 712. And it cannot be recovered though the sale is made on credit, but is nevertheless paid for in cash in consideration of a discount. *Kingston v. Wilson*, 4 Wash. (U. S.) 310.

A *del credere* commission is demandable also, only when the factor is bound by his agreement to guarantee his sales, and therefore a factor is not entitled to a guaranty commission for a voluntary guaranty. *Colton v. Dunham*, 2 Paige (N. Y.) 267. See also *Wittkowski v. Harris*, 64 Fed. Rep. 712.

6. **Sales on Trial.** — In *Sanderson v. Tinkham Smoke Consumer Co.*, 83 Iowa 446, it was held that a factor was not entitled to commissions on sales on trial.

Goods Destroyed. — Where the goods are destroyed or injured so as to prevent a sale, the factor will lose the commissions to which he would have been entitled in case of a sale. *Corlies v. Estes*, 31 Vt. 653.

In *Miller v. Tate*, 12 La. Ann. 160, it was held that where a factor, in violation of his duty, fails to insure the goods, which are destroyed by fire, and therefore becomes liable as an insurer, he can treat the destruction of the goods as a sale so as to entitle him to commissions.

factor.¹ Still, of course, the parties may by express contracts provide that commissions shall be paid on sales by the principal or his other agents.²

Rescinded Sales. — A factor can demand only proportionate compensation where the contract of sale procured by him is rescinded with his consent and advice.³

Credit Sales. — If a loss occurs because of a sale on credit, the factor will or will not be entitled to commissions on such sales according to the usage of commerce⁴ or the agreement of the parties.⁵

(b) **Acceptances and Advances.** — Where a factor makes advances to his principal, or accepts bills drawn by the latter for his accommodation, the factor is, as a general rule, entitled to charge a commission therefor in addition to or in excess of the legal interest on the funds advanced.⁶ In some jurisdictions,

1. **Sales Not Made by Factor.** — *Sawyer v. Lord*, 48 Ala. 332.

In *Corlies v. Estes*, 31 Vt. 653, a principal contracted to consign certain goods to a factor for sale on a certain commission, but failed to consign a portion of the goods, which he himself sold, and it was held that the factor was not entitled to commissions on the goods sold by the principal.

In *Lyons v. Lallande*, 9 La. Ann. 601, it was held that in the absence of an agreement between the parties, the mere fact of advances by the factor on which the usual commissions and interest have been charged does not authorize a charge for commissions on portions of the principal's crops shipped to other factors.

2. **Agreement for Compensation on Sales Not Made by Factor.** — Where a factor made advances on the growing crop of his principal, with the understanding that the entire crop should be shipped to him for sale, and the principal shipped part of the crop to another merchant, it was held that the factor could recover the commission he would have charged on the portion of the crop shipped to such other merchant. *Thornhill v. Picard*, 24 La. Ann. 159.

In *Matthews v. Coe*, 70 N. Y. 239, wherein a factor made advances on consignments on which he was to receive legal interest beside his commissions, it was held immaterial that the principal afterwards took charge of and sold the goods. See also *Cockle v. Flack*, 93 U. S. 344.

A factor advanced money for the purchase of goods which were to be sold by him. The principal repaid the money borrowed and gave his note for the commission stipulated for, under an agreement that the note was to be returned if the goods were shipped before its maturity. It was held that on failure of the principal to ship the goods the factor was entitled to recover on the note. *Ash v. Scott*, 76 Iowa 27.

Noncompliance by Factor with Contract. — The factor may, by his failure to comply with the terms of the contract which entitled him to commissions on sales, though made through other factors, forfeit his right to such commissions; and it has been held that he does so where he fails to comply with his agreement to advance the money necessary to pay for the goods purchased by his principal, and the latter is forced to borrow money from other factors to whom he shipped the goods for sale. *Bramblett v. Feltman*, (Ky. 1896) 35 S. W. Rep. 633.

3. **Rescinded Sales.** — *Albion Phosphate Min. Co. v. Wyllie*, 77 Fed. Rep. 550.

4. **Credit Sales.** — In *Clark v. Moody*, 17 Mass. 145 *Parker, C. J.*, said: "Was it right for the defendants [factors] to charge commissions on this sale, the fruits of which were lost? This must depend upon the usage among merchants. If such commissions are not usually charged, it was improper for the defendants to charge them, and the balance represented by them was not the true balance. If, on the other hand, it is considered proper among merchants, and is usual, to charge a commission in such cases, the account is right in that particular."

5. Goods were consigned under an agreement with the consignor to pay commissions within a specified time after receipt of bills. The factor agreed to keep an account of all sales and to remit all accounts upon the respective days of their maturity, remittances to be made daily if the amounts reached one thousand dollars. It was held that the factor was not entitled to commissions on proceeds not remitted. *Hockanum Co. v. Lincoln*, 16 Daly (N. Y.) 325.

6. **Commissions on Advances and Acceptances Allowed** — *England*. — *Floyer v. Edwards*, 1 Cowp. 112.

Alabama. — *Swilley v. Lyon*, 18 Ala. 552; *Brown v. Harrison*, 17 Ala. 774.

Connecticut. — *De Forest v. Strong*, 8 Conn. 513.

New York. — *Seymour v. Marvin*, 11 Barb. (N. Y.) 80; *Matthews v. Coe*, 70 N. Y. 239; *Ketchum v. Barber*, 4 Hill (N. Y.) 224, 7 Hill (N. Y.) 444; *Suydam v. Westfall*, 4 Hill (N. Y.) 211; *Suydam v. Bartle*, 10 Paige (N. Y.) 94; *Trotter v. Curtis*, 19 Johns. (N. Y.) 160, 10 Am. Dec. 211; *Smith v. Marvin*, 27 N. Y. 137.

Texas. — *Mills v. Johnston*, 23 Tex. 308.

Vermont. — *Corlies v. Estes*, 31 Vt. 653.

See also *Cockle v. Flack*, 93 U. S. 344; *Hutchinson v. Hosmer*, 2 Conn. 341; *Ex p. Henson*, 1 Madd. 110; *Nourse v. Prime*, 7 Johns. Ch. (N. Y.) 69, 11 Am. Dec. 403; and the title *USURY*.

Commission for Advances to Pay Accepted Bill. — Where a factor has accepted a bill drawn by the principal and charged a commission for so doing, and on failure of the principal to furnish funds to meet the bill the factor is bound to advance his own funds therefor, he may charge an additional commission on such advances. *Mills v. Johnston*, 23 Tex. 308.

Dry Balance. — Where the principal is indebted to his factor on a general balance, carried forward from one year to another, for advances on which commissions have been charged, the factor cannot treat such balance

however, while the right of the factor to charge a commission for accepting bills or indorsing notes for the accommodation of the principal is recognized,¹ the factor is not permitted to charge in excess of the legal rate of interest commissions on advances from his own funds.²

Cloak for Usury. — To entitle the factor to charge a commission on advances, however, the transaction must be a *bona fide* charge, and not merely a cloak for taking a higher rate of interest than the law permits.³

(3) **Loss of Commissions — Forfeiture for Misconduct.** — A factor will forfeit his right to commissions where he is guilty of misconduct⁴ or gross negligence in the performance of his duties,⁵ or of fraud,⁶ or in some cases

as a new advance and charge an additional commission thereon. *Mills v. Johnston*, 23 Tex. 303. See also *Walters v. McGirt*, 8 Rich. L. (S. Car.) 287.

1. Commission on Accommodation Paper for Principal Allowed. — *Patterson v. Leake*, 5 La. Ann. 548; *Byrne v. Grayson*, 15 La. Ann. 457; *Smetz v. Kennedy*, *Riley L.* (S. Car.) 218. See also *Norwood v. Waddell*, 11 La. 493; *State Bank v. Briscoe*, 3 La. Ann. 157.

2. Commissions in Excess of Legal Rates on Advances Not Allowed. — *Cheesborough v. Hunter*, 1 Hill. L. (S. Car.) 400; *Smetz v. Kennedy*, *Riley L.* (S. Car.) 218.

In *Keane v. Branden*, 12 La. Ann. 20, it was held that where a factor has made advances to the principal from his own resources all charges for negotiations, discounts, and commissions beyond the legal rate of interest are illegal.

3. Commissions Not Chargeable as a Cloak for Usury. — *Floyer v. Edwards*, 1 Cowp. 112; *Cockle v. Flack*, 93 U. S. 344; *Brown v. Harrison*, 17 Ala. 774; *De Forest v. Strong*, 8 Conn. 513; *Suydam v. Bartle*, 10 Paige (N. Y.) 94; *Trotter v. Curtis*, 17 Johns. (N. Y.) 160, 10 Am. Dec. 211; *Smith v. Marvin*, 27 N. Y. 137.

See the title *USURY*.

Usury a Question of Fact. — And the question whether or not the charge is a cloak for usurious interest is a question of fact for the determination of the jury. *Brown v. Harrison*, 17 Ala. 774; *De Forest v. Strong*, 8 Conn. 513; *Suydam v. Bartle*, 10 Paige (N. Y.) 94; *Trotter v. Curtis*, 17 Johns. (N. Y.) 160, 10 Am. Dec. 211; *Smith v. Marvin*, 27 N. Y. 137.

4. Forfeiting Commissions — Misconduct. — Where a factor misconducts himself in the business of his agency so that by reason of his misconduct, negligence, or fraud his services have not been of any benefit to his principal, or have not proved as beneficial as they otherwise would have been, he forfeits his right to compensation. *Boston Carpet Co. v. Journeay*, 1 Daly (N. Y.) 190.

Failure to Exact Cash Payment. — In *Albion Phosphate Min. Co. v. Wyllie*, 77 Fed. Rep. 541, it was held that the factor's failure to exact a sum required by the contract of sale to be paid on delivery of the goods did not necessarily forfeit his right to commissions.

Violating Instructions or Contract. — A factor to whom goods are consigned for sale is not entitled to commissions for making sales, where he violates the instructions of his principal or his contract in regard thereto. *Ball v. Clark*, 28 Fed. Rep. 179; *Zurn v. Noedel*, 113 Pa. St. 336.

Sale Below Price Limited. — In *Union Hardware Co. v. Plume, etc., Mfg. Co.*, 58 Conn.

219, it was held that where the factor sold goods below the price limited, the principal could recover the difference between the price received and the price limited, but that the factor would be entitled to a deduction for commissions. See also *Dalby v. Stearns*, 132 Mass. 230; *Cothran v. Ellis*, 107 Ill. 413; *Levinson v. Balfour*, 34 Fed. Rep. 382.

Negligence of Factor as Defense to Action for Commissions. — Negligence of the factor in the discharge of his duties may be set up in defense of an action by the factor to recover his commissions, etc. *Brown v. Clayton*, 12 Ga. 564; *Dodge v. Tileston*, 12 Pick. (Mass.) 328; *George Campbell Co. v. Angus*, 91 Va. 438. See also *Basten v. Butter*, 7 East 479; *Farnsworth v. Garrard*, 1 Campb. 38.

5. Gross Negligence. — *White v. Chapman*, 1 Stark. 113, 2 E. C. L. 51; *Fordyce v. Peper*, 16 Fed. Rep. 516; *Talcott v. Chew*, 27 Fed. Rep. 273; *Dodge v. Tileston*, 12 Pick. (Mass.) 328. See also *Montrion v. Jefferys*, 2 C. & P. 113, 12 E. C. L. 50; *Hammond v. Holiday*, 1 C. & P. 384, 11 E. C. L. 427; *Denew v. Daverell*, 3 Campb. 451; *Hill v. Featherstonhaugh*, 7 Bing. 569, 20 E. C. L. 244.

6. Fraud. — Where the factor buys or sells goods for his principal at one price and fraudulently represents that he has sold them at another price, and the principal is put to the expense of litigation to secure his rights, the factor forfeits his right to commissions. *Fordyce v. Peper*, 16 Fed. Rep. 516; *Norman v. Peper*, 24 Fed. Rep. 406; *Talcott v. Chew*, 27 Fed. Rep. 273; *Vennum v. Gregory*, 21 Iowa 326; *Brack v. Hart Commission Co.*, 57 Mo. App. 605.

In *Fish v. Seeberger*, 154 Ill. 30, it was held that a factor who conceals from his principal the fact that he has collected insurance money on goods consigned which were damaged by fire, and with intent to defraud his principal refuses to render an account of the moneys received, forfeits all right to commissions.

Misappropriation of Proceeds. — Where a factor appropriates to his own use the proceeds of the goods sold, and fails to render an account to his principal, he will be held to have forfeited his right to compensation. *Brannan v. Strauss*, 75 Ill. 234. See also *Segar v. Parrish*, 20 Gratt. (Va.) 682.

Delay in Remitting Proceeds. — Where a factor is required to remit the proceeds from time to time, but does not remit promptly and becomes insolvent, he is not guilty of embezzlement so as to deprive him of the right to commissions. *Springville Mfg. Co. v. Lincoln*, 16 Daly (N. Y.) 318. Compare *Hockanum Co. v. Lincoln*, 16 Daly (N. Y.) 325.

where he fails to keep proper accounts.¹

Guaranty as to Amount of Sales. — If the factor guarantees to his principal that he shall realize a certain amount from the sales, he will not be allowed commission where such allowance would bring the amount received by the principal below the amount guaranteed by the factor.²

b. REIMBURSEMENT — (1) *Expenditures.* — A factor, like any other agent,³ is entitled to be reimbursed for all expenditures made and incurred in carrying into effect the purposes of his employment; and aside from the right of the factor to charge in his accounts the expenses incurred in the sale,⁴ the principal is personally liable to the factor therefor,⁵ provided always that such expenditures are made in good faith and without negligence and are necessary to protect and promote the interest of the principal in the subject-matter of the agency.⁶

(2) *Advances to Principal* — (a) *In General.* — Advances by the factor to the principal are held to be made not only on the faith of the goods consigned, but also on the personal credit of the principal, and as a general rule assumpsit on an implied contract lies against the principal therefor.⁷ And so where the

1. **Improper Accounts.** — A factor may forfeit his right to commissions by a failure to keep proper accounts. *White v. Lincoln*, 8 Ves. Jr. 363; *Boston Carpet Co. v. Journeay*, 1 Daly (N. Y.) 190. See also *Smith v. Crews*, 2 Mo. App. 269.

Recovery of Commissions Paid on False Account. — Where, however, the factor properly enters the sales in his account books, the fact that he misrepresents to his principal, in the account rendered to him, the amount of the sales, will not entitle the principal to recover commissions paid. *Boston Carpet Co. v. Journeay*, 1 Daly (N. Y.) 190, *affirmed* on other points in 36 N. Y. 384.

2. **Guaranty as to Price.** — *Lehmann v. Schmidt*, 87 Cal. 15; *Dalton v. Goddard*, 104 Mass. 497; *Holt's Estate*, 4 Del. Co. Rep. (Pa.) 363.

3. See the title *AGENCY*, vol. I, p. 1117.

4. **Expenses Incurred Chargeable in Account.** — In *Brander v. Lum*, 11 La. Ann. 217, it was held that a factor may contract by the year with a cotton press for the storage, drayage, and labor of all cotton consigned to him, and in making up his account sales charge his several principals a fair apportionment of such charge.

Cost of Action Against Wrongdoer. — In *Curtis v. Barclay*, 7 D. & R. 539, 5 B. & C. 141, 11 E. C. L. 181, it was held that where a factor was forced to bring an action against a wrongdoer who withheld the possession of the goods, he was entitled to set off the expenses of such action when sued by the principal for the balance of the proceeds.

Set-off of Expenses Incurred. — In an action by the principal for the proceeds of goods sold by the factor, the latter may set off, without pleading them, the expenses incurred in the sale of the goods. This proposition is based on the ground that the balance only after deducting such expenses is the debt due to the principal. *Brown v. Clayton*, 12 Ga. 564. See also *Curtis v. Barclay*, 5 B. & C. 141, 11 E. C. L. 181, 7 D. & R. 539.

5. **Personal Liability of Principal for Expenditures.** — *Brown v. Clayton*, 12 Ga. 564; *Byrne v. Doughty*, 13 Ga. 52; *Perin v. Parker*, 126 Ill. 201, 9 Am. St. Rep. 571; *Brander v. Lum*, 11

La. Ann. 217; *Folsom v. Mussey*, 8 Me. 400, 23 Am. Dec. 522; *Carter v. Cunningham*, 7 Met. (Mass.) 494. See also *Earl Fruit Co. v. Thurston Cold Storage, etc., Co.*, 60 Minn. 351.

Expenses of Fitting Goods for Market. — The factor may recover from his principal the necessary expenses incurred in fitting the goods for market, where they have been damaged while in transit to him. *Brown v. Clayton*, 12 Ga. 564. See also *Mason v. Bradley*, 74 Wis. 189.

Storage. — In *Mobile, etc., R. Co. v. Whitney*, 39 Ala. 468, it was held that the factor could recover from his principal in assumpsit for the cost of storing the goods.

6. **Reasonableness of and Necessity for Expenditures.** — *Byrne v. Doughty*, 13 Ga. 46. See also *Monnet v. Merz*, 127 N. Y. 151.

In *Waterman v. Bowler*, (Supreme Ct.) 19 N. Supp. 491, a factor was employed to sell a team of horses. The agreement stipulated that the plaintiff should be liable for the keep of the horses, etc., and that the factor should own half of the amount in excess of a certain sum, and also provided that the factor should handle the team as he should "see fit." It was held that the principal was not liable for a present by the factor to the coachman of the purchaser, made to effect the sale. This case was decided on the ground that the specification of the expenses which should be borne by the principal excluded his liability for all others.

7. **Principal Personally Liable for Payment of Advances** — *England.* — *Graham v. Ackroyd*, 10 Hare 192.

Canada. — *Stewart v. Lowe*, 24 U. C. Q. B. 434; *Gooderham v. Marlatt*, 14 U. C. Q. B. 228; *Craig v. Corcoran*, 23 U. C. Q. B. 441; *Cowie v. Apps*, 22 U. C. C. P. 589.

United States. — *Bainbridge v. Wilcocks*, 1 Baldw. (U. S.) 536; *Bradley v. Richardson*, 2 Blatchf. (U. S.) 343; *Burrill v. Phillips*, 1 Gall. (U. S.) 360; *Kufek v. Kehl*, 19 Fed. Rep. 198; *Peisch v. Dickson*, 1 Mason (U. S.) 9.

Alabama. — *Martin v. Pope*, 6 Ala. 532, 41 Am. Dec. 66; *Mobile, etc., R. Co. v. Whitney*, 39 Ala. 468.

Georgia. — *Brown v. Clayton*, 12 Ga. 564. *Illinois.* — *Perin v. Parker*, 126 Ill. 201, 9 Am. St. Rep. 571; *Blandford v. Wing Flour Mill Co.*, 24 Ill. App. 596.

goods are sold and the proceeds are insufficient to pay the expenditures and advances by the factor, he may recover the difference from his principal.¹

Waiver of Personal Liability of Principal. — The factor may, of course, by agreement, waive his recourse against the principal personally and limit his remedy for the recovery of his advances to the goods consigned.²

Forfeiture in Whole or in Part of Right to Reimbursement. — The factor may, by his gross negligence, fraud, or misconduct in his agency whereby the goods are lost entirely, forfeit his right to be reimbursed for advances;³ or he may, by negligence which causes injury to his principal, lose his right *pro tanto*.

Louisiana. — *Sevin v. Caillouet*, 30 La. Ann. 529.

Maryland. — *Adams v. Capron*, 21 Md. 296, 83 Am. Dec. 566.

Massachusetts. — *Carter v. Cunningham*, 7 Met. (Mass.) 491; *Parker v. Brancker*, 22 Pick. (Mass.) 40; *Upham v. Lefavour*, 11 Met. (Mass.) 174; *Dolan v. Thompson*, 126 Mass. 183; *Barrow v. West*, 23 Pick. (Mass.) 270; *Beckwith v. Sibley*, 11 Pick. (Mass.) 482.

Missouri. — *Given v. Lemoine*, 35 Mo. 110; *Bull v. Sigerson*, 24 Mo. 53.

New Hampshire. — *Frothingham v. Everton*, 12 N. H. 239.

New York. — *Whitman v. Horton*, 46 N. Y. Super. Ct. 535; *Rice v. Isham*, 4 Abb. App. Dec. (N. Y.) 37; *Marfield v. Goodhue*, 3 N. Y. 73; *Gihon v. Stanton*, 9 N. Y. 476; *Corlies v. Cumming*, 6 Cow. (N. Y.) 181.

Rhode Island. — *Balderston v. National Rubber Co.*, 18 R. I. 338.

Tennessee. — *Strong v. Stewart*, 9 Heisk. (Tenn.) 137.

Vermont. — *Langdon v. Burrill*, 21 Vt. 466.

Virginia. — *George Campbell Co. v. Angus*, 91 Va. 438.

Goods Destroyed. — If the goods are destroyed the factor may nevertheless recover from his principal the amount of his advances. *Kufefe v. Kehlor*, 19 Fed. Rep. 198.

Del Credere Factor. — The rule rendering the principal personally liable for advances applied whether the factor is acting under a *del credere* commission or not. *Graham v. Ackroyd*, 10 Hare 192, 17 Jur. 657, 22 L. J. Ch. 1046.

Where to Be Repaid. — As a general rule, advances are to be repaid where they are made. Thus, where commission merchants in Boston sent an agent to Mobile for a limited time to transact a factorage business, and goods were consigned to him from a principal in Boston, to whom advances were made by the commission merchants in Boston, it was held that the advances were to be repaid in Boston, and therefore the cost of remitting the proceeds by the agent to his employers was to be borne by the principal. The court said, however, that it might have been otherwise if the commission firm had been established at Mobile. *Carter v. Cunningham*, 7 Met. (Mass.) 491.

Payment of Draft Accepted. — Where a factor accepts drafts drawn by his principal which he is compelled to pay at maturity, he is entitled to recover from his principal the amount paid. *Bainbridge v. Wilcocks*, 1 Baldw. (U. S.) 536; *Rice v. Isham*, 4 Abb. App. Dec. (N. Y.) 37.

Evidence of Payment of Draft — Possession of Draft. — Where it is the usual course of business for a factor to accept bills drawn by his principal and return them to him, to be used

for raising money as he pleases, the factor's possession of such bills, bearing the blank indorsement of the principal, is sufficient *prima facie* evidence of ownership to enable the factor to recover from his principal the money paid thereon at maturity. *Rice v. Isham*, 4 Abb. App. Dec. (N. Y.) 37.

1. Proceeds of Sale Not Enough to Cover Advances — Recovery for Difference. — *Blandford v. Wing Flour Mill Co.*, 24 Ill. App. 596; *Parker v. Brancker*, 22 Pick. (Mass.) 40; *Given v. Lemoine*, 35 Mo. 110; *Frothingham v. Everton*, 12 N. H. 239; *Gihon v. Stanton*, 9 N. Y. 476; *Strong v. Stewart*, 9 Heisk. (Tenn.) 137; *George Campbell Co. v. Angus*, 91 Va. 438.

Sale After Notice to Repay Advances. — As heretofore stated, a factor may, in some jurisdictions, after a demand upon his principal to repay his advances, sell the goods even in violation of instructions, and where he does so he may still recover from the principal the deficiency in case the proceeds are insufficient to repay the advances, etc. *Parker v. Brancker*, 22 Pick. (Mass.) 40; *Frothingham v. Everton*, 12 N. H. 239.

2. Waiver of Personal Liability of Principal. — In *Peisch v. Dickson*, 1 Mason (U. S.) 9, it was held that where a factor agreed that for advances made "he will hold for reimbursement on the amount and net proceeds of the sales of said goods, which are only considered answerable for said amount advanced," it was a waiver of any personal claim against the principal.

Burden of Proving Waiver. — As such a waiver is in derogation of the general law, the burden of proving it lies upon the principal. *Burrill v. Phillips*, 1 Gall. (U. S.) 360. See also *Beckwith v. Sibley*, 11 Pick. (Mass.) 482.

3. Forfeiture of Right to Reimbursement. — *Dodge v. Tileston*, 12 Pick. (Mass.) 328; *Frothingham v. Everton*, 12 N. H. 239. See also *Ewalt v. Harding*, 16 Md. 160.

Departure from Instructions. — A sale by the factor in violation of his instructions does not entirely defeat his right to recover a balance due for advances. This rule has been applied where the factor sold the goods below the price limited by the principal. *Frothingham v. Everton*, 12 N. H. 239. See also *Day v. Crawford*, 13 Ga. 509.

Recoupment in Action for Advances. — The principal may, when sued by his factor for advances, have allowed to him the damages he would be entitled to recover for a breach of duty on the part of the factor. *Kelly v. Smith*, 1 Blatchf. (U. S.) 290; *Hatcher v. Comer*, 73 Ga. 418; *Dodge v. Tileston*, 12 Pick. (Mass.) 328; *Frothingham v. Everton*, 12 N. H. 239. Compare *Best v. Hill*, 21 W. R. 147.

As to a rejoinder of negligence to a reply

Realizing Advances by Bill on Purchaser. — Where the factor realizes the amount of his advances by bills drawn against the purchaser of the goods, he cannot recover for such advances without showing that such bills were dishonored and that he has paid them or is liable thereon.¹

(b) **Primary and Secondary Liability of Principal — Rule Holding Principal Primarily Liable.** — In most jurisdictions the principal is held primarily liable to his factor for all advances, without requiring the factor to resort in the first instance to the goods consigned, and it is held that the factor may, after the lapse of a reasonable time,² and in the absence of any agreement to the contrary, recover the advances from his principal even before the goods are sold.³

Rule Requiring Resort to Goods Consigned. — In other jurisdictions, however, it has been held that the factor must first resort to the goods consigned before he can enforce his claim against the principal personally.⁴

founded on expenditures in an action of assumpsit brought by the principal against the factor for money in the factor's hands originating in an attachment, see *Brown v. Clayton*, 12 Ga. 564.

1. *Sigerson v. Pomeroy*, 13 Mo. 620.

2. **Reasonable Time Must Elapse Before Repayment of Advances Demandable.** — In *Frothingham v. Everton*, 12 N. H. 239, it was held that a reasonable time for a sale must elapse before a factor can demand reimbursement for advances. See also *Upham v. Lefavour*, 11 Met. (Mass.) 174; *Dolan v. Thompson*, 126 Mass. 183.

3. **Rule Holding Principal Primarily Liable.** — *Graham v. Ackroyd*, 10 Hare 192, 17 Jur. 657, 22 L. J. Ch. 1046; *Stewart v. Lowe*, 24 U. C. Q. B. 434; *Cowie v. Apps*, 22 U. C. C. P. 589; *Bradley v. Richardson*, 2 Blatchf. (U. S.) 343; *Upham v. Lefavour*, 11 Met. (Mass.) 174; *Beckwith v. Sibley*, 11 Pick. (Mass.) 482; *Barrow v. West*, 23 Pick. (Mass.) 270; *Dolan v. Thompson*, 126 Mass. 183; *Mertens v. Nottebohm*, 4 Gratt. (Va.) 163. See also *Burrill v. Phillips*, 1 Gall. (U. S.) 360; *Peisch v. Dickson*, 1 Mason (U. S.) 9.

A factor received consignments of goods under an agreement by which he was to advance to his principal money from time to time as the latter required, to charge him interest on the advances at a certain rate, to sell the goods consigned at the market price, to charge a certain commission for selling, and after deducting advances, interest, and commission to pay the balance to the principal; and if, upon settlement, after all the goods were sold, a balance should be found due the factor, the principal was to pay it. It was held that the factor, after having made the advances to the principal on account of goods not sold and which had been on hand for several months, might sue the principal for the amount of the advances already made, without waiting until all the goods were sold. *Dolan v. Thompson*, 126 Mass. 183.

Storage. — In *Mobile, etc., R. Co. v. Whitney*, 39 Ala. 468, it was held that though a factor may have a lien on goods for storage, and may have the goods in his possession, he may still maintain an action of indebitatus assumpsit to recover the storage.

Sale of Goods on Credit. — In *Beckwith v. Sibley*, 11 Pick. (Mass.) 482, it was held that where the goods are sold on credit, the factor may, before the purchase price falls due, sue his principal to recover the advances.

Del Credere Factor. — The rule allowing the factor to recover advances before the goods are sold applies to a *del credere* factor. *Upham v. Lefavour*, 11 Met. (Mass.) 174; *Dolan v. Thompson*, 126 Mass. 183.

And it has been held that even after a sale of the goods on credit a *del credere* factor has, before maturity of the debt from the purchaser, a present right of action against the principal to recover advances. *Bradley v. Richardson*, 2 Blatchf. (U. S.) 343. Compare *Graham v. Ackroyd*, 10 Hare 192, 17 Jur. 657, 22 L. J. Ch. 1046.

4. **Rule Requiring Resort to Goods Consigned.** — *Kraft v. Fancher*, 44 Md. 204; *Hoy v. Reade*, 1 Sweeny (N. Y.) 626; *Gihon v. Stanton*, 9 N. Y. 476; *Corlies v. Cumming*, 6 Cow. (N. Y.) 181; *Balderston v. National Rubber Co.*, 18 R. I. 338. See also *Adams v. Capron*, 21 Md. 186, 83 Am. Dec. 566; *Frothingham v. Everton*, 12 N. H. 239.

Reason for Rule Requiring Resort to Goods. — In *Gihon v. Stanton*, 9 N. Y. 476, *Selden, J.*, in denying the right of the factor to sue for and recover advances before a sale of the goods, said: "An advance is something which precedes; and of course there is something to follow. As applied to the payment of money, the term implies that the parties look forward to a time when the money will be due to the recipient. A debtor who voluntarily pays his debt before it is due is said to advance it. Can he recover it back? An advance by a factor is a transaction somewhat similar. It is a prepayment, a mere anticipation of the avails of the goods consigned; and no more creates a debt, in the first instance, than an advancement of a father to his son, in anticipation of his expected inheritance, creates a debt."

Freight Advanced. — In *Gihon v. Stanton*, 9 N. Y. 476, it was held that where a factor makes an advance on goods consigned by paying a freight draft drawn on him by the consignor, he cannot sue the principal for the amount so paid, before the sale of the goods, but must look first to the goods, and the principal is liable only where the goods are insufficient to pay the advances.

Provision for Payment of Interest. — In *Balderston v. National Rubber Co.*, 18 R. I. 338, it was held that provisions for the payment of interest and allowing the principal to fix the price of goods to be sold did not alter the rule that where advances are made upon the faith of goods consigned, the proceeds ought to be deemed as a primary fund to which the factor

(c) **Insolvency of Principal.** — In those jurisdictions where it is held that the goods consigned constitute the primary fund for the repayment of advances, and that the factor must exhaust this fund before enforcing his remedies against the consignor personally, it is held that, in case the consignor becomes insolvent and makes an assignment for the benefit of creditors, the factor cannot prove his entire claim for advances against the estate of the principal, but must first credit the proceeds of the goods consigned.¹

(d) **Order of Applying Proceeds to Payment of Advances.** — In the absence of all direction on the part of the principal,² the factor has a right to direct the application of the proceeds of a shipment to the items of a running account between himself and the principal.³ In the absence of a different application, credits are applied to the debts in the order of time in which they accrue.⁴

(e) **Interest.** — The factor is entitled, as a general rule, to charge interest on his advances.⁵

(3) **For Loss and Damage Sustained.** — The well-settled rule of agency that the principal is bound to indemnify the agent against the consequences of all

must look for reimbursement, and that such fund must be made to appear insufficient before he can recover his advances from the principal.

Payment of Bills Accepted. — In *Mottram v. Mills*, 2 Sandf. (N. Y.) 189, cited with approval in *Gihon v. Stanton*, 9 N. Y. 483, it was held that a factor who accepts and pays a bill of exchange, drawn by the principal, upon the faith of the property consigned, cannot be regarded as an accommodation acceptor, and before he can call upon the principal for reimbursement he must show the proceeds of the property to be insufficient to meet the bills.

Del Credere Commission. — Where this rule is in force it is of course applied equally to factors acting under a *del credere* commission. *Balderston v. National Rubber Co.*, 18 R. I. 338.

1. Insolvency of Principal. — *Matter of Atwood*, 3 N. Y. App. Div. 578; *Balderston v. National Rubber Co.*, 18 R. I. 338.

In those jurisdictions where the factor is entitled to sue his principal before exhausting the goods consigned, he could probably, in case of insolvency, prove for the entire amount without exhausting his securities. See the title ASSIGNMENTS FOR THE BENEFIT OF CREDITORS, vol. 3, p. 141.

2. See *Farmers'*, etc., *Bank v. Franklin*, 1 La. Ann. 393; and the title APPLICATION OF PAYMENTS, vol. 2, p. 437.

3. **Application by Factor.** — *Upham v. Le-favour*, 11 Met. (Mass.) 174. In this case it was held that where a factor makes advances and sues to recover them before a sale of the goods, and subsequently makes further advances, he may apply the proceeds of the goods to the payment of the latter advances. See also *Bradley v. Richardson*, 2 Blatchf. (U. S.) 343, 23 Vt. 720.

It has been held, however, that the factor cannot, in order to provide for the payment of unsecured debts not yet due, apply proceeds already in his hands to such debts, instead of to debts already due which are secured. *Brander v. Phillips*, 16 Pet. (U. S.) 121.

But the factor has a right to devote the proceeds of goods consigned to him and sold by him to the satisfaction of his commissions on the sale and to his reimbursement for ex-

penses in connection with the sale, and it is only the clear proceeds after making these deductions which must be applied in exoneration of one who has mortgaged property to secure advances made to the consignor. *Sheldon v. Raveret*, 49 Barb. (N. Y.) 203.

4. **Order of Time Controls.** — A factor, from time to time making advances, receiving payments, and blending debits and credits together, in a common account, can claim the balance only as an existing debt, and the parts of the account have no longer a separate existence. The credits are by him applied to the debts in the order of time in which they accrue, unless a different application is shown. *Alabama Gold L. Ins. Co. v. Sledge*, 62 Ala. 566.

5. **Interest on Advances Allowable.** — *Wittowski v. Harris*, 64 Fed. Rep. 712; *Perin v. Parker*, 126 Ill. 201, 9 Am. St. Rep. 571; *Sentell v. Kennedy*, 29 La. Ann. 679; *Cheesborough v. Hunter*, 1 Hill L. (S. Car.) 400; *Snetz v. Kennedy*, *Riley L. (S. Car.)* 218; *Walters v. McGirt*, 8 Rich. L. (S. Car.) 287. Compare *De Hertel v. Supple*, 13 Grant's Ch. (U. C.) 648, 14 Grant's Ch. (U. C.) 421.

In *Bainbridge v. Wilcocks*, 1 Baldw. (U. S.) 536, a foreign factor was allowed interest on advances when by the usage of trade the factor was authorized to charge such interest.

Advance as Loan Distinguished from One by Special Agreement. — Advances by a factor to his principal as a loan, to be repaid out of the proceeds of the consigned goods, and to be accounted for in the future dealings between the parties, entitle the factor to interest until payment is received from the sale of the goods. But advances which are made at the time when the goods are loaded for shipment, and which constitute the payment of an agreed percentage of the guaranteed cost price of manufacture which, by agreement, becomes due to the principal upon the loading of the goods, entitle the factor to no interest thereon. *Wittowski v. Harris*, 64 Fed. Rep. 712.

Accounts Stated. — After the account between the parties has been stated, the factor is entitled to interest on the balance due him. *Bainbridge v. Wilcocks*, 1 Baldw. (U. S.) 536. See also *Sentell v. Kennedy*, 29 La. Ann. 679; *Walters v. McGirt*, 8 Rich. L. (S. Car.) 287; and the title ACCOUNTS, vol. 1, p. 457.

legal acts done by him in the execution of his agency or in pursuance of the authority conferred upon him¹ applies with equal force to factors.²

V. LIEN OF FACTOR — 1. In General. — It is a well-settled and universal rule of the common law that a factor has a lien upon the goods consigned to him while in his possession for all commissions, advances, and expenditures properly incurred in the course of the relation of principal and factor.³

1. See the title AGENCY, vol. I, p. 1117.

2. Rule for Indemnification of Agent Applied to Factor. — *Child v. Morley*, 8 T. R. 610; *Johnston v. Osborne*, 11 Ad. & El. 549, 39 E. C. L. 164; *Stocking v. Sage*, 1 Conn. 519; *Beach v. Branch*, 57 Ga. 362; *Searing v. Butler*, 69 Ill. 575; *Randall v. Kehlor*, 60 Me. 37, 11 Am. Rep. 169; *Hill v. Packard*, 5 Wend. (N. Y.) 375; *Rogers v. Kneeland*, 10 Wend. (N. Y.) 219; *Blakely v. Frazier*, 11 S. Car. 122.

Illustrations. — In *Beach v. Branch*, 57 Ga. 362, it was held that where the factor, after having accounted to his principal, is forced to refund to the purchaser on account of the false packing of the cotton sold, he can recover such amount from his principal. It was held, however, that the factor must make his claim therefor within a reasonable time, so as to enable the principal to demand reclamation from the person from whom he purchased the cotton.

A commission merchant, by the direction of his principal, sold for the latter five thousand bushels of wheat, to be delivered at any time during the current year, at the seller's option, and after an advance in the price the principal refused to stand to the contract, and the merchant settled with the buyer by paying him the difference between the contract price and the market value. It was held that the principal was liable to the merchant for the amount so paid. *Searing v. Butler*, 69 Ill. 575.

In *Randall v. Kehlor*, 60 Me. 37, 11 Am. Rep. 169, it was held, under a local custom allowing the purchaser of flour to rescind the sale and return the flour within ten days, if it should prove unsound, that a factor who after such return sells the flour as unsound at its full value, without laches on his part, may recover from his principal the actual loss sustained thereby.

Where a factor is directed to sell oats as of a certain quality at a certain price, and he does so in his own name, such a sale being sanctioned by custom, he may recover from his principal the amount he is compelled to pay to the purchaser by reason of the oats being of an inferior quality. *Johnston v. Osborne*, 11 Ad. & El. 549, 39 E. C. L. 164.

In *Maxwell v. Audinwood*, 15 Hun (N. Y.) 111, it was held that where a factor is compelled to take back goods sold on account of their being unequal to the sample he cannot require the principal to make good a loss on a resale without having at once notified the principal and demanded the repayment of the proceeds received from the first sale.

Burden of Proof. — A factor who voluntarily pays the amount of a reclamation demanded of him by cotton sellers to whom he had shipped the goods for a balance due on account sales, on account of overdrafts by his principal, assumes the burden of proving the accounts correct; the account sales and the payment

are not sufficient evidence of his right to recover. *Blakely v. Frazier*, 11 S. Car. 122.

Unauthorized Transaction. — If, however, a loss is incurred by the factor in an unauthorized transaction he cannot claim to be indemnified by the principal. *Rogers v. Kneeland*, 10 Wend. (N. Y.) 219.

In *Johnston v. Osborne*, 1 Jur. 943, reversed on other points in 11 Ad. & El. 549, 39 E. C. L. 164, it was held that where a factor sells in his own name contrary to instructions, he cannot recover from his principal the damages he is compelled to pay to the purchaser by reason of the defective quality of the goods sold.

Ratification of Unauthorized Transaction. — If, however, the principal ratifies the unauthorized act of the factor, such ratification will have the same effect that previous authority would have had; and it has been held that where a principal ratifies a sale by his factor with warranty and acknowledges his liability to the factor for damages the factor may sustain by reason of his warranty, the factor may claim to be indemnified against loss incurred by such warranty. *Rogers v. Kneeland*, 10 Wend. (N. Y.) 219.

Accrual of Right of Action. — The right of action does not accrue to the factor until the loss for which he demands indemnification has been sustained, and it has been held that where a factor through whom cotton had been shipped for sale paid the amount of a reclamation made upon him by the seller for a balance due on the sales of the cotton shipped through him, on account of overdrafts by his principal, the statute of limitations began to run in favor of his principal from the day of payment by the factor, and not from the sale of such cotton. *Blakely v. Frazier*, 11 S. Car. 122.

3. Factor Entitled to Lien — *England*. — *Drinkwater v. Goodwin*, 1 Cowp. 251; *Pultney v. Keymer*, 3 Esp. N. P. 182; *In re Pavy's Patent Felted Fabric Co.*, 45 L. J. Ch. Div. 318; *Hammonds v. Barclay*, 2 East 227; *Foxcroft v. Devonshire*, 2 Burr. 941; *Houghton v. Matthews*, 3 B. & P. 494; *Scrimshire v. Alderton*, 2 Stra. 1182.

Canada. — *Gourdeau v. Cassils*, 15 Quebec L. Rep. 258.

United States. — *New York Fourth Nat. Bank v. American Mills Co.*, 29 Fed. Rep. 611; *Brander v. Phillips*, 16 Pet. (U. S.) 129; *The Frances*, 8 Cranch (U. S.) 418; *Peisch v. Dickson*, 1 Mason (U. S.) 9; *Matthews v. Menedger*, 2 McLean (U. S.) 145; *Marks v. Barker*, 1 Wash. (U. S.) 178; *Bradley v. Richardson*, 2 Blatchf. (U. S.) 343.

Alabama. — *Martin v. Pope*, 6 Ala. 532, 41 Am. Dec. 66; *Sawyer v. Lorillard*, 48 Ala. 332; *Schiffer v. Feagin*, 51 Ala. 335; *Barnett v. Warren*, 82 Ala. 557; *Comer v. Way*, 107 Ala. 300, citing 3 AM. AND ENG. ENCYC. OF LAW (1st ed.) 333.

Georgia. — *Brown v. Clayton*, 12 Ga. 564; *Daniel v. Swift*, 54 Ga. 113.

When Goods Are Sold. — And when the goods are sold the lien extends to the

Illinois. — *Winne v. Hammond*, 37 Ill. 99; *Eaton v. Truesdail*, 52 Ill. 307; *Warren v. Columbus First Nat. Bank*, 149 Ill. 9; *Hunter v. Mathewson*, 27 Ill. App. 192.

Indiana. — *Shaw v. Ferguson*, 78 Ind. 547.

Kentucky. — *Bard v. Stewart*, 3 T. B. Mon. (Ky.) 72; *Cook v. Brannin*, 87 Ky. 101.

Louisiana. — *Maven v. Landrum*, 21 La. Ann. 366; *Howe v. Whited*, 21 La. Ann. 495.

Maine. — *McKenzie v. Nevius*, 22 Me. 144, 38 Am. Dec. 291; *Sewall v. Nichols*, 34 Me. 582; *Gragg v. Brown*, 44 Me. 157.

Maryland. — *Hodgson v. Payson*, 3 Har. & J. (Md.) 339, 5 Am. Dec. 439; *Miller v. Lea*, 35 Md. 396, 6 Am. Rep. 417.

Massachusetts. — *Vail v. Durant*, 7 Allen (Mass.) 408, 83 Am. Dec. 695; *Beckwith v. Sibley*, 11 Pick. (Mass.) 482; *Stevens v. Robins*, 12 Mass. 179; *Johnson v. Campbell*, 120 Mass. 449.

Minnesota. — *Habler v. Luttgen*, 61 Minn. 315.

Missouri. — *Benny v. Rhodes*, 18 Mo. 147, 59 Am. Dec. 293; *Lewis v. Mason*, 94 Mo. 551; *State v. Thompson*, 120 Mo. 12.

New Hampshire. — *Parks v. Ingram*, 22 N. H. 295, 55 Am. Dec. 153.

New York. — *Bradford v. Kimberly*, 3 Johns. Ch. (N. Y.) 431; *Heard v. Brewer*, 4 Daly (N. Y.) 136; *Knapp v. Alvord*, 10 Paige (N. Y.) 205, 40 Am. Dec. 241; *Sheldon v. Raveret*, 49 Barb. (N. Y.) 203; *Hidden v. Waldo*, 55 N. Y. 294; *Nagle v. McFeeters*, 97 N. Y. 196; *Cooper v. Hong Kong, etc., Banking Corp.*, 107 N. Y. 282.

Ohio. — *Jordan v. James*, 5 Ohio 100.

Pennsylvania. — *Watson v. Beatty*, 22 W. N. C. (Pa.) 169; *Harrison v. Mora*, 150 Pa. St. 481.

Tennessee. — *Owen v. Iglanor*, 4 Coldw. (Tenn.) 15.

Wisconsin. — *Chappell v. Cady*, 10 Wis. 111.

Illustrations. — In *Cutters v. Baker*, 2 La. Ann. 572, it was held that where a factor, instructed to apply the proceeds of a consignment to a bill, pays it before selling the property, he will have as a factor a lien on the goods for his reimbursement.

In *Shaw v. Knox*, 12 La. Ann. 41, it was held that payments made by a factor of debts due by his principal are considered as money advanced by the factor, and without a subrogation to the right of the creditor the factor cannot claim any privilege arising from the nature of the debts thus paid.

In *Sewall v. Nichols*, 34 Me. 582, it was held that a factor is entitled to a lien on a part of the goods consigned, after he has sold the balance for commissions and advances on account of the whole.

In *Brown v. Clayton*, 12 Ga. 564, it was held that the factor has a lien on the goods for freight paid thereon.

Lien Recognized in Equity. — The right of the factor to a lien is recognized in equity as well as in courts of law. *Bard v. Stewart*, 3 T. B. Mon. (Ky.) 72.

Claim Barred by Limitations. — It seems that the factor would have a lien for advances, etc., though his claim against the principal personally were barred by the statute of limitations.

Spears v. Hartly, 3 Esp. N. P. 81. See also *Higgins v. Scott*, 2 B. & Ad. 413, 22 E. C. L. 113. Compare *Byers v. Danley*, 27 Ark. 77.

Purchaser from Principal Takes Subject to Lien. — A sale by the principal cannot destroy or impair any lien which the factor has acquired, but the purchaser takes subject to such lien. *DeWolf v. Howland*, 2 Faine (U. S.) 356; *New York Fourth Nat. Bank v. American Mills Co.*, 137 U. S. 234; *Daniel v. Swift*, 54 Ga. 113; *Eaton v. Truesdail*, 52 Ill. 307; *Bard v. Stewart*, 3 T. B. Mon. (Ky.) 72; *Watson v. Beatty*, 22 W. N. C. (Pa.) 169.

Estoppel to Assert Lien Against Purchaser. — In *Stevens v. Robins*, 12 Mass. 183, it was held that where the factor assents to a conveyance of the goods by his principal, without claiming a lien for a general balance, he is estopped to assert such lien as against the purchaser. See also *Gragg v. Brown*, 44 Me. 157.

Still the factor is not estopped to claim a lien for advances made upon the consignment, by his mere failure to inform the purchaser of the goods from the principal that such advances had been made, at the time when such purchaser deposited the receipts for the cotton with him and directed that it should be sold on his account. *Daniel v. Swift*, 54 Ga. 113. See, however, *Gragg v. Brown*, 44 Me. 157.

An Assignee in Insolvency of the principal, like a purchaser from the principal, takes subject to the factor's lien. *Terry v. Bamberger*, 44 Conn. 562.

Purchaser from Principal Not Personally Liable for Advances to Principal. — The purchaser of the goods from the principal does not assume any personal obligation to the factor for advances theretofore made to the principal. *Heinze v. Buckingham*, (Supreme Ct.) 17 N. Y. Supp. 12; *Watson v. Beatty*, (Pa. 1888) 13 Atl. Rep. 521.

Lien Superior to Claims of Creditors of Principal. — The lien of the factor is superior to the claims of creditors of the principal. *New York Fourth Nat. Bank v. American Mills Co.*, 29 Fed. Rep. 611; *Eaton v. Truesdail*, 52 Ill. 307; *Cook v. Brannin*, 87 Ky. 101.

Attaching Creditors. — The factor, unless his lien is discharged, cannot be deprived of the possession of the goods by the levy of an execution or attachment by the creditors of the principal. *Nesmith v. Dyeing, etc., Co.*, 1 Curt. (U. S.) 130; *Winne v. Hammond*, 37 Ill. 99; *Lambeth v. Turnbull*, 5 Rob. (La.) 264, 39 Am. Dec. 536; *Maven v. Landrum*, 21 La. Ann. 366; *Sewall v. Nichols*, 34 Me. 582; *Lewis v. Mason*, 94 Mo. 551; *Harrison v. Mora*, 150 Pa. St. 481.

And an attachment by creditors of the principal does not even suspend or affect the right of the factor to sell for his reimbursement. *Baugh v. Kirkpatrick*, 54 Pa. St. 84, 93 Am. Dec. 675; *White Mountain Bank v. West*, 46 Me. 15.

See also the titles ATTACHMENT, vol. 3, p. 227; EXECUTIONS, vol. 11, p. 689.

Damages Recoverable Against Attaching Creditor. — A factor having a lien upon goods for the amount of advances can, in an action against a creditor of his principal who has taken the goods under attachment, recover

proceeds,¹ or, if sold upon credit, to the debt or securities taken for the price.²

Lien Extends to Insurance Money. — Where the goods have been destroyed, it has been held that the factor's lien extends to the proceeds of an insurance policy taken out upon them.³

Lien Is Independent of Agreement. — The factor's right to a lien is implied or inferred by law from the relation of the parties, and arises independently of any express agreement.⁴

Lien Inconsistent with Agreement. — The factor cannot claim a lien where such claim would be inconsistent with the agreement between the factor and his principal;⁵ the agreement must, however, be totally inconsistent with the idea

only the amount of his lien, and is not entitled to a judgment for the whole value of the goods. *Heard v. Brewer*, 4 Daly (N. Y.) 136.

Agricultural Liens. — In some jurisdictions factors are by statute given a lien on the crops of a planter for supplies, etc., furnished to the planter to enable him to make the crop. *Thomason v. Poullain*, 54 Ga. 306; *Gunn v. Pattishal*, 48 Ga. 406; *Story v. Flournoy*, 55 Ga. 56; *Byrd v. Johnson*, 38 Ga. 113; *Tift v. Newsom*, 44 Ga. 600; *Richardson v. Weiner*, 5 La. Ann. 646; *Barrett v. Chaler*, 2 La. Ann. 874; *Steamer General Quitman v. Packard*, 22 La. Ann. 70. See the title CROPS, vol. 8, p. 327.

1. Proceeds of Goods Sold — England. — *Drinkwater v. Goodwin*, 1 Cowp. 251; *Houghton v. Matthews*, 3 B. & P. 494.

United States. — *Bradley v. Richardson*, 2 Blatchf. (U. S.) 343; *Brander v. Phillips*, 16 Pet. (U. S.) 121.

Alabama. — *Schiffer v. Feagin*, 51 Ala. 335; *Martin v. Pope*, 6 Ala. 532, 41 Am. Dec. 66; *Comer v. Way*, 107 Ala. 300.

Georgia. — *Brown v. Clayton*, 12 Ga. 564.

Illinois. — *Warren v. Columbus First Nat. Bank*, 149 Ill. 9.

Louisiana. — *Howe v. Whited*, 21 La. Ann. 495.

Massachusetts. — *Vail v. Durant*, 7 Allen (Mass.) 408, 83 Am. Dec. 695.

New York. — *Bradford v. Kimberly*, 3 Johns. Ch. (N. Y.) 431; *Commercial Nat. Bank v. Heilbronner*, 108 N. Y. 439, reversing 52 N. Y. Super. Ct. 388.

Compare Marks v. Barker, 1 Wash. (U. S.) 178.

2. Securities for Price of Goods Sold. — *Brander v. Phillips*, 16 Pet. (U. S.) 129; *Brown v. Clayton*, 12 Ga. 564; *Bard v. Stewart*, 3 T. B. Mon. (Ky.) 72; *Beckwith v. Sibley*, 11 Pick. (Mass.) 482; *Commercial Nat. Bank v. Heilbronner*, 108 N. Y. 439.

If a purchaser of the factor, with knowledge of the factor's lien, pays over the proceeds to the principal, he renders himself liable to the factor for the amount of his lien. *Drinkwater v. Goodwin*, 1 Cowp. 251.

In *Atkins v. Amber*, 2 Esp. N. P. 493, it was held that the purchaser cannot offset a debt due to him from the principal so as to defeat the lien of the factor.

Agent Employed to Exchange Securities. — In *Chappell v. Cady*, 10 Wis. 111, it was held that an agent employed to exchange for his principal certain shares of stock for other stock of a different character has a lien on the stock received in exchange. Such an agent is to be considered as a factor.

Lien for Price — Alabama. — By statute in Alabama (Rev. Code 1867, §§ 1164, 1167), a lien for the purchase price of cotton was provided for factors in the city of Mobile, selling cotton in accordance with a custom of that market by which, on sales considered as cash sales, the purchaser or his agent was allowed a reasonable time to examine, reweigh, or re-sample cotton before paying for it, and such a lien was paramount to the rights of one who bought from such purchaser or his agent within fifteen days from the delivery of the cotton to the latter. *Beyer v. Bush*, 50 Ala. 19. This statute does not appear in the Alabama Codes of 1886 or 1896.

3. Proceeds of Insurance Policy. — *Johnson v. Campbell*, 120 Mass. 440.

4. Lien Is Independent of Agreement. — *Walker v. Birch*, 6 T. R. 262; *De Wolf v. Howland*, 2 Paine (U. S.) 363; *Gragg v. Brown*, 44 Me. 157; *Nagle v. McFeeters*, 97 N. Y. 202.

In *Martin v. Pope*, 6 Ala. 532, 41 Am. Dec. 66, *Collier, C. J.*, said: "The general lien of factors does not depend upon any express contract, but rests upon its manifest tendency to aid the interests of trade and commerce and to promote confidence and a liberal spirit on the part of factors, in respect to advances to their principals. It is deemed to exist in all cases until the contrary presumption is clearly established."

In *Haebler v. Luttgen*, 61 Minn. 315, the principle that no express agreement was necessary to give the factor a lien for advances, etc., was applied, and it was held that a factor was entitled to a lien though the contract between himself and his principal was in writing and contained no agreement to that effect, provided the contract contained no agreement inconsistent with the existence of such a lien.

5. Agreement Inconsistent with Lien — England. — *Walker v. Birch*, 6 T. R. 258; *Frith v. Forbes*, 32 L. J. Ch. 10; *Burn v. Brown*, 2 Stark. 272, 3 E. C. L. 406; *Muir v. Fleming*, D. & R. N. P. 29, 16 E. C. L. 420; *Brandao v. Barnett*, 3 C. B. 531, 54 E. C. L. 531; *Bock v. Gorrissen*, 30 L. J. Ch. 39. See also *Raitt v. Mitchell*, 4 Campb. 146; *Crawshaw v. Homfray*, 4 B. & Ald. 50, 6 E. C. L. 385; *Chase v. Westmore*, 5 M. & S. 180. *Compare* *McGillivray v. Simson*, 9 D. & R. 35, 22 E. C. L. 383, 2 C. & P. 320, 12 E. C. L. 146.

Alabama. — *Schiffer v. Feagin*, 51 Ala. 335.

Illinois. — *Darlington v. Chamberlain*, 20 Ill. App. 443, affirmed 120 Ill. 585.

Louisiana. — *Goodhue v. McClarty*, 3 La. Ann. 447; *Gordon v. Goodrich*, 11 La. Ann. 410.

of the existence of a lien in favor of the factor.¹

2. The Indebtedness Secured — *a*. LIABILITIES INCURRED BY FACTOR. — The factor has a lien not only for the actual advances and expenditures made by him, but also to indemnify him against liabilities incurred for his principal, as where he accepts drafts drawn by the principal or indorses notes for his accommodation.²

b. LIEN FOR GENERAL BALANCE OF ACCOUNTS. — The lien of the factor covers not only the expenditures and liabilities incurred in regard to the particular consignment, but also the general balance of accounts between the parties.³

Massachusetts. — *Jarvis v. Rogers*, 15 Mass. 399.

Minnesota. — *Haebler v. Luttgen*, 61 Minn. 315.

Missouri. — *Archer v. McMechan*, 21 Mo. 43.
Nebraska. — *Moline, etc., Co. v. Walter A. Wood Mowing, etc., Mach. Co.*, 49 Neb. 869.
Tennessee. — *Owen v. Iglanor*, 4 Coldw. (Tenn.) 15.

See also *Chandler v. Belden*, 18 Johns. (N. Y.) 157, 9 Am. Dec. 193.

Illustrations. — In *Moline, etc., Co. v. Walter A. Wood Mowing, etc., Mach. Co.*, 49 Neb. 869, it was held that under an agreement by which the principal reserves the right to order the reshipment of the goods at pleasure and both parties reserve the right to draw at sight on each other for any balance, the factor is not entitled to a lien on the goods.

The lien of a factor may be lost by a special provision for a particular mode of payment of his charges. *Cowell v. Simpson*, 16 Ves. Jr. 275.

In *Walker v. Birch*, 6 T. R. 258, it was held that where the factor promises to pay the proceeds of goods to the principal when sold, he has no lien on them, if not sold, for the balance of his general account arising upon other articles.

Specific Instructions as to Application of Proceeds. — A factor receiving goods under specific instructions as to the application of the proceeds is bound to carry out such instructions and can claim a lien only in case there is a surplus. *Frith v. Forbes*, 32 L. J. Ch. 10, 4 De G. F. & J. 499, cited in *Bock v. Gorrissen*, 2 De G. F. & J. 434; *Darlington v. Chamberlain*, 20 Ill. App. 443, affirmed 120 Ill. 585. Compare, however, *Reynolds v. Davis*, 5 Sandf. (N. Y.) 267, wherein goods were shipped to a factor with instructions to remit the proceeds to a certain person. The factor received the goods without notice that such person had made advances upon the goods. It was held that the factor had his usual lien as against such person for his general balance of accounts.

If the factor receives goods in the usual line of business, without notice that they were consigned to him for a special purpose, he may claim a lien upon them for a general balance. *Archer v. McMechan*, 21 Mo. 43.

1. In *Harrison v. Mora*, 150 Pa. St. 481, it was held that a factor might have a lien for past advances on goods shipped to him with directions to deliver to a third party on payment of the price to the factor, as there was nothing in such a circumstance indicating an intention to limit the lien to the price.

2. **Lien as Indemnity Against Liabilities Incurred** — *England*. — *Drinkwater v. Goodwin*,

1 Cowp. 251; *Hammonds v. Barclay*, 2 East 227; *Pultney v. Keymer*, 3 Esp. N. P. 182; *In re Pavy's Patent Felted Fabric Co.*, 45 L. J. Ch. Div. 318.

United States. — *Nesmith v. Dyeing, etc., Co.*, 1 Curt. (U. S.) 130; *Matthews v. Menedger*, 2 McLean (U. S.) 145.

Illinois. — *Eaton v. Truesdail*, 52 Ill. 307.

Louisiana. — *Lambeth v. Turnbull*, 5 Rob. (La.) 264, 39 Am. Dec. 536.

Maryland. — *Hodgson v. Payson*, 3 Har. & J. (Md.) 339, 5 Am. Dec. 439.

Massachusetts. — *Stevens v. Robins*, 12 Mass. 179; *Vail v. Durant*, 7 Allen (Mass.) 408, 83 Am. Dec. 695.

Missouri. — *State v. Thompson*, 120 Mo. 12.

New Hampshire. — *Parks v. Ingram*, 22 N. H. 295, 55 Am. Dec. 153.

New York. — *Knapp v. Alvord*, 10 Paige (N. Y.) 205, 40 Am. Dec. 241; *Hidden v. Waldo*, 55 N. Y. 296; *Bradford v. Kimberly*, 3 Johns. Ch. (N. Y.) 431; *Nagle v. McFeeters*, 97 N. Y. 196.

Ohio. — *Jordan v. James*, 5 Ohio 88.

Commission for Indorsement — **Effect.** — The fact that the factor has received a commission for indorsing the bills of his principal does not defeat his right to a lien to indemnify him against liability on such indorsement. *Hodgson v. Payson*, 3 Har. & J. (Md.) 339, 5 Am. Dec. 439.

3. **Lien Covers General Balance** — *England*. — *Kruger v. Wilcox*, Ambbl. 252; *Godin v. London Assur. Co.*, 1 Burr. 494, 1 W. Bl. 104; *Drinkwater v. Goodwin*, 1 Cowp. 256; *Foxcraft v. Wood*, 4 Russ. 487; *Lickbarrow v. Mason*, 6 East 23, note *a*.

United States. — *Matthews v. Menedger*, 2 McLean (U. S.) 153; *The Frances*, 8 Cranch (U. S.) 418. Compare *De Wolf v. Howland*, 2 Paine (U. S.) 356.

Alabama. — *Martin v. Pope*, 6 Ala. 532, 41 Am. Dec. 66; *Schiffer v. Feagin*, 51 Ala. 335; *Comer v. Way*, 107 Ala. 300.

Illinois. — *Winne v. Hammond*, 37 Ill. 99; *Strahorn v. Union Stock Yard, etc., Co.*, 43 Ill. 424, 92 Am. Dec. 142; *Warren v. Columbus First Nat. Bank*, 149 Ill. 36 [citing 3 AM. AND ENG. ENCYC. OF LAW (1st ed.) 333]; *Darlington v. Chamberlain*, 20 Ill. App. 443; *Hunter v. Mathewson*, 27 Ill. App. 192.

Louisiana. — *Cutters v. Baker*, 2 La. Ann. 572; *Cator v. Merrill*, 16 La. Ann. 137; *Phillips v. Felician Cotton Oil Co.*, 48 La. Ann. 404.

Maryland. — *Hodgson v. Payson*, 3 Har. & J. (Md.) 341, 5 Am. Dec. 439.

Massachusetts. — *Jarvis v. Rogers*, 15 Mass. 389; *Baker v. Fuller*, 21 Pick. (Mass.) 318.

Missouri. — *Archer v. McMechan*, 21 Mo. 43.

Balance of Account Against Factor. — And on the other hand the factor cannot claim a lien for advances in respect to a particular consignment where the general balance of accounts is in favor of the principal, as the advances will be presumed to have been made in liquidation of the indebtedness of the factor.¹

c. INDEBTEDNESS INCURRED OUTSIDE OF AGENCY. — The factor's lien for a general balance of accounts extends, however, only to debts incurred between the parties in their relation as principal and factor, and does not cover a debt due from the principal to the factor but not connected with the purposes of their relation as principal and factor.²

3. When Lien Attaches — *a. NECESSITY FOR POSSESSION.* — The lien of a factor belongs to the class known as possessory liens, and it is a well-settled and universal rule that the factor must have either the actual or the constructive possession of the goods in order that his lien may attach thereto.³

Nebraska. — Moline, etc., Co. v. Walter A. Wood Mowing, etc., Mach. Co., 49 Neb. 880.

New York. — Bradford v. Kimberly, 3 Johns. Ch. (N. Y.) 434; Knapp v. Alvord, 10 Paige (N. Y.) 205, 40 Am. Dec. 241; Brownell v. Curtis, 10 Paige (N. Y.) 210; Brooks v. Bryce, 21 Wend. (N. Y.) 17; Bryce v. Brooks, 26 Wend. (N. Y.) 367; Whitman v. Horton, 46 N. Y. Super. Ct. 534.

North Dakota. — Rosenbaum v. Hayes, 5 N. Dak. 476.

Ohio. — Grieff v. Cowguill, 2 Disney (Ohio) 58.

Wisconsin. — Chappell v. Cady, 10 Wis. 111; McGraft v. Rugee, 60 Wis. 406, 50 Am. Rep. 378.

A principal, in consideration of further advances by his factor, agreed to ship to him goods enough to balance his account for such advances and a large indebtedness already existing and any indebtedness that might subsequently accrue. It was held that the lien of the factor upon the goods received was not limited to his advances on each shipment, but was available for the satisfaction of the general balance due him. Chapman v. Kent, 3 Duer (N. Y.) 234.

Purchasing Factor. — A purchasing factor as well as a factor for sale has a lien upon goods in his hands for his general balance of account. Brooks v. Bryce, 21 Wend. (N. Y.) 14, 26 Wend. (N. Y.) 367.

Existence of General Agency Not Necessary. — In order that the factor may have a lien for a general balance of accounts, it is not necessary that the factor should have been the general agent of the principal. Such an indebtedness and the right to a lien therefor may arise when the factor has acted for his principal in two transactions, just as effectually as where he has acted in a longer course of dealings. Bryce v. Brooks, 26 Wend. (N. Y.) 374.

1. Balance of Account Against Factor. — Enoch v. Wehrkamp, 3 Bosw. (N. Y.) 398; McGraft v. Rugee, 60 Wis. 406, 50 Am. Rep. 678.

2. Debts Not Connected with Agency. — *Ex p.* Deeze, 1 Atk. 229; *Ex p.* Ockenden, 1 Atk. 236; Houghton v. Matthews, 3 B. & P. 494; Green v. Farmer, 4 Burr. 2222; Martin v. Pope, 6 Ala. 532, 41 Am. Dec. 66; Jarvis v. Rogers, 15 Mass. 396; Sturgis v. Slacum, 18 Pick. (Mass.) 40; Thacher v. Hannahs, 4 Robt. (N. Y.) 407; Owen v. Iglanor, 4 Coldw. (Tenn.) 15.

In Thacher v. Hannahs, 4 Robt. (N. Y.) 407, it was said that the factor's lien for a general

balance did not embrace the price of goods sold by the factor to the principal, not connected with the general purposes of the agency.

Debt Contracted Before Consignment and Without Reference Thereto. — In Barry v. Boninger, 46 Md. 59, it was held that where the possession of the factor comes to him subsequently to his debt, and could have had no influence in making the debt, his claim of lien must be subordinate to the true state of the ownership, whether known or not known to him.

Advances on Promised Consignments. — Though an advance on a promised consignment be not an advance on a consignment, still it is to be treated as an advance in the course of the relation of factor and principal, and a lien therefor attaches as soon as possession is acquired under the antecedent promise and is effective where adverse rights are not acquired in the meantime. Campbell v. Penn, 7 La. Ann. 371. See also Bailey v. Hudson River R. Co., 49 N. Y. 70.

3. Possession Essential to Existence of Lien — *England.* — Kruger v. Wilcox, Amb. 252; Sweet v. Pym, 1 East 4; Kinloch v. Craig, 3 T. R. 119, 783; Nichols v. Clent, 3 Price 547; Bruce v. Wait, 3 M. & W. 15; Sargent v. Morris, 3 B. & Ald. 277, 5 E. C. L. 283; Daubigny v. Duval, 5 T. R. 604; Patten v. Thompson, 5 M. & S. 350; M'Combie v. Davies, 7 East 5; Hutton v. Bragg, 7 Taunt. 14, 2 E. C. L. 13; Hallett v. Bonsfield, 18 Ves. Jr. 187; Mitchell v. Ede, 11 Ad. & El. 888, 39 E. C. L. 260.

United States. — Ryberg v. Snell, 2 Wash. (U. S.) 403; Matthews v. Menedger, 2 McLean (U. S.) 145; The Frances, 8 Cranch (U. S.) 418.

Alabama. — Desha v. Pope, 6 Ala. 691, 41 Am. Dec. 76; Swilley v. Lyon, 18 Ala. 552; Sawyer v. Lorillard, 48 Ala. 332.

Arkansas. — Byers v. Danley, 27 Ark. 77.

Illinois. — Strahorn v. Union Stock Yard, etc., Co., 43 Ill. 424, 92 Am. Dec. 142; Warren v. Columbus First Nat. Bank, 149 Ill. 36, citing 3 AM. AND ENG. ENCYC. OF LAW (1st ed.) 335.

Iowa. — Hodges v. Kimball, 49 Iowa 577, 31 Am. Rep. 158.

Kentucky. — Cook v. Brannin, 87 Ky. 101.

Louisiana. — Hamilton v. Campbell, 9 La. Ann. 531.

Maryland. — Ruhl v. Corner, 63 Md. 179.

Massachusetts. — Holly v. Huggefurd, 8 Pick. (Mass.) 73, 19 Am. Dec. 303; Sumner v. Hamlet, 12 Pick. (Mass.) 76; Hall v. Jackson, 20 Pick. (Mass.) 194; Baker v. Fuller, 21 Pick. (Mass.) 318.

b. CHARACTER OF POSSESSION — (1) In General — Possession Must Be Lawful and in Good Faith. — The possession must have been acquired lawfully and in good faith.¹

Conditions of Consignment Must Be Complied With. — And where a consignment to a factor is made subject to certain conditions, the factor will acquire no lien until he has complied with such conditions.²

Must Have Received Goods as Factor. — Factors can claim a lien only on goods which came into their possession as factors.³

(2) Goods Received After Death of Principal. — Where goods have been consigned to a factor before the death of the principal, who dies while they are *in transitu*, and after his death the goods are delivered to the factor by order of the administrator of the principal, it has been held that the factor's lien for advances made upon the consignment during the principal's life will attach.⁴ In cases where the principal dies before the goods are *in transitu* to the factor, the lien does not attach for a general balance of accounts due to the factor,⁵ nor apparently for advances made upon the faith of the future con-

Missouri. — *Archer v. McMechan*, 21 Mo. 43; *Bruce v. Andrews*, 36 Mo. 593; *Valle v. Cerre*, 36 Mo. 575, 88 Am. Dec. 161; *Lewis v. Mason*, 94 Mo. 551.

Nebraska. — *Moline, etc., Co. v. Walter A. Wood Mowing, etc., Mach. Co.*, 49 Neb. 869.

New Hampshire. — *Brown v. Wiggins*, 16 N. H. 317.

New York. — *Rochester Bank v. Jones*, 4 N. Y. 497, 55 Am. Dec. 290; *Winter v. Coit*, 7 N. Y. 288, 57 Am. Dec. 522; *Marine Bank v. Wright*, 48 N. Y. 1.

North Dakota. — *Rosenbaum v. Hayes*, 5 N. Dak. 476.

Tennessee. — *Woodruff v. Nashville, etc., R. Co.*, 2 Head (Tenn.) 87; *Oliver v. Moore*, 12 Heisk. (Tenn.) 482.

Vermont. — *Elliot v. Bradley*, 23 Vt. 217.

Washington. — *Walter v. Ross*, 2 Wash. (U. S.) 283.

Illustrations. — A contract between a corporation and its factor whereby the corporation appoints the factor its general selling agent and agrees to consign all its products to him does not give the factor a lien for advances on money due to the corporation for goods sold and delivered by the corporation directly to the purchasers, as possession is essential to a factor's lien. *Warren v. Columbus First Nat. Bank*, 149 Ill. 9, reversing 50 Ill. App. 193.

In *Hodges v. Kimball*, 49 Iowa 577, 31 Am. Rep. 158, the court, applying the doctrine that possession is essential to a factor's lien, held that where factors had made advances on the strength of consignments thereafter to be made, and before the property intended to be consigned was actually shipped, and before the shipping receipts were forwarded to the factor, it was seized by creditors of the principal as his property, the factors had no lien which they could enforce against such attaching creditors.

1. Possession of Factor Must Be Lawful. — *Kinloch v. Craig*, 3 T. R. 119; *Nagle v. McFeeters*, 97 N. Y. 202; *Rochester Bank v. Jones*, 4 N. Y. 501, 55 Am. Dec. 290.

In *M'Kean v. Wagenblast*, 2 Grant's Cas. (Pa.) 462, it was held that a factor was not entitled to a lien where he acquired possession of the goods without the consent of the principal.

2. Compliance with Conditions of Consignment.

— Where goods are consigned to a factor on condition that he accept a draft drawn upon him by his principal, the factor will acquire no lien unless he accepts the draft. *Winter v. Coit*, 7 N. Y. 288, 57 Am. Dec. 522; *Rochester Bank v. Jones*, 4 N. Y. 497, 55 Am. Dec. 290.

3. Possession Must Have Been Acquired as Factor. — *Dixon v. Stansfield*, 10 C. B. 398, 70 E. C. L. 398.

A factor has no lien on goods which are delivered to him as agent of and for the use of his principal, as such a delivery is considered a delivery to the principal, and the possession is considered to be in the principal. *Gurney v. Sharp*, 4 Taunt. 242.

4. Possession Received After Death of Principal.

— A principal gave notice to his factor of an intended consignment of a ship to him for the purpose of sale, and in consequence drew bills on him, which the factor accepted. The principal died, and his executors directed the captain of the ship to follow his former orders, and the captain thereupon delivered the ship into the possession of the factor, who sold it. It was held that the factor had a lien upon the proceeds, as well for the amount of money disbursed by him for the necessary use of the ship on its arrival, and for the acceptances by him actually paid, as for the amount of his outstanding acceptances not then due. *Hammonds v. Barclay*, 2 East 227. See also *Lempriere v. Pasley*, 2 T. R. 485, and *Story on Agency*, § 377. But compare *Oliver v. Moore*, 12 Heisk. (Tenn.) 482.

5. Goods Not Shipped until Principal Dead — No Lien.

— In *Wylly v. King*, Ga. Dec. (pt. ii.) 7, it was held that a factor has no right to enforce a general lien for a general balance of accounts incurred in the lifetime of his principal on property which comes into his possession subsequently to the death of the principal, and by the order of the personal representative. The case of *Hammonds v. Barclay*, 2 East 227, was distinguished as being a decision upon the ground of a particular lien, and not involving the factor's right to a general lien for a balance of accounts.

A. ordered goods to be packed and forwarded to F. & Co., commission merchants, to whom he owed a balance, on account, and wrote a

signment of the very goods which subsequently reach his hands.¹

c. **SUFFICIENCY OF POSSESSION** — (1) *In General*. — The factor need not have personal possession of the goods in order that his lien may attach, but it is sufficient if he holds possession through his agent.²

Constructive Possession. — Constructive as well as actual possession may be sufficient to support the lien.³

Constructive Possession Not Recognized. — In some jurisdictions, however, the actual possession by the factor or his agent is required.⁴

(2) *Goods in Transit* — (a) **General Rule.** — Goods consigned to a factor for sale without any agreement between the factor and the principal in regard thereto are, while in transit, subject to the directions of the principal, and the factor, before he acquires the actual possession of the goods, has not such a constructive possession thereof as will entitle him to a lien thereon for his general balance of accounts.⁵ This is true though the bill of lading is taken

letter of advice, inclosing an invoice, but died before the letter was mailed or the goods had left his premises. His son, on the day after his death, forwarded the letter and the goods, and F. & Co. sold them and gave credit for the proceeds in reduction of their balance against A., whose estate was insolvent. It was held that F. & Co. had no lien on these goods for the balance of their account against A., and that they must pay over the said proceeds to A.'s administrator. *Farnum v. Boutelle*, 13 Met. (Mass.) 159.

1. In *Swilley v. Lyon*, 18 Ala. 552, it appeared that a farmer obtained an advance from his commission merchant in the month of May. Before the crops for the then current year were gathered, the farmer died, and his administrator shipped the crops when gathered to the commission merchant. It was held that the latter had no lien upon the crops for the advances made by him during the decedent's lifetime. The court said that the extreme limit to which the lien of a factor could be carried was to allow a lien in his favor on goods *in transitu* at the time of the principal's death, and that to allow a lien under the circumstances of the case in hand might lead to an entire change in the statutory order provided for the payment of the decedent's debts. In this case it did not appear that there was an agreement that the advances should constitute a lien upon the principal's then growing crops. But it was proved that "it was not usual for commission merchants to accept bills of exchange for planters, but upon the promise or expectation that the planter would ship his cotton to them" for the purpose of creating a fund from which they might be reimbursed.

Where a commission merchant has advanced money for the purchase of tobacco, in pursuance of an agreement by which the tobacco, when bought, is to be shipped to him for sale, and he is to have a lien thereon for his advances, the lien becomes complete only upon the delivery of the tobacco to the factor. Until then it is inchoate, and is inferior to the intervening equities of third persons. If, therefore, the person to whom the money has been advanced dies insolvent after purchasing the tobacco, but before shipping it to the factor, the factor, by a subsequent receipt of the tobacco from the administrator of such decedent, acquires no lien as against the credit-

ors of the decedent whose right to an equal *pro rata* share of the decedent's property is fixed by Gen. Stat. Ky., 1888, c. 39, art. 2, § 33. *Cook v. Brannin*, 87 Ky. 101.

2. **Possession Through Agent Sufficient.** — *M'Combie v. Davies*, 7 East 5; *Nesmith v. Dyeing, etc. Co.*, 1 Curt. (U. S.) 130; *Ganseford v. Dutillet*, 1 Martin N. S. (La.) 284; *Sumner v. Hamlet*, 12 Pick. (Mass.) 76; *Urquhart v. M'Iver*, 4 Johns. (N. Y.) 103; *Grieff v. Cowguill*, 2 Disney (Ohio) 58; *Clemson v. Davidson*, 5 Binn. (Pa.) 392; *Woodruff v. Nashville, etc., R. Co.*, 2 Head (Tenn.) 87; *Oliver v. Moore*, 12 Heisk. (Tenn.) 482.

Where the goods are delivered to the agents of factors and placed upon their drays to be transferred to their warehouse, their lien for advances attaches, and is superior to that of an attachment levied upon the goods while in transit to the warehouse of the factors. *Burrus v. Kyle*, 56 Ga. 24.

3. **Constructive Possession.** — *Desha v. Pope*, 6 Ala. 691, 41 Am. Dec. 76; *Kollock v. Jackson*, 5 Ga. 155; *Hamilton v. Campbell*, 9 La. Ann. 531.

4. **Cases Requiring Actual Possession.** — *Oliver v. Moore*, 12 Heisk. (Tenn.) 482; *Woodruff v. Nashville, etc., R. Co.*, 2 Head (Tenn.) 87.

5. **Goods in Transit — England.** — *Kinloch v. Craig*, 3 T. R. 119; *Bruce v. Wait*, 3 M. & W. 15; *Nichols v. Clent*, 3 Price 547. See also *Mitchel v. Ede*, 11 Ad. & El. 888, 39 E. C. L. 260.

United States. — *Ryberg v. Snell*, 2 Wash. (U. S.) 403; *The Frances*, 8 Cranch (U. S.) 335, 418. *Alabama.* — *Desha v. Pope*, 6 Ala. 690, 41 Am. Dec. 76.

California. — *National Bank v. Porter*, 73 Cal. 430.

Illinois. — *Lewis v. Galena, etc., R. Co.*, 40 Ill. 283; *Strahorn v. Union Stock Yard, etc., Co.*, 43 Ill. 424, 92 Am. Dec. 142.

Iowa. — *Hodges v. Kimball*, 49 Iowa 577, 31 Am. Rep. 158.

Maryland. — *Ruhl v. Corner*, 63 Md. 179.

Massachusetts. — *Baker v. Fuller*, 21 Pick. (Mass.) 318.

Mississippi. — *Bonner v. Marsh*, 10 Smed. & M. (Miss.) 376, 48 Am. Dec. 754.

New Hampshire. — *Brown v. Wiggin*, 16 N. H. 312.

New York. — *Rochester Bank v. Jones*, 4 N. Y. 497, 55 Am. Dec. 290; *Winter v. Coit*, 7 N. Y. 288, 57 Am. Dec. 522; *Beebe v. Mead*, 33

in the name of the factor, provided the delivery to the carrier was not made with the intention of passing a special property in the goods to the factor.¹

Factor's Lien Attaches When Possession Taken — Taking Possession of Bulky Articles. — Of course the lien of the factor will attach to goods consigned to him as soon as he takes possession, and in case of bulky articles the exercise by the factor of dominion over the goods after they have reached their destination sufficiently shows possession by him.²

(b) **Consignment under Special Agreement.** — Where the consignment to the factor is made in pursuance of an agreement between the principal and the factor, who has made advances to the principal, it has been held that the delivery to the carrier of the goods consigned to the factor, and with the intent to comply with the agreement, gives to the factor a lien upon the goods from the time of such delivery.³

N. Y. 587; *Marine Bank v. Wright*, 48 N. Y. 1. *Vermont*. — *Elliot v. Bradley*, 23 Vt. 217.

In *Ryberg v. Snell*, 2 Wash. (U. S.) 294, goods were consigned to a factor on account of and at the risk of the principal. Before the goods reached the possession of the factor the principal made an assignment of the bill of lading. It was held that the factor had no lien as against the assignee of the bill of lading.

In *National Bank v. Porter*, 73 Cal. 430, it was held that a factor to whom goods are consigned for sale, but who has made no specific advances thereon, does not acquire a lien on the goods for a general balance due him from the consignor, if, prior to the shipment, the consignor has sold the goods, and the factor, prior to receiving possession thereof, is notified of the sale by a letter of advice and an indorsement on the bill of lading.

Statutory Modification. — In *Louisiana*, by force of statute, when goods are consigned to a factor the factor's lien or privilege attaches from the time when the bill of lading is placed in the mail or in the hands of the carrier. *Ouachita Nat. Bank v. Weiss*, 49 La. Ann. 573; *Funkhouser v. Dutcher*, 14 La. Ann. 499.

In *Chaffraix v. Harper*, 26 La. Ann. 22, the court, while recognizing the fact that Civ. Code, § 3247, gave a privilege to the factor superior to the attaching creditors of the principal for any balance due to him, provided he had obtained possession or received a bill of lading, held that the language of the article plainly implied that until the goods had actually reached the possession of the factor they were subject to attachment by the creditors of the principal, provided actual possession of them could be obtained; but that when the goods are so seized the seizure is subject to the rights of the factor to establish his right to the proceeds contradictorily with the attaching creditors.

1. **Bill of Lading Taken in Factor's Name.** — *Rosenbaum v. Hayes*, 5 N. Dak. 476.

2. **Exercising Dominion Over Goods at Destination.** — In *Rice v. Austin*, 17 Mass. 197, a cargo of lumber was consigned to a factor. The lumber was under contract of sale to the United States, and the factor was authorized to receive the price therefor. On arrival of the ship at the destination the factor, who had possession of the bill of lading, indorsed his orders upon it and directed the shipmaster to proceed to the navy yard of the United States to deliver the property. It was held that the factor had taken possession of the property so

that his lien was superior to that of a subsequent attaching creditor of the principal.

3. **Consignment in Pursuance of Agreement** — *England*. — *Bryans v. Nix*, 4 M. & W. 775. See also *Anderson v. Clarke*, 2 Bing. 20, 9 E. C. L. 300, referred to by Parke, B., in *Bryans v. Nix*, 4 M. & W. 788.

Georgia. — *Wade v. Hamilton*, 30 Ga. 450; *Elliott v. Cox*, 48 Ga. 39; *Hardeman v. De Vaughn*, 49 Ga. 596.

Maryland. — *Ruhl v. Corner*, 63 Md. 179.

Missouri. — *Valle v. Cerre*, 36 Mo. 575, 88 Am. Dec. 161.

New York. — *Grosvenor v. Phillips*, 2 Hill (N. Y.) 147; *Holbrook v. Wight*, 24 Wend. (N. Y.) 169, 35 Am. Dec. 607; *Bailey v. Hudson River R. Co.*, 49 N. Y. 75.

Ohio. — *Straus v. Wessel*, 30 Ohio St. 211.

See also *Haille v. Smith*, 1 B. & P. 563; *Brown v. Wiggin*, 16 N. H. 312; *Beebe v. Mead*, 33 N. Y. 587.

Intent of Delivery. — It has been held that the delivery to the carrier must be made with the intent to comply with the agreement and with the intent to pass a special property to the factor. *Rosenbaum v. Hayes*, 5 N. Dak. 476. See also *National Bank v. Porter*, 73 Cal. 430; *Bailey v. Hudson River R. Co.*, 49 N. Y. 70; *Rochester Bank v. Jones*, 4 N. Y. 501, 55 Am. Dec. 290.

In *Wade v. Hamilton*, 30 Ga. 450, it was held that the delivery of goods to a common carrier for the factor in pursuance of a previous agreement between the principal and the factor, and the carrier's acceptance of it for the factor, constitute a constructive delivery to the factor so as to give him a lien as against attaching creditors of the principal.

Placing Goods on Car Without Forwarding Bills of Lading. — In *Hodges v. Kimball*, 49 Iowa 577, 31 Am. Rep. 158, however, it was held that where goods are consigned to a factor under an agreement that he should sell them and apply the proceeds to repay previous advances, placing the goods on the car for shipment without forwarding the bills of lading to the factor would be insufficient to give the factor a lien as against attaching creditors of the principal. But it has been held that, in such a case, even if the consignor retains the bill of lading, simply notifying the factor of the consignment, the title rests in the latter as effectually, as between him and the consignor, as if the bill of lading had been delivered. *Bailey v. Hudson River R. Co.*, 49 N. Y. 70.

The Mere Agreement to Ship the goods, without an actual shipment, will not give the factor a lien thereon.¹

(c) **Advances on Faith of Particular Consignment.** — Where advances are made by the factor on the faith of a particular consignment, he may acquire a lien to the extent of such advances though the consignment was made without any special agreement between the principal and the factor.²

(d) **Assignment of Bill of Lading as Collateral Security.** — The assignment of the bill of lading as collateral security conveys title to the goods, and is valid, and thereby the factor may acquire a security for advances independent of his lien as factor.³

4. **Waiver and Loss of Lien** — *a.* IN GENERAL. — Where the lien of the factor has once attached it cannot, as a general rule, be defeated by the principal or third persons without the consent of the factor.⁴

b. CONTRACT INCONSISTENT WITH CONTINUANCE OF LIEN. — For the same reason that a factor acquires no lien where he receives the goods under

Lien for General Balance. — In *Valle v. Cerre*, 36 Mo. 588, 88 Am. Dec. 161, the court, in speaking of the question whether a factor could claim a lien for a general balance where the consignment is made to him under a special agreement, and the goods are attached *in transitu* by creditors of the principal, said: "Whether or not the given consignment is to be considered as made to cover a general balance of account will depend upon the special arrangements, agreement, and understanding of the parties; but where such an arrangement exists, and the consignment is made in pursuance of it, and there is nothing else in the case which is inconsistent with the hypothesis, the case would be governed by the same principle, and a delivery to the carrier will be considered as constructive delivery to the consignee."

1. *Bryans v. Nix*, 4 M. & W. 775; *Desha v. Pope*, 6 Ala. 690, 41 Am. Dec. 76; *Caldwell v. Wentworth*, 16 N. H. 318.

2. **Advances on Faith of Consignment.** — *Bryans v. Nix*, 4 M. & W. 775; *Burritt v. Rench*, 4 McLean (U. S.) 325; *Lambeth v. Turnbull*, 5 Rob. (La.) 264, 39 Am. Dec. 536; *Hall v. Hinks*, 21 Md. 406; *Valle v. Cerre*, 36 Mo. 588, 88 Am. Dec. 161; *Holbrook v. Wight*, 24 Wend. (N. Y.) 169, 35 Am. Dec. 607; *Heard v. Brewer*, 4 Daly (N. Y.) 136; *Rosenbaum v. Hayes*, 5 N. Dak. 476; *Jordan v. James*, 5 Ohio 88; *Davis v. Bradley*, 28 Vt. 118, 65 Am. Dec. 226. See also *Holl v. Griffin*, 10 Bing. 246, 25 E. C. L. 118; *Taylor v. Kymer*, 3 B. & Ad. 320, 23 E. C. L. 81; *Mitchel v. Ede*, 11 Ad. & El. 888, 39 E. C. L. 260. See, however, *Baker v. Fuller*, 21 Pick. (Mass.) 318. In this case the advance was procured from the factor upon a consignment already *in transitu* to him, and the right of a creditor of the consignor subsequently attaching the goods was held superior to the right of the factor, the goods never having been in his actual or constructive possession.

In *Burritt v. Rench*, 4 McLean (U. S.) 325 it was held that a factor making advances on goods shipped on the faith of a bill of lading has a permanent lien for reimbursement, and may maintain an action against the carrier for the loss of the goods, notwithstanding a compromise between the carrier and the owner.

Acceptances of Drafts on the Faith of the Consignment are regarded as the same as making

an actual advance upon the goods. *Lambeth v. Turnbull*, 5 Rob. (La.) 264, 39 Am. Dec. 536.

No Lien for General Balance Without Actual Possession. — In *Kinloch v. Craig*, 3 T. R. 119, it was held that a factor has no lien for a general balance on goods consigned to him unless they come into his actual possession, and if, in consideration of goods being consigned to him, he accepts bills drawn by the consignor, and pays part of the freight after the goods arrive, and becomes insolvent before the bills are due and before the goods get into his actual possession, the consignor may stop them *in transitu*.

Rule in Tennessee — No Lien While Goods in Transit. — In Tennessee, the courts refuse to allow the factor a lien on goods while in transit, though he has a bill of lading for such goods and has made advances thereon. *Oliver v. Moore*, 12 Heisk. (Tenn.) 482; *Woodruff v. Nashville, etc., R. Co.*, 2 Head (Tenn.) 87. See also *Saunders v. Bartlett*, 12 Heisk. (Tenn.) 316.

3. **Assignment of Bill as Collateral.** — *Gibson v. Stevens*, 8 How. (U. S.) 384; *Tilden v. Minor*, 45 Vt. 198. See the title PLEDGE AND COLLATERAL SECURITY.

4. *Meany v. Head*, 1 Mason (U. S.) 319; *Bard v. Stewart*, 3 T. B. Mon. (Ky.) 72; *Bowker v. Connolly*, 17 La. Ann. 12; *Grieff v. Cowguill*, 2 Disney (Ohio) 58.

Attachment by Creditors of Principal. — As heretofore stated, the lien of the factor is superior to the claims of creditors, and a creditor of the principal cannot, by a levy of an attachment or execution for a debt of the principal, defeat the lien of the factor. See *supra*, this section, subdv. 1, *In General*.

In *Mutual Redemption Bank v. Sturgis*, 9 Bosw. (N. Y.) 660, it was held that a factor having a lien on the goods of his principal beyond their value does not lose his lien when the goods are attached by a creditor of the principal by certifying in good faith that he holds no goods for the benefit of the principal.

In *Seymour v. Hoadley*, 9 Conn. 418, it was held that a factor did not, in the absence of fraud, lose his lien as against creditors of the principal, by holding out his principal as the owner of the goods.

Death of Principal. — The death of the principal does not defeat the lien of the factor, but he is entitled to hold the goods as against the

an agreement inconsistent with the existence of a lien in his favor,¹ he is held to have lost his lien where he enters into a contract with his principal inconsistent with the continued existence of the lien.²

c. SURRENDER OF POSSESSION. — As the existence of the lien is dependent upon the possession of the factor,³ he waives his lien by a voluntary surrender of the possession.⁴

Personal Possession Unnecessary. — If, however, the delivery of possession be special, so that the factor retains control of the goods, his lien is not extinguished.⁵

d. FAILURE TO CLAIM LIEN WHEN GOODS ARE DEMANDED BY PRINCIPAL. — When a demand is made upon the factor by his principal for the goods, he should at the time claim a lien upon the goods, and if he fails to do so and refuses to deliver possession, assigning other reasons than his right to a lien upon the goods as the ground for his refusal, he will be held to have waived his lien.⁶

representative of the principal until his claim is paid. *Martin v. Curd*, 1 Bush (Ky.) 327.

1. See *supra*, this section, subdiv. 1. *In General*.

2. *Agreement Inconsistent with Continuance of Lien.* — In *Cowell v. Simpson*, 16 Ves. Jr. 275, Lord Eldon said that where a factor who has a lien upon the goods in his possession for his advances, etc., and for a general balance upon former transactions, enters into a special contract for a particular mode of payment he loses his lien. See also *Sawyer v. Lorillard*, 48 Ala. 332.

Purchasing Factor. — In *Bryce v. Brooks*, 26 Wend. (N. Y.) 367, it was held that where a purchasing factor had transmitted two distinct orders for goods for his principal, and on the arrival of the first parcel delivered an invoice of them to his principal, and accepted his draft for the amount thereof, payable at a future day, he waived his lien on such goods, which would otherwise have existed, for payments made or responsibilities incurred upon the second parcel.

Taking Note of Principal. — In *Story v. Flournoy*, 55 Ga. 56, it was held that a factor did not waive his statutory lien by taking a note of the principal for advances.

Judgment Note. — In *Darlington v. Chamberlain*, 20 Ill. App. 443, *affirmed* 120 Ill. 585, it was held that the taking of a judgment note by a factor for advances on previous consignments, without relying on his right to retain the amount of such advances out of the proceeds of goods subsequently shipped to him, was a waiver of his lien on such proceeds for such advances.

Drawing a Bill for Advances is not to be considered even after the acceptance of the bill, as a waiver by a factor of his lien. *De Wolf v. Howland*, 2 Paine (U. S.) 356.

See also, as to waiver of lien, the title *LIENS*.

3. See *supra*, this section, *When Lien Attaches*.

4. *Surrender of Possession — England.* — *Kruger v. Wilcox*, Ambl. 252; *Godin v. London Assur. Co.*, 1 Burr. 489; *Gardiner v. Coleman* [cited in *Godin v. London Assur. Co.*, 1 Burr. 494]; *Foxcroft v. Devonshire*, 2 Burr. 936; *Houghton v. Matthews*, 3 B. & P. 489; *Walker v. Birch*, 6 T. R. 262; *Lickbarrow v. Mason*, 6 East 27, note *a*; *Bligh v. Davies*, 28 Beav. 211.

United States. — *Matthews v. Menedger*, 2 McLean (U. S.) 145.

Alabama. — *Sawyer v. Lorillard*, 48 Ala. 332.

Kentucky. — *Bard v. Stewart*, 3 T. B. Mon. (Ky.) 72.

Massachusetts. — *Holly v. Huggefords*, 8 Pick. (Mass.) 73, 19 Am. Dec. 303.

Missouri. — *Archer v. McMechan*, 21 Mo. 43.

New York. — *Sharp v. Whipple*, 1 Bosw. (N. Y.) 557.

West Virginia. — *Barnes Safe etc., Co. v. Bloch Bros. Tobacco Co.*, 38 W. Va. 158.

In *Sweet v. Pym*, 1 East 4, it was held that if the factor ships the goods to his principal, he loses his lien and cannot stop the goods *in transitu*. See also *Kruger v. Wilcox*, Ambl. 252; *Matthews v. Menedger*, 2 McLean (U. S.) 154.

When Wrongly Deprived of Possession. — If the factor is wrongfully deprived of the possession of the goods he of course does not lose his lien. *Winne v. Hammond*, 37 Ill. 99; *Holbrook v. Wight*, 24 Wend. (N. Y.) 169, 35 Am. Dec. 607.

Possession Accidentally Regained. — In *Hale v. Barrett*, 26 Ill. 195, 79 Am. Dec. 367, it was held that where the factor surrenders the goods on receipt of the note of the owner for charges, he loses his lien and such lien does not revive upon his accidentally regaining possession.

Goods Sold — Lien on Proceeds. — Where goods are sold and the factor surrenders possession to the purchaser, though he loses his lien directly upon the goods, the lien still attaches on the price or the securities taken therefor. *Houghton v. Matthews*, 3 B. & P. 494. See *supra*, this section, subdiv. 1, *In General*.

5. *Special Delivery, Factor Retaining Control.* — In *Matthews v. Menedger*, 2 McLean (U. S.) 145, wherein the factor delivered the goods to the agent of the principal, it was held that if such delivery was made to the agent of the principal to hold as agent of the factor, the lien of the factor was not extinguished. See also *Holbrook v. Wight*, 24 Wend. (N. Y.) 175, 35 Am. Dec. 607.

In *Grieff v. Cowguill*, 2 Disney (Ohio) 58, it was held that where the factor reships goods to the place from which they were consigned, he may retain them there in the hands of his agent until his advances are paid.

6. *Refusing Principal's Demand for Possession on Grounds Unconnected with Lien.* — *Knight v.*

c. **BY MISCONDUCT.** — A factor may be guilty of such gross misconduct in the transaction of his principal's business as to forfeit his lien on his principal's goods or the proceeds thereof in his hands.¹

Failure to Render Proper Account. — As heretofore stated, a factor is bound on reasonable demand by his principal to render an account,² and he is generally held by his refusal to do so to have forfeited his lien.³

5. Discharge of Lien. — A tender by the principal to the factor of the amount of his charges for advances, etc., will discharge the lien of the factor.⁴

Death of Principal. — The death of the principal after the goods are in the factor's hands does not affect the right of the factor to retain the goods for his lien thereon.⁵

Harrison [cited in *Scarfe v. Morgan*, 4 M. & W. 271]; *Lehmann v. Schmidt*, 87 Cal. 15; *Winter v. Coit*, 7 N. Y. 293, 57 Am. Dec. 522; *Holbrook v. Wight*, 24 Wend. (N. Y.) 180, 35 Am. Dec. 607; *M'Pherson v. Neuffer*, 11 Rich. L. (S. Car.) 267. Compare *Fowler v. Parsons*, 143 Mass. 403. See also *Boardman v. Sill*, 1 Campb. 410, note; *White v. Gainer*, 2 Bing. 23, 9 E. C. L. 302; *Dirks v. Richards*, 1 C. & M. 626, 41 E. C. L. 340; *Scarfe v. Morgan*, 4 M. & W. 270; *Hanna v. Phelps*, 7 Ind. 24, 63 Am. Dec. 410; *Everett v. Saltus*, 15 Wend. (N. Y.) 478; *Rogers v. Weir*, 34 N. Y. 471; *Hudson v. Swan*, 83 N. Y. 561.

A factor agreed with the owner of some wine to receive and sell it, and under the agreement did receive part of it. He then refused to sell the wine or have anything more to do with the contract, or to return the wine which he had received, or to account for it. When demand was made on the defendant he made no claim of lien. He stated to the witness that it was so mixed up with his wine that he could not make any statement of it. It was held that the court was justified in finding that the factor had waived his lien for advances and expenses. *Lehmann v. Schmidt*, 87 Cal. 15.

1. Pledge. — A factor loses his lien on the goods of his principal by tortiously pledging them. *Ludden v. Buffalo Batting Co.*, 22 Ill. App. 415; *Holly v. Huggefurd*, 8 Pick. (Mass.) 76, 19 Am. Dec. 303; *Jarvis v. Rogers*, 15 Mass. 396. Compare *Steiger v. Third Nat. Bank*, 6 Fed. Rep. 569. See *supra*, this title, *Extent of Authority—To Pledge*.

Violation of Instruction. — It has been held that where a factor employed to purchase grain in his own name for future delivery closes out the deal contrary to the instructions of his principal, and though the principal had advanced the required margins, he loses his lien on moneys in his hands, and the moneys may be recovered by the principal. *Jones v. Marks*, 40 Ill. 313; *Larminie v. Carley*, 114 Ill. 196. See also *Oldershaw v. Knowles*, 101 Ill. 117; *Denton v. Jackson*, 106 Ill. 433.

Commingle Funds. — Commission merchants who have a lien upon moneys received as the proceeds of goods consigned to them for sale, to secure them against loss on acceptances and indorsements for the consignors, may properly mingle such moneys with other funds in their hands, and if they have done so the subsequent assignment of their estate in insolvency will not enable the consignor to maintain an action therefor against the assignee during the continuance of the liabil-

ity of the factors upon the acceptances and indorsement. *Vail v. Durant*, 7 Allen (Mass.) 408, 83 Am. Dec. 695.

See, however, *supra*, this title, *Duties and Liabilities of Parties Inter Se*, as to the right of the factor to commingle the funds of the principal.

2. See *supra*, this title, *Duties and Liabilities of Parties Inter Se*.

3. Failure to Render Account. — *Knight v. Harrison* [cited in *Scarfe v. Morgan*, 4 M. & W. 271]; *Lehmann v. Schmidt*, 87 Cal. 15; *Terwilliger v. Beals*, 6 Lans. (N. Y.) 403.

A principal applied to his factor, to whom he had intrusted goods for sale under an agency of indefinite duration, for the return of the goods, and notified him of a termination of the agency, and the factor, claiming a lien for advances and commissions, declined to surrender, and upon the principal's offer to pay the amount of the claims substantially refused to make a statement of them. It was held that the rules in relation to tender as between debtor and creditor were not applicable, and that a selling factor was bound, when reasonably requested, to make and present to his principal a full and complete statement of his dealings and the accounts between them, and on his failure to do so forfeited his lien. *Terwilliger v. Beals*, 6 Lans. (N. Y.) 403.

4. Tender Discharges Lien. — *Eichel v. Sawyer*, 44 Fed. Rep. 845.

In *Miller v. Price*, (Cal. 1895) 39 Pac. Rep. 781, it was held, under Civ. Code, § 2905, providing that redemption from a lien is made by an offer to do that for which the property is security, that a recovery of property consigned to a factor cannot be defeated on the ground that the factor had a lien on the property for advances, where the principal had tendered the amount of such advances.

Assignment by Principal — To Whom Tender Is to Be Made. — Where a factor, having possession of goods consigned to him, on which he has a lien for charges, makes a valid general assignment for the benefit of his creditors, and delivers such goods to his assignee, and they are subsequently seized by the sheriff under process against the factor, the assignee is the proper person to whom the owner of the goods should tender the charges, in order to acquire a right to their possession. *Cook v. Kelly*, 9 Bosw. (N. Y.) 358.

5. Death of Principal. — *Knapp v. Alvord*, 10 Paige (N. Y.) 205, 40 Am. Dec. 241. See also *Hammonds v. Barclay*, 2 East 227, and *supra*, this section, *When Lien Attaches—Goods Received After Death of Principal*.

6. Lien of Factor Is Personal. — The lien of a factor is personal, and as a general rule he alone has the right to take advantage of it.¹ Still, however, the executor or administrator of the factor succeeds to his right of lien,² as does also his assignee for the benefit of creditors.³

7. Enforcement of Lien. — A factor's lien, being a possessory lien, does not give the factor general authority to sell the goods, but confers merely the right to retain them until his charges are paid;⁴ but the employment of the factor does give him implied power to sell,⁵ and the factor may, of course, do so unless that power is lawfully revoked or limited.

Restriction of Factor's Right to Sell. — Where the principal has placed restrictions upon the right of the factor to sell the goods, or instructed him not to sell, it is held in *England* that his right to sell even to reimburse himself for advances is entirely taken away,⁶ while in the *United States* the general rule is that he may sell after a reasonable notice to and demand upon his principal for repayment of his advances.⁷

Sale under Decree in Equity or in Virtue of Statutes. — It has been held that a factor may bring a suit in equity to enforce his lien for a general balance upon the goods, and will be entitled in such a suit to a deficiency decree in case the proceeds of the goods are insufficient to satisfy his claim.⁸ In some jurisdictions, moreover, the factor is given authority under statute to sell the goods for his reimbursement.⁹

Where Goods Are Sold. — Where the goods are sold, the factor may, of course,

1. Lien Is a Personal Privilege. — *Daubigny v. Duval*, 5 T. R. 606; *M'Combie v. Davies*, 7 East 5; *Ames v. Palmer*, 42 Me. 197, 66 Am. Dec. 271; *Holly v. Huggefurd*, 8 Pick. (Mass.) 73, 19 Am. Dec. 303; *Jones v. Sinclair*, 2 N. H. 319, 9 Am. Dec. 75; *Barnes Safe, etc., Co. v. Bloch Bros. Tobacco Co.*, 38 W. Va. 158, citing 3 AM. AND ENG. ENCYC. OF LAW (1st ed.) 339.

Attaching Creditors of Factor. — The lien of a factor being a personal privilege, it cannot be set up as against the principal by a creditor of the factor who has levied upon the goods for a debt of the factor. *Holly v. Huggefurd*, 8 Pick. (Mass.) 73, 19 Am. Dec. 303.

And goods in the hands of a factor cannot, even to the extent of the factor's lien, be seized on execution or attachment and sold for the payment of the factor's debts. *Loomis v. Barker*, 69 Ill. 360; *Blood v. Palmer*, 11 Me. 414, 26 Am. Dec. 547. See also *McGraft v. Rugee*, 60 Wis. 406, 50 Am. Rep. 378.

In *M'Cullough v. Porter*, 4 W. & S. (Pa.) 177, 39 Am. Dec. 68, it was held that an agreement to place goods in the hands of an insolvent factor for the purpose of sale, upon the terms of his paying to his principal the invoice price of the goods and retaining the surplus, does not vest in the factor such an interest in the goods as is the subject of sale on execution.

2. Death of Factor. — After the death of the factor his personal representative may retain the goods for the lien of the factor thereon. *Gage v. Allison*, 1 Brev. (S. Car.) 495, 2 Am. Dec. 682. See also *Martin v. Curd*, 1 Bush (Ky.) 327.

3. Assignee of Factor. — The assignee for the benefit of the creditors of the factors also succeeds to the lien of the factor upon the goods in his possession. *Terry v. Bamberger*, 44 Conn. 558; *Cameron v. Crouse*, 11 N. Y. App. Div. 391; *Francklyn v. Sprague*, 10 Hun (N.

Y.) 589; *Cook v. Kelly*, 9 Bosw. (N. Y.) 358; *Cabot's Estate*, 7 Phila. (Pa.) 437.

4. May Retain Goods Merely. — *Meany v. Head*, 1 Mason (U. S.) 319; *Sawyer v. Lorillard*, 48 Ala. 340.

5. See supra, this title, *Extent of Authority*.

Sales under Statutes. — In some states the factor is given authority under statute to sell the goods for his reimbursement. See the various local statutes.

Garnishing Factor. — The summoning in of a factor as trustee will not deprive him of the right to sell the property in his possession in order to reimburse himself for advances made thereon. *White Mountain Bank v. West*, 46 Me. 15.

Sale Must Be in Usual Course of Business. — Irrespective of the fact that advances have been made, the sale must be made strictly in accordance with the usual course of business. *Benny v. Rhodes*, 18 Mo. 147, 59 Am. Dec. 293.

6. Smart v. Sandars, 5 C. B. 895, 57 E. C. L. 895.

7. Watson v. Beatty, (Pa. 1888) 13 Atl. Rep. 521; *George Campbell Co. v. Angus*, 91 Va. 438. This question has been fully discussed elsewhere. See *supra*, *Duties and Liabilities of Parties Inter Se*, subdiv. 1. c. (5) (d) *Advances by Factor*.

8. Foreclosure of Lien. — *Whitman v. Horton*, 46 N. Y. Super. Ct. 531. See also the title PLEDGE AND COLLATERAL SECURITY.

Bill of Sale from Principal. — A bill of sale from an insolvent principal to his factor conveying the goods in the factor's possession, and upon which the factor had a lien to the extent of their full value, has been sustained as a foreclosure of the factor's lien. *New York Fourth Nat. Bank v. American Mills Co.*, 29 Fed. Rep. 611.

9. See the various statutes.

apply the proceeds to the payment of his claims.¹

8. Rights of Factor Arising out of Lien — *a. IN GENERAL.* — The factor, by reason of his lien, has merely a special property in the goods. He is entitled to recover the goods when wrongfully deprived of their possession,² but he has not the rights or liabilities of an owner thereof,³ and cannot control the owner's disposition of them subject to his lien;⁴ and, subject to the payment of the factor's lien, the principal is, of course, entitled to the proceeds of goods sold.⁵

b. PRIORITY OF LIEN — **Subject to Legal Ownership.** — A lien, as a general rule, can be conferred only by one who has a lawful title to the property upon which the lien is sought to be imposed, and it is held that a factor receiving goods from a person who has no title thereto cannot assert his lien as against the true and legal owner;⁶ and this is especially true where the factor had knowledge that his consignor was not the owner.⁷

Owner Estopped by His Conduct. — The true owner may, however, be estopped by his conduct to deny the right of the factor as against a third person to a lien for advances made on goods received by him.⁸

Statutes for Protection of Factors. — And in some jurisdictions statutes have been passed for the protection of factors in good faith making advances upon goods to third persons to whom the true owner has intrusted the possession of the goods.⁹

1. May Apply Proceeds to Payment of Lien. — *Copes v. Perkins*, 6 Tex. 150. See also *Alabama Gold L. Ins. Co. v. Sledge*, 62 Ala. 566.

The factor may apply the proceeds of a sale to his claim for advances though directed by his principal to apply such proceeds to another debt, such direction not having been given until after the advances were made. *Frost v. Weathersbee*, 23 S. Car. 354.

Unauthorized Sale by Factor. — Where a factor sells the property of his principal on which the factor has a lien for services and advances, he may retain the amount of his lien out of the proceeds, whether the sale be authorized or tortious, and he is liable only for the balance. *Shaw v. Ferguson*, 78 Ind. 555.

Cannot Apply Gold Dust. — A factor can apply only money in payment of his lien, and it has been held that where gold dust has been taken in payment the factor cannot take his pay out of it. *McCune v. Erfort*, 43 Mo. 134.

2. May Maintain Replevin. — In *Sewall v. Nichols*, 34 Me. 582, it was held that a factor might bring replevin for the goods when they had been seized under an attachment against the principal.

3. Abandoned and Captured Property Act. — A factor is not the "owner" of goods within the meaning of the Abandoned and Captured Property Act, which gives to the owner of any such property which has been sold by the federal government the right to recover the proceeds of it in the treasury of the United States. *U. S. v. Villalonga*, 23 Wall. (U. S.) 35.

Not Subject to Attachment. — In *Meany v. Head*, 1 Mason (U. S.) 319, it was held that the interest of a factor arising from his lien was neither a *jus in re* nor a *jus ad rem*, but a simple right of retainer, and therefore was not attachable as personal property.

4. Subject to Factor's Lien Owner Has Right of Disposition. — *Walter v. Ross*, 2 Wash. (U. S.) 283; *The Ship Packet*, 3 Mason (U. S.) 334.

U. S. v. Villalonga, 23 Wall. (U. S.) 35.

6. Lien Subject to True Ownership. — *Ryberg*

v. Snell, 2 Wash. (U. S.) 403; *Moore v. Hill*, 38 Fed. Rep. 330; *Barnett v. Warren*, 82 Ala. 557; *Branch v. Du Bose*, 55 Ga. 21; *Hale v. Barrett*, 26 Ill. 195, 79 Am. Dec. 367; *Byers v. Johnson County Sav. Bank*, 64 Ill. App. 168; *Bell v. Powell*, 23 La. Ann. 796; *Barry v. Boninger*, 46 Md. 59; *Archer v. McMechan*, 21 Mo. 45. See also *Fowler v. Parsons*, 143 Mass. 403.

A factor who has received a lot of cotton on consignment from a guardian as the property of his ward, cannot appropriate the proceeds thereof to the payment of a debt or obligation due him by the guardian. *Norton's Succession*, 24 La. Ann. 218.

Goods Covered by Same Bill of Lading. — Where the goods of different shippers are covered by the same bill of lading, the factor has no right to hold the goods of one shipper for charges upon the goods of the other. *Hale v. Barrett*, 26 Ill. 195, 79 Am. Dec. 357.

7. Factor's Knowledge of True Ownership. — *Weymouth v. Boyer*, 1 Ves. Jr. 416; *Grove v. Brien*, 8 How. (U. S.) 429.

Where the shipper is not the owner of the goods sent to the factor, and informs the factor that the goods were purchased with the money of another, and directs the factor to credit the proceeds to that other, the factor cannot claim a lien upon the goods for a general balance due from the shipper. *Darlington v. Chamberlin*, 120 Ill. 585.

8. Estoppel to Disputed Lien. — *Fowler v. Parsons*, 143 Mass. 401.

In *Byers v. Johnson County Sav. Bank*, 64 Ill. App. 168, it was held that where goods are consigned, through a mistake of the true owner or his agent, in the name of a third person, and the factor made advances thereon to such person, he has a lien upon the goods for such advances. See also *Duncan v. Blood*, 5 La. Ann. 11.

9. Statutes. — New York Laws 1831, c. 179, *Kinsey v. Leggett*, 71 N. Y. 387; *Mechanics'*, etc., *Bank v. Farmers'*, etc., *Nat. Bank*, 60 N.

Equities in Third Persons. — A factor making advances upon goods is held to be entitled to the rights of a *bona fide* purchaser to the extent of his lien, and his lien is therefore superior to the equitable claims of third persons of which the factor had no notice.¹ The factor's lien is, however, subject to the equitable rights of third persons of which he had notice.²

Advances by Third Persons on Bill of Lading. — A factor cannot claim a lien upon the goods as against a person who has made advances upon the bill of lading and received a transfer of it.³

VI. RELATION OF FACTOR TO THIRD PERSONS — 1. Rights of Factor Against Third Persons — a. ACTION FOR PRICE OF GOODS SOLD. — Factors who have power to sell and who usually do sell the goods consigned to them in their

St. 525. See also *Leuthold v. Fairchild*, 35 Minn. 108; *Michigan State Bank v. Gardner*, 15 Gray (Mass.) 362. See further the titles **BILLS OF LADING**, vol. 4, p. 507; **PLEDGE AND COLLATERAL SECURITY**.

1. Factor's Lien Superior to Claims of Third Persons of Which Factor without Notice. — *Archer v. McMechan*, 21 Mo. 45; *Dows v. Greene*, 16 Barb. (N. Y.) 72, *affirmed* 24 N. Y. 638.

In *May v. McGaughey*, 60 Ark. 357, it was held that where cotton upon which there is a landlord's lien, of which the factor had no notice, is shipped by the tenant with the consent of the landlord, the factor has a lien thereon for advances superior to that of the landlord.

Trust Deed. — In *Hernandez v. Aaron*, 73 Miss. 434, a factor in another state was permitted to retain in payment of his general balance the proceeds of cotton shipped to him and upon which there was a deed of trust, of which, however, he did not have notice until after the sale of the cotton.

Goods Procured by Consignor by Fraud. — Factors making advances are to be treated as *bona fide* purchasers, to the extent of their advances, as against the equity of a third person from whom the factor procured the goods by fraud. *Hall v. Hinks*, 21 Md. 406; *Dows v. Greene*, 16 Barb. (N. Y.) 78; *Williams v. Tilt*, 36 N. Y. 319. See also *Gibson v. Stevens*, 8 How. (U. S.) 384.

2. Lien Subject to Rights of Which Factor Had Notice. — *Cordell v. Hall*, 34 Fed. Rep. 866; *Barnett v. Warren*, 82 Ala. 557; *Branch v. Du Bose*, 55 Ga. 21; *Darlington v. Chamberlin*, 120 Ill. 585.

In *Harrison v. Mora*, 150 Pa. St. 481, it was held that a factor's lien, by reason of advances made under a contract by which the defendants were to consign sugar, on which the factor would make advances, and when sold credit the defendants with the proceeds, is subject to a foreign attachment, by persons to whom the defendants had contracted to sell, upon a quantity of sugar sent by the defendants to the factor to make up a shortage, in the amount sold under the contract, but with instructions not to deliver the sugar unless it was paid for, together with the balance due upon a former delivery.

3. Advances by Third Person on Bill of Lading. — *Means v. Randall Bank*, 146 U. S. 620; *Lee v. Bowen*, 5 Biss. (U. S.) 154; *National Bank v. Porter*, 73 Cal. 430; *Seckel v. York Nat. Bank*, 57 Ill. App. 579; *Fisher v. Shenandoah First Nat. Bank*, 37 Ill. App. 333; *McCausland v. Wheeler Sav. Bank*, 43 Ill. App. 381; *Allen v. Williams*, 12 Pick. (Mass.) 297; *Cincinnati First Nat. Bank v. Kelly*, 57 N. Y. 36; *Rochester Bank v. Jones*, 4 N. Y. 497, 55 Am. Dec. 299; *Holmes v. German Security Bank*, 87 Pa.

St. 525. See also *Leuthold v. Fairchild*, 35 Minn. 108; *Michigan State Bank v. Gardner*, 15 Gray (Mass.) 362. See further the titles **BILLS OF LADING**, vol. 4, p. 507; **PLEDGE AND COLLATERAL SECURITY**.

A consignor, after the shipment, but before delivery of the goods to the factor, drew a bill of exchange upon the factor which was discounted by a bank. The bill of lading was transferred and delivered to the bank. It was held that the lien of the bank was superior to that of the factor for his general balance of accounts. *Marine Bank v. Wright*, 48 N. Y. 1, *affirming* 46 Barb. (N. Y.) 45. See also *Davenport Nat. Bank v. Homeyer*, 45 Mo. 145, 100 Am. Dec. 363, where the rights of the bank were held superior to those of the factor, although the transfer of the bill of lading to the bank was without indorsement or formal assignment.

Assignment of "Duplicate" Part of Bill of Lading. — A principal drew against his consignment on the factor, with whom his account was overdrawn, and transferred the property by assignment of the "duplicate" bill of lading to the bank which discounted the drafts. The factor refused to accept the draft, but afterwards received the property from the carrier on the "original" bill of lading. It was held that the factor had no right to apply the property or its proceeds in discharge of the principal's liability to him arising from other transactions, and that the bank had acquired title to the consignment to the extent of the draft discounted on security thereof. *Batavia First Nat. Bank v. Ege*, 109 N. Y. 120. See also the title **BILLS OF LADING**, vol. 4, p. 552.

One Who Has Made Advances Without Receiving Bill of Lading — Want of Privity. — One who has made advances to a consignor by cashing a draft drawn by the consignor upon the factor, stated to be drawn against the consignor, but who did not, at the time of cashing the draft, receive the bill of lading for the consignment, is not in a position to dispute the right of a factor after the receipt of the goods to apply the proceeds to the settlement of the accounts between himself and the consignor; and this although the factor had promised the consignor that he would accept the draft drawn against the consignment, and this promise had been communicated to the person cashing the draft. *Exchange Bank v. Rice*, 107 Mass. 37, 9 Am. Rep. 1. See also *New Hanover Bank v. Williams*, 79 N. Car. 129; *Cowperthwaite v. Sheffield*, 1 Sandf. (N. Y.) 416, 3 N. Y. 243.

own names are generally held to be entitled to sue in their own names for the price of goods sold.¹

b. ACTION FOR BREACH OF CONTRACTS RELATING TO GOODS. — The factor may also sue for the breach of contracts entered into by him in regard to the goods.²

c. ACTION FOR TORTS RELATING TO GOODS. — As against a wrongdoer, a factor may maintain an action in his own name for torts relating to the property in his possession, and may recover damages to the full amount of the injuries to the goods;³ but where the action is against one claiming through

1. Factor May Sue for Price of Goods. — *Drinkwater v. Goodwin*, 1 Cowp. 256; *McCobb v. Lindsay*, 2 Cranch (C. C.) 215; *Graham v. Duckwall*, 8 Bush (Ky.) 12; *Toland v. Murray*, 18 Johns. (N. Y.) 24; *Ladd v. Arkell*, 37 N. Y. Super. Ct. 39.

In *Van Staphorst v. Pearce*, 4 Mass. 258, it was held that on an express promise to pay a factor he may sue in his own name.

Principal Disclosed. — The fact that the name of the principal was or was not disclosed by the factor is immaterial as affects the factor's right to sue for the recovery of the purchase price. *Isley v. Merriam*, 7 Cush. (Mass.) 242. *Compare Bramble v. Spiller*, 21 L. T. N. S. 672.

Sale Rescinded by Principal. — Goods were consigned for sale to a factor who made advances upon them to the consignor and afterwards sold them under a warranty that they were of a certain quality. The goods did not correspond with the warranty, and the purchaser gave notice thereof to the consignor, and, with his consent, rescinded the sale, but gave no notice to the factor. It was held that the factor could not maintain an action against the purchaser for the price of the goods; if the above transaction between the purchaser and the consignor operated to deprive the factor of his lien, by reason of the transfer of the possession of the goods to the consignor, instead of to himself, he could not for that reason treat the sale as completed and sue for the price. If entitled to any remedy, it must be in some other form of action. *Robinson v. Talbot*, 121 Mass. 514.

Code Provision — "Trustee of an Express Trust." — A factor selling goods in his own name is a "trustee of an express trust" within the meaning of the usual code provisions authorizing trustees of an express trust to bring an action in their own names. *Wolfe v. Missouri Pac. R. Co.*, 97 Mo. 473, 10 Am. St. Rep. 331; *Ladd v. Arkell*, 37 N. Y. Super. Ct. 40; *Grinnell v. Schmidt*, 2 Sandf. (N. Y.) 710. See also *Considerant v. Brisbane*, 22 N. Y. 394, and the title AGENCY, vol. 1, p. 1162, note 1.

2. Contract of Storage. — A factor who makes a contract for storage of goods received by him for sale on commission may maintain a suit for its breach. *Allen v. Steers*, 39 La. Ann. 586.

Contract of Purchase. — Cotton factors can, in their own names, recover all the damages resulting from a breach of contract by the buyer of cotton from them, although they may be bound to pay the same when recovered to their consignors. The measure of damages is the difference between the contract price for the cotton and the value thereof on the day of the breach. *Groover v. Warfield*, 50 Ga. 644.

3. Torts Relating to Goods — *England.* — *Bryans v. Nix*, 4 M. & W. 775.

Alabama. — *Beyer v. Bush*, 50 Ala. 19.

Illinois. — *Winne v. Hammond*, 37 Ill. 99; *Illinois Cent. R. Co. v. Schenk*, 64 Ill. App. 24. *Kentucky.* — *Robinson v. Webb*, 11 Bush (Ky.) 483.

Maryland. — *Miller v. Lea*, 35 Md. 396, 6 Am. Rep. 417.

New York. — *Gorum v. Carey*, 1 Abb. Pr. (N. Y. C. Pl.) 285; *Fitzhugh v. Wiman*, 9 N. Y. 559; *Ladd v. Arkell*, 37 N. Y. Super. Ct. 35, 40 N. Y. Super. Ct. 150.

See also *Miller v. Kirby*, 74 Ill. 242; *De Forest v. Fulton F. Ins. Co.*, 1 Hall (N. Y.) 110.

Trover. — A factor may sue in his own name for a conversion of the goods and may recover the full value thereof. *Mechanics', etc., Bank v. Farmers', etc., Nat. Bank*, 60 N. Y. 40; *Ladd v. Arkell*, 37 N. Y. Super. Ct. 35; *Gorum v. Carey*, 1 Abb. Pr. (N. Y. C. Pl.) 285.

In *Beyer v. Bush*, 50 Ala. 19, it was held that a factor having a statutory lien on goods sold by him for the purchase price could sue a subpurchaser in trover on his refusal to deliver the goods on demand.

Replevin. — A factor having a lien on the goods may recover them in replevin when wrongfully deprived of their possession. *Nesmith v. Dyeing, etc., Co.*, 1 Curt. (U. S.) 130.

In *Holbrook v. Wight*, 24 Wend. (N. Y.) 169, 35 Am. Dec. 607, it was held that a factor may replevin the goods from one to whom they were delivered to hold for him.

Injury to Goods While in Transit. — In some cases a factor has been allowed to maintain an action in his own name against a common carrier for damages done to his principal's goods while in the possession of the carrier. *Houston, etc., R. Co. v. Stewart*, 1 Tex. App. Civ. Cas., § 1247; *Boston, etc., R. Co. v. Warrior Mower Co.*, 76 Me. 261.

In *Wolfe v. Missouri Pac. R. Co.*, 97 Mo. 473, 10 Am. St. Rep. 331, it was held that a factor, as a "trustee of an express trust," could maintain an action against the carrier for the wrongful delivery of the goods.

Correct Rule. — The right of the factor to sue the carrier for injuries to goods or loss of them while in transit to him seems, however, properly to depend upon whether there has been such a constructive delivery to him as to entitle him to a lien upon the goods. If there has been such a delivery he may sue therefor. *Vose v. Allen*, 3 Blatchf. (U. S.) 289; *Burritt v. Rench*, 4 McLean (U. S.) 325; *Dows v. Greene*, 32 Barb. (N. Y.) 490. It is otherwise, however, where the factor has no lien upon the goods. *Sargent v. Morris*, 3 B. & Ald. 277, 5 E. C. L. 283; *Cobb v. Illinois Cent. R.*

the principal the factor can recover only the value of his special property in the goods.¹

d. **PRINCIPAL'S RIGHT TO CONTROL ACTION BY FACTOR.** — The right of the factor to sue for the price of goods or injuries to them is, as a general rule, always subject to the control of the principal.²

e. **DEFENSES TO ACTION BY FACTOR.** — The defendant in an action by the factor may interpose any defense which would have been admissible if the action had been by the principal, in addition to such defenses as would have been good against the factor only.³

2. Liability of Factor to Third Persons — *a.* **FACTOR SELLING GOODS NOT BELONGING TO HIS PRINCIPAL.** — If a factor acting as such receives and sells goods and pays over the proceeds to his consignor, whom he supposes to be the real owner of the goods, the factor is not liable to one who afterwards turns out to be the real owner, and this though the consignor had no authority to sell.⁴

Co., 88 Ill. 394; *Woodruff v. Nashville, etc.*, R. Co., 2 Head (Tenn.) 87.

Ratification by Principal of Wrongful Delivery by Carrier. — Where goods shipped to a factor were delivered through mistake of the carrier to another person, and the principal afterwards ratified the carrier's act, the factor cannot sue the carrier for such misdelivery. *Woodruff v. Nashville, etc.*, R. Co., 2 Head (Tenn.) 87. See also *East Tennessee, etc.*, R. Co. *v. Nelson*, 1 Coldw. (Tenn.) 272.

1. Action by Factor Against Person Claiming through Principal. — A factor having a lien for his advances can, in an action against a creditor of his principal who has taken the goods under attachment, recover only the value of his special property. *Heard v. Brewer*, 4 Daly (N. Y.) 136.

Where buildings were destroyed in New York city to arrest a conflagration it was held that a factor might, under 2 Rev. Laws 568, § 81, in force in 1838, claim damages for goods destroyed, to the amount of his lien for charges, etc., but he could not claim the value of the goods for the benefit of the owner. *New York v. Stone*, 20 Wend. (N. Y.) 139, 25 Wend. (N. Y.) 157.

2. Principal's Control Over Action by Factor. — *Walter v. Ross*, 2 Wash. (U. S.) 283; *Jackson Ins. Co. v. Partee*, 9 Heisk. (Tenn.) 296. See also the title **AGENCY**, vol. 1, p. 1167.

Cannot by Intervention Defeat Lien of Factor. — This rule is, however, subject to the qualification that the principal will not be permitted to intervene in such a manner as to defeat the lien of the factor. *Drinkwater v. Goodwin*, 1 Cowp. 251; *Houghton v. Matthews*, 3 B. & P. 449.

3. Defenses to Action by Factor. — *Atkins v. Amber*, 2 Esp. N. P. 493; *Grice v. Kenrick*, L. R. 5 Q. B. 344; *Gibson v. Winter*, 5 B. & Ad. 56, 27 E. C. L. 47; *Bauerman v. Radenius*, 7 T. R. 659. See also the title **AGENCY**, vol. 1, p. 1167.

Claim Against Principal Not Due. — A purchaser from a factor who sells in his own name cannot set off a claim against the factor's principal, not yet payable. *McCobb v. Lindsay*, 2 Cranch (C. C.) 215.

Qualification — Cannot Defeat Lien of Factor. — The rule permitting defenses to an action by the principal to be interposed in an action by the factor is subject to the qualification that

such defenses cannot go to the extent of defeating a recovery by the factor to the amount of his lien. *Drinkwater v. Goodwin*, 1 Cowp. 251.

4. Factor Selling Goods Not Belonging to His Principal. — *Abernathy v. Wheeler*, (Super. Ct.) 13 Ky. L. Rep. 730; *Roach v. Turk*, 9 Heisk. (Tenn.) 708, 24 Am. Rep. 360, *overruling* *Taylor v. Pope*, 5 Coldw. (Tenn.) 413. Compare *Hollins v. Fowler*, L. R. 7 H. L. 757.

Factor Selling Stolen Goods. — In *Miller v. Laws*, 4 Cinc. Wkly. L. Bul. 123, 7 Ohio Dec. (Reprint) 602, 7 Am. L. Rec. 606, 6 Ohio Dec. (Reprint) 736, it was held that a factor who sells stolen goods is liable to the true owner for their value, though he merely sells them as factor, without knowledge of the theft, and pays over the proceeds to his employer. See also *Koch v. Branch*, 44 Mo. 542; *Spooner v. Holmes*, 102 Mass. 505, 3 Am. Rep. 491.

An auctioneer who sells stolen goods is liable in trover to the true owner for the value of the goods, though he has paid over the proceeds to the thief without notice of the theft. *Hoffman v. Carow*, 20 Wend. (N. Y.) 21, *affirmed* 22 Wend. (N. Y.) 285. See also the title **AUCTIONS AND AUCTIONEERS**, vol. 3, p. 497.

Necessity for Prosecution of Felon. — To entitle the true owner to recover from the factor, it is not necessary that there should have been a prior conviction of the felon. *Rogers v. Huie*, 1 Cal. 429, 54 Am. Dec. 300.

Factor Buying Goods in His Own Name on Expectation of Selling to Customer. — H., whose ordinary business was that of a cotton broker, purchased cotton from B., in the belief and expectation that M., one of his ordinary clients, would accept it. M. did afterwards accept it, and H. received from M. only commission as a broker, and not a trade profit on the sale. The cotton had been fraudulently obtained from F. by B. It was held that H., by purchasing the cotton before any principal was concerned in the transaction, had made himself principal, and by transferring the cotton to M. had committed an act of conversion which made him liable in trover to F., the real owner of the cotton. *Hollins v. Fowler*, L. R. 7 H. L. 757, 14 Moak 138, *affirming* L. R. 7 Q. B. 616, 3 Moak 232.

Factor with Notice of True Ownership. — If the factor has notice of the true ownership either before he has sold the goods or before he has paid over the proceeds, he will become liable to the true owner for the value of the goods or for the amount of the proceeds received.¹

b. LIABILITY OF FACTOR TO PURCHASER — Principal Disclosed. — When a factor sells the goods avowedly as factor for a disclosed principal and acts within his authority, he incurs no personal liability to the purchaser.²

Principal Undisclosed. — Where the factor sells the goods in his own name, without disclosing his principal, he incurs all liabilities, express or implied, created by the contract of sale, in the same manner as if he were the principal in interest.³

Agency Disclosed but Principal Undisclosed. — And it seems that the same rule applies where the factor discloses the fact of his agency but does not disclose the name of his principal.⁴

Factor Acting for Foreign Principal. — The old rule that an agent acting for a foreign principal became personally liable⁵ has been applied to factors.⁶ Modern authorities recognize no distinction between agents acting for foreign principals and other agents.⁷

c. LIABILITY OF FACTOR FOR FREIGHT. — The decisions as to whether a factor is personally liable to the carrier for freight upon the goods consigned to him are conflicting.⁸ Of course if the goods are not delivered to him he incurs no obligation to pay the freight.⁹

d. LIABILITY FOR DUTIES ON IMPORTED GOODS. — The factor, unless he accepts the consignment, is not as a rule personally liable for the duties on goods consigned to him from abroad, but it seems that he would become so if he accepted the consignment.¹⁰

1. **Notice of True Ownership.** — *Ledoux v. Anderson*, 2 La. Ann. 558; *Ledoux v. Cooper*, 2 La. Ann. 586. See also *Jackson Ins. Co. v. Partee*, 9 Heisk. (Tenn.) 236.

Receiving Money Not Belonging to His Principal. — A factor receiving for his principal money to which it is afterwards discovered he is not entitled is liable to the party paying it unless, before it is claimed, he has actually paid it over to the principal or done something equivalent. Its mere entry to the latter's credit on the factor's books is not enough. *Weld v. Shaw*, 2 La. Ann. 559. See also *Buller v. Harrison*, 2 Cowp. 566.

2. **Principal Disclosed.** — *Mida v. Geissmann*, 17 Ill. App. 207. See also the title AGENCY, vol. 1, p. 1119.

3. **Principal Undisclosed.** — *Sprague v. Rosenbaum*, 38 Fed. Rep. 386; *Weld v. Shaw*, 2 La. Ann. 559; *Hastings v. Lovering*, 2 Pick. (Mass.) 214, 13 Am. Dec. 420; *Thompson v. Irwin*, 42 Mo. App. 403; *Waring v. Mason*, 18 Wend. (N. Y.) 426; *Argersinger v. Macnaughton*, 114 N. Y. 535, 11 Am. St. Rep. 687; *Mills v. Hunt*, 20 Wend. (N. Y.) 431; *McCullough v. Thompson*, 45 N. Y. Super. Ct. 449. See also *Schell v. Stephens*, 50 Mo. 375, and the title AGENCY, vol. 1, p. 1122.

Factor Selling Stolen Goods. — If a factor sells property stolen by his principal and gives a bill of sale in his own name, receiving the purchase money, he will be responsible to the purchaser for the return of the money and the expenses incurred in defending his title. *Thompson v. Irwin*, 42 Mo. App. 403.

4. **Agency Disclosed but Principal Undisclosed.** — *Dale v. Humfrey*, El. Bl. El. 1004, 96 E. C. L. 1004; *Weld v. Shaw*, 2 La. Ann. 559;

Argersinger v. Macnaughton, 114 N. Y. 535, 11 Am. St. Rep. 687.

See also *Sprague v. Rosenbaum*, 38 Fed. Rep. 386; *Thompson v. Irwin*, 42 Mo. App. 403, in which case it appeared that the agent's personal credit was relied on by the other party.

And see further the title AGENCY, vol. 1, pp. 1120, 1124.

5. See the title AGENCY, vol. 1, p. 1121.

6. *McKensie v. Nevius*, 22 Me. 138, 38 Am. Dec. 291.

Factors Acting for Principals Residing in Another State are not within the rule holding the factors personally liable on their contracts entered into for their principals. *Vawter v. Baker*, 23 Ind. 63. See also *Taintor v. Prendergast*, 3 Hill. (N. Y.) 72, 38 Am. Dec. 618; *Kirkpatrick v. Stainer*, 22 Wend. (N. Y.) 262.

7. See the title AGENCY, vol. 1, pp. 1121, 1122.

8. **Liability of Factor for Freight.** — In *Brown v. Clayton*, 12 Ga. 564, it was held that if the factor receives the goods he becomes personally liable with his principal for the freight. On the other hand, it was held in *Hayward v. Middleton*, 1 Mill (S. Car.) 186, that the consignee of goods alone, and not his factor, was liable for the freight. See also the title CONTRACTS OF AFFREIGHTMENT AND CHARTER-PARTIES, vol. 7, p. 261 *et seq.*

Factor's Liability on Promise. — The factor would, of course, be liable on his promise to pay the freight, and he could not escape liability thereon by settling his account with his principal. *Johnson, etc., Co. v. McCampbell, etc., Co.*, 6 Baxt. (Tenn.) 294.

9. *Perret v. Sauvinet*, 2 La. Ann. 559.

10. **Import Duties.** — In *Du Peirat v. Wolfe*,

c. LIABILITY ON DIRECTION OR PROMISES BY PRINCIPAL AS TO APPLICATION OF PROCEEDS — Assignment. — An executory agreement or promise by a debtor to pay a debt out of a certain fund is not an equitable assignment of the fund,¹ and therefore a factor is authorized in paying over the proceeds to his principal though he has been directed by his principal to pay the proceeds to a third person,² or has notice of a promise by the principal to do so in payment of a debt due such third person.³ The factor may, however, by an agreement with the principal, become liable to third persons for the proceeds of goods.⁴

VII. RELATION OF PRINCIPAL TO THIRD PERSONS — 1. Liabilities and Rights Arising Out of Contracts by Factor — *a. ACTION BY PRINCIPAL ON CONTRACT BY FACTOR — (1) In General.* — As a general rule the principal may sue upon all contracts entered into by the factor in his behalf.⁵ And the principal may himself recover the purchase price of goods sold on credit though the goods of several principals are sold at the same time to one purchaser, provided the

29 N. Y. 436, it was held that a factor to whom goods were consigned from abroad was not personally liable for the payment of duties on goods burned in a public store, the consignee having refused to accept the goods and having had no part in procuring a permit to land them.

See generally the title *REVENUE LAWS*.

Undervaluations. — A factor is not liable to the penalties imposed by the federal government for undervaluations by his principal, in fraud of the revenue laws, unless an actual intent on the part of the factor to defraud the government is shown. *Monnet v. Merz*, 127 N. Y. 151.

1. See the title *ASSIGNMENTS*, vol. 2, p. 1068.

2. Mere Direction to Factor No Assignment. — In *Walton v. Tims*, 7 Ala. 470, it was held that though a father directed the proceeds of certain bales of cotton to be applied by his factor in payment of a specific debt of his son, he was still warranted in countermanding the direction at any time before the factor had thus appropriated the money or entered into an agreement with the creditor who was the object of the remittance to hold it for his use.

3. Factor May Pay Principal After Notice of Principal's Promise to Third Persons. — A factor may pay over to his principal the proceeds arising from the sale of the consignment though he had notice that the principal had promised to pay certain creditors out of such proceeds. *Pearce v. Roberts*, 27 Mo. 179.

4. Factor's Promise to Principal in Third Person's Favor. — Where factors agreed with a planter that they would pay to a third party a stated amount upon the receipt from the planter of a designated number of hogsheads of sugar, and the planter shipped a portion of the sugar, the factors were held liable to such third person on the stipulation in his favor, to the extent of the proceeds of the shipment. But where a portion of the crop was held by the manufacturers of the sugar under a pledge, which the factors were compelled to pay to get the sugar, and it was also subject to the privilege of the laborers, which they had to assume, and the sugar was shipped to the factors by the manufacturers, and in their name, and its entire proceeds were absorbed by these preferred claims, the factors getting only their commissions on it, they were not

bound to pay the amount of said proceeds to the third person under the aforesaid stipulation. *Moore v. Clapp*, 36 La. Ann. 690.

But see *Exchange Bank v. Rice*, 107 Mass. 37, 9 Am. Rep. 1; and for a general discussion of the right of a third person to sue on a contract made for his benefit between others, see the title *CONTRACTS*, vol. 7, p. 104 *et seq.*; and as to agreements to accept bills of exchange, see the title *BILLS OF EXCHANGE AND PROMISSORY NOTES*, vol. 4, p. 233 *et seq.*

5. Principal May Sue on Contracts by Factor. — *Houghton v. Matthews*, 3 B. & P. 489; *Golden v. Levy*, 1 Law Repos. (4 N. Car.) 527, 6 Am. Dec. 555; *Burton v. Goodspeed*, 69 Ill. 237; *Edmond v. Caldwell*, 15 Me. 340; *Barry v. Page*, 10 Gray (Mass.) 398; *Wadsworth v. Gay*, 118 Mass. 53; *Chickering v. Hosmer*, 12 Mass. 183; *Merrill v. Thomas*, 7 Daly (N. Y.) 393. See also *Fishback v. Brown*, 16 Ill. 74.

Del Credere Factor. — The rule permitting a principal to recover the price of goods sold on credit by his factor applies equally to sales by factors acting under a *del credere* commission. *Merrill v. Thomas*, 7 Daly (N. Y.) 393; *Moore v. Hillabrand*, 37 Hun (N. Y.) 491. See also *Sherwood v. Stone*, 14 N. Y. 270. Compare *Kelley v. Munson*, 7 Mass. 319, and the title *DEL CREDERE AGENCY*, vol. 9, p. 183.

Factors for Foreign Principals have been held entitled to sue upon a contract made by them with reference to their principals' goods, to the exclusion of the principals themselves. *Merrick's Estate*, 5 W. & S. (Pa.) 9. But modern authorities allow the foreign principal to maintain the action. *Barry v. Page*, 10 Gray (Mass.) 398. See also the title *AGENCY*, vol. 1, p. 1169, note.

Principal's Right to Demand Payment. — Subject to the right of the factor to be protected to the extent of his lien, the principal has the right to demand that payment for goods sold by his factor shall be made to him, and a subsequent payment to the factor will not relieve the purchaser from liability to the principal. *Morris v. Cleasby*, 1 M. & S. 576; *Edmond v. Caldwell*, 15 Me. 340; *Kinder v. Shaw*, 2 Mass. 398; *Kelley v. Munson*, 7 Mass. 319; *Duguid v. Edwards*, 50 Barb. (N. Y.) 297.

But the principal cannot demand payment so as to defeat the lien of the factor. *Devereux v. Philadelphia Bank*, 1 Phila. (Pa.) 477, 11 Leg. Int. (Pa.) 38.

price for which the goods of each principal were sold can be ascertained.¹

Factor's Lien to Be Protected. — The right of the principal to sue for the price of goods sold is subject to the right of the factor to be protected to the extent of his lien for advances, etc.²

(2) *Undisclosed Principal.* — Where the factor sells the goods in his own name and the existence of the principal is not disclosed, the principal may still sue the purchaser for the recovery of the purchase price.³

(3) *Defenses to Action by Principal.* — Where a sale is made by a factor in his own name, without disclosing his principal, to a purchaser who has no notice, either actual or constructive, that the factor is selling as an agent, the purchaser, if an action is brought against him by the principal to recover the purchase price, may avail himself of every defense to which he would be entitled if the action were brought by the factor.⁴

1. Goods of Several Sold Together — Price Due Each Principal Ascertainable. — *Corlies v. Cumming*, 6 Cow. (N. Y.) 181; *Jackson Ins. Co. v. Partee*, 9 Heisk. (Tenn.) 296.

2. Factor's Lien to Be Protected. — *Drinkwater v. Goodwin*, 1 Cowp. 251; *Barry v. Page*, 10 Gray (Mass.) 398; *Merrill v. Thomas*, 7 Daly (N. Y.) 393; *Girard v. Taggart*, 5 S. & R. (Pa.) 27, 9 Am. Dec. 327.

3. Undisclosed Principal — Maryland. — *Miller v. Lea*, 35 Md. 396, 6 Am. Rep. 417.

Massachusetts. — *Isley v. Merriam*, 7 Cush. (Mass.) 242; *Kelley v. Munson*, 7 Mass. 319; *Roosevelt v. Doherty*, 129 Mass. 302, 37 Am. Rep. 356; *Allen v. Pierce*, 1 Dane's Abr. 612; *Kinder v. Shaw*, 2 Mass. 398; *Huntington v. Knox*, 7 Cush. (Mass.) 371; *Barry v. Page*, 10 Gray (Mass.) 398.

New York. — *Hogan v. Shorb*, 24 Wend. (N. Y.) 461.

Pennsylvania. — *Girard v. Taggart*, 5 S. & R. (Pa.) 27, 9 Am. Dec. 327.

Tennessee. — *Foster v. Smith*, 2 Coldw. (Tenn.) 474, 88 Am. Dec. 604.

See also *Higgins v. McCrea*, 116 U. S. 680, and the title AGENCY, vol. 1, p. 1168.

4. Equities Available Against Factor — England. — *George v. Clagett*, 7 T. R. 355; *Rabone v. Williams*, 7 T. R. 356, note a; *Houghton v. Matthews*, 3 B. & P. 485; *Carr v. Hinchliff*, 4 B. & C. 547, 10 E. C. L. 408; *Hudson v. Grainger*, 5 B. & Ad. 27, 7 E. C. L. 10; *Sims v. Bond*, 5 B. & Ad. 393, 27 E. C. L. 99; *Isberg v. Bowden*, 8 Exch. 852; *Fish v. Kempton*, 7 C. B. 687, 62 E. C. L. 687; *Ex p. Dixon*, 4 Ch. Div. 133; *Borries v. Imperial Ottoman Bank*, L. R. 9 C. P. 38.

Canada. — *Bowmanville Mach. Co. v. Dempster*, 2 Can. Sup. Ct. Rep. 21, affirming 11 Nova Scotia 273.

Alabama. — *Gardner v. Allen*, 6 Ala. 187, 41 Am. Dec. 45.

Georgia. — *Ruan v. Gunn*, 77 Ga. 53.

Louisiana. — *Bullitt v. Walker*, 12 La. Ann. 276.

Maryland. — *Miller v. Lea*, 35 Md. 396, 6 Am. Rep. 417.

Massachusetts. — *Roosevelt v. Doherty*, 129 Mass. 304, 37 Am. Rep. 356; *Huntington v. Knox*, 7 Cush. (Mass.) 371; *Kelley v. Munson*, 7 Mass. 319; *Barry v. Page*, 10 Gray (Mass.) 398; *Locke v. Lewis*, 124 Mass. 7.

New York. — *Taintor v. Prendergast*, 3 Hill (N. Y.) 72, 38 Am. Dec. 618; *Bliss v. Bliss*, 7 Bosw. (N. Y.) 339; *Hogan v. Shorb*, 24 Wend. (N. Y.) 458.

Pennsylvania. — *Parker v. Donaldson*, 2 W. & S. (Pa.) 9; *Girard v. Taggart*, 5 S. & R. (Pa.) 27, 9 Am. Dec. 327; *Merrick's Estate*, 5 W. & S. (Pa.) 9.

See for the general doctrine the title AGENCY, vol. 1, p. 1169 *et seq.*

Compare Atkinson v. Teasdale, 1 Bay (S. Car.) 299; *Godfrey v. Forrest*, 1 Bay (S. Car.) 300; and also *Dortic v. Jeffers*, 10 Rich. L. (S. Car.) 83, wherein a factor sold goods for his principal, not disclosing his agency, and, being indebted to the purchaser, gave him his due bill for the amount of his indebtedness. It was held in an action by the owner for the price of the goods that the purchaser could not set off or claim as payment the amount of the due bill.

In *Traub v. Milliken*, 57 Me. 63, 2 Am. Rep. 14, it was held that where a foreign factor sells merchandise in his own name, without disclosing his principal, and receives in part payment therefor his own check and the balance in money, the principal cannot recover the price for the goods thus sold, if the purchaser has no knowledge of the factor's representative character.

Duty to Inquire as to Character in Which Factor Acts. — If the purchaser has knowledge that the factor is in the habit of selling sometimes as factor and sometimes as principal, a purchaser who buys with a view of covering his own debt and availing himself of a set-off is bound to inquire in what character the factor is acting in the particular sale. *Miller v. Lea*, 35 Md. 396, 6 Am. Rep. 417. See also *Fish v. Kempton*, 7 C. B. 687, 62 E. C. L. 687.

And if the purchaser knows or has reason to believe that the factor is acting as agent, the purchaser cannot avail himself of equities against the factor. *Baring v. Corrie*, 2 B. & Ald. 137; *Moore v. Clementson*, 2 Campb. 22; *Maanss v. Henderson*, 1 East 335; *Merrick v. Bernard*, 1 Wash. (U. S.) 479; *Browne v. Robinson*, 2 Cai. Cas. (N. Y.) 341; *Hogan v. Shorb*, 24 Wend. (N. Y.) 462; *Bliss v. Bliss*, 7 Bosw. (N. Y.) 339; *Judson v. Stilwell*, 26 How. Pr. (N. Y. Supreme Ct.) 513.

But the mere fact that the factor was in the commission business would not be notice to the purchaser that he was selling the goods as factor, where he was in the habit of selling goods of his own as well as of his principals. *Moore v. Clementson*, 2 Campb. 22; *Bliss v. Bliss*, 7 Bosw. (N. Y.) 339; *Hogan v. Shorb*, 24 Wend. (N. Y.) 458. *Compare Browne v. Robinson*, 2 Cai. Cas. (N. Y.) 341.

(4) *Note Taken by Factor.* — If, when a factor makes a sale, he takes a note in his own name for the price, the principal is entitled to sue for the price in jurisdictions where the paper does not constitute payment;¹ but he has no right of action where the security is considered to constitute payment.²

(5) *Agreement under Seal.* — When the contract between the purchaser and the factor is executed by the factor under his own seal, on technical grounds the principal is denied the right to sue thereon.³

b. LIABILITY OF PRINCIPAL TO THIRD PERSONS. — In accordance with the general principles of the law of agency,⁴ the principal is bound by and is liable for the acts of the factor which are within the scope of the agency or are subsequently ratified by the principal.⁵

2. Principal's Title to the Property and Its Proceeds, and Resulting Rights —
a. IN GENERAL. — The title to goods consigned to a factor for sale and to the proceeds of goods sold is in the principal;⁶ and this is true though the goods are sold on a *del credere* commission.⁷

b. ATTACHMENT AND EXECUTION BY CREDITORS OF FACTOR. — It is the universal rule that the goods of the principal or their proceeds cannot be attached or taken under execution for a debt of the factor.⁸

In *Schell v. Stephens*, 50 Mo. 375, it was held that the fact that a person was in the business of an auctioneer was not notice that he was not selling his own goods.

Agency Disclosed — Principal Undisclosed. — To entitle the purchaser to avail himself of such defense it is necessary not only that the name of the principal should have been unknown to him, but also that he should have been unaware that the factor was selling as agent. *Semenza v. Brinsley*, 18 C. B. N. S. 467, 114 E. C. L. 467; *Miller v. Lea*, 35 Md. 407, 6 Am. Rep. 417.

Claim Against Factor Not Due at Time of Sale. — In *Hogan v. Shorb*, 24 Wend. (N. Y.) 458, it was held that a purchaser could set off a claim against the factor although the sale was for cash, and the claim was not payable at the time of the sale, where it did become payable before the action by the principal for the price.

1. *Corlies v. Cumming*, 6 Cow. (N. Y.) 181. See also *West Boylston Mfg. Co. v. Searle*, 15 Pick. (Mass.) 225, *per Shaw*, C. J.

2. *Roosevelt v. Doherty*, 129 Mass. 301, 37 Am. Rep. 356.

For a full treatment of the effect of notes as payment see the title **PAYMENT**.

3. *Huntington v. Knox*, 7 Cush. (Mass.) 374. See also *Jackson v. Baker*, 1 Wash. (U. S.) 394, and the title **AGENCY**, vol. 1. p. 1165.

4. See the title **AGENCY**, vol. 1, p. 1136 *et seq.*
5. **Liability of Principal for Act of Factor.** — *Higgins v. McCrea*, 116 U. S. 680.

In *Cobb v. Dows*, 10 N. Y. 335, a factor by mistake delivered the goods of another person to a purchaser and paid over the proceeds to his principal, and it was held that the receipt of the proceeds was a ratification of the factor's act and rendered the principal liable to the true owner for the proceeds received.

Exclusive Credit Given to Factor. — An exception as to the liability of the principal on the contract of the factor exists when the person dealing with the factor elects to give an exclusive credit to the factor. *McCullough v. Thompson*, 45 N. Y. Super. Ct. 449.

6. **Title in Principal.** — *Chaffe v. Heyner*, 31 La. Ann. 594; *Baker v. New York Nat. Exch. Bank*, 100 N. Y. 31; *Duguid v. Edwards*, 50

Barb. (N. Y.) 297; *Pinckney v. Dunn*, 2 S. Car. 323.

A mere intent of the principal to vest a special property in his factor, to secure him for an advance on account of a particular consignment, even if the advance is made on the faith of it, will not vest any legal property in the factor. *Nesmith v. Dyeing, etc., Co.*, 1 Curt. (U. S.) 130, 1 Am. L. Reg. 82.

Abandoned and Captured Property Act. — A factor does not become "owner" of goods consigned to him for sale, by making advances upon them, within the meaning of the Abandoned and Captured Property Act of Congress, and the consignor does not lose his ownership by committing the custody of the goods to a factor and by receiving advances upon them. *U. S. v. Villalonga*, 23 Wall. (U. S.) 35, *reversing* 8 Ct. of Cl. 452.

Recovery of Judgment by Factor Against Purchaser. — The prosecution of a claim to decree or judgment by a factor cannot operate to give him a title to the money recovered as against his principal, who was the true owner of the property for the value of which the recovery was had, and his recovery is for the use of his principal. *Matter of Merrick*, 2 Ashm. (Pa.) 485.

7. *Moore v. Hillabrand*, 37 Hun (N. Y.) 491; *Cameron v. Crouse*, 11 N. Y. App. Div. 391.

8. **Principal's Goods Cannot Be Attached or Levied on for Factor's Debt.** — *Powell v. Brunner*, 86 Ga. 531; *Loomis v. Barker*, 69 Ill. 360; *Gray v. Agnew*, 95 Ill. 315; *Ellsner v. Radcliff*, 21 Ill. App. 195; *Berry v. Allen*, 59 Ill. App. 149; *W. O. Dean Co. v. Lombard*, 61 Ill. App. 94; *Titcomb v. Seaver*, 4 Me. 542; *Kelley v. Munson*, 7 Mass. 319; *Holly v. Huggesford*, 8 Pick. (Mass.) 73, 19 Am. Dec. 303; *Merrill v. Norfolk Bank*, 19 Pick. (Mass.) 32; *National Cordage Co. v. Sims*, 41 Neb. 148; *Moore v. Hillabrand*, 16 Abb. N. Cas. (N. Y. Supreme Ct.) 477; *Barnes Safe, etc., Co. v. Bloch Bros. Tobacco Co.*, 38 W. Va. 158. See also the title **EXECUTIONS**, vol. 11, p. 625.

If a factor takes a note of the purchaser, payable to such purchaser's own order and indorsed in blank, and obtains a discount of such note in his own name, and the bank dis-

c. PRINCIPAL'S RIGHT TO FOLLOW THE PROPERTY AND ITS PROCEEDS — (1) *In General.* — The factor holds the goods of his principal and their proceeds when sold in the character of a trustee,¹ and the equitable principle permitting a beneficiary to follow trust funds whenever they can be identified into the hands of any one but a *bona fide* purchaser for value² has been applied to property or its proceeds held by a factor.³

In England the Court of Appeal has denied that the doctrine of following trust funds is applicable in favor of a principal against the subagent of his factor, the subagent claiming the proceeds of goods sold for a balance due from the factor to himself.⁴

(2) *Insolvency and Bankruptcy of Factor.* — In case of the insolvency or bankruptcy of the factor, the proceeds of goods which can be identified, debts

counting it passes the proceeds to the credit of such factor, the consignor may still recover such proceeds of the bank, after notice, although in the meantime such proceeds have been attached on trustee process by a creditor of the factor. *Merrill v. Norfolk Bank*, 19 Pick. (Mass.) 32.

In *Titcomb v. Seaver*, 4 Me. 542, it was held that a purchaser from the factor on credit cannot be charged as his trustee, in a foreign attachment, after he has been notified by the owner, beyond the amount of the lien of the factor for his commissions.

Trespass Against Attaching Officer. — In *Holly v. Huggeford*, 8 Pick. (Mass.) 73, 19 Am. Dec. 303, it was held that where the goods are attached for a debt of the factor the principal may maintain trespass against the officer making the attachment.

Distress for Rent. — Goods consigned to a factor for sale are usually held to be exempt from distress for rent due from the factor. *Gilman v. Elton*, 3 Brod. & B. 75, 7 E. C. L. 355; *Bent v. McDougall*, 14 Nova Scotia 468; *Howe Sewing Mach. Co. v. Sloan*, 87 Pa. St. 438, 30 Am. Rep. 376; *Walker v. Johnson*, 4 McCord L. (S. Car.) 552. For a further discussion of this point see the title *DISTRESS*, vol. 9, pp. 643-645.

1. Factor Holds Goods as Fiduciary. — *Veil v. Mitchel*, 4 Wash. (U. S.) 105; *National Cordage Co. v. Sims*, 44 Neb. 148.

2. See the title *TRUSTS AND TRUSTEES* for a full discussion of the equitable principle of following trust funds.

3. Equitable Principle of Following Trust Funds Applied to Factors — United States. — *Veil v. Mitchel*, 4 Wash. (U. S.) 105; *Thompson v. Perkins*, 3 Mason (U. S.) 232; *Union Stock Yards Bank v. Gillespie*, 137 U. S. 411.

Kentucky. — *Fahnestock v. Bailey*, 3 Metc. (Ky.) 48, 77 Am. Dec. 161.

Louisiana. — *Bloodworth v. Jacobs*, 2 La. Ann. 25.

Massachusetts. — *Chesterfield Mfg. Co. v. Dehon*, 5 Pick. (Mass.) 7, 16 Am. Dec. 367; *Merrill v. Norfolk Bank*, 19 Pick. (Mass.) 32.

Nebraska. — *Cady v. South Omaha Nat. Bank*, 46 Neb. 756.

New Hampshire. — *Martin v. Moulton*, 8 N. H. 504.

New York. — *Duguid v. Edwards*, 50 Barb. (N. Y.) 297; *Baker v. New York Nat. Exch. Bank*, 100 N. Y. 31.

Illustrations. — One who takes from a factor in payment of his debts moneys which he knows equitably belong to the factor's con-

signor and principal, must account to the principal for such moneys. *Union Stock Yards Bank v. Gillespie*, 137 U. S. 411.

In *Clemmer v. Drovers Nat. Bank*, 157 Ill. 206, it was held that a bank cannot apply in payment of its demands against a factor moneys deposited with it by him which it knows, or from the course of dealing with him is bound to know, are the proceeds of sales of stock consigned to him for sale, though it does not know who the principals are.

In *Cady v. South Omaha Nat. Bank*, 46 Neb. 756, it was held that the principal could follow the sales of his property by a factor after they were deposited in a bank to the individual account of the factor, and the bank could not, as against him, apply such funds to the extinguishment of an overdraft of such commission merchant existing at the time of the deposit, whether it knew or did not know of the trust character of the funds. See also *Baker v. New York Nat. Exch. Bank*, 100 N. Y. 31.

Entry by Factor to Defraud Government. — Where a consignee pledged his principal's property to the defendant, and made a fraudulent entry with false invoices at the custom house, by which the government was defrauded, it was held that the consignor, who had no participation in these acts, might recover the property. *Bonriot v. Fuentes*, 10 La. Ann. 70.

4. In *New Zealand, etc., Land Co. v. Watson*, 7 Q. B. Div. 374, reversing same case *sub nom.* *New Zealand, etc., Land Co. v. Ruston*, 5 Q. B. Div. 474, commission merchants employed by the plaintiffs were in the habit of employing the defendants as brokers for the sale of the produce consigned. The plaintiffs were aware that the commission merchants effected their sales through subagents, and the defendants knew that their own immediate principals were agents for others, and not acting for themselves. The plaintiffs claimed the right to follow the proceeds of certain goods consigned to the commission merchants into the hands of the defendants, while the defendants claimed the right to retain the proceeds on account of a balance due on their account with the commission merchants. The Court of Appeal held that there was no privity of contract between the plaintiffs and the defendants, and that, there being no fiduciary relation between them, the plaintiffs were not entitled to follow the proceeds of their property in the defendant's hands; that whatever right the plaintiffs might have had as owners to

due him for goods sold on credit, and securities taken by him for the price do not pass to the assignee of the factor, but remain the property of the principal, who may recover them from the assignee.¹

(3) *Death of Factor* — No Title Passes to Personal Representative. — And in case of the death of the factor no title to the property unsold or the debts due for property sold on credit passes to his personal representative as against the principal.²

(4) *Property Wrongfully Transferred by Factor*. — In accordance with the rule that persons dealing with an agent are bound to take notice of the extent of the agent's authority, a transfer of property by a factor not authorized either by his express or implied authority creates no rights in the person dealing with the factor, as against the principal.³

claim the goods before they were sold by the defendants, they had no right after such sale to the proceeds without giving credit for the sum due to the defendants by the commission merchants.

1. *Insolvency and Bankruptcy of Factor* — *England*. — *Mace v. Cadell*, 1 Cowp. 232; *Godfrey v. Furzo*, 3 P. Wms. 185; *Whitfield v. Brand*, 16 M. & W. 282; *Zinck v. Walker*, 2 W. Bl. 1154; *Hollingworth v. Tooke*, 2 H. Bl. 501; *Scott v. Surman*, Willes 400; *In re Hallett's Estate*, 13 Ch. Div. 696.

United States. — *Hourquebie v. Girard*, 2 Wash. (U. S.) 212; *Thompson v. Perkins*, 3 Mason (U. S.) 232; *Veil v. Mitchel*, 4 Wash. (U. S.) 105; *London, etc., Bank v. Parke, etc., Machinery Co.*, 64 Fed. Rep. 687.

Kentucky. — *Fahnestock v. Bailey*, 3 Metc. (Ky.) 48, 77 Am. Dec. 161.

Louisiana. — *Ward v. Brandt*, 11 Martin (La.) 331, 13 Am. Dec. 352.

Massachusetts. — *Denston v. Perkins*, 2 Pick. (Mass.) 86; *Chesterfield Mfg. Co. v. Dehon*, 5 Pick. (Mass.) 7, 16 Am. Dec. 367; *Goodenow v. Tyler*, 7 Mass. 36, 5 Am. Dec. 22; *Kelly v. Bowman*, 12 Pick. (Mass.) 383; *Beckwith v. Sibley*, 11 Pick. (Mass.) 482; *Merrill v. Norfolk Bank*, 19 Pick. (Mass.) 32.

New York. — *Bertha Zinc, etc., Co. v. Clute*, 7 Misc. Rep. (N. Y. C. Pl.) 123; *Rabel v. Griffin*, 12 Daly (N. Y.) 241; *Merrill v. Thomas*, 7 Daly (N. Y.) 393; *Franklyn v. Sprague*, 10 Hun (N. Y.) 589; *Kip v. State Bank*, 10 Johns. (N. Y.) 63; *Duguid v. Edwards*, 50 Barb. (N. Y.) 290; *Converseville Co. v. Chambersburg Woolen Co.*, 14 Hun (N. Y.) 609.

Pennsylvania. — *Messier v. Amery*, 1 Yeates (Pa.) 533, 1 Am. Dec. 316.

See also the title *ASSIGNMENTS FOR THE BENEFIT OF CREDITORS*, vol. 3, p. 44.

Illustrations. — Where a factor takes one note for the goods of several consignors and afterwards assigns the note in trust to his creditors, each consignor may recover his proportion of the proceeds from the assignee, if it can be distinguished. *Beckwith v. Sibley*, 11 Pick. (Mass.) 482.

If the assignees in insolvency of a factor who has sold merchandise in his own name, on credit, know that the principal claims the debts, and nevertheless proceed to collect them, they are not entitled to retain compensation for their own services, or for expenses incurred in good faith, in making the collection. *Audenried v. Betteley*, 8 Allen (Mass.) 302.

Release of Factor—Effect. — The fact that the

principal has released all claim against the factor will not prevent his recovery against the assignees of such factor who have collected the note of the purchaser of the goods. *Chesterfield Mfg. Co. v. Dehon*, 5 Pick. (Mass.) 7, 16 Am. Dec. 367.

Del Credere Factor. — The rule stated in the text applies with equal force in the case of factors selling under a *del credere* commission. *Thompson v. Perkins*, 3 Mason (U. S.) 232; *Converseville Co. v. Chambersburg Woolen Co.*, 14 Hun (N. Y.) 609; *Merrill v. Thomas*, 7 Daly (N. Y.) 393; *Franklyn v. Sprague*, 10 Hun (N. Y.) 589; *Gindre v. Kean*, 31 Abb. N. Cas. (N. Y. C. Pl.) 100.

Funds Incapable of Identification. — If the funds received by the factor have been used by him for his own use or are incapable of identification, the principal only shares in the distribution of the factor's estate as any other creditor. *Scott v. Surman*, Willes 400; *Hourquebie v. Girard*, 2 Wash. (U. S.) 212; *In re Coan, etc., Carriage Mfg. Co.*, 12 Nat. Bankr. Reg. 203.

Award to Principal Against Estate. — In *Merrick's Estate*, 5 W. & S. (Pa.) 9, it was held that where an award had been made to the principal against the estate of the insolvent factor, equity would not compel the payment to the principal by the assignee of money received by the latter in payment for goods sold by the factor.

English Bankruptcy Act. — A factor is not to be considered the "reputed owner" of goods consigned to him for sale, within the meaning of the Bankruptcy Act, 6 Geo. IV., c. 16, § 72, so as to pass the property to his assignee in bankruptcy. *Whitfield v. Brand*, 16 M. & W. 282.

2. *Death of Factor*. — *Veil v. Mitchel*, 4 Wash. (U. S.) 105; *Fahnestock v. Bailey*, 3 Metc. (Ky.) 49, 77 Am. Dec. 161; *Charleston v. Dunham*, 3 Brev. (S. Car.) 386; *Jackson Ins. Co. v. Partee*, 9 Heisk. (Tenn.) 296.

3. *Unauthorized Transfer Carries No Title*. — *Guerreiro v. Peile*, 3 B. & Ald. 616, 5 E. C. L. 399; *Hull v. Walker*, cited in 5 Coldw. (Tenn.) 118; *Kaufman v. Edwards*, 2 Tex. Unrep. Cas. 132; *Kauffman v. Beasley*, 54 Tex. 563.

Goods Bartered. — The factor has no power to barter the goods, and the principal may recover the goods from one to whom they have been bartered by the factor. *Guerreiro v. Peile*, 3 B. & Ald. 616, 5 E. C. L. 399. And it makes no difference that the person dealing with the factor had no knowledge that he was a factor. *Potter v. Dennison*, 10 Ill. 590.

Sale Within Apparent Scope of Authority. — A sale of the goods, however, within the apparent scope of the factor's authority is valid as against the owner.¹

Factor's Acts. — In *England* and in many of the *United States* statutes have been passed for the protection of third persons who in good faith deal with factors or other agents who are intrusted with the possession of or documents of title to property. The construction of these statutes will be discussed elsewhere.²

d. ACTION BY PRINCIPAL FOR INJURY TO GOODS. — The principal, by consigning the goods to his factor, does not part with the ownership thereof, and he may, as a general rule, sue in his own name for all tortious injuries to them.³

VIII. ACTIONS BY PRINCIPAL AGAINST FACTOR — 1. Assumpsit — Money Had and Received. — When the goods have been sold an action against the factor for money had and received will lie.⁴ So long, however, as the goods remain unsold, the factor is not liable to the principal as for goods sold.⁵

Goods Sold and Delivered. — As a general rule, an action for goods sold and delivered will not lie against the factor,⁶ and this is true though the factor had made an unauthorized sale of the goods⁷ or was guilty of a delay in the sale.⁸

Sales Not in Accordance with Custom of Market. — In *Neill v. Billingsley*, 49 Tex. 161, it was held that a sale of cotton in the Galveston market, not made in accordance with the custom and usage observed by factors in that market, did not divest the principal of his title to the cotton.

Notice of Want of Authority. — A sale of goods by a factor at half their value, to one who has information sufficient to charge him with notice that the factor is exceeding his authority, conveys no title as against the owner. *Singer Mfg. Co. v. Hudson*, 4 Mo. App. 145.

1. Conveying Title to Broker as Implied Authority to Sell. — A purchaser of hemp lying at a wharf had it, at the time of his purchase, transferred in the wharfinger's books into the name of the broker who effected the purchase for him, and whose ordinary business it was to buy and sell hemp. It was held that this gave the broker an implied authority to sell it, and that his sale and receipt of the money bound his unknown principal. *Pickering v. Busk*, 15 East 38.

2. See the title **FACTORS' ACTS**.

3. Principal May Sue for Injuries to the Goods. — In *Holly v. Huggefords*, 8 Pick. (Mass.) 73, 19 Am. Dec. 303, it was held that the principal could maintain trespass against the officer who attached the goods while in the factor's hands for a debt of the factor.

In *Kyle v. Laurens R. Co.*, 10 Rich. L. (S. Car.) 382, 70 Am. Dec. 231, a factor recovered for the loss of goods while in the hands of a carrier in transit to the factor, and it was held that in estimating the damages the amount of commissions to which the factor would have been entitled should not be deducted.

In *Hill v. Georgia, etc., R. Co.*, 43 S. Car. 461, it was held that a factor does not, by accepting and paying drafts drawn on him by a customer to an amount equal to or exceeding the value of a shipment of cotton, become its owner so as to prevent the consignor from maintaining an action against the carrier for failure to deliver the cotton.

4. Action for Money Had and Received. — *Jones v. Marks*, 40 Ill. 313; *Wadsworth v. Gay*, 118 Mass. 44, 53; *Grover v. Clark*, *Wright* (Ohio) 350; *Taylor v. Turner*, 87 Ill. 296; *Tucker v. Utley*, 168 Mass. 415.

Unauthorized Sale on Credit. — In an action by the consignor for money had and received the amount of goods sold on credit by the consignee, having no authority to sell on credit, can be recovered. *Johnson v. Totten*, 3 Cal. 343, 58 Am. Dec. 412.

5. Goods Unsold. — In *Grover v. Clark*, *Wright* (Ohio) 350, it was held that when goods in the hands of a factor have been exchanged with the owner's consent, and such others are still in his hands unsold, assumpsit, as if the goods were sold for money had and received, will not lie.

Necessity for Proof of Sale. — In *Elbourn v. Upjohn*, 1 C. & P. 572, 11 E. C. L. 476, it was held, in an action to recover the proceeds of goods sold, that the principal must prove that a sale actually took place, and a sale will not be presumed even at a distance of twelve months after the delivery of the goods. See also *Selden v. Beale*, 3 Me. 178. Compare *Eaton v. Wilton*, 32 N. H. 352.

6. Action for Goods Sold and Delivered. — *Hull v. Richardson*, 4 Gray (Mass.) 598; *Brown v. Holbrook*, 4 Gray (Mass.) 102; *Holland v. Hopkins*, 2 B. & P. 243; *Grover v. Clark*, *Wright* (Ohio) 350; *Dodds v. Durand*, 5 U. C. Q. B. 623. See also *Miller v. Newman*, 4 M. & G. 646, 43 E. C. L. 334; *Kelly v. Smith*, 1 Blatchf. (U. S.) 290. Compare *Lee v. Shore*, 1 B. & C. 94, 8 E. C. L. 41.

If goods are sent to a factor to use what he needs and sell the remainder, an action lies against him for goods sold and delivered if he uses them all. *Wadsworth v. Gay*, 118 Mass. 44.

Purchase by Factor. — And when the factor himself purchases the goods the principal may ratify the sale and recover from the factor in an action for goods sold and delivered. *Wadsworth v. Gay*, 118 Mass. 44.

7. *Lindley v. Downing*, 2 Ind. 418.

8. *Selden v. Beale*, 3 Me. 178.

A Special Assumpsit May Be Maintained against the factor as such for the proceeds of goods sold.¹

2. Trover. — The factor may also, by dealing with the goods in an unauthorized manner, become liable to his principal in trover as for a conversion of the goods.²

3. Bill in Equity. — It has been held that there is such a trust relationship between the principal and factor as will enable the principal to sue in equity for an accounting.³

4. Necessity for Demand in Action by Principal for Proceeds — General Rule. — As heretofore stated, the factor is bound to render an account within a reasonable time after sale of the goods consigned, without being called upon by the principal to do so; still, he is at liberty as regards the remittance of the proceeds, and should properly wait for instructions as to the mode of remitting, and it is a well-settled rule that an action cannot be maintained against him by the principal for the proceeds of the sale without showing either a demand or a failure to remit pursuant to instructions.⁴

1. Suing Factor as Such for Goods Sold. — *Darlington v. Fredenhagen* 18 Ill. App. 273; *Lindley v. Downing*, 2 Ind. 418; *Frothingham v. Everton*, 12 N. H. 239; *Le Guen v. Gouverneur*, 1 Johns. Cas. (N. Y.) 436.

What Defenses Available. — A factor sued at law by his principal for breach of trust or orders whereby he has substituted himself in place of the purchaser may set up fraud or any other matter of defense which the purchaser could have set up if the suit had been against him. *Le Guen v. Gouverneur*, 1 Johns. Cas. (N. Y.) 436.

In *McCroskey v. Mabry*, 45 Ga. 327, it was held that a factor when sued for the proceeds of goods sold should in that action interpose his claim for expenses incurred in the sale.

Consignment by Joint Owners. — In *Hall v. Leigh*, 8 Cranch (U. S.) 50, it was held that if two joint owners of merchandise consign it to a factor for sale, giving him separate instructions and informing him that each owns a moiety, either may sue the factor for breach of such instructions.

2. Trover and Conversion. — A factor pledging the goods of his principal is liable to the latter in trover for their value. *Kelly v. Smith*, 1 Blatchf. (U. S.) 290.

In *Campbell v. Reeves*, 3 Head (Tenn.) 226, it was held that a factor delegating his power without authority from the principal was liable as for a conversion of the goods.

In *Scott v. Rogers*, 31 N. Y. 676, a factor selling the goods after the time limited by his principal was held liable for a conversion.

In *Haas v. Damon*, 9 Iowa 589, a factor bartering the goods of his principal was held liable for a conversion.

Conversion — Disposal of Warehouse Receipt — When Not. — Where, by the custom of trade, a factor to whom grain is consigned may dispose of the warehouse receipt if he keeps ready for delivery, when called on, other receipts for a like quantity and quality of grain, such disposal is not a conversion of the grain upon which the consignor is entitled to the proceeds; the receipt is a mere evidence of debt to the consignee, not the property nor the representative of property of the consignor. *Bailey v. Bensley*, 87 Ill. 556.

Sale Below Price Limited. — An action for

breach of duty, but not trover, lies against a factor who is authorized to sell goods for a certain price, but sells them at an inferior price. *Dufresne v. Hutchinson*, 3 Taunt. 117.

3. Bill in Equity for an Accounting. — *Roots v. Nye*, 2 Handy (Ohio) 234; *Foley v. Hill*, 2 H. L. Cas. 35; *Ludlow v. Simond*, 2 Cal. Cas. (N. Y.) 1.

Series of Consignments Required. — In *McLinn v. McNamara*, 2 Dev. & B. Eq. (22 N. Car.) 82, it was held that a series of consignments on one side and of payments on the other would give to a court of equity jurisdiction of a suit for an accounting between the principal and the factor, but that a single transaction would be insufficient.

And in *Taylor v. Turner*, 87 Ill. 296, it was held that a suit in equity would not lie to recover the proceeds of a single consignment. See also *Porter v. Spencer*, 2 Johns. Ch. (N. Y.) 169.

Insolvency or Misconduct of Factor. — In *Micklethwaite v. Rhodes*, 4 Sandf. Ch. (N. Y.) 434, it was held that a court of equity will entertain a bill by a consignor against his factor to recover the property consigned when the factor is insolvent or has been guilty of misconduct.

4. Demand by Principal Necessary — England. — *Topham v. Braddick*, 1 Taunt. 572.

Alabama. — *Tyree v. Parham*, 66 Ala. 424.

Arkansas. — *Martin v. Webb*, 5 Ark. 72, 39 Am. Dec. 363.

California. — *Kane v. Cook*, 8 Cal. 449.

Iowa. — *Haas v. Damon*, 9 Iowa 589.

Massachusetts. — *Jellison v. Lafonta*, 19 Pick. (Mass.) 244; *Clark v. Moody*, 17 Mass. 150.

Missouri. — *Cockrill v. Kirkpatrick*, 9 Mo. 697; *Burton v. Collin*, 3 Mo. 315.

New Hampshire. — *Burns v. Pillsbury*, 17 N. H. 66.

New York. — *Cooley v. Betts*, 24 Wend. (N. Y.) 203; *Ferris v. Paris*, 10 Johns. (N. Y.) 285; *Brink v. Dolsen*, 8 Barb. (N. Y.) 337; *Leverick v. Meigs*, 1 Cow. (N. Y.) 646; *Hays v. Stone*, 7 Hill (N. Y.) 128; *Baird v. Walker*, 12 Barb. (N. Y.) 300; *Henbach v. Bother*, 2 Duer (N. Y.) 252; *Middleton v. Twombly*, 125 N. Y. 525. See also *Taylor v. Bates*, 5 Cow. (N. Y.) 376; *Rathbun v. Ingals*, 7 Wend. (N. Y.) 320; *Lyle v. Murrav*, 4 Sandf. (N. Y.) 590.

Impracticability of Demand. — It has been held that a demand is unnecessary where to make it would be impracticable or extremely inconvenient.¹

And a Usage or Course of Dealings between the parties may impose upon a factor the duty to remit and thereby dispense with the necessity for a demand.²

Unreasonable Neglect in Rendering Account. — Where the factor unreasonably neglects to render his account, it has been held that he will be liable to an action for the proceeds without a demand.³

5. Damages in Action Against Factor — *a.* **ASSUMPSIT FOR PROCEEDS.** — Where the principal sues the factor in assumpsit for the proceeds of the goods sold, he can recover only the proceeds of the sale.⁴

b. **INTEREST.** — A factor is not liable to his principal for interest on the proceeds of goods until he has been put in some default in failing to pay over such proceeds, and the general rule has been laid down that a factor is not chargeable with interest on balances which may at any time be in his hands,

See generally the title **DEMAND**, vol. 9, p. 197.

Distinction as to Action for Not Accounting. — In *Lillie v. Hoyt*, 5 Hill (N. Y.) 395, the distinction between an action for not accounting and an action for not paying over the proceeds was recognized. This distinction is also recognized in *Cooley v. Betts*, 24 Wend. (N. Y.) 203. See also *Haas v. Damon*, 9 Iowa 589; *Schee v. Hassinger*, 2 Binn. (Pa.) 325.

Instructions to Remit Given at Time Property Consigned. — In *Kane v. Cook*, 8 Cal. 440, it was held that when instructions were given to the factor when the goods were consigned, the right of action on the part of the principal accrued on his knowledge of the sale and of the receipt of the proceeds by the factor, without the necessity for a demand.

Rendition of Account — Effect. — In *Clark v. Moody*, 17 Mass. 145, it was held that a factor was liable to an action for the proceeds of sales after an account rendered, in which he said that the balance was subject to the order of the principal, without a previous demand, unless there was an understanding that the principal should draw for the balance. See, however, *Haas v. Damon*, 9 Iowa 589.

Goods Unsold — Demand for Their Return. — In *Martin v. Webb*, 5 Ark. 72, 39 Am. Dec. 363, it was held that no recovery against the factor could be had when the goods remained unsold without a demand for the goods and a refusal to return them.

Foreign Factors. — An exception to the general rule has been recognized in the case of foreign factors, and it has been held that they are liable to an action without showing a demand, if they neglect to render an account within a reasonable time. *Clark v. Moody*, 17 Mass. 145. Compare *Topham v. Braddick*, 1 Taunt. 572.

The New York Courts, however, have refused to make any distinction between foreign and domestic factors as regards the necessity for a demand before action. *Halden v. Crafts*, 4 E. D. Smith (N. Y.) 490; *Cooley v. Betts*, 24 Wend. (N. Y.) 203; *Ferris v. Paris*, 10 Johns. (N. Y.) 285; *Hays v. Stone*, 7 Hill (N. Y.) 128.

1. Impracticability of Demand. — The rule dispensing with the necessity of a demand where such demand would be highly inconvenient was applied in a case where a principal at Boston in 1850 shipped goods to a factor in San Francisco. *Eaton v. Welton*, 32 N. H. 352.

See also *Lyle v. Murray*, 4 Sandf. (N. Y.) 590; *Dodge v. Perkins*, 9 Pick. (Mass.) 368 [citing *Clark v. Moody*, 17 Mass. 149; *Ormond v. Hutchinson*, 13 Ves. Jr. 53; *Hardwicke v. Vernon*, 14 Ves. Jr. 504].

2. Usage or Course of Dealings. — *Brink v. Dolsen*, 8 Barb. (N. Y.) 337; *Middleton v. Twombly*, 125 N. Y. 520.

3. Unreasonable Neglect to Render Account. — This rule was applied in *Langley v. Sturtevant*, 7 Pick. (Mass.) 214, wherein the factor, who resided in Alabama, failed for two years to render an account of sales to his principal, who resided in Massachusetts. See also *Haas v. Damon*, 9 Iowa 589.

In *Brink v. Dolsen*, 8 Barb. (N. Y.) 337, however, it was said that the unreasonable neglect to render an account of sales which renders a factor liable for proceeds without a demand means disregard of positive instructions given at the time of the delivery of the goods, or of known and established usages of the business in which the factor is engaged.

4. Assumpsit for Proceeds. — *Ruhl v. Corner*, 63 Md. 179. In this case, which was an action brought against the factor by one who had purchased directly from the principal, the factor having in the meantime, without the knowledge of the transaction, sold to a third party the court said: "In the action of assumpsit, in the absence of proof of actual sale of the goods to the defendant, the plaintiff can only recover for the money had and received from the sale of the flour to the use of the plaintiff."

In *Lubert v. Chauviteau*, 3 Cal. 458, it was held that where the defendant sells the goods of the plaintiff without authority, and the plaintiff waives the tort and sues the defendant as factor for the proceeds of the goods, he can recover only the net proceeds received by the defendant after deducting necessary charges and commissions, if no charge is made of fraud, nonperformance, or negligence, and therefore evidence of the value of the goods sold is inadmissible.

No Damages for Not Remitting When Exchange Favorable. — In *Pope v. Barrett*, 1 Mason (U. S.) 117, it was held in assumpsit against a factor to whom goods were consigned "to sell and dispose thereof to the best advantage" and "to render * * * a reasonable account," that damages for not remitting when exchange was favorable should not be allowed.

until a demand has been made upon him therefor, or he has been instructed to remit.¹

c. FOR NEGLIGENCE OF DUTY — (1) *In General*. — The general rules that a person can recover only such damages as he has actually sustained,² that the act of the defendant must have been the proximate cause of the loss,³ and that speculative damages⁴ are not recoverable, apply with equal force to actions by the principal against his factor.

Violation of Instructions. — Where the factor violates the instructions of his principal, he is, as a general rule, liable for the damages actually sustained by the principal.⁵

(2) *Duty to Insure*. — The factor, on failure to insure when such duty is enjoined upon him, becomes himself liable as insurer,⁶ but in estimating the damages recoverable for breach of such duty the factor will be entitled to a deduction for the premiums he would have had to pay for insurance.⁷

(3) *Duty as to Time of Sale*. — Where the factor fails to sell the goods

1. **Factor Not Chargeable with Interest.** — *Tyree v. Parham*, 66 Ala. 424; *Ellery v. Cunningham*, 1 Met. (Mass.) 112; *Cheesborough v. Hunter*, 1 Hill L. (S. Car.) 400; *Wetmore v. Woodhouse*, 10 Tex. 33; *M'Connico v. Curzen*, 2 Call (Va.) 358, 1 Am. Dec. 540. See also *Consequa v. Fanning*, 3 Johns. Ch. (N. Y.) 587.

See, however, *Newman v. Homans*, Quincy (Mass.) 5, where it was held that, after a reasonable time, a factor was liable for interest on the price received for goods of his principal.

In *McLin v. McNamara*, 2 Dev. & B. Eq. (22 N. Car.) 82, where the principal had been very negligent in calling his factor to an account, had suppressed statements of the accounts, and had subjected himself to a strong suspicion of bad faith, the court refused to charge the factor with interest on the balance due from him.

Accounts Promptly Rendered. — In *Tyree v. Parham*, 66 Ala. 424, explaining and limiting 44 Ala. 627, it was held that where the factor promptly rendered an account of sales and kept the proceeds of the sales on deposit in bank separate from his own, he would not be liable for interest thereon before a demand upon him therefor. See also *Brown v. Clayton*, 12 Ga. 582; *Chedworth v. Edwards*, 8 Ves. Jr. 46.

Failure to Render Account. — It has been held that where the factor, when reasonably requested, unreasonably delays in rendering his accounts of sales, he will be charged with interest on the proceeds received. *Brown v. Clayton*, 12 Ga. 582. See also *Pearse v. Green*, 1 Jac. & W. 135.

And it seems that the factor would be liable for interest where he failed promptly to render accounts of sale, though no request for an account had been made upon him. *Clark v. Moody*, 17 Mass. 149; *Dodge v. Perkins*, 9 Pick. (Mass.) 368.

Conversion of Proceeds. — It seems that where the factor uses the proceeds for his own purpose, he will be liable for interest thereon. *Myers v. Entriiken*, 6 W. & S. (Pa.) 45, 40 Am. Dec. 538.

Agreement to Account for Proceeds. — In *Union Hardware Co. v. Plume*, etc., Mfg. Co., 58 Conn. 219, a factor agreeing to sell the goods at prices to be fixed by the principal and to

account for all sales was held liable for interest on the proceeds where he failed to account therefor.

After Demand. — After a demand by the principal for the payment by the factor of proceeds received from sales, the factor is liable for interest. *Pope v. Barrett*, 1 Mason (U. S.) 117; *Tyree v. Parham*, 66 Ala. 424; *Ellery v. Cunningham*, 1 Met. (Mass.) 112. See also the titles AGENCY, vol. 1, p. 1093; INTEREST.

2. **Damages Must Have Been Actually Sustained.** — In *Kingston v. Wilson*, 4 Wash. (U. S.) 310, it was held that the principal could not recover from his factor damages for the latter's failure to accept a draft drawn upon him unless the principal has paid, or is liable to pay, the draft.

3. **Proximate Damages.** — Where a factor failed to sell the goods within a reasonable time after being instructed to sell, it was held that he was not liable for the destruction of the goods by fire, the delay not being the proximate cause of the loss. *Lehman v. Pritchett*, 84 Ala. 512.

4. **Speculative Damages.** — In *Pope v. Barrett*, 1 Mason (U. S.) 117, it was held in an action by a principal against his factor for breach of his duty to render a reasonable account on demand, that the principal could not recover damages for loss of profits which would have accrued to him if the proceeds of the sale had been punctually remitted.

For the General Principles Governing the Measure of Damages see the title DAMAGES, vol. 8, p. 537.

5. **Violation of Instructions.** — *Frothingham v. Everton*, 12 N. H. 239; *Hamilton v. Cunningham*, 2 Brock. (U. S.) 366.

In *Walker v. Smith*, 1 Wash. (U. S.) 152, it was held that, for violation of an instruction to sell for cash, the factor was liable for the actual loss sustained by the principal through the failure of the purchaser to pay.

When, as a result of the factor's violation of instructions, the principal's goods are lost, the factor is liable for the value of the goods. *Copes v. Phelps*, 24 Ia. Ann. 562.

6. See *supra*, this title, *Duties and Liabilities of Parties Inter Se*, subdiv. 1, f. *Duty to Insure Goods Consigned*.

7. *De Tastett v. Crousillat*, 2 Wash. (U. S.) 136; *Shoenfeld v. Fleisher*, 73 Ill. 304.

within the time his duty requires him to do so, he will be liable to his principal for a loss incurred through a decline in the market price,¹ and also for injury to the goods by reason of their being left in store;² and where he sells in violation of his duty not to sell, he will be liable for any advance in price which could have been obtained from an increase in the market price.³

(4) *Duty as to Place of Sale.* — Where the factor violates his duty as to the place of sale, as, for instance, where he reships the goods to another market, he will be liable to the principal for the difference between the market price of the goods at the place where they should have been sold and the price received therefor.⁴

(5) *Sale Below Authorized Price — Price Limited by Principal.* — Though there are decisions holding that where goods are consigned to a factor to be sold at a fixed price, and are sold by the factor for less than such price, the factor is to be regarded as a purchaser at such price, and is responsible to the principal therefor,⁵ the doctrine followed by the majority of the authorities limits the recovery of the factor to his actual damages, that is the difference between the price obtained and the market value of the goods, taking into consideration the increase in the market price of the goods after the sale by the factor.⁶

1. *Failure to Sell.* — *Courcier v. Ritter*, 4 Wash. (U. S.) 549; *Day v. Crawford*, 13 Ga. 509; *Pulsifer v. Shepard*, 36 Ill. 513; *Cothran v. Ellis*, 107 Ill. 413; *Maggoffin v. Cowan*, 11 La. Ann. 554; *Howland v. Davis*, 40 Mich. 545; *Whelan v. Lynch*, 60 N. Y. 469, 19 Am. Rep. 202; *Johnson v. Wade*, 2 Baxt. (Tenn.) 480.

In *Whelan v. Lynch*, 60 N. Y. 469, 19 Am. Rep. 202, it was held that where a factor fails to sell the goods when instructed to do so, the measure of damages is the market value of the goods at the time when the instructions were given, or within a reasonable time for the sale thereafter, and not the highest market value between the time of the instructions and the commencement of the action.

2. *Pulsifer v. Shepard*, 36 Ill. 513.

3. *Gray v. Bass*, 42 Ga. 270; *Scott v. Rogers*, 31 N. Y. 676.

Time of Increase in Price. — In *Scott v. Rogers*, 31 N. Y. 676, it was held that the damages for a factor's selling in violation of instructions not to sell may be ascertained by referring to the increase in the market price at a reasonable time after the breach of orders within which to commence the action.

4. *Duty as to Place of Sale.* — *Comer v. Way*, 107 Ala. 300, [citing 3 AM. AND ENG. ENCYC. OF LAW (1st ed.) 326]; *Phy v. Clark*, 35 Ill. 377; *Grieff v. Cowguill*, 2 Disney (Ohio) 58.

Where, however, the goods net as much at the place where they were sold as they would have netted if sold at the proper place, the principal can recover no damages. *Ryder v. Thayer*, 3 La. Ann. 149.

See also cases cited *supra*, this title, *Extent of Authority — Implied Powers — To Reship to Other Markets.*

5. *Sale Below Price Limited.* — *Smart v. Sanders*, 5 C. B. 895, 57 E. C. L. 895; *Union Hardware Co. v. Plume*, etc., Mfg. Co., 58 Conn. 219; *Switzer v. Connett*, 11 Mo. 88.

In *Levison v. Balfour*, 34 Fed. Rep. 382, a factor was directed to sell the total shipment, not under a certain price per ton. He sold part of the goods above the limit, but did not sell the remainder. It was held that he was liable to the principal for the whole lot at the price limited.

6. *Factor's Recovery Limited to Actual Damages.* — *Frothingham v. Everton*, 12 N. H. 239; *Austill v. Crawford*, 7 Ala. 335; *Ainsworth v. Partillo*, 13 Ala. 461; *Pugh v. Porter Bros. Co.*, 118 Cal. 628; *Rollins v. Duffy*, 18 Ill. App. 398; *George v. McNeill*, 7 La. 124, 26 Am. Dec. 198; *Lesesne v. Cook*, 16 La. 58; *Nelson v. Morgan*, 2 Martin (La.) 256, 5 Am. Dec. 729; *Maynard v. Pease*, 99 Mass. 555; *Dalby v. Stearns*, 132 Mass. 230; *Blot v. Boiceau*, 3 N. Y. 78, 51 Am. Dec. 345, reversing 1 Sandf. (N. Y.) 111; *Hinde v. Smith*, 6 Lans. (N. Y.) 464; *Taylor v. Ketchum*, 5 Robt. (N. Y.) 507. See also *Webster v. De Tastet*, 7 T. R. 153; *Short v. Skipwith*, 1 Brock. (U. S.) 105. See, however, *Charley v. Watson*, 23 N. Y. Wkly. Dig. 189. *Compare Guy v. Oakley*, 13 Johns. (N. Y.) 332, wherein a factor, instructed not to sell goods below a certain price, effected a sale at that figure, which was above the market price, by agreeing with the buyer that the proceeds should be applied on a note which the buyer held against the principal. It was held that the factor was bound to account to the principal for the price at which he had sold the goods, without taking into consideration the agreement for the application of the proceeds on the note held by the buyer.

In *Osburn v. Delafield*, 75 Hun (N. Y.) 246, it was held that where a factor, instructed to sell the goods for sufficient to pay his advances and commissions, sells below such amount and draws on the principal for the balance, the principal, without having paid the draft, cannot recover the difference between the price limited and the price received by the factor, as in such case the principal has received no loss by reason of the violation of his instructions.

Works of Art or Antiquity. — Where, however, works of art or antiquity which have no fixed market value are consigned to be sold at a fixed price, it seems that the factor would, in case of a sale below such price, be liable to the principal for such price. *Blot v. Boiceau*, 3 N. Y. 78, 51 Am. Dec. 345; *Hinde v. Smith*, 6 Lans. (N. Y.) 466.

Increase in Market Price an Element of Damages. — Where the factor sells the goods below

(6) *Limitation of Time for Considering Advance in Price* — **Earlier Rule.** — Where the measure of damages for breach of duty on the part of the factor in the sale of the goods is to be determined by the advance in the market price of the goods, as where the factor sells when instructed not to sell, or where he sells below the price limited by his principal, it was formerly held that the highest market price between the time of sale and the commencement or trial of the action by the principal was to be taken into consideration.¹

Later Rule. — The manifest hardship of this rule in cases where the commencement of the action or the trial has been greatly delayed and the market price of the goods has fluctuated widely has compelled the adoption of a different rule, and the better rule now appears to be to limit the time for the consideration of an advance in price to a date which would give the principal a reasonable time within which to bring his action.²

6. Imprisonment of Factor for Debt Due Principal. — It is generally held that factors act in a fiduciary character in the sale of goods consigned to them, and are liable to civil arrest and imprisonment under statutes providing for the civil arrest of persons misapplying funds received in a fiduciary capacity.³

the price limited, the recovery of the principal is not limited to the market value of the goods at the time of sale, but the increase in the market after the sale is to be taken into consideration. *Maynard v. Pease*, 99 Mass. 555; *Dalby v. Stearns*, 132 Mass. 230; *Blot v. Boiceau*, 3 N. Y. 78, 51 Am. Dec. 345; *Scott v. Rogers*, 31 N. Y. 676; *Wilson v. Mathews*, 24 Barb. (N. Y.) 295.

Nominal Damages. — In case there was no actual loss, by reason of the fact that the market price of the goods had steadily declined from the time of sale, it would seem that the principal would still be entitled to recover nominal damages. *Frothingham v. Everton*, 12 N. H. 239; *Blot v. Boiceau*, 3 N. Y. 78, 51 Am. Dec. 345.

Price Limited as Evidence of Value. — The price limited by the principal has been held to be *prima facie* evidence of the actual market value of the goods. *Blot v. Boiceau*, 3 N. Y. 78, 51 Am. Dec. 345. Compare *Hinde v. Smith*, 6 Lans. (N. Y.) 464.

Guaranty of Fixed Price. — The measure of damages for breach of a factor's express guaranty of a fixed price upon the sale of goods is the difference between the price guaranteed and the price at which the goods were sold and accounted for. The rule applied when a factor sells below the price limited by his principal does not apply in such a case. *Pugh v. Porter Bros. Co.*, 118 Cal. 628. See also *Rollins v. Duffy*, 18 Ill. App. 398; *Dalton v. Goddard*, 104 Mass. 497.

1. Highest Market Price up to Time of Trial — **Earlier Rule.** — In *Blot v. Boiceau*, 3 N. Y. 78, 51 Am. Dec. 345, Bronson, J., in speaking of the rule of damages limiting the recovery against a factor, for a sale below the price limited, to the actual damages suffered by the principal, taking into consideration the increase in the market price, said: "It is said that this rule of damages will enable factors to violate the instructions of their principals with impunity. But that is a mistake. If they sell below the instruction price, though at the then market value, they will take the peril of a rise in the value of the goods at any time before an action is brought for the wrong; and, perhaps, down to the trial."

In *Maynard v. Pease*, 99 Mass. 555, Foster, J., said that it was not "necessary to decide what rule of damages is absolutely correct. It has sometimes been said that the highest market price before action brought is the standard; at others, that the highest value before the trial may be awarded. It is safe to say that the factor is at least liable for the highest market value of the goods within a reasonable time after a sale in violation of instructions. And in the present case there can be no doubt that the time when the plaintiff demanded the return of the goods was soon enough after the defendant's disobedience of instructions to make the highest market price previous to that date a limit sufficiently favorable to the defendants."

2. Later Rule. — *Galigher v. Jones*, 129 U. S. 193; *Matthews v. Coe*, 49 N. Y. 57; *Suydam v. Jenkins*, 3 Sandf. (N. Y.) 619.

In *Whelan v. Lynch*, 60 N. Y. 469, 19 Am. Rep. 202, it was held, in an action against a factor charging him as purchaser because of his neglect to obey the instructions of his principal directing the sale, that the measure of liability was the market value of the goods at the time of the receipt of the order, or within a reasonable time thereafter to be allowed for sale, and that a charge allowing the highest market price between the time of the receipt of the order and that of the commencement of the action was erroneous. See also *Scott v. Rogers*, 31 N. Y. 676.

In *Baker v. Drake*, 53 N. Y. 211, 13 Am. Rep. 507, 66 N. Y. 518 [*overruling* *Markham v. Jaudon*, 41 N. Y. 235], the leading case establishing the later rule, it was held, in an action against a stockbroker for a conversion of stock by reason of an unlawful sale, that an advance in the market up to a reasonable time for the principal to replace the stock afforded a complete indemnity and was the proper measure of damages. This case was followed in *Grueman v. Smith*, 81 N. Y. 25; *Colt v. Owens*, 90 N. Y. 370; *Wright v. Metropolis Bank*, 110 N. Y. 237, 6 Am. St. Rep. 356. See also the title STOCKBROKERS.

3. Factors Liable to Civil Arrest — *United States*. — In *re Kimball*, 6 Blatchf. (U. S.) 292; *Matter of Seymour*, 1 Ben. (U. S.) 348.

And this is true though they act under a *del credere* commission;¹ a factor acting under a *del credere* commission cannot be arrested, however, if he has never received the proceeds of the sale.²

7. Statute of Limitations. — It has been held that the statute of limitations does not begin to run against an action by the principal against his factor to recover the proceeds of goods sold until after the principal has made a demand upon the factor or instructed him to remit the proceeds.³

IX. TERMINATION OF RELATION — By Principal. — As a general rule the authority of the factor is terminable at the will of the principal.⁴

Advances by Factor—English Rule. — In England it is held that the principal may revoke the authority of the factor to sell even though the latter has made advances upon the goods.⁵

In the United States, however, it is held that the principal cannot defeat the right of the factor to sell the goods for his reimbursement, after reasonable notice to and demand upon the principal for payment. This ques-

New York. — Duguid v. Edwards, 50 Barb. (N. Y.) 288; Standard Sugar Refinery v. Dayton, 70 N. Y. 486; Kelly v. Scripture, 9 Hun (N. Y.) 283; Schudder v. Shiells, 17 How. Pr. (N. Y. Supreme Ct.) 420; Ridder v. Whitlock, 12 How. Pr. (N. Y. Supreme Ct.) 208; Barret v. Gracie, 34 Barb. (N. Y.) 20; Turner v. Thompson, 2 Abb. Pr. (N. Y. Supreme Ct.) 444.

North Carolina. — Travers v. Deaton, 107 N. Car. 500.

Wisconsin. — Williams Mower, etc., Co. v. Raynor, 38 Wis. 119.

1. Rule Applicable to Del Credere Factor. — Wallace v. Castle, 14 Hun (N. Y.) 106; Ostell v. Brough, 24 How. Pr. (N. Y. Supreme Ct.) 274; Williams Mower, etc., Co. v. Raynor, 38 Wis. 119. See also Duguid v. Edwards, 50 Barb. (N. Y.) 288, reversing 32 How. Pr. (N. Y.) 254.

2. Sutton v. De Camp, 4 Abb. Pr. N. S. (N. Y. C. Pl.) 483; Wallace v. Castle, 14 Hun (N. Y.) 106.

3. Statute of Limitations. — Topham v. Brad-dick, 1 Taunt. 572; Baird v. Walker, 12 Barb. (N. Y.) 300; Halden v. Crafts, 4 E. D. Smith (N. Y.) 497.

In Fulkerson v. White, 22 Tex. 674, it was held that the statute of limitations does not begin to run in favor of the factor until an account of sales has been rendered or demanded, or until a reasonable time in which to render it has elapsed, or until there has been a conversation, either actual or implied.

In Kane v. Cook, 8 Cal. 449, the court said that to hold that the statute of limitations ran against the principal before the factor had rendered an account of the sales would be to permit the consignee to take advantage of his own wrong and to sustain a defense of which in conscience he ought not to be permitted to avail himself.

Foreign Factor. — In Halden v. Crafts, 4 E. D. Smith (N. Y.) 490, it was held that the statute of limitations did not begin to run in favor of a foreign factor until after a demand upon him by the principal or instructions to remit. It would seem, however, that this rule would not hold in those jurisdictions which hold that in case of a foreign factor a demand is not necessary to the principal's right of action. See *supra*, this section, *Necessity for Demand in Action by Principal for Proceeds*.

4. Termination of Relation. — Ryberg v. Snell, 2 Wash. (U. S.) 403; Walter v. Ross, 2 Wash. (U. S.) 283; Jones v. Sinclair, 2 N. H. 319, 9 Am. Dec. 75; Scott v. Rogers, 31 N. Y. 676; Jordan v. James, 5 Ohio 100.

Notice of Revocation. — The revocation, however, so far as affects the factor, becomes effective only after he has received notice of it. Jones v. Hodgkins, 61 Me. 480.

Notice to Purchaser. — And a sale of goods by a factor after the revocation of his authority will be valid if the purchaser had no notice of such revocation. Jones v. Hodgkins, 61 Me. 480.

Sale by Principal. — The sale of the goods by the principal revokes the power of the factor to sell. Torre v. Thiele, 25 La. Ann. 418.

Still, a sale by a factor who was ignorant of the sale by his principal will convey a valid title to a *bona fide* purchaser. Jones v. Hodgkins, 61 Me. 480.

Contract of Agency for Season Construed. — A contract between a foreign nurseryman and an American factor provided that the latter was to make sales and collections for the former for a certain commission on all orders which the former should receive from such factor or direct from his customers. The contract was dated August 25, 1886, and provided that the agreement was to be for the term of one year from date or until the business of the season of 1886-87 was wholly closed up. It was held that the factor was entitled only to commissions upon orders secured and filed during the time intervening between the close of the shipping season of the previous year and the close of the season of 1886-87, whether such close were before or after August 25, 1887, it appearing that in such business shipments of stock commenced in the fall and continued through the winter until about April 1, and that the business season was understood to be from the commencement to the close of the shipping season. Anderson v. Dickinson, 72 Hun (N. Y.) 556. Compare Thompson v. Packwood, 2 La. Ann. 624.

5. Smart v. Sandars, 5 C. B. 895, 57 E. C. L. 895; Raleigh v. Atkinson, 6 M. & W. 676. See also *supra*, this title, *Duties and Liabilities of Parties Inter Se*, subdiv. 1. c. (5)(d) *Advances by Factor*.

tion has been fully discussed elsewhere.¹

Renunciation by Factor. — The factor may also, as a general rule, renounce the agency at will.²

Termination by Operation of Law. — And as in the case of other agencies the authority of the factor may be terminated by operation of law.³

X. CRIMINAL AND PENAL LIABILITY OF FACTOR. — In some states there are statutes imposing penalties upon and providing for the punishment of factors who refuse to pay over on demand the proceeds of goods consigned. Such statute being penal, a recovery or conviction thereunder can be had only when the case is brought strictly within their provisions.⁴

FACTORY — MANUFACTORY. (See also the titles EXEMPTIONS (FROM TAXATION), *ante*; FACTORY ACTS, *ante*; FIRE INSURANCE; MILLS; and see MANUFACTURE — MANUFACTURER.) — The word "factory" is a contraction of "manufactory," which is defined to be a building or collection of

1. See *supra*, this title, *Duties and Liabilities of Parties Inter Se*, subdv. I. c. (5) (d) *Advances by Factor*.

2. *Barrows v. Cushway*, 37 Mich. 481.

3. **Insolvency of Factor.** — The authority of the factor is, as in the case of other agencies, terminated by his insolvency, and his assignee acquires no right to sell the goods. *Terry v. Bamberger*, 44 Conn. 558; *Audenried v. Betteley*, 8 Allen (Mass.) 302.

Death of Factor. — The authority of a factor to sell is terminated by his death. *Gage v. Allison*, 1 Brev. (S. Car.) 495, 2 Am. Dec. 682; *Jackson Ins. Co. v. Partee*, 9 Heisk. (Tenn.) 296.

Death of Principal. — The death of the principal revokes the general authority of the factor to sell. Still it does not affect his lien upon the goods. *Knapp v. Alvord*, 10 Paige (N. Y.) 205, 40 Am. Dec. 241; *Hammonds v. Barclay*, 2 East 227.

Attachment by Creditors of Principal. — When a factor has made advances upon the goods an attachment or garnishment sued out by the creditors of the principal does not revoke his authority to sell. *White Mountain Bank v. West*, 46 Me. 15; *Baugh v. Kirkpatrick*, 54 Pa. St. 84, 93 Am. Dec. 675.

4. **Criminal Prosecution for Failure to Pay Over Proceeds on Demand — Sufficiency of Demand.** — In *Wright v. People*, 61 Ill. 382, it was held under the Act of March 4, 1869, providing for the punishment of a factor who on "demand" should fail to pay over the proceeds of goods sold, that it was necessary that an actual demand should be made in such a manner as fully to apprise the factor that he would be subject to the penalties of the statute if he failed to comply, and that a conviction could not be had on evidence that when the principal went to the factor's place of business the latter said: "I know what you have come for, but it is impossible for me to pay you anything now."

What Constitutes a Payment — Transmission of Check by Factor — Want of Funds. — In *Warriner v. People*, 74 Ill. 346, it was held in a prosecution under the same statute that it was not a sufficient defense that the factor by agreement with his principal was to send his check for the proceeds, and that he did send his check, when

it appeared that there were no funds in the bank on which the check was drawn to pay it, and that the check was promptly presented and not paid.

Penal Liability to Principal. — In *Hope v. Hull*, 60 Mo. App. 61, it was held under Rev. Stat. Mo., § 3579, providing that if any factor shall convert the proceeds of goods consigned for sale, or shall fail to pay over the same on demand, he shall "on conviction" be punished by a fine and shall be liable to the person injured to double the value of the goods, that the factor was not liable for double the value of the goods until he had been convicted under the statute.

Settlement with Consignor According to Highest Weight. — Under the *Kentucky* statute (Gen. Stat. 1887, p. 1265; Stat. 1894, § 4799), which provides that commission merchants storing and selling tobacco shall cause to be weighed every hogshead which may be sent to them for storage and sale, after the tobacco is stripped, and shall take the tare weight of each cask in which the tobacco has been prized, and after each hogshead has been sealed and properly recovered shall again cause it to be weighed by the person who first weighed it, and shall settle with the seller according to the highest weight, after deducting the exact tare, it was held that the commission merchant who in suing his customer for money advances upon tobacco gives him credit by the lowest weight instead of the highest weight does not thereby incur the penalty denounced by the statute for its violation, as he is not to be regarded as having "settled" with his customer within the meaning of the statute, the account being changed before judgment so as to conform to the statute, although not before the defendant had by his counterclaim sought to enforce the penalty. *McMasters v. Burnett*, 92 Ky. 358.

Embezzlement. — In *Com. v. Keller*, 9 Pa. Co. Ct. Rep. 253, it was held that horses were "merchandise" within the meaning of Bright, *Purd. Dig.* 499, punishing the embezzlement of the proceeds of merchandise by factors. See also *Com. v. Kelly*, 8 York Leg. Rec. (Pa.) 9. For a discussion of the liability of factors for embezzlement see the title EMBEZZLEMENT, vol. 10, p. 976.

buildings appropriated to the manufacture of goods.¹ In general the term

1. **Factory.**—Webster's Dict., *quoted* in Schott v. Harvey, 105 Pa. St. 227; Liebenstein v. Baltic F. Ins. Co., 45 Ill. 301.

In Atwood v. De Forest, 19 Conn. 518, the court said: "So, as we think, it is equally clear that an individual or copartnership carrying on the business of manufacturing for sale in the market, without reference to the supply of the community where their establishment is located, a particular article, as German-silver spectacles, is not, within the meaning of the statute, carrying on the business of a silversmith, or even of a spectacle maker. Such a concern is a *factory*, and not a mechanic's shop; and the individuals carrying it on are manufacturers, and not tradesmen."

Statutory Definition.—In Ritchie v. People, 155 Ill. 98, the definition of *factory* in the Illinois Factory Act is given as follows: "The words 'manufacturing establishment,' *factory*, or 'workshop,' wherever used in this act, shall be construed to mean any place where goods or products are manufactured or repaired, cleaned or sorted, in whole or in part, for sale or for wages."

Works in the Open Air.—Premises consisting of ten acres in which the manufacture of cement from chalk and mud was carried on chiefly in the open air, and in which two hundred people were employed in grinding and washing in mills, but in which there was no great building where men and women were employed under cover, was held not to be a *factory* within the English Factory Act. Redgrave v. Lee, L. R. 9 Q. B. 363.

So in Kent v. Astley, L. R. 5 Q. B. 24, a slate quarry, a large open space extending over an area of four hundred acres, the works on which were carried on in the open air, the only buildings being sheds, and in which more than fifty persons were employed in splitting the rock in slates and shaping them for sale, was held not to be a *factory* within the English Factory Act.

Number of Buildings and Extent of Ground Covered by Term.—An English statute enacted that a railroad company, on notice from the owner of any house, *manufactory*, ground, or building situated within fifty feet of such railway, should treat for the interest only in such property. The lessees of premises on which were a vinegar *manufactory*, warehouse, and principal dwelling house, a garden, and five smaller dwelling houses, which premises were so situated that a straight line drawn parallel to the railway at the distance of fifty feet would divide the principal dwelling house and garden, but would pass between the rest of the premises and the railroad, called upon the company to purchase their interest in the whole premises. It was held that the act did not oblige them to purchase more than the dwelling house and garden. Reg. v. London, etc., R. Co., 3 Q. B. 166, 43 E. C. L. 681.

In Richards v. Swansea Imp., etc., Co., 9 Ch. Div. 425, however, it was held that a whole block of buildings operated as one *manufactory* were within the statute. And see also Furniss v. Midland R. Co., L. R. 6 Eq. 473.

In Sparrow v. Oxford, etc., R. Co., 2 De G.

M. & G. 94, it was held that lands included in the same wall with tinplate works and used for the deposit of ashes from the works were part of the *manufactory*, although the two portions of the property were separated by a road over which a stranger had a right of way.

In Reddin v. Metropolitan Board of Works, 4 De G. F. & J. 532, it was held that where land was employed for the purpose of a business not involving manufacture, but parts were used for auxiliary manufacturing processes, the whole was not a *manufactory*.

In Barker v. North Staffordshire R. Co., 12 Jur. 590, it was held that brine reservoirs and brine pits adjoining a salt *manufactory* formed no part of the manufactory. And see generally, upon the construction of the term as used in this statute, the following cases: Gibson v. Hammersmith, etc., R. Co., 32 L. J. Ch. 337, 11 W. R. 299, 8 L. T. N. S. 43; Benington v. Metropolitan Board of Works, 54 L. T. N. S. 837, 50 J. P. 740; Sparrow v. Oxford, etc., R. Co., 16 Jur. 703.

By 30 & 31 Vict., c. 103, § 3, it is provided that the word *factory* shall mean "any premises in which steam, water, or other mechanical power is used for moving machinery employed, * * * in the manufacture of any article of metal not being machinery." A company carried on very large works, comprising the business of blast furnaces, iron rolling mills, engine building, and iron shipbuilding, in all its branches. The works of the several branches communicated and were open from one end to the other, and were within one common boundary. A boy was employed as a rivet boy, and in the department where he worked steam machinery was in use for cutting and shaping iron plates, and rivets were heated there. Both the plates and the rivets were used in the manufacture of a ship. The company having been convicted of having employed the boy in a *factory* beyond the statutable number of hours, it was held that the department in which the boy was employed was a *factory* within the above definition, and that the conviction was therefore right. Palmer's Shipbuilding, etc., Co. v. Chaytor, L. R. 4 Q. B. 209.

In Liebenstein v. Baltic Ins. Co., 45 Ill. 301, it was said: "The word *factory* does not necessarily mean a single building or edifice, but may apply to several, where they are used in connection with each other for a common purpose, and stand together in the same inclosure. This is popular usage, and also that of the lexicographers." Accordingly, the word, used in an insurance policy, was held to include a building ten feet distant from the main building in which the manufacture of chairs was carried on, which was in use as an engine and dry house.

Manufactory—Brooms Made by Hand.—A fire-insurance policy contained a stipulation that the insured should not carry on a mill or *manufactory* of any kind upon the insured premises without the consent of the insurer. With the consent of the company, the insured kept hay, straw, produce, etc., upon the premises. This he afterwards gave up and kept broom straw, and made brooms by hand. It

will include the necessary machinery as well as the building.¹ But it has

was held that this did not come within the prohibition against mills and *manufactories*. Strong, J., in his charge to the jury, said: "Is not a *manufactory* or a *factory* a building the main or principal design or use of which is to be a place for producing articles as products of labor? There is no difficulty in understanding what is meant when we speak of a *factory* or *manufactory*. It is something more than a place where things are made." And this was approved on appeal. Franklin F. Ins. Co. v. Brock, 57 Pa. St. 82.

Ashery — Burglary. (See generally the title BURGLARY, vol. 5, p. 52.) — In Blackford v. State, 11 Ohio St. 327, the court said: "An inclosed building, commonly called an ashery, and used since its erection for the purpose of depositing ashes therein, and converting the same into potash, is a *factory*, within the meaning of the 14th section of the Act of March 7, 1835, providing for the punishment of crimes, as amended April 3, 1857 (Swan & Critchfield's Stat. 506), and is therefore the subject of burglary."

Arson — Flax Mill. (See generally the title ARSON, vol. 2, p. 924.) — Mr. Irving Browne, in his "Judicial Interpretation," at page 242, says: "At the Rensselaer (N. Y.) Sessions, many years ago, in People v. Bradt, it was held that a flax mill is not a *manufactory* within the statute of arson, it being only a place where the flax is separated from the husk."

Same — Tobacco Factory. — A tobacco *factory* has been held a *manufactory* within a statute against arson. Langhorne v. Com., 76 Va. 1012.

Fire Escapes. (See also the title FIRE ESCAPES.) — A statute provided that it should be the duty of any owner or agent of any *factory* or workshop, more than two stories high, to provide convenient exits from the upper stories, easily accessible in case of fire. It was held that this statute did not require the owner of a building of which he had not the possession or control to provide such exits, although his tenant in control of the building used it as a *factory* or workshop. The court said: "That a *factory* or 'workshop' is not synonymous with 'building' must be admitted. The former can apply to a building only when used for the purpose of manufacturing; the latter denotes the character of the structure without reference to the use to which it is applied. The distinction between a *factory* and a building, under this statute, does not depend upon the intent of the architect. If the buildings were constructed and fitted for the purpose of manufacturing, but was never used for such purpose, it would not be a *factory* within the meaning of this statute; and, on the other hand, if the building were not constructed for the purpose of a manufactory, but were afterwards so used, it would be a *factory*. In either case it becomes a *factory* when so used. The legislature intended to provide for the safety of laborers or employees engaged in manufacturing. This is very clear. If the business of manufacturing in the building is discontinued, the duty of providing fire escapes does not rest on any owner, as it does not

where such business was never commenced. The owner of a building may have no interest in the use to which it is applied. Hence the owner of a building and the owner of a *factory* which is conducted in the building may be different persons." Lee v. Smith, 42 Ohio St. 460.

So in Schott v. Harvey, 105 Pa. St. 227, it was held under a similar statute that a tenant in possession using the premises as a *factory*, and not the holder of the fee, was the owner of the *factory*.

Lumbering — Lien for Wages. — In Pardee's Appeal, 100 Pa. St. 408, it was held that the business of cutting sawlogs and driving them to the place of manufacture was not included within the words "works, mines, *manufactory*, or other business," as used in the statute giving a lien for wages to laborers employed in such works, etc. The court said: "*Ex vi termini* the branches of business intended to be described by them [works, mines, *manufactories*] are, in a certain sense, complete and independent, and of a fixed and permanent character, as opposed to a temporary employment that is merely incidental to any particular branch of business. It will scarcely be pretended that either of these words fitly describes the business in which appellant was employed." See generally the titles LOGS AND LOGGING; MECHANICS' LIENS.

Preference for Wages. (See also the title INSOLVENCY AND BANKRUPTCY.) — A journeyman shoemaker employed by a manufacturer of shoes and boots for customers was held entitled to a preference for wages under the Pennsylvania statute allowing such preference to laborers employed in a *manufactory*, and this though his employer incidentally carried a small stock of goods, purchased from others, to sell at retail. The court said: "But it was a *manufactory*, unless a distinction is to be taken between a manufacturing principally for customers and manufacturing for sale generally. The evidence is that from six to ten journeymen were employed. It seems to me to come clearly within the term *manufactory* in the Act of 1872 and the Act of June 13, 1883, and gives to the mechanics employed therein a preference for wages for a period of six months immediately preceding the assignment, not to exceed two hundred dollars." Allen's Estate, 2 Pa. Dist. Rep. 88.

1. Machinery. — Lee v. Smith, 42 Ohio St. 458.

"But a *manufactory* is something more than a building. It includes not only the building, but the machinery necessary to produce the particular goods manufactured, and the engines or other power requisite to propel such machinery. A building with only bare walls and a roof would no more be a *manufactory* than it would be a hotel." Schott v. Harvey, 105 Pa. St. 227, 228.

In a covenant to keep insured, the term *factory* embraces the fixed machinery necessary to operate the *factory*, as a waterwheel, shafting, and gearing. The court said: "A building is no more a *factory* without machinery, than machinery would be a *factory* without a building." Mayhew v. Hardesty,

not always been held applicable to the machinery.¹

FACTORY ACTS. (For a full treatment of this subject, see the title LABOR REGULATIONS. See also in this connection the titles EIGHT-HOUR LAWS, vol. 10, p. 462; FIRE ESCAPES; MASTER AND SERVANT; and see FACTORY—MANUFACTORY, *ante*.)—In *England* and in many of the *United States*, statutes have been enacted regulating the hours of labor, the age at which children may be employed, the buildings in which employees are required to work, providing that such buildings shall have fire escapes, etc. These statutes are generally denominated factory acts.

FACTUM. (See also the title EXECUTION AND PROOF OF DOCUMENTS, vol. 11, p. 583.)—The *factum* of an instrument means not barely the signing of it and the formal publication or delivery, but proof that the maker knew and understood the contents thereof and did give, will, dispose, and do in all things as the said instrument sets out.²

FACULTATIVE.—See the title BILLS OF EXCHANGE AND PROMISSORY NOTES, vol. 4, p. 277.

FAIL—FAILURE. (See also the title INSOLVENCY AND BANKRUPTCY. As to failure to qualify see the title PUBLIC OFFICERS, and see QUALIFY. As to failure of issue see the titles ISSUE; PERPETUITIES; WILLS.)—To fail is to neglect to aid or supply; to fall short; to become deficient; to decay; to not succeed in a design; to become bankrupt.³ Failure means bankruptcy;

8 Md. 495. See also *Peoria M. & F. Ins. Co. v. Lewis*, 18 Ill. 562.

1. **Building or Machinery.**—The defendant issued a policy of fire insurance on all machinery “used in the business of manufacturing leather and morocco” contained in a certain building. A clause of the policy declared that “if a building covered by this policy shall become vacant or unoccupied, or, if a mill or *manufactory*, shall stand idle, * * * without notice to and the consent of the company clearly stated hereon, all liability hereunder will thereupon cease.” The property insured was destroyed by fire. In an action upon the policy it appeared that for several months prior to the fire the *factory* had stood idle, although the machinery was not removed from the building. It was held that the property insured was neither a mill nor a *manufactory* within the meaning of the condition; that it referred to a building used for milling or manufacturing, and had no application to personal property such as was covered by the policy, although used in a mill or *manufactory*. *Halpin v. Insurance Co. of North America*, 120 N. Y. 73.

A testator disposed specifically of his “*factory* estate.” It was held that the term “*factory* estate” did not include machinery. The court said: “It is claimed that by ‘*factory* estate’ the deviser means the *factory* and machinery; and so this machinery is also specifically devised, and cannot be sold to pay debts. But we see nothing in the words ‘*factory* estate’ which necessarily imports a conveyance of the machinery in the *factory*. It has been decided by this court that the machinery in a *factory* is personal property; and the word ‘estate’ is one appropriated to real property, though it is sometimes applied to personal. There is certainly nothing to prove that he intended to convey machinery unless we can infer it from the words ‘*factory* estate.’ Had a man given his estate at East Haddam, where he had a house and home-

stead, no one could pretend he intended to give the furniture in the house; and had he given his *factory* merely, it could hardly have been claimed that he gave the furniture in it, or the machinery; and certainly there is nothing in the term ‘estate’ which will convey a stronger idea of personal property; nor is there a syllable tending to show that he used the word ‘estate’ in any other than its legal sense. It is asked, however, could he intend to strip his *factory* of all that could render it useful? If a farmer, having a well-stocked farm, and one well furnished with farming utensils, should order his lawful debts paid, and give legacies to one child, and devise his farm or his estate to another, it would hardly be claimed that because that farm would be of no use without stock or farming implements, the stock or farming implements passed with the farm; and we see no difference in the principle. The *factory* estate and the farm would both possess a certain value without the machinery or implements used with them; but they would be of just as much more value, if these implements or that machinery were given with them, as it would cost to supply them; and whether the deviser intended that both should pass or not must be ascertained, not by the importance of them, but by the words he used and the general intent.” *Brainerd v. Cowdrey*, 16 Conn. 10.

Factory Prices are prices at which goods are sold at the *factory*, in contradistinction to their prices in the market after they have passed into the hands of middlemen. *Whipple v. Levett*, 2 Mason (U. S.) 89. In *Avery v. Stewart*, 2 Conn. 69, it was left to the jury to find, from the evidence, the meaning of this phrase in a note payable in cotton yarn at “ten per cent. below the wholesale *factory* prices.”

2. *Zacharias v. Collis*, 3 Phil. Ecc. 176. See generally the title WILLS.

3. **Fail.**—The term does not necessarily imply a wilful default. *Miedbrodt v. Fitzsimon*, L. R. 6 P. C. 306.

insolvency; the not meeting of current obligations at maturity.¹

FAILURE OF CONSIDERATION.—See the title CONSIDERATION, vol. 6, p. 780.

Fail and Refuse. (See also REFUSE.)—A statute authorized a defendant to call upon a plaintiff in an action upon a usurious contract, to discover upon oath the truth of the facts as to the usury set forth in his plea, and further provided that if the plaintiff *failed* or refused to disclose in the manner and to the extent which the statute required, the defendant should be permitted to testify in his own behalf. It was held that the insufficiency of the plaintiff's affidavit to prove the facts stated in the defendant's plea as to the usury was not the criterion upon which the defendant's affidavit was to be admitted. Nisbet, J., said: "The two words *fail* and 'refuse' in this act seem to me to mean substantially the same thing. They contemplate a *failure* to come up, in whole or in part, to the requirements of the statute." *Persons v. Hight*, 4 Ga. 497. See generally the title USURY.

The difference between "refuse" and *fail* is that the former is an act of the will, while the latter may be an act of inevitable necessity. *Taylor v. Mason*, 9 Wheat. (U. S.) 344.

Where the indorser of a promissory note held himself liable to the indorsee should the maker *fail*, the word *fail* was held of larger import than "refuse." The court said: "The word *fail*, which is expressive of the condition, was not used as synonymous with 'inability,' but is used in that sense in which mercantile men generally understand it, as conveying an idea of insolvency, or a want of resources to meet engagements. In this sense it was doubtless understood by the parties; to suppose otherwise would render the condition of the indorsement totally useless. The obligation then incurred by the indorser makes him chargeable to the indorsee upon proof of the inability of the maker to pay, as ascertained by suit or otherwise." *Davis v. Campbell*, 3 Stew. (Ala.) 321.

Under a *Missouri* statute relating to the administration of a partnership estate by a surviving partner, the latter must have refused to allow a demand against such estate before the demandant could apply to the Probate Court for an allowance of his claim. In construing this provision the court, in *Easton v. Courtwright*, 84 Mo. 35, said: "With excessive reluctance, the learned counsel for appellants argue that the only recognition, under the statute, which the survivor can give a demand against the estate is to pay it. And therefore when he does not pay it, that is tantamount to a refusal to pay in contemplation of the statute. This makes the terms 'refusal' and *failure* synonymous. The obvious meaning of the statute is that when the claim is presented to the survivor for payment, and he should reject it, refuse it for want of justness, or like cause, then from this *quasi* adjudication of the survivor the statute gives the demandant a right of readjudication before the Probate Court on the validity of his claim." See generally the title PARTNERSHIP.

Deficiency—Trustee in a Mortgage.—In *Stallings v. Thomas*, 55 Ark. 326, it was held that the power to substitute a trustee in a

mortgage was governed by the terms of the instrument; and that where the instrument provided for the substitution if the trustee *failed* to act, no occasion for exercise of that power could arise until the trustee *failed* to act within a reasonable time after being requested to do so. The court said: "But the word *fail* implies delinquency as well as nonaction; and this could not be ascribed to him unless he ought to have acted. The parties never contemplated that he would act without a request to do it, and the terms of the provision did not make it his duty. He did not *fail*, within the meaning of the instrument, to sell unless he ought to have sold, and it cannot be said that he ought to have sold unless he was asked to do it and after a reasonable time had not done it."

Fail to Obtain Relief.—Where a person objected to his assessment to the poor rate, and the assessment committee, considering that his case would be governed by a case then pending in a superior court, adjourned its decision until that case was decided, he was held not to have "*failed* to obtain relief," within the meaning of an act giving an appeal in case of such *failure* only. *Reg. v. Bedminster Union*, 1 Q. B. Div. 503.

Fail to Prosecute.—A plaintiff *fails* to prosecute when he *fails* to appear. *Martin v. Fales*, 18 Me. 23, 36 Am. Dec. 693. See also 5 ENCYC. OF PL. AND PR., p. 128.

1. Insolvency. (See also the title INSOLVENCY AND BANKRUPTCY.)—The charter of a bank provided that in case of the *failure* of the bank each stockholder should be individually liable for a certain amount. The bank suspended specie payments, but continued banking operations for more than four years longer. It was held that this was a *failure*. The court said: "Was the suspension of specie payments by the bank, in November, 1860, a *failure* within the sense of the statute? *Failure* means a *failure* to meet its current obligations at maturity. 'Insolvency' looks to the liability to pay; *failure*, to the fact of payment. It is not necessary to say that the statute intended that *failure*, independently of insolvency, should fix the liability of the stockholders. All that need be said for the purposes of the present case is that *failure* was the outward act that was to stand for evidence that the bank was insolvent. If it should happen that the bank refused without justifiable cause to pay its current obligations at maturity, and had, notwithstanding such fact, sufficient assets to pay its indebtedness, the stockholder would get the benefit of that part, for his liability depended wholly on insufficiency of assets. At the same time the creditors of the bank, and all others interested, would be justified in assuming that the *failure* of the bank was by reason of its insolvency. The *failure* of the bank to pay its bills on presentation in specie was a *failure* to meet its current obligations at maturity, and, under the view we take of the statute, is presumptive evidence of insolvency." *Terry v. Calnan*, 13 S. Car. 226. And see *Boyce v. Ewart*, Rice L. (S.

FAILURE OF EVIDENCE. — See the titles NONSUIT; VARIANCE; and see 6 ENCYC. OF PL. AND PR. 667, title DIRECTING VERDICT.

FAILURE OF TITLE. — See the titles CONSIDERATION, vol. 6, p. 780; VENDOR AND PURCHASER.

FAILURE OF TRUST. — See the titles CHARITIES AND TRUSTS FOR CHARITABLE USES, vol. 5, p. 893; TRUSTS AND TRUSTEES.

FAIR — FAIRLY. (See also the title AGRICULTURAL SOCIETIES, vol. 2, p. 18; and see FAITHFUL.) — I. In its primary and etymological meaning, the word "fair" simply embraces a market for buying and selling such articles as may be exhibited, but it is now more generally used to designate an exhibition where the industrial products of a people are exhibited as a display of the success, workmanship, and art of the exhibitors and to obtain such premiums as may be paid by the owners of the fair as a reward of excellence.¹

II. "Fair" means characterized by honesty and impartiality; upright; free from suspicion of bias; equitable; reasonable.²

Car.) 126, 140; Fallon v. Robinson, 2 Hawaiian 227.

In Mayer v. Hermann, 10 Blatchf. (U. S.) 260, it was said: "Inability to meet their engagements in the usual course of business has been again and again adjudged to constitute insolvency, within the meaning of the bankrupt law. When, therefore, a merchant *fails* to pay his notes, or other mercantile obligations, as they become payable, the immediate presumption of inability to pay arises. This is according to the universal sense of the mercantile world. When a merchant does not so pay, he is at once and everywhere assumed, in the common language applied to the subject, to have *failed*."

Preferences — Fraudulent Conveyances. — The Louisiana Code provided that a debtor, should he have disposed of his goods within a certain time preceding his *failure*, in order to give an unjust preference, should be debarred of the benefit of the insolvent laws. In construing this provision the court said: "The word *failure* used in the code signifies the situation of the debtor who finds himself in the impossibility of paying his debts. Solvency is the ability to pay one's debts. He who cannot pay all that he owes is not solvent." Kennedy v. New Orleans Sav. Inst., 36 La. Ann. 8. See generally the title FRAUDULENT SALES AND CONVEYANCES.

Failure signifies the situation of the debtor who finds himself in the impossibility of paying his debts. Lea v. Bringier, 19 La. Ann. 198.

Same — Failing Circumstances. — Within the Connecticut statute, in order to make the deed of an insolvent debtor fraudulent and void, it is necessary that the grantor must be in *failing* circumstances. In construing this provision the court, in Utley v. Smith, 24 Conn. 310, said: "The words '*failing* circumstances,' as used in the statute, mean more than actual insolvency, for that is consistent with an honest belief of the insolvent debtor of his wealth and prosperity; the words would seem to imply that the insolvent is about *failing*, and closing his affairs, from an inability to continue in business and to meet his payments; to hold that a debtor, honestly pursuing his business, believing he is solvent, or, if embarrassed, hoping to extricate himself by con-

tinued efforts, and with that view buying and selling in the usual course of business — to hold such a person to be a bankrupt within this statute, and that all who deal with him deal with him at their peril, if it should turn out he was really insolvent at the time, would interrupt all business, and create great and general alarm. We construe the words of the statute in a more specific sense, to wit, the closing of business by an avowed and deliberate *failure*." See also Quinebaug Bank v. Brewster, 30 Conn. 559; Bloodgood v. Beecher, 35 Conn. 469; Hall v. Gaylor, 37 Conn. 550. And in Millard's Appeal, 62 Conn. 185, it was held that a man was in *failing* circumstances when, being insolvent in fact, he was acting in contemplation of actually stopping his business because he was not able to carry it on.

The phrase "*failing* circumstances" used in the constitution and statutes of Missouri, when applied to a bank, must be taken to mean a state of uncertainty whether the bank will be able to sustain itself, depending upon favorable or unfavorable contingencies which, in the course of business, may occur, and over which its officers have no control. Dodge v. Mastin, 17 Fed. Rep. 660, 5 McCrary (U. S.) 404.

1. State v. Long 48 Ohio St. 509, in which case it was held that a place where industrial products in agriculture, manufacturing, and the arts were placed on exhibition for the purpose of displaying them and awarding premiums as a reward for excellence was an agricultural *fair* within a statute making it an offense to sell intoxicating liquors within two miles of the place where an agricultural fair was being held. See generally the title INTOXICATING LIQUORS.

2. Bryan v. Chicago, etc., R. Co., 63 Iowa 464; State v. Johnson, 72 Iowa 393.

The word *fair*, as defined by Webster, is synonymous with honest, equitable, impartial, reasonable. Hirshfield v. Davis, 43 Tex. 161.

Fair and Legal. (See also LEGAL.) — A statute provided that before countersigning a warrant a city auditor should be satisfied that the proceedings had been legal and *fair*. In Wood v. Strother, 76 Cal. 545, 9 Am. St. Rep. 250, it was held that the word *fair* added nothing to the force of the word "legal," and therefore, if

FAIR ABRIDGMENT. — See the title **COPYRIGHT**, vol. 7, pp. 564, 574.

FAIR COMMENT, CRITICISM, ETC. — See the title **LIBEL AND SLANDER**.

the proceedings were legal, the auditor might be compelled by mandamus to countersign the warrant. The court said: "The word *fair* seems very loosely used in the above provision. In common usage it would convey some idea of justice or equity. But it is not possible that it could have been intended that in a case where the proceedings are legal—that is to say, in accordance with the requirements of the act—the auditor could refuse to sign upon the ground that the law was not just, or upon his own undefined notions of fairness. The word, therefore, adds nothing to the force of the word 'legal,' but is one of those expressions which are put in for the sake of sound, and which convey no definite meaning."

Fair, Reasonable, and Ordinary. (See generally the title **MALPRACTICE**.)—In a case against a surgeon for malpractice, the court instructed that a surgeon is not required "to have an infallible judgment or perfect skill. If possessed of *fair* or ordinary knowledge and skill, and if he exercises them to the best of his ability, he is not bound to warrant his judgment. Acting in good faith, a properly qualified physician or surgeon may do an act or adopt a treatment which may do harm and produce a bad result, yet if done in good faith and in the exercise of *fair* knowledge and skill he would not be liable." The appellate court said: "The only objection urged by the appellant to this instruction is that the expression '*fair* knowledge and skill' is used in lieu of the phrase 'reasonable or ordinary knowledge and skill.' It will be observed that in the first part of the instruction the phrase employed was '*fair* or ordinary knowledge and skill.' It is quite evident that the words *fair* and 'ordinary' were used by the court as synonyms. Webster, in his dictionary, gives as a synonym for *fair* the word 'reasonable.'" *Jones v. Angell*, 95 Ind. 382.

Fair Preponderance of Evidence. (See also the titles **EVIDENCE**, vol. II, p. 491; **REASONABLE DOUBT**.)—The expression "*fair* preponderance of evidence" means no more than that the evidence spoken of must *fairly* preponderate, i. e., it must preponderate so that the preponderance can be perceived upon a *fair* consideration of the evidence. *State v. Grear*, 29 Minn. 225.

In an action for damages on account of personal abuse, the jury was instructed that the plaintiff was required to prove her allegations by a *fair* preponderance of evidence. The appellate court said: "Counsel for plaintiff object to the terms used in the instruction. 'the *fair* preponderance of evidence,' on the ground that it expresses something more than an absolute preponderance. We think the expression is unobjectionable. The adjective *fair*, in this connection, means characterized by honesty and impartiality, upright, free from suspicion of bias, and is properly used in qualifying the word 'preponderance.'" *Bryan v. Chicago, etc., R. Co.*, 63 Iowa 466.

Same — Alibi. (See also titles **ALIBI**, vol. 2, p. 56; **REASONABLE DOUBT**.)—In *State v. Johnson*, 72 Iowa 399, the court said: "The defendant

claimed, and so testified, that he was at his home at the time of the homicide. The court directed the jury that if they found this claim supported by a '*fair* preponderance of the evidence,' they should acquit. Counsel insist that the instruction is rendered erroneous by reason of the use of the qualifying word *fair*. We have held that the use of this word in an instruction in precisely the same connection, qualifying the term 'preponderance of evidence,' is unobjectionable. *Bryan v. Chicago, etc., R. Co.*, 63 Iowa 464."

Quality. (See also **QUALITY**.)—In an action for failure to deliver ice of the quality called for in a contract, the trial judge, without objection being made, submitted this question to the jury for a special finding: "Was or was not the ice on board these vessels *fair* merchantable ice for the market for which both the parties knew it was intended?" The jury answered, "It was." This was held not error. The court said: "The principal objection urged in argument by the plaintiff relates not to the general principle stated to the jury and supported by the authorities cited, but to the use of the words *fair* and *fairly*, in the charge and in the special finding, to modify the term 'merchantable.' It is said that thereby the force of that term was reduced, when the plaintiff was entitled to the full effect of it. That there may be and are different grades of merchantable ice, as of other merchandise, is not denied. One quality may be purer and finer than another, and both be merchantable. * * * The received definitions of the word *fair* show that it is well adapted to convey this idea of mediocrity in quality, or something just above that." *Warner v. Arctic Ice Co.*, 74 Me. 475. See also the title **SALES**.

Fair Average Quality.—The plaintiff sold to the defendant, deliverable in London from Savannah, timber warranted of a *fair* average quality. It was held that the contract must be construed as for timber of a *fair* average of Savannah, although evidence was introduced to show that in several parts of Central America better material of the same kind was produced. *Pollock, C. B.*, said: "To satisfy the warranty, the cargo must be a *fair* average of the various sorts of the article which come from the port. The comparison must be with those things which would be present to the minds of the contracting parties when dealing for the article. There are many departments of commerce in which people know only the market in which they deal. Wine from a particular place of *fair* average quality does not mean of *fair* quality taking the average of wines in general." *Jones v. Clarke*, 2 H. & N. 727.

Fair Value. (See also **VALUE**.)—A statute provided that only cash or land at a *fair* cash valuation should be taken in payment of capital stock. In *Jones v. Whitworth*, 94 Tenn. 606, the court said: "A '*fair* cash valuation' is such a price as honest and impartial men would naturally and reasonably place upon any given piece of property in view of its useful capabilities and the end to be accomplished by its sale and purchase."

FAIRWAY. (See generally the titles **NAVIGABLE WATERS**; **NAVIGATION**.) — The word "fairway" means a clear passageway by water. Wherever there

A statute prohibited the issuing of stock of a corporation organized under it for property, except for such as was actually received for the use and legitimate purpose of said corporation at its *fair* value. It was held that the "*fair* value" contemplated by this provision was that which the property had at the time of the sale and was not dependent upon the subsequent success or failure of the investment. *Huntington v. Attrill*, 118 N. Y. 365. See also the titles **STOCK**; **STOCKHOLDERS**.

Fair Valuation. (See generally the titles **TAXATION**; **TAXATION (CORPORATE)**.) — Where, in answer to a tax suit, the defense was fraud in the assessment, and it was alleged that in a certain statement furnished the assessor (but which was informal) the property was "set down as of the value of six thousand dollars per mile, which was a *fair* valuation thereof, and was so known to and believed by the said assessor," it was held that this amounted to an allegation that six thousand dollars per mile was a just and *fair* value, and consequently that an assessment of fifteen thousand dollars per mile was excessive. *State v. Central Pac. R. Co.*, 7 Nev. 99.

Fair and Equitable Value. — For the construction of this phrase, within a provision reserving the right to a city to acquire waterworks at the expiration of a certain period at a *fair* and equitable value, see *National Waterworks Co. v. Kansas City*, 62 Fed. Rep. 853. See also the titles **MUNICIPAL CORPORATIONS**; **WATERWORKS**.

Fair Price — Barter. (See also **PRICE**.) — An English statute provided that where live stock, belonging to another person, had been taken by a tenant to be fed at a *fair* price agreed to be paid by the owner of said stock to the tenant, such stock should not be distrained by the landlord for rent. It was held that stock agisted for a *fair* equivalent, although such equivalent was not to be paid in money, was within the statute. *Coleridge, C. J.*, said: "Putting aside pedantic and scholastic refinements and derivations, 'price,' in ordinary colloquial language, does not always mean money, and '*fair* price' does not always mean coin of the realm." *Mathew, J.*, said: "I think the words '*fair* price' mean equivalent." *London, etc., Bank v. Belton*, 15 Q. B. Div. 459.

Fair Average Crop. — An owner of land entered into a contract with an overseer which stipulated that the overseer should make a *fair* average crop. It was held that by *fair* average crop was meant a *fair* average one making due allowances for the season and unforeseen events, and not that the crop should be an average one at all events. *Wright v. Morris*, 15 Ark. 444.

Fair Compensation. (See generally the titles **EXECUTORS AND ADMINISTRATORS**, vol. II, p. 1277; **GUARDIAN AND WARD**.) — In *Ratliff v. Davis*, 38 Miss. 112, it was held that a promise by a ward or devisee to pay the guardian, executor, or administrator a *fair* compensation for his services was a mere promise to pay what might be allowed by the appropriate tribunal according to law. The court said: "A

fair compensation to an executor must be taken to be what the law allows."

Fair Sale. — A *fair* sale is a sale conducted with fairness as respects the rights and interests of the parties affected by it. *Lalor v. McCarthy*, 24 Minn. 419. In this case the court further said: "As respects the mortgagor, then, any manner of conducting the sale which prevents the property from bringing a price as high as it would bring if otherwise conducted is unfair."

Administrator's Sale. (See generally the title **EXECUTORS AND ADMINISTRATORS**, vol. II, pp. 1005, 1040, 1133.) — A statute provided that where an administrator should make a public sale, the Probate Court should make an order confirming it, if it appeared to have been *fairly* made. It was held that a sale was not *fairly* made when made for an inadequate price. The court said: "The sale has not been *fairly* made if it appears that the land has been sold for an unfair or inadequate price. The word *fair*, as defined by Webster, is synonymous with honest, equitable, impartial, reasonable. If, therefore, it appears that the price at which the land was sold was inequitable or unreasonable, the sale, within the meaning of the law, has not been *fairly* made and should not be confirmed." *Hirshfield v. Davis*, 43 Tex. 161.

Fairly Wrought — Mines. — Where it was provided, in a demise of coal mines, that in case the whole of the coal, so far as the same could be *fairly* wrought, should have been worked out at any time prior to the expiration of the term, the annual payment was to cease, it was held that the question whether the coal could be *fairly* wrought did not depend on whether it could be worked at a profit, or whether it was worth working. *Pollock, C. B.*, said: "'*Fairly* wrought' means that which can be *fairly* and properly gotten, according to mining usage, without extraordinary difficulty or expense." *Griffiths v. Rigby*, 1 H. & N. 237.

Truly and Fairly. — An oath by a commissioner, "truly, faithfully, and without partiality, to take the examinations and depositions," etc., materially departs from the requirements of a statute directing that he be sworn "*faithfully, fairly, and impartially*" to execute the commission. Said the court: "The words [*truly* and *fairly*] are not synonymous. They have widely different shades of meaning, and convey entirely distinct ideas. Every day's experience teaches us that language may be truly, yet most unfairly, repeated. * * * On the other hand, language may be *fairly* reported, yet not in accordance with strict truth." *Lawrence v. Finch*, 17 N. J. Eq. 234.

Fairly — Proportionately. — The report of commissioners for laying out an avenue in a city set forth that they had assessed the expense of making said improvement *fairly* and equitably. The report followed the language of that part of the act which authorized the assessment and prescribed the mode of distributing its burden. It was held that the words "*fairly* and equitably" indicated a legislative intent that the burden which might,

is an open navigable passage used by vessels proceeding up and down a river or channel, that may be said to be a fairway.¹

FAITH. — See note 2.

consistently with established legislative principles, be imposed upon the frontage should be so distributed that each should bear his just proportion of the whole, according to, and not in excess of, the benefits received. *State v. West Orange Tp.*, 39 N. J. L. 453. See generally the title **SPECIAL ASSESSMENTS**.

Fairly and Equitably. — An averment in a petition for the sale of the decedent's lands that they could not be "*fairly*, beneficially, and equitably divided" without a sale was held to be a substantial compliance with the statutory requisite that they could not be equitably divided. The court said: "It is conceivable that a construction might be placed upon the words '*fairly*, beneficially, and equitably divided,' which would render them diverse in effect from the words 'equitably divided.' They are, however, susceptible of a construction which would make each of the three adverbs so nearly the synonym of the others that, if there be a distinction at all, it is too nice for practical application, and not likely to be observed by those unaccustomed to refinements in defining words. One of the definitions of *fairly* is 'equitably' (*Worcester's Dictionary*), and if we understand '*beneficially*' to refer to and qualify the division, as affecting the interest of the respective owners in the land itself, we cannot perceive how a division which would not in itself be beneficial, or (adopting an equivalent positive form of expression) which, tested by its own intrinsic qualities, would be injurious, could be equitable." *Satcher v. Satcher*, 41 Ala. 40. To the same effect see *Warnock v. Thomas*, 48 Ala. 465, where the court said: "*Fairly* means 'equitably,' and when used to represent a division of lands is too nearly its synonym for practical distinction."

Insurance Policy — Honestly. (See also the titles **ACCIDENT INSURANCE**, vol. 1, p. 284; **FIRE INSURANCE**; **INSURANCE**; **LIFE INSURANCE**; **MARINE INSURANCE**.) — A statute provided that an insurance policy should be void "if any material fact or circumstance stated in writing has not been *fairly* represented by the insured." It was held error to instruct, in an action on a policy, that the jury should determine whether the representations were in fact false, and if so, whether they were made innocently and by mistake, and so *fairly* made. The court said: "Of course it is possible to read the word *fairly* as meaning 'honestly,' and as cutting down the effect of misrepresentations which form the basis of insurance to the single case of fraud. But it is just as possible to read the word as requiring a *fair* correspondence between the representation and the fact." *Ring v. Phoenix Assur. Co.*, 145 Mass. 426.

Fairly Estimated. — An English bankruptcy act provided that a liability should not be provable against a bankrupt if it were incapable of being *fairly* estimated. In construing this provision *Halsbury, L. C.*, said: "I do not therefore see why, if any contingent liability can be valued, this cannot be valued,

and the introduction of the adverb *fairly*, giving a jurisdiction to the court to decide whether in particular cases a liability could not be *fairly* valued, seems to me to involve the principle that all liabilities subject to the express exceptions enacted by the statute were intended to be included, but that in the one case where the court should adjudicate that the liability was such that at that time it could not be *fairly* estimated, then and then only should the liability continue." *Hardy v. Fothergill*, L. R. 13 App. 356.

Fairness and Good Faith. (See also **GOOD FAITH**.) — A *Mississippi* statute provided that no action for the recovery of property sold at a probate sale should be maintained by the heirs or devisees after a certain period, provided the sale was *fair* and *bona fide*. The court, in *Morgan v. Hazlehurst Lodge*, 53 Miss. 683, said: "*Fairness* and good faith in the sale means that *fair* dealing which usually characterizes business transactions. They are used as the antithesis of *mala fides*."

1. The *Blue Bell*, (1895) Prob. 246.

A *fairway* is water on which vessels of commerce habitually move. *The Oliver*, 22 Fed. Rep. 849.

2. **Bad Faith.** — See **BAD**, vol. 3, p. 526, note.

Good Faith. — See **BONA FIDE**, vol. 4, p. 615; **GOOD FAITH**.

Full Faith and Credit. — As to the constitutional provision that full *faith* and credit shall be given to judgments and decrees of a sister state, see the title **JUDGMENTS AND DECREES**.

Abiding Faith. (See also title **REASONABLE DOUBT**.) — The trial court instructed the jury that "if after a full, fair, and impartial consideration of all the evidence in the case, the instructions of the court, and the arguments of counsel, you can say and feel that you have an abiding *faith* of the truth of the charge of the guilt of the accused, then you are convinced beyond a reasonable doubt." This was held error. The court said: "'Abiding' means continuing, permanent, durable. *Faith* means, as used in this connection, the assent of the mind to what is stated or put forward by another; trust or confidence in the veracity of another. An abiding *faith* would be a belief or confidence in the guilt of the accused which remains or continues in the minds of the jury. It is certainly true that before a jury can convict a person charged with a crime they must have an abiding *faith* of the truth of the charge of his guilt. But what degree of *faith*? How strong must that *faith* be before it crosses the line which separates the realm of doubt from that of moral certainty? Of this the court, when it attempted to explain or define these words, should have advised the jury. The instruction given by the trial court in this case has been given and approved in other states with the words 'amounting to a moral certainty' immediately following the words 'abiding *faith*.' But nowhere in any of the books have we been able to find the instruction as given approved by any court." *Patzwald v. U. S.*, (Okla. 1898) 54 Pac. Rep. 459.

FAITHFUL — FAITHFULLY. — See note 1.

FALL. — See note 2.

1. **Oath.** (See also the titles **DEPOSITIONS**, vol. 9, p. 306; **OATH**.) — A statute provided that the commissioners to take depositions in a foreign state must be sworn or affirmed *faithfully*, fairly, and impartially to execute the commission. It was held that an oath *faithfully* to execute, etc., omitting the other terms, was insufficient. The court said: "They do not swear that they will execute the commission either fairly or impartially, as the statute enacts; but leaving out both those requirements, they swear to do it *faithfully*. Now the court has a power which it often exercises of dispensing with form; not, however, with the substance of a statute; and yet 'fairly and impartially' are a part of the substance of the oath. They mean something more than is meant by the word *faithfully*, or they would not have been used in the statute. If they mean only the same thing as *faithfully*, then it is granted that by the rule of legal construction they become useless words, and may be stricken out of the statute. The word *faithfully*, as it respects temporal affairs, means diligently, without unnecessary delay; as a *faithful* officer, a *faithful* servant, in applying to their duties. An agent may be very *faithful*, yet very partial, to his employer." *Den v. Thompson*, 16 N. J. L. 73.

Faithfully — Official Bond. — In *Hoboken v. Evans*, 31 N. J. L. 342, it was held that an official bond stipulating "for the *faithful* performance" of the duties of an officer did not in legal effect differ from one stipulating that the incumbent "shall well and truly, *faithfully*, firmly, and impartially execute and perform the duties of his said office during his continuance therein." The court said: "A bond stipulating 'for the *faithful* performance' of an officer does not, in legal effect, however much it may in words, differ from one stipulating that the incumbent will 'well and truly, *faithfully*, firmly, and impartially execute and perform' such office. The words 'well,' 'truly,' 'firmly,' and 'impartially' are simply redundant; they are comprised in their legal signification in the word *faithfully*. It is an error to suppose that the agreement to perform the duties of the office *faithfully* means merely that the incumbent will not wilfully do any wrong act. It has a stretch beyond this, and is broken by a neglect or by carelessness in discharge of the official duty, as well as by an intentional misfeasance."

Official Bond. (See also the title **OFFICIAL BONDS**; and see such titles as **EXECUTORS AND ADMINISTRATORS**, vol. 11, p. 862; **GUARDIAN AND WARD**; **TRUSTS AND TRUSTEES**, etc.) — A bond for the *faithful* performance of the duties of an office is a security, not only for the honesty and integrity of the officer, but also for reasonable and competent skill, and due and ordinary diligence, in the discharge of his duties. *American Bank v. Adams*, 12 Pick. (Mass.) 303.

In *State v. Chadwick*, 10 Oregon 468, it was said: "The rule of interpretation seems to be, that when a public officer gives a bond conditioned *faithfully* to discharge his official duties, the word *faithfully* is held to imply that he

has assumed that measure of responsibility laid on him by law had no bond been given; that the object of a bond so conditioned is to get sureties for the performance of the duties of the office according to law, and that everything is unfaithfulness which the law does not excuse."

A statute required that a register in chancery should enter into a bond for the *faithful* discharge of his duties. In *Governor v. Wiley*, 14 Ala. 180, it was said: "By the terms '*faithful* discharge,' in the connection in which they are used, we are to understand a stipulation that the register shall correctly, with exactness and according to law, perform his official duties; and if he does an act under color of his office, and as an officer, so inaccurately and imperfectly as to occasion a loss to a party to the proceeding, this is a breach of the condition of his bond."

But in *Union Bank v. Clossey*, 10 Johns. (N. Y.) 271, 11 Johns. (N. Y.) 183, it was held that the term *faithfully* in the bond of a bank clerk applied only to his honesty and not to his ability to perform his trust, and therefore that his sureties were not liable for a loss due to a mistake.

Same — Faithfully Account. — In *State v. Colman*, 73 Mo. 684, 13 Cent. L. J. 158, it was held that an administrator or guardian has not *faithfully* accounted for money received by him as such administrator or guardian, within the meaning of a statute or bond requiring him to *faithfully* account therefor, when he simply charges himself therewith before the proper officer, and at the time has the same in his possession. In order to *faithfully* account for such money he must not only charge himself with it, but he must safely keep and disburse it according to law.

2. **Fire Insurance.** (See also the title **FIRE INSURANCE**.) — An insurance policy provided that "if a building shall *fall*, except as the result of a fire, all insurance by this corporation on it or its contents shall immediately cease and determine." It was held that when substantially all the floors and the roof of a building used as a storehouse *fall*, leaving nothing standing but the outer walls, and perhaps a staircase or the elevator, the building must be deemed to have *fallen*. *Huck v. Globe Ins. Co.*, 127 Mass. 306, 9 Cent. L. J. 290.

In *Breuner v. Liverpool, etc., Ins. Co.*, 51 Cal. 101, 6 Ins. L. J. 475, 5 Cent. L. J. 66, under a similar clause it was held, where the walls of a building were of brick and a portion *fell*, leaving more than three-fourths standing, that the building was not a *fallen* building within the condition of the policy.

So in *Fireman's Fund Ins. Co. v. Congregation Rodeph Shalom*, 80 Ill. 558, it was held that so long as the building remained standing, no matter how much it might have been depreciated by the action of the wind, or any other cause, the liability of the company would continue. The building in that case after a storm leaned towards the street and was out of plumb, but had not *fallen*, although greatly damaged.

FALSA DEMONSTRATIO NON NOCET. (See also the titles BOUNDARIES, vol. 4, p. 797; INTERPRETATION AND CONSTRUCTION; STATUTES; WILLS.)—A false description does not impair.

FALSA GRAMMATICA NON VITIAT CHARTAM. (See also the titles INTERPRETATION AND CONSTRUCTION; STATUTES; WILLS.)—Bad grammar does not invalidate an instrument.

FALSE—FALSELY.—The word “false” sometimes means something more than untrue, viz., something designedly untrue, deceitful, and implying an intention to perpetrate some treachery or fraud.¹ But the word is

The “Falling Through” of a Sale, though a term not susceptible of a precise definition, is broad enough to comprehend the failure of the contract through the refusal of the buyers to pay the price. *Norris v. Maitland*, 9 Phila. (Pa.) 7, 29 Leg. Int. (Pa.) 149.

Fall—Wills.—A devise over was in the following words: “After that term, it is my will and desire that it *fall* into the possession of my brother.” It was held that the brother took a fee, notwithstanding the will contained an injunction that he should not leave the property to any but the legitimate heirs of his father’s family. The court said: “The land is to *fall* into his brother’s possession; words more expressive than the word to ‘give’ or ‘grant,’ as the tree *falls*, so it lieth. It is a word much in use in common speech, to indicate that lands become the property or estate of a particular person, upon the occurrence of a particular event; *exempli gratia*, ‘the land *falls* to him upon the death of his mother.’” *McCullough v. Gilmore*, 11 Pa. St. 373.

Contract of Sale—Autumn.—A vendor undertook to deliver fruit trees to the vendee at a certain place “this *fall*.” It was held that this did not warrant the delivery of the trees to the vendee upon the twenty-second day of November, the season being inclement and unfit for the planting of fruit trees, the true construction of the contract requiring that the period of delivery should be limited to the last of the *fall* season suited to transplanting such trees and usually adopted by nurserymen and parties planting such trees at the place of delivery. *Weltner v. Riggs*, 3 W. Va. 450.

Fall Term. (See also the title INDICTMENTS, INFORMATION, AND COMPLAINTS, 10 ENCYC. OF PL. AND PR. 425.)—In *State v. Haddock*, 2 Hawks (9 N. Car.) 461, an indictment containing in its caption the date as “Fall Term, 1822,” and charging that the offense was committed “on the 1st day of August, in the present year,” was held sufficient. The court said: “A court acting under limited and special powers may require a caption specifying its authority, but not a court sitting under the general law of the land. But ‘Fall Term’ is certain enough, for we know the fall begins the first of September, and that the circuit in which Columbus is located also begins in September. The time of committing the offense is stated with sufficient precision; ‘the present year’ refers to the year mentioned in the caption. The judgment must be entered up for the state.”

Falls—Watercourse.—A logging company was authorized to build a dam at a designated place and to improve the *falls* below its dam. In construing this power the court said: “We think this authority is confined to the *falls*

next below, and near the dam. The word *falls*, though plural in form, usually means only one locality; and when the designation is of *falls* below a dam, it usually means the *falls* immediately below. Dams are usually built upon or near *falls*.” *Davis v. Mattawamkeag Log Driving Co.*, 82 Me. 346.

1. Intentionally Untrue.—*Mason v. Agricultural Mut. Assur. Assoc.*, 18 U. C. C. P. 19. And see *Anderson v. Fitzgerald*, 4 H. L. Cas. 484.

False means that which is not true, coupled with a lying intent. *Wood v. State*, 48 Ga. 297.

In *State v. Brady*, 100 Iowa 204, it was said: “The word *falsely*, as used in the instruction, manifestly meant something more than ‘mistakenly,’ or ‘untruly.’ The jury, in reading this instruction in connection with the others, could not fail to have construed the word to mean something designedly untrue or deceitful, and as involving an intention to perpetrate some fraud.”

Same—False Account.—In *Putnam v. Osgood*, 51 N. H. 207, it was held that an account, to be *false*, must be wilfully incorrect. The court said: “It is quite obvious that the term ‘*false account*’ may be construed to mean an account which is morally *false*—known to be untrue; and this, we think, is the more common and ordinary meaning of the term; and so it is understood in *Bouvier’s Law Dictionary*, where the word ‘*falsehood*’ is defined to be ‘a wilful act or declaration contrary to truth,’ as the more common meaning.”

Same—Falsely Described.—In *Atchison R. Co. v. Goetz, etc., Mfg. Co.*, 51 Ill. App. 151, it was held that the term “*falsely described*” as used in the Interstate Commerce Act, prescribing penalties for those who *falsely described* or billed goods, did not mean a mere incorrect description, and that a person who in good faith incorrectly described his goods was not within the statute. See generally the title INTERSTATE COMMERCE.

Same—False Return—Taxation. (See also the title TAXATION.)—In *Ratterman v. Ingalls*, 48 Ohio St. 483, it was held that to render a taxpayer’s return a *false* return there must appear, if not a design to mislead or deceive, at least a culpable negligence. It was contended on the one side that *false* in this connection was to be taken as implying simply the opposite of correct or true, while upon the other it was insisted that the term necessarily implied that which is not only untrue but is designedly untrue. The court said: “The legislature having used words admitting of more than one meaning, it is the court’s duty to ascertain, if it may, the sense in which the

often used simply in the sense of "untrue."¹ For the construction of the

words were intended, the intention of the law-makers being in all cases the ultimate object sought in construction. Looking for the use of the word in a legal sense, we find it given in 7 AM. AND ENG. ENCYC. OF LAW 661, as meaning 'something more than untrue; it means something designedly untrue, deceitful, and implies an intention to perpetrate some treachery or fraud.' In Abbott's Law Dictionary 478, under the head *False*, it is stated: 'In the more important uses, in jurisprudence, of *false* and *falsely*, they usually import something more than the vernacular sense of erroneous or untrue. They are oftenest used to characterize a wrongful or criminal act, such as involves an error or untruth intentionally or knowingly put forward. A thing is called *false* when it is done or made with knowledge, actual or constructive, that it is untrue or illegal; or is said to be done *falsely* when the meaning is that the party is in fault for its error.'

Same — False Witness. (See also the title WITNESSES.) — The Code of California provides that "a witness *false* in one part of his testimony is to be distrusted in others." A defendant requested an instruction substantially covering this provision of the code. The court modified it by inserting the word "wilfully" before the word *false*. This was held no error. *People v. Luchetti*, 119 Cal. 501. And where the lower court had modified the words of the statute in the same way, in *People v. Sprague*, 53 Cal. 494, the appellate court said: "The word *false* is not the equivalent of 'mistake,' as contended for by defendant's counsel; the word 'wilfully' did not change the effect of the instruction as offered."

Same — False Entries — National Banks. (See also the title NATIONAL BANKS.) — The Revised Statutes of the United States make it a misdemeanor for an officer of a national bank to make a *false* entry in the books of the bank with intent to deceive, etc. In *U. S. v. Allen*, 47 Fed. Rep. 698, it was held that to come within the statute, the entries must have been intentionally *false*. The court said: "The word *false*, as used in this law, means wilfully and intentionally *false*. A mistake in the amount of an item, growing out of accounts in bookkeeping, would not make a man guilty under the law." To the same effect see *U. S. v. Graves*, 53 Fed. Rep. 634.

False Entries — National Banks — By Whom Made. — In *U. S. v. Potter*, 56 Fed. Rep. 94, the court said: "It would be an unnatural and strained construction of the statute to hold that the words '*false* entry' mean forged entry, fictitious entry, or any other entry made by any person not authorized to make the report, or, at least, who did not make it. The context of the statute shows that the word *false* is used in contradistinction to the word 'correct,' and that the statute in this particular relates only to those who have the right or authority to make correct and true entries or reports, or who assume such authority, and to none others. Presumably these reports are made by the cashier or president, who, as the executive officers, are authorized to verify them; and presumably any entry made in

them by any other person would not be a *false* one within the meaning of the statute, but fictitious, forged, or otherwise unauthorized."

1. See *State v. Kyle*, 14 Wash. 550; *Harding v. Randall*, 15 Me. 332.

False in the Sense of Untrue. — In *Walker v. Hawley*, 56 Conn. 559, it was said: "But a *false* assertion, in logic, ordinarily has a somewhat modified meaning. To say of a man that he reasons from *false* premises, or draws *false* conclusions from correct premises, is not libelous. In such cases the word *false* means no more than that the premises were not true, or that the conclusion was erroneous. So, also, to say of an advocate before a jury that he *falsely* asserted the guilt or innocence of the accused, that he *falsely* maintained the affirmative or negative of the issue, is not libelous, inasmuch as it means simply a mistaken view as to the effect of the evidence." See also the title LIBEL AND SLANDER.

Same — Instruction. — In an appeal from an action for death by wrongful act, the defendant assigned as error that the Circuit Court erred in its charge to the jury in announcing that the defendants had made two defenses, "one of which is that they did have a light out and the other that they did not have a light out, and in stating that both of these statements could not be true — one must be *false*." The appellate court said: "Counsel urge in their brief that by the use of the word *false* in the instruction the court 'made a direct accusation of perjury; of wilful *false* statement,' and that the jury must have received the word in such sense, and not as an equivalent for 'untrue.' This is inferred because in certain statutes imposing penalties or detriments the word is so construed. The inference we do not think is justified. Besides, the context refutes the contention of counsel." *McGowan v. Larsen*, 66 Fed. Rep. 914.

Same — Officers of Corporations. (See also the title OFFICERS AND AGENTS OF PRIVATE CORPORATIONS.) — In *Torbett v. Eaton*, 49 Hun (N. Y.) 209, 113 N. Y. 623, it was held that a statute making the officers of a corporation who signed a *false* certificate or report personally liable for debts of the corporation applied to officers who had no knowledge that the certificate or report which they signed was *false*. The court said: "The effect to be given to the word *false*, as it has been used in this section, was considered by the Court of Appeals in *Van Ingen v. Whitman*, 62 N. Y. 513. In that case the law had provided that if any *false* statement should be made in the certificate or affidavit, requisite for the formation of a special partnership, all the persons interested in the partnership should be liable for its engagements as general partners. 2 Rev. Stat. (6th ed.) 1154, § 8. And it was in that case held not to have been the intention of the legislature to require that the statement should be knowingly or fraudulently *false* to be attended with this result. But even if the affidavit stated in good faith that the capital had been paid in in cash, when that was not the fact, this statutory liability would arise * * * And as the word was used in the same general connection in the Act of 1875 as

word in other connections, see note 1.

it had been in this preceding statute, the reasons which the court assigned for giving this construction to it there are directly applicable to this case, and not only justify, but require, the same construction here."

Same — Insurance. (See also the title INSURANCE and the particular kinds of insurance there referred to.) — An insurance policy stated that if any of the answers of the insured should be found in any respect *false* or fraudulent the policy would be void, and it was held that the word *false* in the policy was used in the sense of untrue and did not limit the effect of the warranty to statements intentionally untrue. *Foot v. Ætna L. Ins. Co.*, 61 N. Y. 571.

False Swearing. — In a clause in an insurance policy, avoiding the same for "*false* swearing" by an applicant for insurance, this phrase means "a verified *false* assertion, which does deceive, or is fitted and likely to deceive, the one to whom it is made." But if the facts sworn to are known by the company's agents to be *false*, and they are not deceived, the policy is not rendered void thereby. *Maher v. Hibernia Ins. Co.*, 67 N. Y. 292.

But see *Mason v. Agricultural Mut. Assur. Assoc.*, 18 U. C. C. P. 19; *Franklin Ins. Co. v. Culver*, 6 Ind. 137. In these cases "*false* swearing" was to vitiate the policy, and it was held that "*false* swearing" meant wilful *false* swearing.

1. **Perjury.** — In *State v. Smith*, 63 Vt. 201, it was held that an indictment for perjury which alleged that the defendant had given wilfully and corruptly untrue testimony, omitting the word *false*ly, was sufficient, the court holding that "wilfully and corruptly" sufficiently alleged that the statement was *false*. See also *Rex v. Richards*, 7 D. & R. 665, 16 E. C. L. 313. And see the title PERJURY.

False Trade Description. — An English statute provided that a person who sold goods to which a *false* trade description was applied should be guilty of an offense. In *Kirshenboin v. Salmon*, (1898) 2 Q. B. 19, it was held that the words "*false* trade description" meant a trade description which was *false* in a material respect as regards the goods to which it was applied. See generally the title TRADEMARKS.

Action for False Return of Sheriff. (See also ENCYC. OF PL. AND PR., title RETURN.) — In *Raker v. Bucher*, 100 Cal. 219, it was said: "'False return' was simply the specific name (probably derived from the forms of the original writ) for one of the numerous class of actions on the case. It was not an action *in rem* for the purpose of canceling or setting aside the return in order to pave the way for another action for damages, but was itself an action for damages founded upon the official misconduct of the sheriff."

Forgery. (See also the title FORGERY, and 9 ENCYC. OF PL. AND PR. 546.) — In *State v. Young*, 46 N. H. 266, the court said: "The term *false*ly, as applied to making or altering a writing in order to make it forgery, has reference, not to the [contents] or tenor of the writing, or to the fact stated in the writing, because a writing containing a true statement may be forged or counterfeited as well as any

other, but it implies that the paper or writing is false, not genuine, fictitious, not a true writing, without regard to the truth or falsehood of the statement it contains — a writing which is the counterfeit of something which is or has been a genuine writing, or one which purports to be a genuine writing or instrument when it is not."

In *Rohr v. State*, 60 N. J. L. 576, it was said: "'Thus, it is forgery to alter the dates, names, or any other material parts of an instrument when the alteration gives it a new operation.' 1 Whart. Crim. Law 677. Our own statute, section 235 of the Crimes Act (Gen. Stat., p. 1092), makes it a high misdemeanor to *false*ly make, alter, forge, or counterfeit, etc., among the other instruments named, a check, with intent to prejudice, injure, damage, or defraud any person or persons, body politic or corporate. That the checks in question were altered in a material part will not be disputed. Nor will it be contended but that the alterations were *false*ly made, since the word *false*ly used in such connection implies that the paper or writing so altered is *false*, not genuine, fictitious, not a true writing, or writing which is the counterfeit of something which is or has been a genuine writing, or one which purports to be a genuine writing when it is not. *State v. Young*, 46 N. H. 270, cited in 9 ENCYC. OF PL. AND PR. 557."

The term "forgery" imports a *false* making *State v. Fitzsimmons*, 30 Mo. 242.

Same — False or Forged. — In *State v. Willson*, 28 Minn. 54, it was said: "Therefore, in order to determine what is a *false* instrument, we must resort to the common law on that subject. Now, according to the ordinary and popular meaning of the words '*false* or forged,' as applied to a note or other instrument in writing, we always understand one that is counterfeit or not genuine — an instrument by which some one has attempted to imitate another's personal act, and by means of such imitation to cheat and defraud, and not the doing of something in the name of another which does not profess to be the other's personal act, but that of the doer thereof, who claims by the act itself to be authorized to obligate the individual for whom he assumes to act. This definition of the words *false* and 'forged' is abundantly sustained by authority as the proper legal definition of these words."

Same — Falsely. — In *State v. McKiernan*, 17 Nev. 224, it was held that an indictment for forgery was sufficient although it did not use the word *false*ly, as the word "forge" used in the indictment necessarily implied that the writing was *false*ly made.

Same — Falsely Make. — The Revised Statutes of the United States declare it to be an offense to *false*ly make, alter, forge, or counterfeit any deed, certificate, or other writing, for the purpose of obtaining from the government any sum of money. It was held that the statute applied to making an affidavit genuine in itself, but containing *false* statements. The court said: "At the argument of this demurrer, my impression was that the offense defined consisted in the technical execution of an

FALSEHOOD. — A falsehood is a wilful act or declaration contrary to the truth.¹

instrument of the class defined in the statute, and not [in] the falsity of the statement of fact contained in such instrument. During the course of the opinion in the case of *U. S. v. Staats*, 8 How. (U. S.) 41, and rather in line of argument than tending to construe this paragraph of the section, the Supreme Court threw out an intimation, if not expressly deciding it, in confirmation of this thought. Upon more mature reflection, I am persuaded that this paragraph of the statute should have a wider scope. Indeed, I cannot conceive how any significance can be given to the words '*falsely* make' unless they shall be construed to mean the statements in a certificate which in fact are untrue. '*Falsely* means in opposition to the truth. '*Falsely* makes' means to state in a certificate that which is not true, and, if this be done with the intent and knowledge which the statute condemns, it falls within the punishment; and this view, if it needs confirma-

tion, is emphasized by section 5479 of the statute, which relates to forgeries only, and not to making an affidavit which is genuine itself, but containing untrue and false statements." *U. S. v. Hartman*, 65 Fed. Rep. 490.

False, Forged, Counterfeited. — In an indictment for counterfeiting it was held that the words "*false*, forged, and counterfeited" necessarily implied that the instrument so charged was not genuine. *U. S. v. Howell*, 11 Wall. (U. S.) 432.

False Bill. — An indictment for uttering a "false, forged, altered, and counterfeited bill" is repugnant. These are different things. Although *false* might be applied to any one of them in a loose way, it is not to be so used in construing a statute of crimes. A *false* bill may be only an illegitimate impression from a genuine plate. *Kirby v. State*, 1 Ohio St. 185.

1. *Putnam v. Osgood*, 51 N. H. 207.

FALSE IMPRISONMENT.

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CROSS-REFERENCES.

For matters of *PROCEDURE*, see *ENCYCLOPÆDIA OF PLEADING AND PRACTICE*, vol. 8, p. 841.

For other matters of *SUBSTANTIVE LAW* and *EVIDENCE*, related to this subject, see the following titles in this work: *ADVICE OF COUNSEL*, vol. 1, p. 894; *AGENCY*, vol. 1, p. 930; *ARREST*, vol. 2, p. 832; *CHARACTER (IN EVIDENCE)*, vol. 5, p. 850; *IMPRISONMENT FOR DEBT AND IN CIVIL ACTIONS*; *JUSTICE OF THE PEACE*; *MALICE*; *MALICIOUS PROSECUTION*; *SHERIFFS, MARSHALS, AND CONSTABLES*; *WARRANTS*.

I. DEFINITION AND SCOPE OF ARTICLE — Definition. — False imprisonment may be defined most simply and clearly as any unlawful detention of the person.¹

Other Definitions. — There are, however, definitions to be found in text books and opinions of courts slightly variant from the foregoing, the difference being one of phraseology and form rather than of matter of substance. A number of examples of these will be found in the notes below.²

1. **False Imprisonment**, it is said in *Johnson v. Bouton*, 35 Neb. 898, is the unlawful detention of a party. Likewise, in *Marks v. Sullivan*, 9 Utah 12, false imprisonment is defined as consisting of restraining another of his liberty without sufficient authority. And see *Rich v. McNerny*, 103 Ala. 345; *Kirk v. Garrett*, 84 Md. 383; *State v. Lunsford*, 81 N. Car. 528.

Some Authorities, It Will Be Observed, Subjoin to the Definition of false imprisonment given in the text as the unlawful detention of the person of another, the phrase "against his will." See *Rich v. McNerny*, 103 Ala. 345, *per* Head, J.; *Crowell v. Gleason*, 10 Me. 325; *Kirk v.*

Garrett, 84 Md. 383; *Limbeck v. Gerry*, 15 Misc. Rep. (N. Y. Supreme Ct.) 663; *State v. Lunsford*, 81 N. Car. 528, *per* Ashe, J. But this clause is, it is apprehended, generally if not invariably superfluous, because unless the act relied upon to constitute the offense were contrary to the will of the person acted upon, it could not be properly termed a detention, nor unless the detention were involuntary as to the person detained would it, in general, be unlawful.

2. **Other Definitions of False Imprisonment.** — False imprisonment, it is said in *Addison on Torts* (Wood's ed.), § 798, is a trespass committed by one man against the person of an-

False Imprisonment as Name of Action. — The term "false imprisonment" is also used as the name of the civil action for damages which lies for this species of injury.¹

Scope of Article. — This article will consider false imprisonment in both its criminal and civil aspects, though as a tort the subject is of vastly greater importance and interest. In fact, though false imprisonment was by the common law a crime as well as a civil injury, the reported cases of trials upon indictments are in number, as compared with the civil actions for damages, but few indeed. The following pages, therefore, will be chiefly devoted to a discussion of the principles applicable to the civil action. When, in making general observations, it is proper to discriminate between the tort and the crime, it will be done specifically, unless the context sufficiently indicates which is intended.

II. GENERAL PRINCIPLES — 1. Foundation and Nature of Action. — The foundation of the action for damages for false imprisonment has been said to be the right which even a guilty man has to be protected against any unlawful restraint of his personal liberty,² the liberty of the citizen, it has been rightly observed, being a matter of great importance and concern.³ At common law the action for damages for false imprisonment was, in general, one of trespass,⁴ though where the act of imprisonment by one person is in consequence of information from another, an action upon the case, it has been held, is the proper remedy.⁵

2. False Imprisonment as Including Assault and Battery. — False imprisonment generally includes an assault and battery, and always at least a technical assault.⁶ But though it frequently happens that a false imprisonment includes a battery, it is obvious that a battery is not an essential element of the former.⁷

3. Unlawful Detention Gist of False Imprisonment. — The gist of the action is, as it has been frequently declared, the unlawful detention.⁸

other by unlawfully arresting him and detaining him without a legal authority.

An Illegal Subjection to the Will of Another Without Legal Authority. — A false imprisonment is any illegal detention of a person against his will, whether under a valid process or without any process at all. It is placing a person against his will in a position where he cannot exercise his will in going where he may lawfully go, and holding him subject to the will of another without lawful authority. *Crowell v. Gleason*, 10 Me. 325.

Restraint May Be With or Without Process of Law. — False imprisonment is the unlawful restraint of a person contrary to his will, either with or without process of law. *Limbeck v. Gerry*, 15 Misc. Rep. (N. Y. Supreme Ct.) 663.

Unlawful Arrest and Detention. — False imprisonment is "a trespass committed by one man against the person of another by unlawfully arresting and detaining him without any legal authority." *Taylor v. Coolidge*, 64 Vt. 506. And see *Lock v. Ashton*, 12 Q. B. 871, 64 E. C. L. 871; *Bourden v. Alloway*, 11 Mod. 180; *Burns v. Erben*, 40 N. Y. 463; *Gelzenleuchter v. Niemeyer*, 64 Wis. 316, 54 Am. Rep. 616.

A Violation of Personal Liberty. — False imprisonment is the unlawful violation of the personal liberty of another. *People v. Wheeler*, 73 Cal. 252. Or, as was said in another case, it is a wrongful interference with the personal liberty of an individual. *Valentine, J.*, in *Comer v. Knowles*, 17 Kan. 436.

1. 3 Black. Com. 138.

2. *McConnell v. Kennedy*, 29 S. Car. 180.

3. *Pastor v. Regan*, 9 Misc. Rep. (N. Y. Supreme Ct.) 547.

Imprisonment to Extort Deed. — A release or conveyance of property extorted by imprisonment is void for duress. *Hackett v. King*, 6 Allen (Mass.) 58.

4. 3 Black. Com. 137; 1 Chitty on Pleadings 133; *Stanton v. Seymour*, 5 McLean (U. S.) 267; *Head, J.*, in *Rich v. McInerney*, 103 Ala. 345; *Colter v. Lower*, 35 Ind. 285, 9 Am. Rep. 735; *Brown v. Chadsey*, 39 Barb. (N. Y.) 253. And see *Morgan v. Hughes*, 2 T. R. 231.

Kidnapping — False Imprisonment. — At common law, it has been said, the offense of kidnapping is treated as an aggravated species of false imprisonment. *Click v. State*, 3 Tex. 282.

5. *Morgan v. Hughes*, 2 T. R. 231.

For Statutory Limitation of Actions of False Imprisonment see the statutes of the several states. See also *Sargent v. Johnson*, 1 McCord L. (S. Car.) 336; *Taylor v. Coolidge*, 64 Vt. 506; *Lavoie v. Gregorie*, 9 L. C. Rep. 253.

6. 3 Black. Com. 137; *Baldwin, J.*, in *Johnson v. Tompkins*, 1 Baldw. (U. S.) 578; *State v. Lunsford*, 81 N. Car. 528.

7. *Colter v. Lower*, 35 Ind. 285, 9 Am. Rep. 735; 2 Stark. Ev. 1113.

8. **Gist of Action the Unlawful Detention.** — *Brown v. Chadsey*, 39 Barb. (N. Y.) 253; *McCarthy v. De Armit*, 99 Pa. St. 71; *Neall v. Hart*, 115 Pa. St. 347, 2 Am. St. Rep. 559; *Hobbs v. Ray*, 18 R. I. 84; *McConnell v. Ken-*

Inquiry into Charge Against Plaintiff.—And, the legality of the confinement being the question upon which the action turns, it has been held that where the arrest is under warrant, it is immaterial to inquire whether the charge against the plaintiff for which he has been arrested is well or ill founded in fact.¹

Grand Jury's Disposition of the Charge.—And likewise, in an action for damages for false imprisonment, it was held that evidence of the disposition made by the grand jury of the charge against the plaintiff was properly excluded on the trial, as it could have no legitimate bearing on the question of the lawfulness of the plaintiff's arrest and imprisonment.²

Where Process Irregular.—But where the process under which the plaintiff was confined has been held irregular, it has been decided that the whole record of the case in which the imprisonment occurred is competent evidence for the plaintiff.³

Discharge on Habeas Corpus Proceedings.—And if by reason of the illegality of the arrest the plaintiff was discharged on habeas corpus proceedings, evidence of such fact has been held competent.⁴

Evidence of the Plaintiff's Regular Acquittal of the charge against him is, it seems, in general inadmissible,⁵ though if an arrest has been made without warrant,

nedy, 29 S. Car. 180; *Tavener v. Morehead*, 41 W. Va. 116. And see *Baker v. Barton*, 1 Colo. App. 183; *Stevens v. Manson*, 87 Me. 436; *State v. Lunsford*, 81 N. Car. 528.

In the case of *Tavener v. Morehead*, 41 W. Va. 116, it was observed that the gist of an action for damages for false imprisonment is an illegal detention of the person without lawful process or by the unlawful execution of a lawful process. And similarly in the case of *McConnell v. Kennedy*, 29 S. Car. 180, the court said: "It seems to us that the gist of the action for false imprisonment is that one has been restrained of his liberty without lawful authority; and where it appears that the restraint or imprisonment complained of is under lawful process the action must necessarily fail."

What Necessary to Make Out Case.—Where one brings an action for false imprisonment, all that it is necessary for him to allege and prove is that he has been unlawfully restrained of his liberty. *McConnell v. Kennedy*, 29 S. Car. 180.

1. *McConnell v. Kennedy*, 29 S. Car. 180. And see *Kirbie v. State*, 5 Tex. App. 60.

2. *Hopner v. McGowan*, 116 N. Y. 405.

3. *Parsons v. Harper*, 16 Gratt. (Va.) 64.

Complaint and Warrant in Evidence.—In an action for false imprisonment against a person who made a complaint and procured the issuance of a warrant of arrest by a justice of the peace, the justice of the peace who issued the warrant, and the constable who executed it, the complaint and warrant are admissible in evidence. *Forbes v. Hicks*, 27 Neb. 111. And in the case of *Robertson v. Meyers*, 7 U. C. Q. B. 423, which was an action for damages for having procured an arrest on an irregular ca. sa., it was held that the counsel for the plaintiff might read at the trial, from the original judgment of the court in discharging the plaintiff from arrest and setting aside the ca. sa., the grounds upon which the ca. sa. had been set aside.

Where the Warrant of Arrest Is Voidable for Irregularity it not only may, but must, be shown

to have been declared invalid by the proper tribunal. See *infra*, this title, *What Constitutes False Imprisonment*, subdiv. 3. b. (3) *Arrest on Voidable Warrant*.

4. *American Express Co. v. Patterson*, 73 Ind. 430.

5. **Evidence of Acquittal on Charge.**—In support of the principle announced in the text see *Fitzgerald v. Lewis*, 164 Mass. 495. And see also *Fowle v. Child*, 164 Mass. 210; *Com. v. Cheney*, 141 Mass. 102, 55 Am. Rep. 448; *Com. v. Waters*, 11 Gray (Mass.) 81; *Kirbie v. State*, 5 Tex. App. 60. But see *Shea v. Manhattan R. Co.*, (City Ct.) 7 N. Y. Supp. 497, which was an action for damages for false imprisonment against a corporation for the acts of its agent, wherein it was held that evidence of the police court records to show that the plaintiff was arrested on the charge by the defendant's employee and was discharged by the police justice was admissible. And see also *Grohmann v. Kirschman*, 168 Pa. St. 203, in which it was held that while in an action for damages for false imprisonment evidence that the plaintiff had been acquitted of the charge against him was admissible, it was not competent to show what had been said by the trial judge at Quarter Sessions in submitting the case to the jury. In this case the trial judge had directed a verdict of acquittal and instructed the jury to hold the prosecutor liable for costs. The foregoing, though styled an action for damages for false imprisonment by Fell, J., who delivered the opinion of the court, seems rather to have been one for a malicious prosecution, the arrest having been made upon a warrant regular on its face. And also as in apparent conflict with the true rule as announced in the text, see *Wrexford v. Smith*, 2 Root (Conn.) 171, which was an action for damages for false imprisonment against a private person, who, acting by the authority of a shopkeeper, purchased, overtook, and delivered into custody a person who had purchased some tobacco and carried it off without paying for it. The person so taken was convicted of theft, and the defendant held not liable in false imprisonment.

and its legality is dependent upon probable cause, the subsequent acquittal or conviction of the plaintiff would, it is believed, be relevant in such connection.¹

4. Imprisonment Shown — Presumption of Illegality. — The fact alone that a person has been imprisoned is, it has been held, of itself sufficient to raise the presumption that the confinement was illegal,² placing upon the defendant the burden of establishing the contrary.³ But if a plaintiff goes further and shows that his imprisonment was caused by a complaint before a magistrate, the issuing of a warrant upon such complaint, and a trial and conviction under it, the burden of proof is on the plaintiff to show that the imprisonment was unlawful.⁴ And where there was an action for damages for an alleged unlawful detention on account of the plaintiff's nonpayment of a tax, which was on the trial shown to have been slightly in excess of the proper assessment, it was held that the mere fact that a part of the tax was unlawful was not sufficient to create a liability in damages for false imprisonment.⁵

5. Motive, Malice, and Provocation — a. MOTIVES OF DEFENDANT — TO WHAT EXTENT MATERIAL. — In the action for damages for false imprisonment the motives of the defendant are not material, so far as the making out of a right of action is concerned,⁶ though, as is observed in another place, the

ment, stress being laid upon the circumstance that the person seized had been found guilty.

1. See *Oppenheimer v. Manhattan R. Co.*, (Supreme Ct.) 18 N. Y. Supp. 411.

2. Imprisonment Shown — Presumption of Illegality. — *People v. McGrew*, 77 Cal. 570; *Gallimore v. Ammerman*, 39 Ind. 323; *Barker v. Anderson*, 81 Mich. 508; *McCarthy v. De Armit*, 99 Pa. St. 70; *Kirbie v. State*, 5 Tex. App. 60. And see *Floyd v. State*, 12 Ark. 43, 54 Am. Dec. 250; *Mitchell v. State*, 12 Ark. 50, 54 Am. Dec. 253.

Florida Rule. — Compare in this connection *Barber v. State*, 13 Fla. 675; *Waterman v. State*, 13 Fla. 683, holding that under the laws of Florida the want of authority is an essential element of the offense (as it is everywhere, for that matter), and that, therefore, an indictment charging that the defendant "did forcibly confine and imprison within this state, against his will, one G. B.," did not state an offense under the Florida statute or at common law. It is believed that the court's statement given above is in conflict with the weight of authority with reference to the rule at common law.

3. Burden of Proof. — *Hicks v. Faulkner*, 8 Q. B. Div. 167; *People v. McGrew*, 77 Cal. 570. And see *Floyd v. State*, 12 Ark. 43, 54 Am. Dec. 250; *Mitchell v. State*, 12 Ark. 50, 54 Am. Dec. 253.

On an indictment for false imprisonment the state is required only to prove the imprisonment, and then it devolves upon the defendant to prove that he was justified in what he did and that the imprisonment was lawful. *Floyd v. State*, 12 Ark. 43, 54 Am. Dec. 250.

Burden of Proof — Distinction Between False Imprisonment and Malicious Prosecution. — In contrasting actions for damages for malicious prosecution with those for false imprisonment, the court said in the case of *McCarthy v. De Armit*, 99 Pa. St. 70, that in the first instance the presumption is that the defendant is not guilty; in the latter the act in itself is wrongful, and the burden is upon the defendant to prove that the imprisonment was by authority of law.

4. *Barker v. Anderson*, 81 Mich. 508.

5. Detention for Nonpayment of Tax Partly Illegal. — *Meserve v. Folsom*, 62 Vt. 504. "It is not to be presumed," said the court in this case, "that he [the plaintiff] was detained until the unlawful excess was paid. Being rightfully held for part, the detention was justifiable." And see *Shorland v. Govett*, 5 B. & C. 485, 11 E. C. L. 279; *Stoughton v. Mott*, 25 Vt. 668.

Detention under Two Warrants — One Legal, the Other Illegal. — It is not a false imprisonment that a person is convicted before a trial justice of two distinct offenses, and is committed to the house of correction under two warrants, one legal and the other illegal, and held in custody under both warrants during the whole time of his imprisonment. *Doherty v. Munson*, 127 Mass. 495. It was further said in this case that the magistrate who issued the illegal warrant could be held liable only in nominal damages if at all.

6. *England.* — *Chivers v. Savage*, 5 El. & Bl. 697, 85 E. C. L. 697; *Brandt v. Craddock*, 27 L. J. Exch. 314.

Alabama. — Head, J., in *Rich v. McInerney*, 103 Ala. 345; *Sugg v. Pool*, 2 Stew. & P. (Ala.) 196.

Arkansas. — *Akin v. Newell*, 32 Ark. 605; *Chrisman v. Carney*, 33 Ark. 316.

Indiana. — *Colter v. Lower*, 35 Ind. 285, 9 Am. Rep. 735; *Taylor v. Moffatt*, 2 Blackf. (Ind.) 305; *American Express Co. v. Patterson*, 73 Ind. 437.

Iowa. — See *Holmes v. Blyler*, 80 Iowa 365.

Kansas. — *Comer v. Knowles*, 17 Kan. 436.

Michigan. — *Livingston v. Burroughs*, 33 Mich. 511.

Missouri. — *Boeger v. Langenberg*, 97 Mo. 390, 10 Am. St. Rep. 322.

Nebraska. — *Johnson v. Bouton*, 35 Neb. 898; *Painter v. Ives*, 4 Neb. 122.

New Hampshire. — *Gibbs v. Randlett*, 58 N. H. 407.

New York. — *Marks v. Townsend*, 97 N. Y. 590; *Moore v. Devoy*, 37 How. Pr. (N. Y. Super. Ct.) 18; *Cunningham v. East River Electric Light Co.*, 60 N. Y. Super. Ct. 282; *Limbeck v. Gerry*, 15 Misc. Rep. (N. Y.

contrary is true in actions for malicious prosecution.¹ Where, however, a false imprisonment is shown, the motives of the defendant may affect the measure of damages.² It has been held, therefore, that if one person is arrested and imprisoned on a *capias* sued out by another unlawfully or without complying with the conditions upon which it could be lawfully issued, and it is afterwards set aside, the former is entitled to maintain an action for the injury sustained without reference to the particular motive by which the party suing out the *capias* may have been prompted, though the damages might be aggravated because of the motives by which the defendant was actuated.³ And though a person has been arrested and imprisoned under a warrant by mistake, such circumstance will not justify the imprisonment,⁴ unless the mistake was caused or contributed to by the plaintiff's own words or acts,⁵ though the fact of the defendant's honest mistake would be a mate-

Supreme Ct.) 663; *Hewitt v. Newburger*, 66 Hun (N. Y.) 230.

Ohio. — *Diehl v. Friester*, 37 Ohio St. 473; *Taylor v. Alexander*, 6 Ohio 144.

Rhode Island. — *Hobbs v. Ray*, 18 R. I. 84.

South Carolina. — *McIver, J.*, in *McConnell v. Kennedy*, 29 S. Car. 180.

Tennessee. — *Herzog v. Graham*, 9 Lea (Tenn.) 152.

Texas. — *Karner v. Stump*, 12 Tex. Civ. App. 460; *Formwalt v. Hylton*, 66 Tex. 288.

Virginia. — *Parsons v. Harper*, 16 Gratt. (Va.) 64.

Motive Immaterial to Maintenance of Action. — In the case of *McConnell v. Kennedy*, 29 S. Car. 180, *McIver, J.*, said with reference to an action for false imprisonment: "In such an action it does not seem to us that the motive with which the prosecution is instituted constitutes any element of the cause of action. If a prosecution is commenced against a party and he is arrested without lawful authority, the person who procures such arrest, no matter how pure or laudable may have been the motives of the prosecutor in instituting the prosecution, may be liable to an action for false imprisonment, because he caused a citizen to be restrained of his liberty without lawful process, and his motive has nothing to do with the case, except, perhaps, as an element to be considered in measuring the damages. So, on the other hand, if a prosecution is commenced according to the strictest forms of law against a party, through malice and without probable cause, under which he is arrested and imprisoned, he cannot maintain an action for false imprisonment, though he may maintain an action for malicious prosecution."

Evidence of Purpose and Intent — When Admissible. — In the case of *Girdner v. Taylor*, 6 Heisk. (Tenn.) 244, where several persons were charged in an action of false imprisonment with having aided and abetted in making an unlawful arrest, it was held to have been error to exclude from the jury evidence tending to show the purposes with which the defendants went to the place where the arrest was made. There was, however, in this case a conflict of evidence upon the question as to what part the defendants actually took in the arrest and imprisonment, and the court was of the opinion that the defendants had a right to show that they went to the place where the arrest was made without intending to take part therein.

1. See *infra*, this section, *False Imprisonment as Distinguished from Malicious Prosecution*.

2. **Motive as Affecting Measure of Damages.** — *Livingston v. Burroughs*, 33 Mich. 511; *McConnell v. Kennedy*, 29 S. Car. 180; *Formwalt v. Hylton*, 66 Tex. 288; *Parsons v. Harper*, 16 Gratt. (Va.) 64. And see *Sugg v. Pool*, 2 Stew. & P. (Ala.) 196; *Wachsmuth v. Merchants' Nat. Bank*, 96 Mich. 426; *Landrum v. Wells*, 7 Tex. Civ. App. 625; *Hays v. Creary*, 60 Tex. 445; *Tenney v. Harvey*, 63 Vt. 520.

In an action for false imprisonment for procuring the plaintiff's arrest upon a criminal complaint and warrant which charged no offense known to the law, the question whether the defendant has reasonable or probable cause for making the complaint is wholly immaterial, except as it affects the recovery of exemplary damages. His good faith could not prevent the recovery of actual damages. *Livingston v. Burroughs*, 33 Mich. 511.

Evidence that the Execution Had Been Paid, under which the plaintiff in an action for false imprisonment had been imprisoned, and that the defendant who caused the imprisonment knew of the fact at the time when he procured the plaintiff's incarceration, has been held admissible in an action for false imprisonment. *Paget v. Cook*, 1 Allen (Mass.) 522.

3. *Lee, J.*, in *Parsons v. Harper*, 16 Gratt. (Va.) 64.

4. **Arrest by Mistake.** — *Sugg v. Pool*, 2 Stew. & P. (Ala.) 196; *Holmes v. Blyler*, 80 Iowa 365; *Wachsmuth v. Merchants' Nat. Bank*, 96 Mich. 426; *Formwalt v. Hylton*, 66 Tex. 288; *Landrum v. Wells*, 7 Tex. Civ. App. 625. And see *Aaron v. Alexander*, 3 Campb. 35; *Hays v. Creary*, 60 Tex. 445; *Tenney v. Harvey*, 63 Vt. 520.

In the case of *Sugg v. Pool*, 2 Stew. & P. (Ala.) 196, which was an action for trespass for false imprisonment, it was held broadly that a plea that the defendants, believing the plaintiff to be another man, caused him to be arrested was no justification, but merely matter of extenuation. And see *Aaron v. Alexander*, 3 Campb. 35.

The Good Faith of an Officer in arresting the wrong person under a warrant will not exempt him from liability. *Holmes v. Blyler*, 80 Iowa 365. And see *Painter v. Ives*, 4 Neb. 122; *Rogers v. Wilson*, Minor (Ala.) 407, 12 Am. Dec. 61.

5. *Formwalt v. Hylton*, 66 Tex. 288; *Landrum v. Wells*, 7 Tex. Civ. App. 625.

rial consideration on the question of malice and the measure of damages.¹ If the detention, therefore, is not positively illegal, no action for false imprisonment can be maintained, no matter at whose instigation the act was done, or by what motives actuated,² and if the confinement is unlawful the action lies no matter how innocent or even commendable was the defendant's object and intent.³

b. MALICE NOT ESSENTIAL ELEMENT. — Applying the foregoing rule, the proposition is frequently met with that malice is not a necessary element to the constitution of the offense,⁴ malice in such connection being material only

1. **Evidence of Good Faith in Mitigation of Damages.** — *Sugg v. Pool*, 2 Stew. & P. (Ala.) 196; *Wachsmuth v. Merchants' Nat. Bank*, 96 Mich. 426; *Painter v. Ives*, 4 Neb. 122; *Formwalt v. Hylton*, 66 Tex. 288; *Landrum v. Wells*, 7 Tex. Civ. App. 625; *Tenney v. Harvey*, 63 Vt. 520.

In the case of *Landrum v. Wells*, 7 Tex. Civ. App. 625, the court said: "The good faith of an officer, or his honest belief, in arresting a person, that he is the one named and wanted, is admissible as evidence in mitigation of damages, when such good faith and belief is predicated upon the words or conduct of the party arrested of a nature calculated to create such a belief in the mind of a person of ordinary prudence and caution. This principle obtains when the recovery is sought for actual damages, as well as when it is for exemplary damages." Likewise, in the case of *Sugg v. Pool*, 2 Stew. & P. (Ala.) 196 which was an action for damages for false imprisonment, the arrest of the plaintiff having been caused by the defendants on account of his resemblance to a notorious criminal and fugitive from justice, it was held that evidence of such resemblance and of the *bona fides* of the error was admissible in evidence in mitigation of damages. And where, in one case, it was shown that the arrest and imprisonment were due to a *bona fide* mistake as to the person arrested, and not to malice, nominal damages only were awarded. *Chartrand v. Pudney*, 3 Leg. N. (Quebec) 237.

Evidence of Good Faith and Lack of Malice is relevant only on the subject of punitive damages. Such evidence cannot be received to reduce actual damages. *Tenney v. Harvey*, 63 Vt. 520.

Good Faith, Honest Belief, and the Advice of Counsel may be shown to rebut the presumption of malice and to avoid punitive damages, but not to justify an arrest and imprisonment under an absolutely void process. *Wachsmuth v. Merchants' Nat. Bank*, 96 Mich. 426. And see *Frazier v. Turner*, 76 Wis. 562.

2. *Bierwith v. Pieronnet*, 65 Mo. App. 431; *Marks v. Townsend*, 97 N. Y. 590; *Taylor v. Alexander*, 6 Ohio 144.

"The True Question in Such a Case Is, were the acts complained of legal? If they were they are none the less so because the party instituting the legal proceeding was actuated by motives of revenge or malignity." *Wright, J.*, in *Taylor v. Alexander*, 6 Ohio 144.

Even Malicious Motives and an Absence of Probable Cause do not give a party arrested an action for false imprisonment. They may aggravate his damage, but they have nothing whatever to do with the cause of action. Hence, if a defendant intentionally withheld

from the judge who granted a warrant of arrest the fact of the party's prior arrest, that fact would have been quite pertinent in the maintenance of an action for damages for malicious prosecution, but would not have laid the foundation for a recovery in an action for false imprisonment. *Marks v. Townsend*, 97 N. Y. 590.

3. *McConnell v. Kennedy*, 29 S. Car. 180.

In Order to Constitute the Wrong of False Imprisonment there need not be any ill will towards the complaining party, or even the slightest wrongful intent. *Valentine, J.*, in *Comer v. Knowles*, 17 Kan. 436.

4. **Malice Not Essential** — *England*. — *Chivers v. Savage*, 5 El. & Bl. 697, 85 E. C. L. 697; *Brandt v. Craddock*, 27 L. J. Exch. 314.

Alabama. — *Head, J.*, in *Rich v. McInerney*, 103 Ala. 345.

Arkansas. — *Chrisman v. Carney*, 33 Ark. 316; *Akin v. Newell*, 32 Ark. 605.

Indiana. — *Colter v. Lower*, 35 Ind. 285, 9 Am. Rep. 735; *Taylor v. Moffatt*, 2 Blackf. (Ind.) 305; *Carey v. Sheets*, 60 Ind. 17; *Boaz v. Tate*, 43 Ind. 60; *American Express Co. v. Patterson*, 73 Ind. 437.

Iowa. — See *Holmes v. Blyler*, 80 Iowa 365.

Kansas. — See *Comer v. Knowles*, 17 Kan. 436.

Louisiana. — *Wentz v. Bernhardt*, 37 La. Ann. 636.

Michigan. — *Livingston v. Burroughs*, 33 Mich. 511. And see *Maliniemi v. Gronlund*, 92 Mich. 227, 31 Am. St. Rep. 576.

Missouri. — *Boeger v. Langenberg*, 97 Mo. 390, 10 Am. St. Rep. 322.

Nebraska. — *Johnson v. Bouton*, 35 Neb. 898.

New Hampshire. — *Gibbs v. Randlett*, 58 N. H. 407.

New York. — *Moore v. Devoy*, 37 How. Pr. (N. Y. Super. Ct.) 18; *Cunningham v. East River Electric Light Co.*, 60 N. Y. Super. Ct. 282; *Limbeck v. Gerry*, 15 Misc. Rep. (N. Y. Supreme Ct.) 663; *Marks v. Townsend*, 97 N. Y. 590; *Hewitt v. Newburger*, 66 Hun (N. Y.) 230.

Ohio. — *Diehl v. Friester*, 37 Ohio St. 473; *Taylor v. Alexander*, 6 Ohio 144.

Rhode Island. — *Hobbs v. Ray*, 18 R. I. 84.

South Carolina. — *McIver, J.*, in *McConnell v. Kennedy*, 29 S. Car. 180.

Tennessee. — *Herzog v. Graham*, 9 Lea (Tenn.) 152.

Texas. — *Karner v. Stump*, 12 Tex. Civ. App. 460.

In the case of *Limbeck v. Gerry*, 15 Misc. Rep. (N. Y. Supreme Ct.) 663, the court said that a false imprisonment is constituted by a pure naked unlawful detention, unaffected by any question of motive or purpose. The want

as affecting the measure of damages whether punitive or compensatory merely.¹

c. PROVOCATION NOT A JUSTIFICATION IN LAW. — While, in an action for damages for false imprisonment, the jury may consider the defendant's provocation, if any, as affecting the question of punitive damages, such evidence is irrelevant and inadmissible where only actual damages are claimed.²

of lawful authority is an essential element of the offense, malice is not. And in the case of *Cunningham v. East River Electric Light Co.*, 60 N. Y. Super. Ct. 282, it was observed that "even if the defendant were moved by malice in causing the arrest, unless the process was irregular and unlawful, an action for false imprisonment, as distinguished from one for malicious prosecution, would not lie." Citing *Sleight v. Ogle*, 4 E. D. Smith (N. Y.) 445; *Von Latnam v. Libby*, 38 Barb. (N. Y.) 339; *Brown v. Chadsey*, 39 Barb. (N. Y.) 253; *Ackroyd v. Ackroyd*, 3 Daly (N. Y.) 38; *Castro v. Uriarte*, 2 Civ. Pro. Rep. (U. S. Dist. Ct.) 214.

The Gravamen of the Offense of False Imprisonment is the unlawful detention of another without his consent, and malice is not an essential element thereof; while in an action for malicious prosecution the essential elements are malice and want of probable cause. *Hobbs v. Rav*, 18 R. I. 84.

Malice as Incidental to False Imprisonment. — In the case of *Comer v. Knowles*, 17 Kan. 436, the court said that while malice was not an essential ingredient in the constitution of the wrong of false imprisonment, yet "malice and wilfulness may belong to any particular case of false imprisonment; but when they do so belong to such particular case they belong to it as a portion of the special facts of that case, for which special or exemplary damages may be awarded, and do not belong to the case as a portion of the general and essential facts of the case for which general damages may be awarded."

Not Necessary that Imprisonment Should Be under Criminal Charge. — It is clearly not necessary to the maintenance of an action for false imprisonment that the arrest and detention should be "under a criminal charge, preferred falsely, maliciously, and without probable cause." *Rich v. McNerny*, 103 Ala. 345. "These characteristics," said the court in this case, "while they constitute unlawfulness, in themselves sufficient to show trespass and support an action of that nature when the arrest is not under legal process, are yet restrictive of the unlawfulness by which the action may be supported."

1. *Head, J.*, in *Rich v. McNerny*, 103 Ala. 345; *Johnson v. Bouton*, 35 Neb. 898; *Lee, J.*, in *Parsons v. Harper*, 16 Gratt. (Va.) 64. And see *Comer v. Knowles*, 17 Kan. 436; *Brown v. Chadsey*, 39 Barb. (N. Y.) 253; *McIver, J.*, in *McConnell v. Kennedy*, 29 S. Car. 180.

Malice as Aggravating Damages — Want of Probable Cause. — Though malice is not necessary to the maintenance of an action for damages for false imprisonment, it will aggravate the damages; and the same, it has been held, may be said as to want of probable cause. *Herzog v. Graham*, 7 Lea (Tenn.) 152.

Presumption of Malice — Malice as an Element of the Offense. — The case of *Neall v. Hart*, 115 Pa. St. 347, 2 Am. St. Rep. 559, seems to have been an action for damages for false imprison-

ment in which the recovery of punitive damages was not claimed, and yet the court discusses the admissibility of evidence going to prove malice in fact as also evidence tending to show probable cause. And in the same case it was said that malice, in such actions, might be presumed from lack of probable cause. And in the case of *Brown v. Chadsey*, 39 Barb. (N. Y.) 262, the court said, with reference to an action for false imprisonment: "Malice in the defendant will be inferred, so far at least as to sustain the action." As has been seen elsewhere, malice is not at all necessary to the support of the action, nor, in general, need want of probable cause be considered except where the arrest was without warrant.

2. *Grace v. Dempsey*, 75 Wis. 313.

A Letter Written to One of Several Defendants Charging Him with Crime is no justification of an unlawful imprisonment committed under provocation of such letter. *Grace v. Dempsey*, 75 Wis. 313.

Imprisonment of Trespasser. — The case of *Green v. Bartram*, 4 C. & P. 308, 19 E. C. L. 400, was an action for damages for false imprisonment where the plaintiff entered the house of the defendant to demand a debt which the latter said he could not pay, whereupon angry words passed and the plaintiff made a disturbance in the house of the defendant, on account of which the defendant sent for a police officer and had the plaintiff locked up in the watchhouse. It was held that while the plaintiff's action would have justified the defendant in turning him out of the house, using no more force than was necessary, he had no right to cause him to be imprisoned in the watchhouse, and was liable in damages therefor.

Imprisonment of Disorderly Person by Innkeeper — Charging with Felony. — In the case of *Rose v. Wilson*, 1 Bing. 353, 8 E. C. L. 544, it appeared that the plaintiff entered a public house after all the doors had been closed for the night and conducted himself in a disorderly manner. The defendant went for a constable, and charged the plaintiff with a felony, whereby he was detained in custody two days. The defendant was held liable for an imprisonment, the court holding that though the plaintiff had been guilty of gross misconduct the defendant was not justified in charging him with a felony.

Imprisonment of Contractor Wrongfully Proceeding with Contract After Being Ordered to Desist. — One Durgin had a contract with the city, made while he was a member of the city government, for constructing a bridge, which necessitated the removal of the old structure. He had collected his materials at the point where they were to be used, when a controversy arose between him and the city authorities as to the suitability of the materials, and the defendant, who was city marshal, by direction of the city authorities for this reason notified Durgin and his employees not to remove the bridge or proceed with the work. The defendant knew that the plaintiff was in

6. Probable Cause. — The absence or existence of probable cause to believe a person guilty of an offense for which he is taken into custody will not in general affect the maintenance of an action for a false imprisonment,¹ unless, indeed, where there has been an arrest and imprisonment without warrant.² Perhaps, however, where there has been an arrest on a void or irregular warrant, evidence of want of probable cause might be properly considered on the question of malice and punitive damages.³

7. Advice of Counsel. — Advice of counsel is not a justification of an illegal imprisonment,⁴ though such circumstance, it has been held, may be shown to rebut the presumption of malice, material on the question of the measure of damages.⁵

8. Waiver of False Imprisonment. — It has been held that if a person exempt

the employ of Durgin, and on his refusal to desist from the work arrested him without a warrant, committed him to jail until a warrant could be procured, and took him before the municipal court on a charge of obstructing the highway and removing the planking from the bridge. It was held, however, that inasmuch as the city authorities at the time of the arrest had not claimed that the contract was void because Durgin was a member of the city government, or given any notice to that effect, but were insisting upon its performance, the contract could not be regarded as a nullity, and that although the use of so much force as might be necessary to prevent the plaintiff from proceeding with the work might be justified, the arrest and imprisonment of the plaintiff without legal process were unwarranted in law and constituted a false imprisonment. *Moore v. Durgin*, 68 Me. 148.

1. Probable Cause Not Material. — *Chivers v. Savage*, 5 El. & Bl. 697, 85 E. C. L. 697; *Brandt v. Craddock*, 27 L. J. Exch. 314; *Boaz v. Tate*, 43 Ind. 60; *Carey v. Sheets*, 60 Ind. 17; *American Express Co. v. Patterson*, 73 Ind. 437; *Boeger v. Langenberg*, 97 Mo. 390, 10 Am. St. Rep. 322; *Marks v. Townsend*, 97 N. Y. 590. And see *Wentz v. Bernhardt*, 37 La. Ann. 636.

"There are some cases," said the court, in *Brown v. Chadsey*, 39 Barb. (N. Y.) 262, "in which the existence of reasonable ground of suspicion is spoken of as a defense in actions for false imprisonment, but upon examination it will be found that these cases turn upon the authority given to magistrates in particular instances to arrest upon suspicion merely, to prevent or punish crimes, and in which therefore a reasonable suspicion is a sufficient authority and justification for an arrest; or else they are cases in which the actual commission of a felony was first proved and the case turned upon the ground for suspecting the person arrested."

Not a Justification for an Imprisonment. — Probable cause or reasonable ground of suspicion against the party arrested affords no justification of an arrest or imprisonment which is without authority of law. *Brown v. Chadsey*, 39 Barb. (N. Y.) 253. There may, indeed, be a false imprisonment though the arrest be without malice and with probable cause. *Rich v. McNerny*, 103 Ala. 345.

2. See *Brown v. Chadsey*, 39 Barb. (N. Y.) 253; opinion of Head, J., in *Rich v. McNerny*, 103 Ala. 345. See also *infra*, this title, *What*

Constitutes False Imprisonment, subdiv. 3. b. (1) (d) *Whether Probable Cause Question of Law or Fact*.

3. See *Beckwith v. Bean*, 98 U. S. 266. See also *infra*, this title, *False Imprisonment as a Civil Wrong*, subdiv. 2. k. (2) *Punitive Damages in Actions for False Imprisonment*.

4. Advice of Counsel. — *Fire Assoc. v. Fleming*, 78 Ga. 733; *Block v. Meyers*, 33 La. Ann. 776; *Wachsmuth v. Merchants' Nat. Bank*, 96 Mich. 426; *Josselyn v. McAllister*, 22 Mich. 300; *Ogg v. Murdock*, 25 W. Va. 139. And see *Frazier v. Turner*, 76 Wis. 562; *Page v. Miller*, 13 Ohio Cir. Ct. Rep. 663, 6 Ohio Cir. Dec. 676; *Filer v. Smith*, 96 Mich. 355, 35 Am. St. Rep. 603; *Clark v. Baldwin*, 25 Kan. 120. See the cases in succeeding note.

Advice of Counsel Given After the Arrest cannot be given in evidence in an action for damages for false arrest and imprisonment. *Filer v. Smith*, 96 Mich. 355, 35 Am. St. Rep. 603. But though advice of counsel given after an arrest could not justify the arrest, such circumstance might, it has been intimated, have bearing upon the subsequent detention, if predicated upon a full disclosure of all facts. *Filer v. Smith*, 96 Mich. 355, 35 Am. St. Rep. 603.

5. *Mortimer v. Thomas*, 23 La. Ann. 165; *Wachsmuth v. Merchants' Nat. Bank*, 96 Mich. 426; *Josselyn v. McAllister*, 22 Mich. 300; *Ogg v. Murdock*, 25 W. Va. 139. And see *Vinal v. Core*, 18 W. Va. 4; *Cooper v. Utterbach*, 37 Md. 284. See also cases in preceding note.

Advice of Counsel in Mitigation of Damages. — In the case of *Mortimer v. Thomas*, 23 La. Ann. 165, it was shown that the defendant, in procuring a wrongful arrest and imprisonment, acted under the advice of a young and inexperienced lawyer. This circumstance, it was held, though it could not justify the arrest, might be shown in mitigation of damages.

The Advice of a Person Not an Attorney, but who sometimes advised his neighbors for pay, has been held not admissible in evidence as advice of counsel in an action for false imprisonment. *Livingston v. Burroughs*, 33 Mich. 511. Inasmuch, however, as the only object for which evidence of advice of counsel in actions for false imprisonment is admissible is to show absence of malice, it would seem that evidence of advice from such source, coupled with proof of *bona fide* reliance on it, might be admissible.

from arrest and imprisonment on civil process fails when arrested and imprisoned to claim his privilege and obtain his liberty, he will be deemed to have waived his privilege and will not thereafter be permitted to set up his exemption so as to render his imprisonment unlawful that he may recover damages in an action for false imprisonment.¹ And where the complaint and warrant and mittimus in proceedings before a magistrate were simply informal and irregular, it was held that no action for damages for false imprisonment would lie, the defendant in such proceedings having made no objection to the proceedings in the magistrate's court.² But the fact that a person arrested on a void warrant does not, when taken before a magistrate, object to the validity of the warrant or the regularity of the proceedings, but pleads not guilty and consents to an adjournment of the case, does not constitute a waiver of the right of action for false imprisonment.³

9. Remedies and Reparation. — The remedy for a false imprisonment is means of securing a restoration of liberty. These, it is said by Blackstone, are fourfold: (1) by writ of mainprize; (2) by writ *de odio et atia*; (3) by writ *de homine replegiando*; (4) by writ of habeas corpus.⁴ Of these four writs known to the ancient law, it may be said that all but the writ of habeas corpus are now actually or practically obsolete, the latter writ in fact having superseded all the others.⁵ Reparation for a false imprisonment is secured by a civil action for damages.⁶

10. Evidence of Character and Reputation. — A false imprisonment, it has been said, does not necessarily include injury to the character or reputation.⁷

1. Waiver of Exemption from Arrest. — *Wood v. Kinsman*, 5 Vt. 589.

Waiver of Affidavit and Warrant of Arrest. — Where a person was imprisoned without preliminary affidavit or warrant he cannot recover in false imprisonment if he waived the requirement for the affidavit and warrant by voluntarily appearing before the magistrate and insisting that the offense with which he had been verbally charged by a constable be inquired into and settled without further delay. *Williamson v. Wilcox*, 63 Miss. 335.

2. *Stoness v. Lake*, 40 U. C. Q. B. 320; *Miller v. Woods*, 23 Neb. 200.

Release of Prisoner at His Request Instead of Presentment to Magistrate. — Where a person, drunk and disorderly, was arrested by an officer and imprisoned until the following morning, when, instead of being presented to a magistrate, was liberated at his earnest request, it was held that the circumstances warranted the implication of an understanding that the officer should not be held liable for damages by reason of his action in liberating the plaintiff instead of detaining him for arraignment as he had a right to do. *Joyce v. Parkhurst*, 150 Mass. 243. And see *Caffrey v. Drugan*, 144 Mass. 294; *Langdon v. Chittington*, 2 Root (Conn.) 133; *Lapierre v. Gagnon*, 11 Leg. N. (Quebec) 32, 8 Rev. Lég. 727.

3. Facts Held Not to Constitute Waiver. — *Blythe v. Tompkins*, 2 Abb. Pr. (N. Y. Supreme Ct.) 468.

The facts that the plaintiff, after his arrest, was taken in a carriage, at his own request, to his lawyer, and to the residence of the magistrate, for the purpose of giving bond, the plaintiff paying for the drafting of the bail bond and half the carriage fare, and later appeared and answered the writ, making no objection to its service, and consented to dispose of the case by an entry of "neither party," do

not constitute a waiver of the right to bring an action for illegal arrest and false imprisonment. *Buzzell v. Emerton*, 161 Mass. 176.

Assignment of Damages to Be Recovered. — It is no defense to an action for false imprisonment that the plaintiff has assigned the damages to be recovered, if any, to a third person. *Chapman v. Dyett*, 11 Wend. (N. Y.) 31, 25 Am. Dec. 598.

Submitting to Examination, Giving Bail, etc. — The right to recover damages for a false imprisonment under an illegal arrest is not waived by submitting to examination, giving bail, and taking the poor debtor's oath before the magistrate authorizing the arrest. *Carleton v. Akron Sewer Pipe Co.*, 129 Mass. 40.

Release of Damages Obtained by Duress. — A release of damages for false imprisonment obtained while the person executing it was still in the custody of his captors or under their influence is void for duress. *Harris v. Louisville, etc., R. Co.*, 35 Fed. Rep. 116. It was held in this case that such a release was rather an aggravation of damages than otherwise.

4. See 3 Black. Com. 128.

5. In Order to Be Restored to Liberty the remedy is by writ of habeas corpus, a recovery of damages for the injury being an action of trespass *vi et armis*. *Bouvier Law Dict.*, title False Imprisonment.

See for a full discussion of the substantive law upon the subject of habeas corpus, the title HABEAS CORPUS in a subsequent volume of this series. For questions of pleading and practice in the same connection, see the title HABEAS CORPUS, 9 ENCYC. OF PL. AND PR. 998.

6. 3 Black. Com. 137.

7. Character and Reputation — Evidence of. — *Comer v. Knowles*, 17 Kan. 436; *Cochran v. Toher*, 14 Minn. 385. And see *American Express Co. v. Patterson*, 73 Ind. 430. See gen-

Nor is the character of the plaintiff directly in issue, as it may be in actions of libel or slander, seduction and malicious prosecution.¹ As a general rule, therefore, evidence of character or reputation is not admissible.² Certainly, in the absence of evidence to the contrary, the presumption of law will be that the plaintiff's character is good,³ and evidence is clearly inadmissible to establish such fact where no attempt to assail the plaintiff's character or reputation has been made by the defendant.⁴ But where, in an action for damages for unlawful arrest and false imprisonment, the defendant pleads in mitigation of damages that he acted in good faith in causing the arrest, and adduces evidence thereunder tending to cast suspicion on the plaintiff's character, it has been held that evidence of his general good character and of his reputation for honesty and integrity is admissible to rebut the claim of such good faith and belief of his guilt on the part of the defendants, though not admissible in the first instance.⁵

11. Survival of Action Against Representative of Decedent. — Contrary to the rule of the common law, the action for damages for false imprisonment is by statute, in some states, made to survive against the personal representative of a decedent.⁶ But though a false imprisonment be committed in a state where statutory provision is made for the survival of the action, it has been held that if the decedent is domiciled at the time of his death in a state possessing no such statute, an action cannot be maintained against his executor in the latter state.⁷

12. False Imprisonment as Distinguished from Malicious Prosecution. — With-

erally the title *CHARACTER (IN EVIDENCE)*, vol. 5, p. 850.

1. *Geary v. Stevenson*, 169 Mass. 23; *Cochran v. Toher*, 14 Minn. 385.

2. **Evidence of Character and Reputation — General Rule.** — *American Express Co. v. Patterson*, 73 Ind. 430; *Geary v. Stevenson*, 169 Mass. 23; *Cochran v. Toher*, 14 Minn. 385; *Winebiddle v. Porterfield*, 9 Pa. St. 137; *Ryburn v. Moore*, 72 Tex. 85. And see *Diers v. Mallon*, 46 Neb. 121.

In the case of *Geary v. Stevenson*, 169 Mass. 23, the testimony of the plaintiff's mother and sister was excluded, the plaintiff having sought to introduce it to show that prior to the false arrest and imprisonment complained of he had never been arrested or imprisoned for any crime, and that he bore a good reputation. On exception thereto in the appellate court it was said: "This evidence, we are of opinion, was rightly excluded. In civil proceedings evidence of this kind is, by the great weight of authority, held not to be admissible unless the character of a party is directly in issue, as it is in actions of libel or slander, seduction, and malicious prosecution. In other cases the general rule applies that the character of a party is immaterial and evidence of it is inadmissible, even though the cause of action is one for which a criminal prosecution might be brought, or where the offense set up in justification involves a crime."

Evidence that Plaintiff Is "Dead Beat" and Violator of Law. — In the case of *Ryburn v. Moore*, 72 Tex. 85, which was an action for damages for false imprisonment in which the plaintiff sought to recover for his mental suffering, it was held that evidence was inadmissible that long before the arrest and imprisonment the plaintiff was regarded by the public generally as a "dead beat" and violator of law, and a fugitive from justice, and

had been frequently imprisoned for violations of law.

Evidence of Character and Reputation Since Complaint Made. — In an action for damages for false imprisonment, evidence of the bad character of the plaintiff since the complaint was made is inadmissible. *Winebiddle v. Porterfield*, 9 Pa. St. 137. Compare, however, in this connection the case of *Beckwith v. Bean*, 98 U. S. 266, *Field and Clifford, JJ., dissenting*.

But on the Question of Probable Cause to believe a person guilty of the larceny of money evidence of former good character has been held admissible. *Bright v. Patton*, 5 Mackey (D. C.) 534, 60 Am. Rep. 396.

3. **Presumption of Good Character.** — *Cochran v. Toher*, 14 Minn. 385; *Wolf v. Perryman*, 82 Tex. 112. Compare, however, *Bright v. Patton*, 5 Mackey (D. C.) 534, 60 Am. Rep. 396.

In the absence of any evidence that plaintiff, suing for damages for false imprisonment under a charge of murder, was not of good character, it is proper to instruct the jury that the presumption of law is that it is good. *Wolf v. Perryman*, 82 Tex. 112. In this case it was also held that such presumption would prevail, although it was shown that statements had been made by the plaintiff himself that he had killed a negro, it not being proven that such statements had resulted in giving the plaintiff a bad reputation.

4. *Fire Assoc. v. Fleming*, 78 Ga. 733; *Cochran v. Toher*, 14 Minn. 385; *Diers v. Mallon*, 46 Neb. 121. Compare, however, *Bright v. Patton*, 5 Mackey (D. C.) 534, 60 Am. Rep. 396.

5. *American Express Co. v. Patterson*, 73 Ind. 430. And see *Bright v. Patton*, 5 Mackey (D. C.) 534, 60 Am. Rep. 396.

6. This, for instance, is the statutory rule in *Massachusetts*. See *Whitten v. Bennett*, 77 Fed. Rep. 271.

7. *Whitten v. Bennett*, 77 Fed. Rep. 271.

out much reason, it would seem, the torts of false imprisonment and malicious prosecution have not infrequently been confused by the authorities.¹ Thus it has been said by a court of high authority: "The gist of false imprisonment is unlawful detention," which, as has been seen, is true; but the court continues, "and the general rule is that malice will be inferred from the want of probable cause, so far, at least, as to sustain the action."² As has been shown heretofore, neither malice nor want of probable cause is an essential element in the constitution of an action for false imprisonment,³ though both may be material considerations as affecting the measure of damages,⁴ and where there has been an arrest without warrant, the question of reasonable grounds of suspicion may be material in the present connection.⁵ The action for damages for false imprisonment depends upon an essentially different state of facts than one for malicious prosecution.⁶ Thus, while a rule for contempt,

1. Confusion of False Imprisonment with Malicious Prosecution — Illustrations. — In Brown's Law Dictionary (2d ed.), title False Imprisonment, it is stated with reference thereto: "For the success of the action it is necessary to prove both malice on the part of the defendant and the absence of all reasonable or probable cause, and, of course, that the accused was acquitted." It is evident here that false imprisonment has been confused with malicious prosecution, for, as is shown in other parts of this article, none of the above-stated essentials is necessary for the maintenance of an action for false imprisonment.

Another Instance of Confusion is presented by the case of *Perry v. Sutley*, (Supreme Ct.) 18 N. Y. Supp. 633, in which the court begins its opinion by saying: "The action was for false imprisonment." Then further: "The rules of law applicable to actions of this character are very simple and familiar. There must be want of probable cause, and malice, but if the former is established the latter may be inferred therefrom." Thus it appears that either the action was not false imprisonment, but more in the nature of an action for damages for malicious prosecution, or the court misstates the rules of law applicable thereto. In fact, it further appears that the arrest of the plaintiff was under legal process, valid and regular, and the point upon which the case turned was whether or not there was probable cause for the prosecution, the conclusion being that under the circumstances it was a question of fact for the jury.

And also in the case of *Brown v. Chadsey*, 39 Barb. (N. Y.) 262, the court said with reference to an action for false imprisonment: "Malice in the defendant will be inferred, so far at least as to sustain the action."

Likewise in another case the action, though stated in the opinion of the court to be one for false imprisonment and malicious prosecution, seems to have been regarded only in its latter aspect and a verdict was directed for the defendant, although from the facts stated it would seem that an action for false imprisonment might have been sustained. *Castro v. De Uriarte*, 16 Fed. Rep. 93.

Again, in the case of *Warren v. Dennett*, 17 Misc. Rep. (N. Y. City Ct.), 86, the court in distinguishing between actions for false imprisonment and those for malicious prosecution, said: "In the one for false imprisonment the plaintiff must show that the

defendant had him imprisoned or deprived of his liberty, and that the mode or process was unlawful, *i. e.*, without due process of law. He must prove want of probable cause, and malice is presumed. The defendant may, however, disprove malice. In an action for malicious prosecution the plaintiff must prove that the process was regular, and the arrest under it lawful, or by lawful authority acting for itself, and must also prove a want of probable cause, and that the same was malicious. Here malice is not presumed, as in the action for false imprisonment, but must be proven."

See also, for other instances, the Pennsylvania cases cited in the succeeding note.

2. See *McCarthy v. De Armit*, 99 Pa. St. 63. The above quotation, also, is made with approval in *Neall v. Hart*, 115 Pa. St. 347, 2 Am. St. Rep. 559.

3. See *supra*, this section, *Motive, Malice, and Provocation; Probable Cause*.

4. See *supra*, this section, *Motive, Malice, and Provocation; Probable Cause*.

5. *Limbeck v. Gerry*, 15 Misc. Rep. (N. Y. Supreme Ct.) 663.

6. False Imprisonment Essentially Different from Malicious Prosecution. — In the case of *Comer v. Knowles*, 17 Kan. 436, the court said that "the wrong constituting false imprisonment differs essentially from the wrongs constituting malicious prosecution, malicious arrest, assault, and assault and battery, though all of these wrongs may sometimes be united in one comprehensive and aggregated wrong. It also differs from libel and slander, and indeed from every other wrong for which an action is given. Therefore a rule of law found to be applicable to some other class of cases may not have any application whatever to an action of false imprisonment. As we have before stated malice and wilfulness are not essential elements of false imprisonment, and in this the action of false imprisonment differs from that of libel, slander, malicious prosecution, and perhaps from some others."

In the case of *Hobbs v. Ray*, 18 R. I. 84, it was said with reference to the distinction between false imprisonment and malicious prosecution: "These actions are quite distinct and different from each other. An action of trespass for false imprisonment lies for an arrest or some other similar act of the defendant, 'which,' as is said, 'upon the stating of it is manifestly illegal;' while malicious prosecution, on the contrary, lies for a prosecution

being a judicial act of the court issuing it, cannot be the foundation of an action for false imprisonment, it may be for an action for damages for malicious prosecution, providing the application for the rule was without probable cause, actuated by impure or malicious motives, and founded on falsehood or mis-

which upon the stating of it is manifestly legal." And see *Johnstone v. Sutton*, 1 T. R. 544, where it was stated that "there is no similitude or analogy between an action of trespass or false imprisonment and this kind of action" (malicious prosecution).

The Two Actions Different in Allegation and Proof.—In the case of *McConnell v. Kennedy*, 29 S. Car. 180, in distinguishing between an action for false imprisonment and one for malicious prosecution, the court said: "It is quite true that one arrested and restrained of his liberty, even under lawful process, may have a cause of action if it is alleged and shown that the prosecution was malicious and was without probable cause and has terminated; but that is a different cause of action and depends upon different allegations and proofs, and the action for malicious prosecution must not be confounded with an action for false imprisonment."

Distinctions Between the Two Actions Stated.—In the case of *Herzog v. Graham*, 9 Lea (Tenn.) 152, the court said with reference to false imprisonment and malicious prosecution: "The distinction is that false imprisonment is some interference with the personal liberty of the plaintiff which is absolutely unlawful and without authority. Malicious prosecution is in procuring the arrest or prosecution under lawful process on the forms of law, but from malicious motives and without probable cause."

And in the case of *Cunningham v. East River Electric Light Co.*, 60 N. Y. Super. Ct. 282, the distinction between the two actions was stated as follows: "It is well settled that the material allegations in a complaint in an action for false imprisonment, as distinguished from one for malicious prosecution, are that defendant had plaintiff imprisoned and that the process was unlawful, *i. e.*, without authority of law. See *Ackroyd v. Ackroyd*, 3 Daly (N. Y.) 38; also *Castro v. De Uriarte*, 12 Fed. Rep. 250; *Marks v. Townsend*, 97 N. Y. 596. The action cannot be maintained where the process was regular and the arrest under it lawful. See *Nebenzahl v. Townsend*, 61 How. Pr. (N. Y. C. Pl.) 353; *Landt v. Hiltz*, 19 Barb. (N. Y.) 283; *Sleight v. Ogle*, 4 E. D. Smith (N. Y.) 445; *Marks v. Townsend*, 97 N. Y. 596; *Reynolds v. Corp.*, 3 Cai. (N. Y.) 267; *Brown v. Crowl*, 5 Wend. (N. Y.) 298."

In *Marks v. Sullivan*, 9 Utah 12, the court said: "If the imprisonment is extra-judicial, and without legal process, the action for false imprisonment may lie. It is held to be the general rule that where a person procures the issuance of a warrant, fair on its face, from a judicial officer having jurisdiction to issue it, such person procuring it is not liable in an action for false imprisonment, even though the issuance of such warrant was erroneous because of facts not disclosed; nor would the party procuring it be liable in an action of false imprisonment even though the warrant

was procured maliciously and without probable cause, although he might be liable in an action for malicious prosecution."

A Clear and Concise Statement of the Distinction under discussion is to be found in the case of *Colter v. Lower*, 35 Ind. 285, 9 Am. Rep. 735, wherein it was observed that if the imprisonment is under legal process, but the action has been commenced and carried on maliciously and without probable cause, it is malicious prosecution. If it has been extrajudicial, without legal process, it is false imprisonment. And see also in the same connection *Murphy v. Martin*, 58 Wis. 279; *Elsee v. Smith*, 2 Chit. Rep. 304, 18 E. C. L. 344; *Nebenzahl v. Townsend*, 10 Daly (N. Y.) 236; *Brown v. Chadsey*, 39 Barb. (N. Y.) 260.

Warrant Void on Its Face.—The fact that the warrant upon which an arrest was made is void on its face is not available to the plaintiff in an action for malicious prosecution, but only in an action for false imprisonment. *Murphy v. Martin*, 58 Wis. 279.

Action for False Imprisonment in Trespass—Malicious Prosecution Case.—In the case of *Farnam v. Feeley*, 56 N. Y. 451, which was an action for damages for false arrest and imprisonment and malicious prosecution, the court said: "If in this case the defendant had no such direct agency in the original arrest of the plaintiff as to make him liable in the action for false imprisonment, the action may be maintained as one in the nature of malicious prosecution, if the subsequent arrest on the warrant issued by the magistrate was instigated by him maliciously and without probable cause. The distinction between the two forms of action is clearly stated by *Ashhurst, J.*, in *Morgan v. Hughes*, 2 T. R. 225. He says: 'When the immediate act of imprisonment proceeds from the defendant, the action must be trespass and trespass only; but when the act of imprisonment by one person is in consequence of information from another, then an action on the case is the proper remedy, because the injury is sustained in consequence of the act of that other.' To the same effect see the opinion of *Head, J.*, in *Rich v. McInerney*, 103 Ala. 345. And see also the case of *Turpin v. Remy*, 3 Blackf. (Ind.) 210, in which it was said by *Stevens, J.*, in delivering the opinion of the court: 'An action for a malicious prosecution can only be supported for the malicious prosecution of some legal proceeding, before some judicial officer or tribunal. If the proceedings complained of are extrajudicial, the remedy is trespass, and not an action on the case for a malicious prosecution.'

Necessity for Termination of Criminal Prosecution.—In an action for damages for false imprisonment, where the plaintiff had been arrested on a criminal charge without warrant, it was held that the termination of the criminal proceeding against the plaintiff had no importance, although such fact is essential in an action for malicious prosecution. *Hopner v. McGowan*, 116 N. Y. 405; *Josselyn v.*

representation.¹ An imprisonment in the course of a malicious prosecution is not false imprisonment, unless without legal process or extrajudicial.² Nor can there be a recovery upon a declaration alleging only a false imprisonment, where the evidence establishes malicious prosecution merely.³ And so essentially are the two actions different, it has been held, that a recovery of damages in an action for false imprisonment is not a bar to an action for malicious prosecution.⁴

III. WHAT CONSTITUTES FALSE IMPRISONMENT — 1. In General. — The constituent elements of false imprisonment are, first, the detention or restraint, and second, the unlawfulness of the detention or restraint.⁵ Conversely, it has been held that a defendant, in order to escape liability, must either prove that he did not imprison the plaintiff or he must justify the imprisonment.⁶

2. The Detention or Restraint — a. IN GENERAL. — This branch of the subject will be considered in three divisions: (1) means of accomplishing; (2) place of confinement; (3) extent of restraint.

b. MEANS OF ACCOMPLISHING — (1) Necessity for Actual Force. — In order to constitute a false imprisonment it is not necessary that actual force be used,⁷

McAllister, 22 Mich. 300. But as no damages are recoverable for a legal arrest and imprisonment, it seems that no action should be maintained as long as the legality of the proceedings may be affirmed by subsequent conviction. Campbell, C. J., in Josselyn v. McAllister, 22 Mich. 307.

1. Tavenner v. Morehead, 41 W. Va. 116.

2. Hobbs v. Ray, 18 R. I. 84. And see Murphy v. Martin, 58 Wis. 276; Colter v. Lower, 35 Ind. 285, 9 Am. Rep. 735.

Imprisonment under Legal Process — Suit Instituted Maliciously. — If the imprisonment is under legal process, but the process has been commenced and carried on maliciously and without probable cause, terminating in the discharge of the defendant, it is malicious prosecution and not false imprisonment. Head, J., in Rich v. McInerny, 103 Ala. 345.

3. Herzog v. Graham, 9 Lea (Tenn.) 152. And see Burns v. Erben, 26 How. Pr. (N. Y. Super. Ct.) 273.

Even Though a Plaintiff May Join Counts for false imprisonment and malicious prosecution in the same complaint, if counsel states that the action is for false imprisonment solely, it will be so treated, and, though the allegations might be sufficient for an action for malicious prosecution, the complaint will be dismissed if the allegations do not make out a false imprisonment. Cunningham v. East River Electric Light Co., 60 N. Y. Super. Ct. 282. And see Wagstaff v. Schippel, 27 Kan. 450.

4. Guest v. Warren, 9 Exch. 379.

5. Head, J., in Rich v. McInerny, 103 Ala. 345; State v. Lunsford, 81 N. Car. 528; Click v. State, 3 Tex. 282; Limbeck v. Gerry, 15 Misc. Rep. (N. Y. Supreme Ct.) 663; 3 Black. Com. 127.

In Order to Constitute False Imprisonment there must be a detention, and the detention must be unlawful. State v. Lunsford, 81 N. Car. 528. And likewise in Hopner v. McGowan, 54 N. Y. Super. Ct. 98, 116 N. Y. 405, the court said that to sustain an action for false imprisonment the plaintiff "must prove an unlawful restraint of his liberty by the defendant."

Not Necessary that Act Complained of Is under Color of Law. — To constitute false imprisonment it is not necessary that the act com-

plained of be under color of any legal or judicial proceeding. Comer v. Knowles, 17 Kan. 436. Nor is it necessary that the imprisonment should be based upon a criminal charge. Rich v. McInerny, 103 Ala. 345.

If an Arrest Is Lawful and the Detention Not Unreasonable there can be no liability for a false imprisonment. Kirk v. Garrett, 84 Md. 383.

6. Floyd v. State, 12 Ark. 43, 54 Am. Dec. 250.

7. Actual Force Not Necessary — England. — Bird v. Jones, 7 Q. B. 742, 53 E. C. L. 742; Horner v. Battyn, Buller's N. P. 626; Pocock v. Moore, R. & M. 321, 21 E. C. L. 449. And see Williams v. Jones, Lee temp. Hardw. 298.

United States. — Johnson v. Tompkins, 1 Baldw. (U. S.) 578; Fotheringham v. Adams Express Co., 36 Fed. Rep. 252.

Illinois. — Greathouse v. Summerfield, 25 Ill. App. 296.

Kansas. — Comer v. Knowles, 17 Kan. 436.

Michigan. — Hill v. Taylor, 50 Mich. 549; Brushaber v. Stegemann, 22 Mich. 266.

New Hampshire. — Pike v. Hanson, 9 N. H. 491.

New York. — Searls v. Viets, 2 Thomp. & C. (N. Y.) 224; Gold v. Bissell, 1 Wend. (N. Y.) 210.

North Carolina. — State v. Lunsford, 81 N. Car. 528.

Tennessee. — Smith v. State, 7 Humph. (Tenn.) 43.

Texas. — Jones v. State, 8 Tex. App. 365; Herring v. State, 3 Tex. App. 108; Maner v. State, 8 Tex. App. 361.

Wisconsin. — Marshall v. Heller, 55 Wis. 392.

Personal Violence Unnecessary. — To constitute a false imprisonment it is not necessary that any injury should be done to the individual's person or his character or reputation. Valentine, J., in Comer v. Knowles, 17 Kan. 436.

Restraint from Fear of Force. — Restraint may be from fear of force as well as from force itself. Moore v. Thompson, 92 Mich. 503.

Apprehension May Be of Injury to Person, Property, or Reputation. — The apprehension or fear by which a person is restrained of his liberty may, it seems, be that of some injury either to his person, reputation, or property. Jones v.

if a person submits to an apprehension that force will be used if he does not.¹ If, therefore, a man is restrained of his liberty by fear of a personal difficulty, or an apprehension of personal injuries, that may amount to a false imprisonment,² it not being necessary, it is held, that a person so threatened should await the actual application of the violence;³ nor is his submission to the apprehended force a consent to or waiver of the detention or restraint upon the freedom of his will.⁴

Duration of Imprisonment. — The imprisonment continues, in such cases, it has been held, until the person is left free at his own volition to go where he pleases, and all efforts at coercion or restraint cease, and the means of effecting it are removed.⁵

Must Be Reasonable Apprehension of Force. — But in order to constitute an unlawful imprisonment where no force or violence is actually employed, the submission must be to a reasonably apprehended force,⁶ the circumstance merely that one considers himself restrained in his person not being sufficient to constitute a false imprisonment unless there is in fact a reasonable ground to apprehend a resort to force upon an attempt to assert one's liberty.⁷

Illustrations. — It will be such a restraint of the liberty of a person as to constitute an imprisonment, though there be no force or violence or touching of

State, 8 Tex. App. 365. And see *Herring v. State*, 3 Tex. App. 108.

Detention May Be by Actual Violence, Threats, or "Otherwise." — In the case of *Miller v. Ashcraft*, 98 Ky. 314, which was an action for damages for a false imprisonment consequent upon an alleged unlawful arrest, the trial court charged the jury that "any deprivation of the liberty of plaintiff by defendant, or any detention of him, for however short a time, without plaintiff's consent, against his will, whether it was by actual violence, threats, or otherwise, constitutes an arrest." Commenting upon the propriety of this instruction the court on appeal was inclined to criticise the use of the word "otherwise" as too indefinite, but the conclusion reached was that it could not under the circumstances have confused or misled the jury. And in the case of *Limbeck v. Gerry*, 15 Misc. Rep. (N. Y. Supreme Ct.) 663, *Giegerich, J.*, said that any deprivation of the liberty of another without his consent, whether by actual violence, threats, or otherwise, constituted an imprisonment within the meaning of the law.

Nature of Threats Required. — In order to constitute an imprisonment by threats it is not necessary that there should have been express verbal threats. Threats may consist of acts, gestures, or the like which, equally with words, may be calculated to operate upon the person threatened, and inspire a just fear of some injury to his person, reputation, or property. *Jones v. State*, 8 Tex. App. 365; *Maner v. State*, 8 Tex. App. 361. And see *Herring v. State*, 3 Tex. App. 108; *Woods v. State*, 3 Tex. App. 204.

1. *Horner v. Battyn*, Buller's N. P. 626; *Pocock v. Moore*, R. & M. 321, 21 E. C. L. 449; *Baldwin, J.*, in *Johnson v. Tompkins*, 1 *Baldw. (U. S.)* 571; *Brushaber v. Stegemann*, 22 Mich. 266; *Pike v. Hanson*, 9 N. H. 491; *Searls v. Viets*, 2 *Thomp. & C. (N. Y.)* 224; *Smith v. State*, 7 *Humph. (Tenn.)* 43. And see *Williams v. Jones*, Lee temp. Hardw. 298.

A Demonstration of Physical Violence which to

all appearance can only be avoided by submission operates as effectually, if submitted to, as if the arrest had been forcibly accomplished. *Brushaber v. Stegemann*, 22 Mich. 266.

2. *Pike v. Hanson*, 9 N. H. 491; *Smith v. State*, 7 *Humph. (Tenn.)* 43. And see *Brushaber v. Stegemann*, 22 Mich. 266.

3. **Person Threatened Need Not Await Actual Application of Violence.** — *Brushaber v. Stegemann*, 22 Mich. 266; *Pike v. Hanson*, 9 N. H. 493; *Herring v. State*, 3 Tex. App. 108; *Marshall v. Heller*, 55 Wis. 392.

It is not necessary, to constitute false imprisonment, that a person restrained of his liberty should be touched or actually arrested if he is ordered to do or not to do a thing, to move or not to move, against his own free will, if it is not left to his own option to go or stay where he pleases, and force is feared or threatened, and the means of coercion are at hand ready to be used, or there is reasonable ground to apprehend that coercive means will be used if he does not yield. A person so threatened need not wait for the actual application of violence. *Baldwin, J.*, in *Johnson v. Tompkins*, 1 *Baldw. (U. S.)* 571.

4. *Baldwin, J.*, in *Johnson v. Tompkins*, 1 *Baldw. (U. S.)* 571.

5. *Baldwin, J.*, in *Johnson v. Tompkins*, 1 *Baldw. (U. S.)* 571.

6. **Submission Must Be to Reasonably Apprehended Force.** — *Moran, P. J.*, in *Greathouse v. Summerfield*, 25 Ill. App. 296. And see *Johnson v. Tompkins*, 1 *Baldw. (U. S.)* 571; *Pike v. Hanson*, 9 N. H. 491; *Smith v. State*, 7 *Humph. (Tenn.)* 43.

* "While in general no actual force or manual touching of the body, no compulsory seizure, is necessary to constitute an arrest or imprisonment, yet there must be words and acts used and done toward the person to be arrested which clearly show an intention to arrest, and his submission must be as to the caption." *Greathouse v. Summerfield*, 25 Ill. App. 296.

7. *McClure v. State*, 26 Tex. App. 102.

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the person, where an officer goes for the purpose of executing his process and has the party in his presence and power, the party so understanding it and in consequence thereof submitting and allowing the officer to direct his movements without resistance, as by going before a magistrate by the direction of the officer.¹ And even though the process be void, if an officer notifies a person that he arrests him, and the person so notified submits and accompanies him, it is an imprisonment.²

Forcible Attempt to Secure Possession of Chattel. — Though force be used, if it is employed against the person of another, not for the purpose of detaining him or restraining his liberty, but with the intent to obtain possession of a chattel, it has been held that there is no false imprisonment.³ But it will constitute an imprisonment if there be a detention for the purpose of extorting a confession, or a sum of money,⁴ or if a carrier detains a passenger for alleged non-payment of fare.⁵

(2) *Manual Touching Unnecessary.* — Not only, as has been seen, is the employment of actual force not required in order to constitute a false imprisonment, but any manual touching or contact with the person is wholly unnecessary.⁶ Thus where an attorney's clerk accompanied a creditor to his debtor and pretended that he was a sheriff's officer, and in consequence the debtor went away with them, not willingly, but supposing that they had the power to compel him, it was held that there was a sufficient arrest to maintain a trespass for false imprisonment though no writ was produced and it did not distinctly appear that either the creditor or the clerk actually touched the debtor's person at all.⁷

(3) *Imprisonment by Words Alone.* — From what has gone before it is apparent that a false imprisonment may be committed by words alone.⁸ If a bailiff, it has been held, who has a process against any one says to him: "You are my prisoner; I have a writ against you," upon which the person addressed submits, turns back, or goes with him, though the bailiff never touches him, yet it is an arrest and imprisonment, because the person submits to the process.⁹ But it is not necessary, in order to constitute imprisonment, that there should be any formal declaration of an arrest. If the officer goes for the purpose of executing his warrant, and has the party in his presence and power, and the party so understands it, and in consequence submits, this will constitute an imprisonment.¹⁰

(4) *Necessity for Submission.* — Where no actual force is employed, there must, in order to constitute an imprisonment, be a submission to the threatened or apprehended violence.¹¹

(5) *Necessity for Coercion or Restraint in Fact.* — But whatever means have been employed, they must be such as have operated to restrain or coerce the plaintiff in point of fact.¹² Thus, it has been held, there is no imprisonment

1. P. Potter, J., in *Searls v. Viets*, 2 Thomp. & C. (N. Y.) 224.

2. Moran, P. J., in *Greathouse v. Summerfield*, 25 Ill. App. 296.

3. McClure v. State, 26 Tex. App. 102.

4. Hildebrand v. McCrum, 101 Ind. 61.

5. Smith v. State, 7 Humph. (Tenn.) 43.

6. **Manual Touching Unnecessary.**—*Greathouse v. Summerfield*, 25 Ill. App. 296; *Comer v. Knowles*, 17 Kan. 436; *Campbell, C. J.*, in *Brushaber v. Stegemann*, 22 Mich. 266; *Hill v. Taylor*, 50 Mich. 549; *Searls v. Viets*, 2 Thomp. & C. (N. Y.) 224; *Gold v. Bissell*, 1 Wend. (N. Y.) 210; *Grainger v. Hill*, 4 Bing. N. Cas. 212, 33 E. C. L. 328; *Wood v. Lane*, 6 C. & P. 774, 25 E. C. L. 945.

7. *Wood v. Lane*, 6 C. & P. 774, 25 E. C. L. 645.

8. **Imprisonment by Words Alone.**—*Buller's N.*

P. 62; *Grainger v. Hill*, 4 Bing. N. Cas. 212, 33 E. C. L. 328; *Valentine, J.*, in *Comer v. Knowles*, 17 Kan. 436; *Pike v. Hanson*, 9 N. H. 493.

9. *Buller's N. P.* 62; *Grainger v. Hill*, 4 Bing. N. Cas. 212, 33 E. C. L. 328.

10. *Pike v. Hanson*, 9 N. H. 493.

11. **Necessity for Submission.**—*Genner v. Sparkes*, 1 Salk. 79. And see *Russen v. Lucas*, 1 C. & P. 153, 11 E. C. L. 351; *Chinn v. Morris*, 2 C. & P. 361, 12 E. C. L. 171; *Brushaber v. Stegemann*, 22 Mich. 266.

12. *Kirk v. Garrett*, 84 Md. 383; *Hill v. Taylor*, 50 Mich. 549. And see *Comer v. Knowles*, 17 Kan. 436, *per Valentine, J.*; *Hill v. Taylor*, 50 Mich. 549.

It Is the Fact of Compulsory Submission which brings a person into imprisonment; impending and threatened physical violence which to all

where the officer purporting to make the arrest merely informs the person to be arrested of his business, but neither takes him into custody nor in any way deprives him of his freedom of action.¹ And where it appeared that an officer merely asked the plaintiff if he did not want to go to the court-house with him, the officer saying nothing which indicated an intention to arrest, having no authority to arrest, and not pretending to have any, the language and acts of the plaintiff indicating that he knew that he was not arrested and did not have to go with the officer unless he was willing to do so to clear himself of a suspicion against him, it was held that a false imprisonment had not been committed.²

But It Is Not Necessary, to Show Coercion or Restraint, that there should have been an effort on the part of the person imprisoned to escape.³

Act of Imprisonment Must Have Been So Intended and Understood. — The act relied upon as an unlawful arrest to constitute a false imprisonment must have been intended as such and so understood by the party arrested, or there can be no imprisonment.⁴

(6) Imprisonment Must Be Against Will of Complaining Party. — In order to constitute an imprisonment in law the detention or restraint must have

appearance can only be avoided by submission. *Moran, P. J., in Greathouse v. Summerfield*, 25 Ill. App. 296.

Must Be a Restraint of Party's Liberty. — In the case of *Searls v. Viets*, 2 Thomp. & C. (N. Y.) 224, which was an action for damages for false imprisonment, P. Potter, J., delivering the opinion of the court, said: "I think by the modern practice as drawn from the cases that an actual manual touching of the body is not required, but only whatever is equivalent, amounting to a restraint of liberty of the person."

Restraint May Be by Words or Acts Manifesting Intent. — While in general no actual force or manual touching of the body or compulsory seizure is necessary to constitute an arrest or imprisonment, yet there must be words or acts used or done towards the person to be arrested which clearly show an intention to arrest and cause an involuntary submission. *Greathouse v. Summerfield*, 25 Ill. App. 298.

If a Person Is Commanded by a Constable to go with him, and the order is obeyed, and they walk together in the direction pointed out by the constable, that is strictly an imprisonment, though no actual force be used, for the party addressed feels that he has no option, no more power of going in any other than the one direction prescribed to him, as if the constable or bailiff had actual hold of him; and it is that restraint upon the will which constitutes the imprisonment. *Williams, J., in Bird v. Jones*, 7 Q. B. 742, 53 E. C. L. 742; *Buller's N. P.* 62.

Where There Is No Restraint, and the individual of his own free choice and volition remains where he is, though at liberty to depart if he pleases, there is no imprisonment. *Kirk v. Garrett*, 84 Md. 383.

Circumstances Held to Constitute Restraint. — In the case of *Moore v. Thompson*, 92 Mich. 498, the facts relied on to constitute a false imprisonment were that the plaintiff, in a physician's office, was accused of having stolen certain articles from her former employer, and was told at the time that an officer was at hand to arrest her if she did not produce the missing articles. The plaintiff protested her innocence, and started towards the door as if to go out,

when her accuser interposed himself between the plaintiff and the closed door, with his hand on the knob. Upon the plaintiff's refusing to go through the streets to her house with an officer to permit her house to be searched, she was taken there in a conveyance and a search was made. The plaintiff testified that she felt that she was a prisoner. These circumstances, it was held, justified a finding that there had been an imprisonment, the fact that the plaintiff made no forcible attempt to escape being immaterial.

Restraint Question of Fact for the Jury. — Whether or not there has been a restraint of the person is, it seems, a question of fact for the jury. *Moore v. Thompson*, 92 Mich. 498. And so where there is a conflict of evidence as to whether the party was imprisoned against his will, it is the province of the jury to determine the weight of evidence, and its verdict is conclusive. *Floyd v. State*, 12 Ark. 43, 54 Am. Dec. 250.

1. *Hill v. Taylor*, 50 Mich. 549.

2. **Voluntarily Attending Constable.** — *Greathouse v. Summerfield*, 25 Ill. App. 298.

Where, upon a magistrate's warrant being shown to the plaintiff, the latter voluntarily and without compulsion attended the constable who had the warrant to the magistrate, it was held that there was no sufficient imprisonment to support an action. *Arrowsmith v. Le Mesurier*, 2 B. & P. N. R. 211. With reference to this decision it was said in *Pike v. Hanson*, 9 N. H. 491: "But in this case there was no declaration of any arrest, and the warrant was in fact used only as a summons. And if the decision cannot be sustained upon this distinction, it must be regarded as of doubtful authority."

Where an Officer Merely Sends a Message to a party telling him that he has a process for his arrest and requesting that he fix a time and call and give bail, his voluntary compliance with this request does not constitute an arrest and imprisonment. *Berry v. Adamson*, 6 B. & C. 528, 13 E. C. L. 245.

3. *Moore v. Thompson*, 92 Mich. 503.

4. *Limbeck v. Gerry*, 15 Misc. Rep. (N. Y. Supreme Ct.) 663.

been against the will of the person alleged to have been imprisoned.¹ Thus where a person connived at his own arrest, designing to bring an action for damages for false imprisonment against the persons causing it, it was held in a criminal prosecution therefor that the defendant was not guilty.² And where the victim of a practical joke was, by a subterfuge, induced voluntarily to accompany the defendants until he discovered the deception, when he was permitted, without hindrance, to depart, it was held that no imprisonment had been committed.³ But there may, of course, be an imprisonment against the will of a party, though he has it in his power to secure his liberty by the making of a confession⁴ or the payment of a sum of money.⁵

c. PLACE OF CONFINEMENT. — To constitute an imprisonment it is not necessary that there should have been an actual confinement in jail.⁶ Every

1. *Berry v. Adamson*, 6 B. & C. 528, 13 E. C. L. 245; *Floyd v. State*, 12 Ark. 43, 54 Am. Dec. 250; *Greathouse v. Summerfield*, 25 Ill. App. 296, *per* Moran, P. J.; *Kirk v. Garrett*, 84 Md. 383; *Hill v. Taylor*, 50 Mich. 549. And see *Pike v. Hanson*, 9 N. H. 493; *Comer v. Knowles*, 17 Kan. 436, *per* Valentine, J.; *Johnson v. Von Kettler*, 66 Ill. 63.

Where Person Alleged to Have Been Imprisoned Went Willingly and Without Compulsion. — In the case of *Floyd v. State*, 12 Ark. 43, 54 Am. Dec. 250, which was a criminal prosecution for a false imprisonment, an instruction was approved to the effect that if the person alleged to have been imprisoned "went willingly, and would not have been compelled to go if he had not went [*sic*] willingly, it is no false imprisonment."

Detention of Customer of Bank by Closing and Locking Doors at Regular Hour. — In the case of *Woodward v. Washburn*, 3 Den. (N. Y.) 369, the plaintiff's servant had been detained in a bank by the closing and locking of its door, such servant having remained in the bank a few minutes after the usual time for closing its doors. The facts were that a few minutes before four o'clock P. M., the plaintiff's employee entered the bank for the purpose of presenting some of the notes of the bank for redemption. The defendant was in attendance as the teller, and on the notes being presented to him he counted out the money and handed it to Smith (the plaintiff's servant). While the latter was counting it the clock struck four, upon which the defendant locked the street door on the inside and put the key in his pocket. When Smith had finished counting the money he requested to be let out, to which the defendant answered that the door would be unlocked when they went to tea, though it might by chance be opened before, requesting Smith to sit down and wait. About half an hour afterwards the door was opened to admit a notary who came on business, and then Smith passed out. It was admitted that the bank was usually closed at four o'clock, and that Smith was in the habit of going to the bank with notes for redemption and was acquainted with its customary closing hour. It was urged upon this that as the defendant shut the door of the bank at the usual time and in the usual manner, if Smith was detained thereby it was his own fault. The defendant, however, was held liable, the court observing that the facts plainly showed that the conduct of the defendant was highly reprehensible, admitting no

just ground of excuse, and clearly indicating that there must have existed other motives between the parties, not disclosed, which prompted the defendant's vexatious conduct.

Removal of Drunken Passenger to Baggage Car.

— The removal of the plaintiff by the officers and agents of the defendant corporation, who were also railroad police officers, from the passenger car in which he was riding to the baggage car, in which he was carried to his destination, will not render the corporation liable in damages where it appears that the removal was made on account of the disorderly conduct and indecent language of the plaintiff, who had continued to ride in the baggage car without objection, expressing or manifesting no desire to leave the train. *Sullivan v. Old Colony R. Co.*, 148 Mass. 119.

Where, at One's Own Request, one is committed to jail in a county other than the one prescribed by law, it will not, however, constitute a false imprisonment. *Ellis v. Cleveland*, 54 Vt. 437.

2. *Floyd v. State*, 12 Ark. 43, 54 Am. Dec. 250.

3. Victim of Practical Joke. — In the case of *State v. Lunsford*, 81 N. Car. 528, which was the trial of an indictment for false imprisonment, it appeared that the defendants went to the prosecutor's house at night, aroused him out of bed, and represented to him in disguised voices that they were in search of a stolen horse, offering to pay him to accompany them. The prosecutor thereupon mounted behind one of the defendants on his horse and went voluntarily without coercion or threats from the defendants, but after riding a short distance and discovering that he was the victim of a hoax he was permitted by the defendants to dismount and was left in the road. The circumstances, it was held, did not constitute an imprisonment.

4. *Hildebrand v. McCrum*, 101 Ind. 61. And see *McNay v. Stratton*, 9 Ill. App. 215.

5. *Hildebrand v. McCrum*, 101 Ind. 61; *Smith v. State*, 7 Humph. (Tenn.) 43.

Where a Claimant of Uninclosed Public Lands refused to remove himself therefrom on the demand of another claimant, whereupon the former was assaulted, bound, and forcibly removed from the property and neighborhood by the latter, it was held that a false imprisonment had been committed. *People v. Wheeler*, 73 Cal. 252.

6. Not Necessary to Be Confined Within Walls. — 3 Black. Com. 127; *Warner v. Riddiford*, 4

confinement of the person, it is said by Blackstone, is an imprisonment, whether it be in a common prison, or in a private house, or in the stocks, or even by forcibly detaining one in the public streets.¹

Walking with Constable. — And if a person is commanded by a constable to go with him, and the order is obeyed, and they walk together in the direction pointed out, that is an imprisonment.²

d. EXTENT OF RESTRAINT. — While it has always been admitted that confinement within any certain designated limits constitutes imprisonment,³ it has also been held that a mere partial restraint of the will of a person is not sufficient to constitute an imprisonment.⁴ But this proposition has been denied, and, it seems, with reason, the weight of authority favoring the position that to hinder a man from going in any direction in which he has a right to go, though without detaining him in a particular spot, may constitute false imprisonment.⁵ Many authorities, indeed, have defined an imprisonment, without special reference to the facts of the case, as "any" restraint upon the personal liberty,⁶ which statement, of course, is broad enough to include

C. B. N. S. 180, 93 E. C. L. 180; Valentine, J., in *Comer v. Knowles*, 17 Kan. 436; *Taylor v. Coolidge*, 64 Vt. 506.

In the case of *Warner v. Riddiford*, 4 C. B. N. S. 180, 93 E. C. L. 180, the trial judge told the jury that to constitute an act of imprisonment it was not necessary that the person should be locked up within four walls, but that if he was restrained in his freedom of action by another, that was an act of imprisonment, and that the way in which the plaintiff had been constrained in his own house and restraint put upon his person by refusing him permission to leave the room and go upstairs in his own house was in itself an imprisonment. This instruction was held correctly to state the law.

1. 3 Black. Com. 127. As announcing the same proposition, see *Floyd v. State*, 12 Ark. 43, 54 Am. Dec. 250; *Taylor v. Coolidge*, 64 Vt. 506.

Compulsory Labor on Public Streets. — Where a person who had been fined for a violation of a municipal ordinance was wrongfully compelled to pay the fine by manual labor on the streets, it was held that there could be a recovery in false imprisonment. *Torbert v. Lynch*, 67 Ind. 474.

2. *Williams, J.*, in *Bird v. Jones*, 7 Q. B. 742, 53 E. C. L. 742; *Buller's N. P.* 62.

3. See opinion of Coleridge, J., in *Bird v. Jones*, 7 Q. B. 742, 53 E. C. L. 742.

4. **Partial Restraint of Will.** — *Bird v. Jones*, 7 Q. B. 742, 53 E. C. L. 742. This was a case where a part of a public footway on a bridge had been taken and prepared for seats to view a regatta, and separated for that purpose from the adjoining carriage road by a temporary fence, and the plaintiff insisted upon a right of way across the part so prepared, and climbed over the fence, but was stopped by two policemen, who prevented him from proceeding forward, but at the same time told him that he might go back if he pleased, which the plaintiff refused to do and remained where he was for half an hour. It was held that this was no imprisonment. With reference to the conclusion reached by the court in this case, Coleridge, J., said: "Some confusion seems to me to arise from confounding imprisonment of the body with mere loss of freedom. It is one part

of the definition of freedom to be able to go whithersoever one pleases, but imprisonment is something more than the mere loss of this power; it includes the notion of restraint within some limits defined by a will or power exterior to our own."

5. **Rule Approved by Weight of Authority.** — *Harkins v. State*, 6 Tex. App. 452; *Woods v. State*, 3 Tex. App. 204. See also *Herring v. State*, 3 Tex. App. 108.

In the case of *Bonesteel v. Bonesteel*, 28 Wis. 245, it appeared that the plaintiff had been arrested on a writ of *ne exeat*, which was, however, void for the want of a proper affidavit. He was, nevertheless, compelled to procure friends to vouch for him that he would not abscond, and was subjected to the expense of having the writ set aside, which was done six days after its issue. It was held that there might be a recovery in damages for this interference with the plaintiff's person and restraint upon his liberty, although he was not actually imprisoned under the writ and never actually gave the bond required thereby.

Refusal of Carrier to Permit Passenger to Proceed Before Payment of Fare. — The case of *Smith v. State*, 7 Humph. (Tenn.) 43, was an indictment for assault and battery and false imprisonment, the prosecutor having been detained on the defendant's ferry for a period of ten or fifteen minutes for alleged nonpayment of ferriage. The act of the defendant relied on to constitute the imprisonment was his informing the prosecutor he could not proceed until he paid the ferriage, which the prosecutor contended had already been paid. The court charged the jury that if the objection to the prosecutor's going forward was such as a prudent man would not risk, then the defendant would, in contemplation of law, be guilty of false imprisonment. The charge was held by the appellate court to be correct in all respects.

6. **Any Restraint Is Imprisonment.** — See opinion of Baldwin, J., in *Johnson v. Tompkins*, 1 Baldw. (U. S.) 600, where it was said that "imprisonment is any restraint of the personal liberty of another; any prevention of his movements from place to place or his free action according to his own pleasure and will; a man is imprisoned when he is under the control of another in these respects or either of

a mere partial restraint. Pursuant to this principle it has been held that if a person is restrained from leaving a room or going out of a house without the presence of a constable, it is such an infringement of his personal liberty as will constitute an imprisonment.¹

3. The Unlawfulness of the Detention or Restraint — a. IN GENERAL. — The second and no less essential requisite to the constitution of a false imprisonment is that the detention or restraint should be unlawful.² It is a rule of law in this connection which admits of no exception that where there is an arrest on a valid warrant — one neither void nor voidable — it is not a false imprisonment, and no liability is incurred by any person whomsoever, whether immediately or only remotely connected therewith.³ And the rule applies, no

them, against his own will. It is false imprisonment when this is done without lawful authority." And see *Warner v. Riddiford*, 4 C. B. N. S. 206, 93 E. C. L. 206. See also *supra*, this title, *Definition and Scope of Article*.

1. *Warner v. Riddiford*, 4 C. B. N. S. 206, 93 E. C. L. 206.

Continued Surveillance of Detectives. — In the case of *Fotheringham v. Adams Express Co.*, 36 Fed. Rep. 252, it was held that an illegal imprisonment was constituted where the evidence showed that the plaintiff, during a period of about two weeks, "was constantly guarded by detectives employed by defendant for that purpose; that he was at no time free to come and go as he pleased; that his movements were at all times subject to the control and direction of those who had him in charge; that he was urged by them on several occasions to confess his guilt, and make known his confederates; and that he was subjected to repeated examinations and cross-examinations touching the robbery, of such character as clearly to imply that he was regarded as a criminal, and that force would be used to detain him if he attempted to assert his liberty." It was held in this case that such circumstances would warrant a finding by the jury that during the time when the plaintiff remained in company with the detectives he was in fact deprived of all real freedom of action and that whatever consent he gave to such restraint was an enforced consent and did not justify the detention without a warrant.

2. Detention Must Be Unlawful. — *Crowell v. Gleason*, 10 Me. 325; *Spoor v. Spooner*, 12 Met. (Mass.) 281; *Cunningham v. East River Electric Light Co.*, 60 N. Y. Super. Ct. 282; *King v. Johnston*, 81 Wis. 578; *Murphy v. Martin*, 58 Wis. 276.

In the case of *Warren v. Dennett*, 13 Misc. Rep. (N. Y. City Ct.) 329, the court said: "It is well settled that the action for false imprisonment can only be maintained where the arrest was unlawful and without authority of law." Citing *Cunningham v. East River Electric Light Co.*, 60 N. Y. Super. Ct. 282.

Imprisonment May Be Without Process or under Color of Illegal Process. — In the case of *Ahern v. Collins*, 39 Mo. 150, Fagg, J., said: "It makes no difference whether the restraint of the person is caused without process or under color of process wholly illegal; * * * it is a trespass against the person, for which the plaintiff is entitled to compensation in damages upon the necessary proof of the facts."

3. England. — *Brown v. Chapman*, 6 C. B. 365, 60 E. C. L. 365.

United States. — *Kilbourn v. Thompson*, *MacArthur & M. (D. C.)* 401; *Carman v. Emerson*, 71 Fed. Rep. 264.

Alabama. — *Leib v. Shelby Iron Co.*, 97 Ala. 626. And see *Rhodes v. King*, 52 Ala. 272.

Arkansas. — *Floyd v. State*, 12 Ark. 43, 54 Am. Dec. 250.

Colorado. — *Baker v. Barton*, 1 Colo. App. 183.

Connecticut. — *Watson v. Watson*, 9 Conn. 148, 23 Am. Dec. 324. And see *Luddington v. Peck*, 2 Conn. 700. Compare *Stoddard v. Bird*, Kirby (Conn.) 65.

Georgia. — *Joiner v. Ocean Steamship Co.*, 86 Ga. 238; *Riley v. Johnston*, 13 Ga. 260; *Sewell v. State*, 61 Ga. 496. And see *Melson v. Dickson*, 63 Ga. 682, 36 Am. Rep. 128.

Illinois. — *Krebs v. Thomas*, 12 Ill. App. 266.

Kansas. — See *Wichita, etc., R. Co. v. Quinn*, 57 Kan. 737.

Massachusetts. — *Morrow v. Wheeler, etc., Mfg. Co.*, 165 Mass. 349; *Coupal v. Ward*, 106 Mass. 289; *Mullen v. Brown*, 138 Mass. 114.

Michigan. — *Johnson v. Morton*, 94 Mich. 1; *Johnson v. Maxon*, 23 Mich. 129; *Filer v. Smith*, 96 Mich. 351, 35 Am. St. Rep. 603; *Tryon v. Pingree*, 112 Mich. 338; *Schultz v. Huebner*, 108 Mich. 274. And see *Hill v. Taylor*, 50 Mich. 549; *Wheaton v. Whittemore*, 49 Mich. 348.

Missouri. — *Finley v. St. Louis Refrigerator, etc., Co.*, 99 Mo. 559; *Taaffe v. Kyne*, 9 Mo. App. 15.

Nebraska. — *Miller v. Woods*, 23 Neb. 200.

New York. — *Cunningham v. East River Electric Light Co.*, 60 N. Y. Super. Ct. 282; *Lewis v. Penfield*, 39 How. Pr. (N. Y. Supreme Ct.) 490; *Mott v. Union Bank*, 38 N. Y. 18; *Marks v. Townsend*, 97 N. Y. 509; *Nebenzahl v. Townsend*, 61 How. Pr. (N. Y. C. Pl.) 353; *Nowak v. Waller*, (Supreme Ct.) 10 N. Y. Supp. 199; *Hallock v. Domyne*, 69 N. Y. 238; *Warren v. Dennett*, 13 Misc. Rep. (N. Y. City Ct.) 329. And see *Brown v. Feeter*, 7 Wend. (N. Y.) 301; *Fuller v. Redding*, 13 N. Y. App. Div. 61.

Ohio. — *Taylor v. Alexander*, 6 Ohio 144.

Rhode Island. — *Hobbs v. Ray*, 18 R. I. 84.

South Carolina. — See *McConnell v. Kennedy*, 29 S. Car. 180.

Tennessee. — *Herzog v. Graham*, 9 Lea (Tenn.) 152.

Utah. — *Marks v. Sullivan*, 9 Utah 12.

Vermont. — *Pierson v. Gale*, 8 Vt. 509, 30 Am. Dec. 487; *Aldrich v. Weeks*, 62 Vt. 89.

Wisconsin. — *Murphy v. Martin*, 58 Wis. 276; *King v. Johnston*, 81 Wis. 578.

matter how corrupt or unfounded or mistaken the motives which induced the issuance or execution of the warrant may have been.¹ Thus it has been said that though the purpose of one party in causing the arrest of another under valid legal process was to extort a deed or other instrument in writing, no action can be maintained for false imprisonment.² False imprisonment may, however, arise by the execution of a lawful warrant or process at an unlawful time, as on Sunday when not warranted by statute.³ The unlawfulness of an imprisonment, as will be seen hereafter, may result from the restraint's being unlawful in its inception, as originally without justification in law, or there may be a restraint upon the person, lawful when first imposed, but becoming an illegal detention thereafter, constituting a false imprisonment.

b. WHERE RESTRAINT IS ORIGINALLY UNLAWFUL — (1) Arrest Without Warrant — (a) In General. — It is a false imprisonment where an arrest is improperly made without warrant, liability in damages for which is thereby incurred.⁴

(b) Rule as to Probable Cause — aa. ARREST BY OFFICER OF LAW. — An arrest made without warrant by an officer of the law is not a false imprisonment if the officer arresting had reasonable grounds to believe that a felony had been committed, and that the person arrested was the guilty party,⁵ or if, in the pres-

1. *Watson v. Watson*, 9 Conn. 148, 23 Am. Dec. 324; *Johnson v. Maxon*, 23 Mich. 129; *Marks v. Townsend*, 97 N. Y. 590, *Hobbs v. Ray*, 18 R. I. 84; *Marks v. Sullivan*, 9 Utah 12; *Pierson v. Gale*, 8 Vt. 509, 30 Am. Dec. 487. And see *Luddington v. Peck*, 2 Conn. 700; *Brown v. Feeter*, 7 Wend. (N. Y.) 301.

There Is No False Imprisonment where the detention complained of was under lawful process, although the process may have been wrongfully obtained. *Hobbs v. Ray*, 18 R. I. 84. And see *Nebenzahl v. Townsend*, 61 How. Pr. (N. Y. C. Pl.) 353.

In the case of *Marks v. Townsend*, 97 N. Y. 590, the plaintiff had been arrested for debt under what was known as the "Stillwell Act." He was discharged from the arrest upon showing to the court that he had previously been arrested for the same cause, and upon the same grounds. It was held that an action for false imprisonment would not lie for the second arrest, even if the defendant maliciously caused it to be made, because it was made upon a process regularly issued by a court having jurisdiction of the matter.

Malicious Prosecution the Remedy. — In the case of *Tryon v. Pingree*, 112 Mich. 338, it was held that where a person is arrested on a warrant valid on its face and prosecuted for the offense charged therein, he is confined to an action for malicious arrest or prosecution, and an action for damages for false imprisonment will not lie. And see *Mullen v. Brown*, 138 Mass. 114. See also *Herzog v. Graham*, 9 Lea (Tenn.) 152.

2. *McIver, J.*, in *McConnell v. Kennedy*, 29 S. Car. 180.

Although the Object of an Arrest and Imprisonment was to enforce the payment of a debt, an action for false imprisonment cannot be maintained if the warrant was a lawful one. An action for malicious prosecution is the proper remedy. *Mullen v. Brown*, 138 Mass. 114.

In the case of *Hackett v. King*, 6 Allen (Mass.) 58, however, an instruction that "if the plaintiff was arrested under a legal war-

rant and by a proper officer, yet if one of the objects of the arrest was thereby to extort money or property from him or to enforce the settlement of a civil claim, such arrest would be a false imprisonment by all who directly or indirectly procured the same or participated therein," was approved. See also the case of *Fellows v. Goodman*, 49 Mo. 62, wherein it was held that an arrest caused by the defendant, though under legal process first procured, might constitute a false imprisonment where it was evident that the proceedings were instituted for the purpose of interrupting operations for the removal of a certain building until an injunction could be procured for the purpose. The facts in this case would seem to constitute more properly a malicious prosecution than a false imprisonment, but the point does not seem to have been raised before the court.

Arrest under Warrant for "John Doe." — Where there was an improper arrest under a warrant against John Doe, made for the purpose of extorting money, the persons participating therein would, it was held, be liable in damages for false imprisonment. *Holley v. Mix*, 3 Wend. (N. Y.) 350, 20 Am. Dec. 702.

3. 3 Black. Com. 127.

4. *Thorne v. Turck*, 94 N. Y. 90, 46 Am. Rep. 126; *Isaacs v. Flahive*, 14 Misc. Rep. (N. Y. City Ct.) 249; *Winn v. Hobson*, 54 N. Y. Super. Ct. 330; *State v. Hunter*, 106 N. Car. 796; *McGarrahan v. Lavers*, 15 R. I. 302; *Karner v. Stump*, 12 Tex. Civ. App. 460.

5. *Arrest for Felony Without Warrant.* — *Beckwith v. Philby*, 6 B. & C. 638, 13 E. C. L. 289; *Davis v. Russell*, 2 M. & P. 590; *Tindal, C. J.*, in *Allen v. Wright*, 8 C. & P. 522, 34 E. C. L. 512; *Dewey, J.*, in *Rohan v. Sawin*, 5 Cush. (Mass.) 281; *Firestone v. Rice*, 71 Mich. 377, 15 Am. St. Rep. 266; *Lord Mansfield in Samuel v. Payne*, 1 Doug. 360; *Brockway v. Crawford*, 3 Jones L. (48 N. Car.) 433, 67 Am. Dec. 250; *Taaffe v. Slevin*, 11 Mo. App. 507; *Willis v. Warren*, 17 How. Pr. (N. Y. C. Pl.) 100. And see *Hall v. Booth*, 3 N. & M. 316, 28 E. C. L. 398.

ence of the officer arresting, a misdemeanor has been committed by the person taken into custody.¹ But while a constable having reasonable grounds to suspect that a felony has been committed is authorized to detain the party suspected until inquiry can be made by the proper authorities,² if the prisoner be detained an unreasonable length of time before the procuring of a warrant it will constitute a false imprisonment.³

bb. ARREST BY PRIVATE INDIVIDUAL. — Where the arrest has been made without warrant by a private individual, it will be a false imprisonment unless it can be shown that a felony has actually been committed, and that there is reasonable ground for suspecting the plaintiff thereof,⁴ or, according to some authorities, an arrest under such circumstances will be a false imprisonment unless the actual guilt of the party arrested can be shown.⁵

(c) *What Constitutes Probable Cause* — *aa. IN GENERAL.* — Though a person be arrested and imprisoned without warrant and for an alleged crime of which the officer arresting has no personal knowledge, and the person so arrested is in fact innocent, it is not a false imprisonment if the officer acted upon information received from one on whom he had reason to rely.⁶ "If a felony be

1. *Arrest for Misdemeanor Without Warrant — Commission in Presence of Arresting Officer.* — *Bowditch v. Balchin*, 5 Exch. 378; *Griffin v. Coleman*, 4 H. & N. 265; *Walker v. Montreal*, 4 Leg. N. (Quebec) 215; *Bright v. Patton*, 5 Mackey (D. C.) 534, 60 Am. Rep. 396; *U. S. v. Cross*, 1 MacArthur (D. C.) 149; *Newton v. Locklin*, 77 Ill. 103; *Doering v. State*, 49 Ind. 56, 19 Am. Rep. 669; *Prell v. McDonald*, 7 Kan. 426, 12 Am. Rep. 423; *Curran v. Taylor*, 92 Ky. 537; *Taaffe v. Slevin*, 11 Mo. App. 507; *Willis v. Warren*, 17 How. Pr. (N. Y. C. Pl.) 100; *Braddy v. Hodges*, 99 N. Car. 319; *Wade v. Chaffee*, 8 R. I. 224, 5 Am. Rep. 572; *Eanes v. State*, 6 Humph. (Tenn.) 53, 44 Am. Dec. 289; *Beville v. State*, 16 Tex. App. 70.

Even Though a Misdemeanor Has Actually Been Committed, an arrest without warrant is a false imprisonment if the offense was not in the presence of the arresting officer. *Newton v. Locklin*, 77 Ill. 103.

Bribery at Elections — Presence of Officers. — In the case of *Curran v. Taylor*, 92 Ky. 537, it was held that the buying of a vote at an election held for the purpose of determining the sense of the voters with reference to the imposition of a tax, while not an offense within the state statute with reference to bribery at elections, was nevertheless such an offense as gave officers of the law a right to arrest without warrant where committed in their presence, and such officers, it was held, were not liable in actions for damages for false imprisonment therefor. But, it has been decided, the person presiding at a municipal election has no power to imprison persons protesting, though in a loud voice and in an energetic manner, against the way in which the election is being conducted, and if he does so without having them regularly tried and convicted he will be liable in damages for false imprisonment. *Cloutier v. Trépanier*, 14 Rev. Leg. 670. See also the title ARREST, vol. 2, p. 832.

2. *Lord Tenterden*, C. J., in *Beckwith v. Philby*, 6 B. & C. 635, 13 E. C. L. 287. To the same effect see *Davis v. Russell*, 5 Bing. 354, 15 E. C. L. 463; *Wakely v. Hart*, 6 Binn. (Pa.) 410.

3. See *infra*, this section, *Detention Originally Lawful, but Subsequently Unlawful*.

Presumption of Official Character. — In an action for false imprisonment, upon proof that a person making an arrest was an officer *de facto* it will be presumed *prima facie* that he is an officer *de jure*. *Prell v. McDonald*, 7 Kan. 426, 12 Am. Rep. 423.

4. *Arrest Without Warrant by Private Person.* — *Tindal*, C. J., in *Allen v. Wright*, 8 C. & P. 522, 34 E. C. L. 512; *Lord Tenterden*, C. J., in *Beckwith v. Philby*, 6 B. & C. 635, 13 E. C. L. 287; *Lander v. Miles*, 3 Oregon 35. And see *Hall v. Booth*, 3 N. & M. 316, 28 E. C. L. 398; *Benham v. Vernon*, 5 Mackey (D. C.) 18.

A private person may take into custody, without a warrant, one suspected of felony; but if he does so, and it turns out that the wrong man is imprisoned, he must be prepared to show in justification, first, that a felony has been committed, and second, that the circumstances under which he acted were such that any reasonable person, acting without passion or prejudice, would have fairly suspected that the plaintiff committed the felony or was implicated in it. *Maliniemi v. Gronlund*, 92 Mich. 222, 31 Am. St. Rep. 576.

5. *Rohan v. Sawin*, 5 Cush. (Mass.) 281.

Where there has been an imprisonment of a Seaman by the captain of a vessel, the fact that the latter believed the former to be a dangerous man or that the imprisonment was at the request of the crew is no justification. *Jay v. Almy*, 1 Woodb. & M. (U. S.) 262. Compare, however, in this connection the case of *Leith v. Trott*, 16 Nova Scotia 120, where themaster of a vessel lying in Halifax harbor, suspecting the plaintiff of stealing, procured warrants to be issued against him, and confined him while the search was being made in order to prevent any communication with the rest of the crew. It was held in an action for damages for false imprisonment that the master had acted within the scope of his authority, and had, therefore, incurred no liability.

6. *Filer v. Smith*, 96 Mich. 351, 35 Am. St. Rep. 603; *White v. McQueen*, 96 Mich. 249.

What Constitutes Probable Cause — Arrest After Such Investigation as Circumstances Permitted. — In the case of *White v. McQueen*, 96 Mich. 249, the court said: "When an officer, in arresting fugitives from justice, and those who

committed, and A acquaint him [the constable] that B did it, the constable may take him and imprison him, at least till he can bring him before some justice of peace."¹ But an officer should not receive every idle rumor, but before he assumes to arrest one upon the information of another should make such diligent inquiry touching the truth of the charge as the circumstances will permit.²

bb. RESEMBLANCE TO PHOTOGRAPH. — Where there has been an imprisonment without warrant, it has been held that the officer could not justify his act by a reliance upon a personal resemblance of the plaintiff to the photograph of an alleged felon,³ especially where other means of identification were accessible.⁴

cc. RELIANCE UPON ANONYMOUS LETTER. — As a general rule it is believed that an arrest made upon the faith of an anonymous letter, without other evidence of guilt, will constitute a false imprisonment.⁵ But in one instance, where there existed in addition other circumstances of suspicion, it was held that there would be no liability in damages at the suit of the person taken into custody.⁶

(d) Whether Probable Cause Question of Law or Fact. — On this point there is a conflict of authority, it being held on the one hand that where an arrest has been made without warrant, whether or not there was reason for apprehending that a felony had been committed is, in general, a question of fact for the jury,⁷ and on the other that where the facts are admitted or proved the question of probable cause is one solely for the determination of the court.⁸

(e) Burden of Proof. — It has been held that where there has been an arrest without warrant, the burden of proof is upon the plaintiff in an action for false

he honestly believes have been guilty of a felony, has acted in good faith and after such an investigation as the circumstances permitted him to make, he will be protected in his action, and will be relieved from the consequences of a false imprisonment. This is required for the protection of society, and to prevent the escape of criminals."

Officer Bound to Use Reasonable Means to Avoid Mistake. — An officer arresting without warrant is bound to use all reasonable means to avoid mistake and the arrest of an innocent man, or he may be held liable in damages for false imprisonment. *Stanton v. Hart*, 27 Mich. 539.

Circumstances Held Not to Constitute Probable Cause. — Where a traveling showman told the defendant, a police constable at a fair, that he had some harness stolen a year before, and that the stolen harness was in the plaintiff's possession, and the constable went to the plaintiff and asked him where he got the harness, to which the plaintiff replied that he had bought the harness of a man whom he did not know and had given him a shilling for it, whereupon the constable took the plaintiff into custody, but it appeared that the constable had known the plaintiff for twenty years as a respected householder, it was held that there was no reasonable cause for the arrest and that the constable was responsible in damages for the arrest and imprisonment. *Hogg v. Ward*, 3 H. & N. 417.

1. 1 Hale's P. C. 587.

2. *Holley v. Mix*, 3 Wend. (N. Y.) 350, 20 Am. Dec. 702.

3. *Filer v. Smith*, 96 Mich. 354, 35 Am. St. Rep. 603.

Evidence Admissible. — Where an arrest was made by an officer upon a supposed resemblance between the plaintiff and the photograph of a felon, it was held error to admit the testimony of witnesses as to such resemblance,

the photograph and the plaintiff both being in court and before the jury. *Filer v. Smith*, 96 Mich. 355, 35 Am. St. Rep. 603.

4. *Filer v. Smith*, 96 Mich. 354, 35 Am. St. Rep. 603.

5. *Coyle v. Richardson*, 2 Leg. N. (Quebec) 60.

Arrest on Letter Stating Facts Charging No Crime at Law. — An arrest by an officer without warrant upon a letter stating facts which if true would not charge an offense under the laws of the state where the arrest was made will constitute a false imprisonment. *Malcolmson v. Gibbons*, 56 Mich. 459.

Detention as Matter of "Official Courtesy." — A marshal of a city arrested a man on Saturday evening on the faith of a letter purporting to come from the chief of police of a city in another state, and signed with such official's name, but by some person whose initials only were attached. The letter stated nothing that would constitute a criminal offense in the state where the arrest was made, but the marshal detained the prisoner as a matter of "official courtesy." It was held a false imprisonment. *Malcolmson v. Gibbons*, 56 Mich. 459.

6. *Davis v. Russell*, 5 Bing. 354, 15 E. C. L. 463.

7. Probable Cause — Whether Question of Law or Fact. — *Mitchell v. Wall*, 111 Mass. 492; *Firestone v. Rice*, 71 Mich. 377, 15 Am. St. Rep. 266; *Cochran v. Toher*, 14 Minn. 385; *Newman v. New York*, etc., R. Co., 54 Hun (N. Y.) 335.

8. *Davis v. Russell*, 5 Bing. 354, 15 E. C. L. 463; *White v. McQueen*, 96 Mich. 249; *Huntington v. Gault*, 81 Mich. 155; *Perry v. Sulier*, 92 Mich. 72.

The case of *Davis v. Russell*, 5 Bing. 354, 15 E. C. L. 463, *supra*, though stating the proposition announced in the text, is not, on the facts, altogether undoubted authority for the proposition.

imprisonment to show want of probable cause.¹ But a discharge by the magistrate upon trial of the charge is *prima facie* evidence of want of probable cause sufficient to shift upon the defendant the burden of proving the contrary.²

(f) **Conviction on Charge as Evidence of Probable Cause.** — It has been held by a court of high authority that a party cannot maintain a civil action for damages for false imprisonment where his arrest has been followed by conviction in a criminal court and that conviction remains unreversed, unless such person establishes the fact that his conviction was obtained by fraud and conspiracy.³ But it is believed that this means no more than that where there has been an arrest without warrant, conviction on the charge is, in general, *prima facie* evidence of probable cause; if more than this is intended, it is contrary to the weight of a majority of the best-considered cases.⁴ Indeed, the converse of the proposition, it would seem, has been expressly denied in the same state, viz., where there has been an arrest without warrant, a discharge by the police justice is *prima facie* evidence of want of probable cause.⁵

(g) **Wrongful Arrest Without Warrant — Continuation of Imprisonment on Valid Warrant.** — Where there was a wrongful arrest without warrant it was held that though a warrant was subsequently procured there might be a recovery in an action for damages for false imprisonment,⁶ and that the argument that the plaintiff's damage had been no greater than if the arrest had been made with warrant in the first place was untenable.⁷ The law, it is held, will not permit an officer to perpetrate a wrong for the purpose of executing process, nor the use of a valid process for the purpose of continuing an imprisonment commenced without legal authority.⁸ And it has been held that where there has been an arrest without valid process a party cannot be detained on valid process until he has been restored to the condition in which he was at the time of his unlawful arrest.⁹ But though a certain

1. *Rosenkranz v. Hass*, 1 Misc. Rep. (N. Y. City Ct.) 220. Compare, however, in this connection, *supra*, this title, *Imprisonment Shown — Presumption of Illegality*.

Evidence Admissible. — Where the plaintiff in an action for damages for false imprisonment and his brother were arrested without warrant for having committed the alleged crime of larceny, evidence that the plaintiff's brother was very ill at the time is admissible to show a want of reasonable ground for belief of the guilt of the parties arrested. *Fitzpatrick v. New York, etc., R. Co.*, (Supreme Ct.) 5 N. Y. Supp. 685.

In an action for damages for a wrongful arrest of a woman without warrant, the arresting officer pleading in justification that he believed her to be a street walker and that on the night of her arrest she was plying her vocation, evidence of the specific acts of lewdness on the part of plaintiff is admissible. *Pinkerton v. Verberg*, 78 Mich. 573, 18 Am. St. Rep. 473.

On the Question of Probable Cause the facts should be considered as of the time when the warrant was issued. *Olmstead v. Doland*, (Supreme Ct.) 6 N. Y. Supp. 130. This case seems to have been regarded as an action for false imprisonment, although the arrest was made upon warrant duly issued, which is inaccurate, to say the least. But it is doubtless true that where there has been an imprisonment without warrant, the reasonableness of the arrest must be determined with reference to facts existing at the time when the arrest was made. Compare, however, *Beckwith v. Bean*, 98 U. S. 266.

2. *Rosenkranz v. Hass*, 1 Misc. Rep. (N. Y. City Ct.) 220.

3. *Cuniff v. Beecher*, 84 Hun (N. Y.) 137. See also *Sloan v. Schomaker*, 136 Pa. St. 382; *Oppenheimer v. Manhattan R. Co.*, (Supreme Ct.) 18 N. Y. Supp. 411.

4. See *Fitzgerald v. Lewis*, 164 Mass. 495; *McConnell v. Kennedy*, 29 S. Car. 180. And see also *Fowle v. Child*, 164 Mass. 270; *Com. v. Cheney*, 141 Mass. 102, 55 Am. Rep. 448; *Com. v. Waters*, 11 Gray (Mass.) 81.

5. *Rosenkranz v. Hass*, 1 Misc. Rep. (N. Y. City Ct.) 220.

6. **Wrongful Arrest Without Warrant — Subsequent Detention under Valid Warrant.** — The case of *Cabell v. Arnold*, (Tex. Civ. App. 1893) 22 S. W. Rep. 62, was an action for damages for false imprisonment where, though the arrest had been made without warrant, the accused was subsequently delivered into the hands of an officer who had a warrant for his arrest, and was later acquitted of the charge against him. It was held in this case that there might be a recovery for a false imprisonment until the time when the plaintiff was delivered to the officer having the warrant for his arrest and detention.

7. *Cabell v. Arnold*, (Tex. Civ. App. 1893) 22 S. W. Rep. 62.

8. *Mandeville v. Guernsey*, 51 Barb. (N. Y.) 99.

9. **Wrongful Arrest — Restoration to Liberty.** — *Mandeville v. Guernsey*, 51 Barb. (N. Y.) 99. This case was affirmed without opinion in 50 N. Y. 669, by a divided court. See also, as more or less in accord with the above case,

judicial officer may not be authorized to award a habeas corpus to bring before him the body of a person committed for a felony, yet if he does so and remands the prisoner because he is unable to give bail, the imprisonment may be referred to the original warrant for his detention and the person imprisoned will be considered legally in custody.¹

(2) *Arrest on Void Warrant.* — An arrest on a warrant absolutely void for want of jurisdiction or otherwise is a false imprisonment and affords no justification to a party thereto for any action under it.² But where the plaintiff had been arrested on a void execution, and gave bond for the prison limits, conditioned to surrender himself to the jailer within a certain time thereafter, it was held that he could not recover of the officer or the execution creditor damages for imprisonment within the prison limits according to the terms of the bond, for, it was said, as the arrest was on a void execution, the plaintiff's remaining within the prison limits was voluntary, and for his detention during that period he could recover no damages.³

(3) *Arrest on Voidable Warrant.* — For a discussion of this question reference is made to a subsequent part of this article.⁴

(4) *Arrest of Privileged Person* — **Rule at Common Law.** — As a general rule the arrest on warrant of a privileged person does not at common law constitute a false imprisonment,⁵ the exemption from imprisonment in

Hooper v. Lane, 6 H. L. Cas. 443; Matter of Eggington, 2 El. & Bl. 728, 75 E. C. L. 728. Compare the case of Holley v. Mix, 3 Wend. (N. Y.) 350, 20 Am. Dec. 702, wherein the plaintiff Holley was arrested on a warrant directing the officer to arrest John Doe. The warrant was subsequently altered by inserting the name of the plaintiff, in which connection the court said: "And then it was a justification for all subsequent regular acts of all concerned in its execution." And in Bauer v. Clay, 8 Kan. 580, it was held that where an imprisonment was wrongful for only a portion of the time there may be a recovery in damages for such detention as was illegal.

1. State v. Guest, 6 Ala. 778.

2. **Arrest on Void Warrant.** — Brooks v. Hodgkinson, 4 H. & N. 712; Garrison v. Harding, 14 New Bruns. 166; Baldwin, J., in Johnson v. Tompkins, 1 Baldw. (U. S.) 571; Winchester v. Everett, 80 Me. 535, 6 Am. St. Rep. 228; Wachsmuth v. Merchants' Nat. Bank, 96 Mich. 426; Bergman v. Noble, 45 Hun (N. Y.) 133; Williams v. Garrett, 12 How. Pr. (N. Y. Supreme Ct.) 456; Neimitz v. Conrad, 22 Oregon 164; Frazier v. Turner, 76 Wis. 562. And see Smith v. Cattel, 2 Wils. 376; Green v. Morse, 5 Me. 292; Day v. Bach, 87 N. Y. 56; Garvin v. Blocker, 2 Brev. (S. Car.) 157.

Statement of Rule. — In the case of Winchester v. Everett, 80 Me. 535, 6 Am. St. Rep. 228, Virgin, J., delivering the opinion of the court, said that at an early day the English courts and more recently many of the courts of the United States have had before them numerous cases of false imprisonment against the respective parties who caused the arrests, in which one of the principles announced has been: A writ of execution, void for want of jurisdiction or otherwise, can be no justification to a party thereto, for any action under it; as where the debtor was arrested on a writ of execution wherein the debt was less than that authorizing an arrest, Green v. Morse, 5 Me. 292; Smith v. Cattel, 2 Wils. 376; or where an administratrix was arrested on an execution

without suggestion of devastavit, Barker v. Braham, 3 Wils. 368; or where a term intervened between the teste and the return of the writ on which the defendant was arrested, Parsons v. Loyd, 3 Wils. 341. So in case of arrest on an execution issued after the judgment was paid, Bates v. Pilling, 6 B. & C. 38, 13 E. C. L. 104; or discharged under the insolvency statute, Deyo v. Van Valkenburgh, 5 Hill (N. Y.) 242.

Where the Affidavit upon Which a Circuit Court Commissioner indorses an order to hold to bail in a libel suit shows upon its face that the alleged libelous publication was, as a matter of law, absolutely privileged, the order is void and affords no protection in an action for damages for false imprisonment to the parties instituting the proceeding, procuring the order, and delivering the process to the sheriff for service. Wachsmuth v. Merchants' Nat. Bank, 96 Mich. 426.

Warrant Executed by Minor. — In McConnell v. Kennedy, 29 S. Car. 180, it was held that the prosecutor was not liable to an action for false imprisonment where without his agency the warrant under which the arrest was made was placed by the magistrate in the hands of a minor for execution.

3. Allen v. Shed, 10 Cush. (Mass.) 375. And see Neimitz v. Conrad, 22 Oregon 164; Moses v. Dubois, Dudley L. (S. Car.) 209; Warne v. Constant, 4 Johns. (N. Y.) 32.

4. See *infra*, this title, *False Imprisonment as a Civil Wrong — Liability of Person Causing, Instigating, or Procuring Imprisonment — Procuring Arrest on Voidable Warrant.*

5. **Arrest of Privileged Person — At Common Law.** — Rennett v. Woods, 11 U. C. Q. B. 29; Magnay v. Burt, 5 Q. B. 381, 48 E. C. L. 381; Tarlton v. Fisher, 2 Doug. 671; Winchester v. Everett, 80 Me. 535, 6 Am. St. Rep. 228; Cassier v. Fales, 139 Mass. 461; Wood v. Kinsman, 5 Vt. 589; Pierson v. Gale, 8 Vt. 509, 30 Am. Dec. 487; Moore v. Chapman, 3 Hen. & M. (Va.) 260. And see Smith v. Jones, 76 Me. 138, 49 Am. Rep. 598; Kreiser v. Scofield, 10

such cases arising not from any illegality or irregularity in the writ, but from the personal privilege of the person arrested.¹ No liability in false imprisonment, therefore, will be incurred for the arrest and imprisonment for debt of a person exempt from such imprisonment because of infancy.² And where, contrary to law, a married woman had been arrested and imprisoned for debt, she not having set up her coverture in an action for the debt, the plaintiff in such action was held not liable in false imprisonment, though after the woman's arrest he learned of her coverture and refused to order her release.³

Rule under Statutes. — By statute in some states there may be an action for damages for the arrest of a privileged person against the officer or party making the arrest.⁴

c. DETENTION ORIGINALLY LAWFUL BUT SUBSEQUENTLY UNLAWFUL —
(1) *In General.* — Though the original imprisonment may have been lawful, an action for false imprisonment will lie for detention after the time warranted.⁵ And the converse of the proposition is also true, that where there has been a lawful taking into custody there can be no false imprisonment in the absence of subsequent improper detention.⁶

Misc. Rep. (N. Y. C. Pl.) 350; *Deyo v. Van Valkenburgh*, 5 Hill (N. Y.) 242; *Marks v. Townsend*, 97 N. Y. 590; *Brown v. Crowl*, 5 Wend. (N. Y.) 298.

No Recovery Though Officer Knew of Privilege and Acted Maliciously. — No action lies against a sheriff for arresting a party attending court under a summons, though it be alleged that the party was there by privilege and that the defendant knew the fact and did arrest maliciously. *Magnay v. Burt*, 5 Q. B. 381, 48 E. C. L. 381.

Construction of Statute Exempting from Arrest. — The case of *Tarlton v. Fisher*, 2 Doug. 671, was an action of trespass for an assault and false imprisonment of a certified bankrupt. Some doubt arose upon the express words of the statute that such persons "shall not be liable to be arrested." But it was held that though the debtor might have a supersedeas to the execution, yet that till superseded it was a justification; and even after supersedeas, though trespass would lie against the party, it would not lie against the sheriff.

1. *Morton, C. J.*, in *Cassier v. Fales*, 139 Mass. 461.

2. *Cassier v. Fales*, 139 Mass. 461.

3. *Winchester v. Everett*, 80 Me. 535, 6 Am. St. Rep. 228. In this case the execution on which the woman was arrested described her as a "single woman." Personal service of the writ had been made on her, and she appeared by counsel, and, making no suggestion that she was other than as described in the writ, she suffered the action, after several continuances to go to judgment on default, and suggested her coverture only after she was arrested and taken to the place where the jail was situated. It was held in this case that the defendant was not liable though after the woman's arrest he learned of her coverture and refused to direct her discharge, and this on the principle that the writ was neither irregular nor void and therefore afforded complete protection to the person for whom and at whose instance it was issued, as well as to all others concerned. And see *Rennett v. Woods*, 11 U. C. Q. B. 29.

4. *New York.* — Such a statute exists in

New York. See Code Civ. Pro., §§ 863, 864. See also *Kreiser v. Scofield*, 10 Misc. Rep. (N. Y. C. Pl.) 350.

5. Original Imprisonment Lawful — Subsequent Detention Unlawful — Georgia. — *Johnson v. Americus*, 46 Ga. 80; *Potter v. Swindle*, 77 Ga. 419; *Manning v. Mitchell*, 73 Ga. 660.

Maryland. — *Kirk v. Garrett*, 84 Md. 383.

Michigan. — *Linnen v. Banfield*, 114 Mich. 93.

Minnesota. — *Cochran v. Toher*, 14 Minn. 385.

Mississippi. — *Anderson v. Beck*, 64 Miss. 113.

Nebraska. — *Diers v. Mallon*, 46 Neb. 121.

New York. — *Pastor v. Regan*, 9 Misc. Rep. (N. Y. Supreme Ct.) 547.

Ohio. — *Raitz v. Green*, 7 Ohio Cir. Dec. 238.

Texas. — *Pratt v. Brown*, 80 Tex. 608; *Newby v. Gunn*, 74 Tex. 455.

West Virginia. — *Tavener v. Morehead*, 41 W. Va. 116.

And see *Worth v. Terrington*, 13 M. & W. 789; *Stricker v. Pennsylvania R. Co.*, 60 N. J. L. 230; *Wood v. Graves*, 144 Mass. 365, 59 Am. Rep. 95.

6. *Tavener v. Morehead*, 41 W. Va. 116. See also *Stricker v. Pennsylvania R. Co.*, 60 N. J. L. 230. And see *Kent v. Miles*, 68 Vt. 48.

Arrest under Mesne Process — Release and Re-arrest. — Where, after the lawful arrest of an absconding debtor under mesne process, the officer liberates the person, but afterwards retakes him and holds him until the return day of the writ, it is not a false imprisonment. *Aldrich v. Weeks*, 62 Vt. 89.

In Bacon's Abridgment, tit. Escape, C., it is stated: "If the prisoner be in custody on mesne process, the sheriff may retake him after having permitted him to go at large." And see *Aldrich v. Weeks*, 62 Vt. 89, *supra*, citing to this effect 3 Black. Com. 290; *Nottingham's Case*, Noy 72; *Lewis v. Morland*, 2 B. & Ald. 56; *Atkinson v. Matteson*, 2 T. R. 172; *Hawkins v. Plomer*, 2 W. Bl. 1048; *Stone v. Woods*, 5 Johns. (N. Y.) 182. "In *Ravenscroft v. Eyles*, 2 Wils. 295," said the court in *Aldrich v. Weeks*, 62 Vt. 89, "it was adjudged to the contrary, citing only the cases of *Key v. Briggs*, Skin. 582, and *Scott v. Peacock*, 1

(2) *Arrest Without Process—Delay in Procuring Warrant.*—A false imprisonment may be committed though the detention consist merely of unreasonable delay in procuring a warrant where the arrest has been without one.¹

(3) *Delay in Presentment of Prisoner for Examination or Trial*—(a) *In General.*—Likewise it will constitute false imprisonment if there be unreasonable delay in presentment of the prisoner to a magistrate for examination or trial.² So it has been held that a bridge keeper and constable are liable for false imprisonment where, after lawfully arresting a person for violating a

Salk. 271, neither of which supports the decision."

Rearrest Where Declaration Lost.—In the case of *Aldrich v. Weeks*, 62 Vt. 89, there had been an arrest of a debtor on mesne process, the officer, however, releasing the prisoner while under arrest, but subsequently retaking him to be held to the return day of the writ. At the time of the retaking of the plaintiff the declaration in the writ had become detached and was lost, and the question was whether the officer was justified in retaking the person subsequently plaintiff in an action for damages for false imprisonment. In holding that the retaking of the plaintiff was legal, the court said that the question depended upon "whether the officer could return the writ and the justice legally take jurisdiction of the suit. The process was complete. It was duly returned. The defendant therein was present. We hold that the justice had jurisdiction; that he could, under section 1172, Rev. Laws, order a new declaration filed; that within that statute an action may be said to be pending in court at any time after the officer begins to make service; and that when the suit was entered such order could have been made although the loss of the declaration happened before the return day of the writ."

Removal of Prisoner from One Place of Confinement to Another.—That a person lawfully in custody is removed from one place and confined in another does not constitute false imprisonment. *Hopner v. McGowan*, 54 N. Y. Super. Ct. 98, 116 N. Y. 405.

1. *Johnson v. Americus*, 46 Ga. 80; *Potter v. Swindle*, 77 Ga. 419; *Ocean Steamship Co. v. Williams*, 69 Ga. 251.

Arrest Without Warrant—Detention for Two Days.—A detention of a person arrested without warrant, for two days without obtaining a warrant, has been held unreasonable and to constitute a false imprisonment. *Linnen v. Banfield*, 114 Mich. 93.

Detention for Five Days.—Where a person was arrested without warrant on suspicion of having committed a felony, and was detained five days before being taken before a magistrate, whereas there was nothing to prevent an immediate presentment, and then was released from custody without presentment, it was held that the detention was, as a matter of law, for an unreasonable time. *Cochran v. Toher*, 14 Minn. 385.

Examination Before Magistrate Deferred by Consent.—In the case of *Diers v. Mallon*, 46 Neb. 121, an arrest without warrant was made on Sunday, but the complaint was not filed until Tuesday, the examination by the magistrate being, by consent of the prisoner's counsel, deferred until Tuesday. In this case the court

held that although the code conferred upon the magistrates in criminal proceedings the power to hold an examination upon the first day of the week, they were not required to do so, and that under all the circumstances the plaintiff's detention had not been shown so unreasonable as to warrant a recovery of damages for false imprisonment.

The Georgia Code, § 901 (Code 1882, § 4725), provides: "In every case of an arrest without warrant, the person arresting shall, without delay, convey the offender before the most convenient officer authorized to receive an affidavit and issue a warrant. And no such imprisonment shall be legal beyond a reasonable time allowed for this purpose." See *Manning v. Mitchell*, 73 Ga. 660.

2. *Lavina v. State*, 63 Ga. 513; *Arneson v. Thorstad*, 72 Iowa 145; *Kirk v. Garrett*, 84 Md. 383; *Holley v. Mix*, 3 Wend. (N. Y.) 350, 20 Am. Dec. 702; *Pastor v. Regan*, 9 Misc. Rep. (N. Y. Supreme Ct.) 547; *Raitz v. Green*, 7 Ohio Cir. Dec. 238; *Pratt v. Brown*, 80 Tex. 608; *Newby v. Gunn*, 74 Tex. 455. And see *Six Carpenters' Case*, 8 Coke 146; *Hayes v. Mitchell*, 69 Ala. 452; *Tubbs v. Tukey*, 3 Cush. (Mass.) 438, 50 Am. Dec. 744; *Brock v. Stimson*, 108 Mass. 520, 11 Am. Rep. 390.

Lawful Arrest—Detention for Thirty Days Without Presentment.—Where, though a person has been lawfully arrested, he is detained in jail for thirty days without presentment before a magistrate, it will constitute *prima facie* a false imprisonment. *Anderson v. Beck*, 64 Miss. 113.

Arrest Without Warrant—No Imprisonment Without Judicial Order.—It has been held that an officer arresting a person without warrant has no authority to imprison him without an order from some judicial officer first obtained, unless there is no judicial officer accessible or the public peace is in immediate danger. *Hayes v. Mitchell*, 69 Ala. 452.

Detention for Reasonable Time Pending Trial.—Where an officer, under a warrant from the County Court, commanding him to arrest the respondent and have him before that court forthwith, arrests the respondent, brings him to the place of holding such court, but finds the court not in session, he may detain the respondent a reasonable time until he can ascertain whether it is possible to deliver him into court, and may lodge him in jail meantime for safe keeping. *Kent v. Miles*, 65 Vt. 582; *Wiltse v. Holt*, 95 Ind. 460.

Unreasonable Delay in Taking Bail is not a false imprisonment. *Cargill v. State*, 8 Tex. App. 431.

But a Refusal to Admit to Bail where a prisoner is entitled to it may be. *Manning v. Mitchell*, 73 Ga. 660.

proper rule regulating the use of a public bridge, they hold him in custody, subjecting him to the alternative of paying a fine or of going to jail forthwith, instead of at once taking him before a justice of the peace according to law.¹ And where one arrested under a warrant issued by a magistrate of one county and indorsed by a magistrate of another was, instead of being taken before a magistrate in the county where he was arrested or where the offense was committed, taken into the county of the magistrate issuing the warrant and presented for trial there, it was held that the officer was liable in damages for false imprisonment,² such conduct, it has been held, constituting the officer arresting a wrongdoer *ab initio*.³ The fact, however, that a prisoner awaiting trial in court was, on account of a disturbance created by him, removed to a room near by provided for the confinement of prisoners until their cases are reached by the magistrate, does not constitute a false imprisonment, as, it was held, it would be "a novel proposition that the fact that the plaintiff's preference as to the particular place of his confinement was not consulted would give him a cause of action as against the officer selecting such place of detention."⁴

(b) **Delay in Presentment on Account of Prisoner's Intoxication.** — The presentment before a magistrate of a person arrested for drunkenness may be delayed without the incurrance of liability for false imprisonment so long as the person arrested remains too intoxicated for trial.⁵

(c) **Release Without Presentment.** — And as it is the duty of an officer arresting to present the person for trial without delay,⁶ so if the prisoner is released without presentment before a magistrate, the officer will be held a trespasser *ab initio*.⁷ But where there had been an arrest legally and properly made for drunkenness and disorderly conduct, the officer arresting, however, not making a charge against the prisoner, but releasing him in response to his appeal that he be permitted "to go home and take care of his family," it was held that the circumstances would warrant an understanding that the officer was not to be held liable in damages for granting the plaintiff's request.⁸

1. *Twilley v. Perkins*, 77 Md. 252, 39 Am. St. Rep. 408.

2. *Green v. Rumsey*, 2 Wend. (N. Y.) 611; *Francisco v. State*, 24 N. J. L. 30.

Arrest in One County for Alleged Crime Committed in Another — Detention while Notifying Officers of Latter. — Where it is provided by statute that where an officer of any county in that state arrests a person charged with crime under a warrant issued by a judicial officer of another county it is "the duty of such arresting officer to carry said accused, with the warrant under which he was arrested, to the county in which the offense is alleged to have been committed, for examination before any judicial officer of that county," the arresting officer cannot legally detain the accused in jail until information of the arrest has been communicated to an officer of the county in which the offense is alleged to have been committed and until the latter can reach the place of detention and there receive the prisoner from the officer who made the arrest. *Lamb v. Dillard*, 94 Ga. 206.

One Lawfully Arrested, but, at His Own Request, Committed to Jail in a county other than that specified by law, cannot maintain an action for false imprisonment. *Ellis v. Cleveland*, 54 Vt. 437.

3. *Francisco v. State*, 24 N. J. L. 30.

4. *Hopner v. McGowan*, 54 N. Y. Super. Ct. 67.

So It Has Been Held Not a False Imprisonment where a United States marshal merely confined a prisoner arrested by him upon a warrant in

the penitentiary instead of removing him to the county jail. *Clinton v. Nelson*, 2 Utah 284.

5. *Wiltse v. Holt*, 95 Ind. 469; *Arneson v. Thorstad*, 72 Iowa 145; *Brock v. Stimson*, 108 Mass. 520, 11 Am. Rep. 390; *Pratt v. Brown*, 80 Tex. 608. And see *Scircle v. Neeves*, 47 Ind. 289.

A Person Crazed with Drink, arrested under a peace warrant and brought before a justice of the peace on Saturday night, and committed over Sunday in default of bail, is not falsely imprisoned. *Pepper v. Mayes*, 81 Ky. 674.

6. *Arneson v. Thorstad*, 72 Iowa 145.

7. *Brock v. Stimson*, 108 Mass. 520, 11 Am. Rep. 390; *Hackett v. King*, 6 Allen (Mass.) 58; *Pastor v. Regan*, 9 Misc. Rep. (N. Y. Supreme Ct.) 547. And see *Cochran v. Toher*, 14 Minn. 385.

In the case of *Pastor v. Regan*, 9 Misc. Rep. (N. Y. Supreme Ct.) 547, it appeared that on Friday the defendant arrested the plaintiff without a warrant, and took him into the court room, but did not call the attention of the magistrate to the case, as the complainant could not be found. The plaintiff was therefore detained without any direction from the magistrate until the following Monday, when he was discharged without having been examined. These facts, it was held, rendered the arrest and imprisonment illegal and the defendant a trespasser from the beginning.

8. *Joyce v. Parkhurst*, 150 Mass. 243. See also *Caffrey v. Dragan*, 144 Mass. 204.

Although it is the duty of officers arresting

(4) *Unlawful Restraint After Right of Discharge.* — Any unlawful restraint of a prisoner after he has gained a right to be discharged is an unlawful imprisonment.¹ Thus where a person had been arrested without warrant on suspicion of having committed a felony, but was found to be an innocent person, it was held to have been a false imprisonment for an officer to escort such person from the jail to the railroad station for the purpose of sending him out of the town and remain with him there until the starting of the train.² And though the wrong person be arrested under a writ, the person arrested, however, representing himself to be the person named therein, yet the officer will be liable for detaining him after knowledge that he is not in fact the person named.³

(5) *Whether Lawfulness of Detention Question of Law or Fact.* — In an action for false imprisonment against an officer for arresting without a warrant, the reasonableness of the plaintiff's detention is a question for the court where there is no conflict in the evidence as to the length of time and the circumstances under which the plaintiff was held.⁴ Where the facts are in dispute it is for the jury, under proper instructions by the court, to determine as to the reasonableness of the detention.⁵

4. Detention by Carrier for Nonpayment of Fare. — Though a carrier of passengers is entitled to demand fare from a passenger, the detention of his person for the nonpayment thereof is a false imprisonment.⁶ But where the custom on a boat was to collect the passage tickets as the passengers disembarked, and a passenger attempted to land without a ticket, alleging that he had lost it, it was held that the carrier had a right to detain him for a reasonable time for the purpose of making inquiries into the circumstances of the case.⁷

5. Detention by Innkeeper for Nonpayment of Bill. — It is a false imprisonment if an innkeeper detains the person of a guest for the nonpayment of his bill for entertainment.⁸ And though a person entering a public house con-

a person for violating a regulation with reference to the use of a public bridge to take him at once before a justice of the peace to be dealt with according to law, yet if the offender is willing to pay and does pay to the officer making the arrest the prescribed penalty rather than be taken before a justice of the peace he has no cause of action against the officer for false imprisonment. *Twilley v. Perkins*, 77 Md. 252, 39 Am. St. Rep. 408.

1. *Withers v. Henley*, Cro. Jac. 379.

2. *Bath v. Metcalf*, 145 Mass. 274, 1 Am. St. Rep. 455.

3. *Dunston v. Paterson*, 2 C. B. N. S. 495, 89 E. C. L. 495.

4. **Lawfulness of Detention — Whether Question of Law or Fact.** — *Kirk v. Garrett*, 84 Md. 383; *Cochran v. Toher*, 14 Minn. 385; *Diers v. Mallon*, 46 Neb. 121. Compare *Raitz v. Green*, 7 Ohio Cir. Dec. 238.

5. *Diers v. Mallon*, 46 Neb. 121; *Harris v. Atlanta*, 62 Ga. 290.

6. *Chilton v. London, etc., R. Co.*, 16 M. & W. 212; *Lynch v. Metropolitan El. R. Co.*, 90 N. Y. 83, 43 Am. Rep. 141; *Smith v. State*, 7 Humph. (Tenn.) 43. And see *Standish v. Narragansett Steamship Co.*, 111 Mass. 512, 15 Am. Rep. 66; *Krulevitz v. Eastern R. Co.*, 143 Mass. 228. See generally the title TICKETS AND FARES.

Detention of Passenger by Carrier for Nonpayment of Fare. — In the case of *Lynch v. Metropolitan El. R. Co.*, 90 N. Y. 77, 43 Am. Rep. 141, it was held that a defendant railroad company was liable in an action for damages for false imprisonment by the action of its gate-

keeper in causing the plaintiff's arrest and imprisonment for the nondelivery of a ticket and a refusal to pay fare when demanded, where the ticket had been lost. It was held in this case that while the defendant had the right to make reasonable rules and regulations for the management of its business and conduct of its passengers, and might reasonably require every passenger, before entering one of its cars, to procure a ticket and to produce and deliver up the ticket at the end of his passage or again pay his fare, it could not legally have a rule that if the passenger did not produce a ticket or pay his fare he should then and there be imprisoned until he did so. "At most," continued the court, "the plaintiff was a debtor to the defendant for the amount of his fare, and that debt could be enforced against him by the same remedies which any creditor has against his debtor. If the defendant had the right to detain him to enforce payment of the fare, for ten minutes, it could detain him for one hour, or a day, or a year, or for any other time until compliance with its demand. That would be arbitrary imprisonment by a creditor without process or trial, to continue during his will until his debt should be paid. Even if a reasonable detention may be justified to enable the carrier to inquire into the circumstances, it cannot be to compel payment of fare."

7. *Standish v. Narragansett Steamship Co.*, 111 Mass. 512, 15 Am. Rep. 66.

8. Detention by Innkeeper for Nonpayment of Bill. — In the case of *Sunbolf v. Alford*, 3 M. & W. 248, it was held that an innkeeper could not detain the person of his guest in order to

ducts himself in a disorderly manner, if his arrest and imprisonment are caused by falsely charging him with the commission of a felony there will be a liability in false imprisonment.¹

6. Imprisonment under Military Authority.—Where a private person not subject to the jurisdiction of a court martial is arrested and imprisoned for an offense not within its jurisdiction, it is a false imprisonment.² Where, however, an arrest is made by a military officer under circumstances sufficient to create a reasonable belief that the person arrested has committed a crime within the jurisdiction of a court martial, there will not for this alone be a liability in false imprisonment.³

secure payment of his bill. Lord Abinger, C. B., said in this case: "If an innkeeper has a right to detain the person of his guest for the nonpayment of his bill, he has a right to detain him until the bill is paid, which may be for life; so that this defense supposes that by the common law a man who owes a small debt for which he could not be imprisoned by legal process may yet be detained by an innkeeper for life. The proposition is monstrous."

Where a Restaurant Keeper restrained a customer who he alleged refused to pay a portion of his bill, until a policeman could be summoned, the former was held liable in an action for damages for false imprisonment. *Warren v. Dennett*, 17 Misc. Rep. (N. Y. City Ct.) 86. A similar case was that of *McGarrahan v. Lavers*, 15 R. I. 302, which was an action for damages for false imprisonment. It appeared that the plaintiff at a restaurant ordered a rare steak, the waiter, however, serving one which was well done, and which the plaintiff refused to take. He repeated his order to the waiter, who brought him another steak, which he accepted and offered to pay for, but refused to pay for the one which was well done. The defendant, a clerk having charge of the restaurant, ordered an officer to take the plaintiff into custody. The officer obeyed and took the plaintiff to the police station, from which he was removed to jail. On trial he was acquitted. It was held that the defendant was liable in damages for the arrest and imprisonment. See generally the title **INNS AND INNKEEPERS**.

1. *Rose v. Wilson*, 1 Bing. 353, 8 E. C. L. 544.

2. *Flewster v. Royle*, 1 Campb. 188; *Smith v. Shaw*, 12 Johns. (N. Y.) 257. See the title **MILITARY LAW**.

If a Person Apprehended as a Deserter turns out to be a civilian, and not a recruit or soldier, the person who apprehended him or ordered or procured his imprisonment will be held responsible in damages for the wrong done, for none are bound by the Mutiny Act or the Articles of War except her Majesty's forces. 2 Addison on Torts (Wood's ed.), § 818. And see *Grant v. Gould*, 2 H. Bl. 60.

Arrest by Sergeant Outside of Garrison Limits.—A negro sergeant, in garrison and on duty adjoining an incorporated city, arrested a citizen of Texas with his military guard, while he was outside the garrison grounds, standing in a street of the city, and, with fixed bayonets, escorted him to the garrison, for using insulting words to the sergeant. On the trial of the sergeant on an indictment for false imprisonment it was held that, being charged by the laws of the United States with the good order

and discipline of the fort, the defendant was justified in going out of the fort to remove the citizen and abate the nuisance caused by his abusive language. *Oglesby v. State*, 39 Tex. 53.

Martial Authority to Arrest and Imprison Strictly Construed.—The case of *Trask v. Payne*, 43 Barb. (N. Y.) 569, was an action for damages against a deputy sheriff who had arrested the plaintiff as an alleged deserter from the United States army. Without reference to the question whether or not the plaintiff was in fact a deserter, it was held that the arrest was wrongful and the imprisonment unlawful, the order of the war department under which the arrest was made authorizing only sheriffs, and not deputy sheriffs, to arrest deserters. It was held that such authority must be construed strictly, deputy sheriffs, as stated, having no right to arrest thereunder.

3. Person Suspected of Aiding and Harboring Deserters.—The arrest and confinement of a person under a reasonable suspicion of having aided the escape of deserters from the military service of the United States will not afford any cause of action against a military officer having authority to arrest persons committing such an offense. *Teagarden v. Graham*, 31 Ind. 422.

Person Suspected of Transporting Property to Enemy.—In the case of *Clow v. Wright, Brayt.* (Vt.) 118, it appeared that a military officer stationed on the lines of the territory in time of war seized the person of an individual who was transporting property towards the enemy's province under such circumstances as to create a reasonable suspicion that he was about to transport such property to the enemy, and immediately delivered him over to his superior officer. It was held that the officer seizing the plaintiff was justified.

Evidence Admissible—Plaintiff's Conduct in Mitigation of Damages.—In an action for damages against a military officer for an alleged false imprisonment it was held that the fact that the plaintiff used seditious and violent language which influenced the defendant to order his arrest might be proved in mitigation of damages. *McCall v. McDowell*, 1 Abb. (U. S.) 212.

Mitigation of Damages—Knowledge of Circumstances After Arrest and Imprisonment.—In the case of *Beckwith v. Bean*, 98 U. S. 266, where the plaintiff had been arrested by military authority on the charge of aiding and abetting deserters from the army, it was held that the defendant might show in mitigation of damages, by evidence which was not known to him at the time of the plaintiff's arrest, imprison-

Liability of Superior for Acts of Subordinate. — A superior officer who commands, directs, or ratifies the act of a subordinate constituting a false imprisonment is liable in damages therefor.¹

Liability of Subordinate for Executing Commands of Superior Officer. — The general rule is that a military subordinate is not liable in false imprisonment for acts done in obedience to the orders of his commander.²

7. Imprisonment of Insane Persons. — Any private person may, without warrant, and without incurring liability in false imprisonment, confine a person disordered in mind who appears disposed to do injury to himself or others, such a rule being necessary both for the welfare of the lunatic and for the public safety.³ But such detention is warranted for such length of time only as is required to institute the proper legal proceedings for a judicial determination of the person's sanity.⁴ Where a person actually sane is confined as an insane person, the general rule is that the person imposing the restraint is liable in false imprisonment.⁵

IV. FALSE IMPRISONMENT AS CIVIL WRONG — 1. In General. — As has already

ment, and discharge therefrom, that the latter had, during the rebellion, been engaged in procuring men to enlist in the army and to desert after they had obtained their bounty. Justices Field and Clifford *dissented* in this case.

1. *Smith v. Shaw*, 12 Johns. (N. Y.) 257.

Liability and Duty of Superior Officer. — A military officer who orders the arrest and confinement of a person is bound to see that his subordinates to whom the execution of the order is intrusted use no unnecessary severity or cruelty in carrying the order into execution, and such officer is liable in damages for oppression or undue harshness practised by his subordinates through his neglect to superintend their course. *McCall v. McDowell*, 1 Abb. (U. S.) 212. See also *Dinsman v. Wilkes*, 12 How. (U. S.) 405, which was an action for illegal imprisonment brought by a marine against Commodore Wilkes for an alleged imprisonment in a jail at Honolulu. In this case the Supreme Court said that "it was his [the defendant's] duty, through proper and trustworthy officers, to inquire into his [the plaintiff's] situation and treatment and to see that it was not cruel or barbarous in any respect."

2. Except in a Plain Case of Excess of Authority, where it is at first blush palpable to the commonest understanding that the order given is illegal, a military subordinate should be held excusable in law for acts done in obedience to the orders of his commander. *McCall v. McDowell*, 1 Abb. (U. S.) 212. See the title MILITARY LAW.

3. 2 *Addison on Torts* (Wood's ed.), § 819; *Look v. Dean*, 108 Mass. 116, 11 Am. Rep. 323; *Colby v. Jackson*, 12 N. H. 526; *Com. v. Kirkbride*, 2 Brews. (Pa.) 419.

Imprisonment of Harmless Lunatic. — The case of *Look v. Dean*, 108 Mass. 116, 11 Am. Rep. 323, was an action for false imprisonment brought by the plaintiff against a constable and the keeper of an insane asylum. The plaintiff had been arrested without warrant at a camp-meeting while addressing a crowd. The court held that the mere fact that a man is insane does not authorize his arrest and confinement without a warrant, if he is not dangerous to himself and others, and that the plaintiff was entitled to recover. And see also in this con-

nection the case of *Com. v. Kirkbride*, 2 Brews. (Pa.) 419, in which the court said: "No man can be deprived of his liberty without the judgment of his peers, and * * * it matters not to the law whether the alleged cause of detention is insanity or crime. Unless there is danger to the public or to the patient or to his estate, he should not be in duress pending the investigation, nor indeed after its conclusion, though adverse to him."

Imprisonment of Insane Person for Breach of Peace. — In *Lott v. Sweet*, 33 Mich. 308, the court said: "It is just as competent for a magistrate, as conservator of the peace, to order into custody an insane man who is committing a breach of the peace in his presence as to order the arrest of a sane person under like circumstances; though an insane person may not be guilty of crime, he may lawfully be prevented from doing harm."

4. Detention Beyond Reasonable Time Constitutes Trespass Ab Initio. — *Colby v. Jackson*, 12 N. H. 526.

By Statute in New York (Cook's Penal Code, § 377), "a person who confines an idiot, lunatic, or insane person in any other manner or in any other place than as authorized by law * * * is guilty of a misdemeanor." For a full treatment of this phase of the subject see the title INSANITY.

5. *Van Deusen v. Newcomer*, 40 Mich. 90; *Hewlett v. George*, 68 Miss. 703. And see 2 *Addison on Torts* (Wood's ed.), § 819; *Dobbyn v. Decow*, 25 U. C. C. P. 18. See the title INSANITY.

Evidence Admissible. — In an action for damages for false imprisonment on the ground of insanity, any evidence bearing on the question of the plaintiff's sanity, as for example what she said and did while at the asylum, how she appeared, etc., is admissible. *Van Deusen v. Newcomer* 40 Mich. 90.

Liability of Superintendent of Insane Asylum. — In the case of *Van Deusen v. Newcomer*, 40 Mich. 90, it was held that the superintendent of an insane asylum, having quasi-judicial powers, was not liable in an action for damages for false imprisonment for the confinement of a person in the asylum in good faith and in the intelligent and careful discharge of his duties.

been seen, false imprisonment is a civil wrong, redressed by an action for damages therefor.¹

2. Who Liable in False Imprisonment — *a. LIABILITY OF PERSON CAUSING, INSTIGATING, OR PROCURING IMPRISONMENT* — (1) *In General.* — A person who causes, instigates, and procures an unlawful imprisonment is liable in damages therefor.² Although, it has been held, the defendant himself did

1. 3 Black. Com. 137. And see *supra*, this title, *General Principles — Remedies and Reparation.*

Who May Maintain — Action by Master for Imprisonment of Servant. — A master may maintain an action for damages against one who imprisons his servant for the loss of his service thereby. *Woodward v. Washburn*, 3 Den. (N. Y.) 369. In this case the court said: "It is enough that the relation of master and servant exists between the plaintiff and the person who is disabled or prevented from performing the service he has contracted to perform, by the tortious act of the defendant. It is not necessary, to sustain such action, to show that the person whose service has been lost by the plaintiff was either his apprentice or child. The reason and foundation upon which this doctrine is built seem to be the property that every man has in the service of those whom he has employed, acquired by the contract of hiring and purchased by giving them wages." See the title **MASTER AND SERVANT.**

Action by Husband for Imprisonment of Wife. — See *Coffin v. Varila*, 8 Tex. Civ. App. 417. And see the title **HUSBAND AND WIFE.**

2. General Rule as to Liability for False Imprisonment — England. — *Shergold v. Holloway*, 2 Stra. 1002; *Barker v. Braham*, 2 W. Bl. 866; *Warner v. Riddiford*, 4 C. B. N. S. 200, 93 E. C. L. 200.

Canada. — *Carter v. Purrington*, 7 New Bruns. 226; *Hawkins v. Patterson*, 23 U. C. Q. B. 197; *Patterson v. Scott*, 38 U. C. Q. B. 642. And see *Fraser v. Gagnon*, 11 Rev. Lég. 517.

Alabama. — *Clifton v. Grayson*, 2 Stew. (Ala.) 412; *Sugg v. Pool*, 2 Stew. & P. (Ala.) 196.

Arkansas. — *Floyd v. State*, 12 Ark. 43, 54 Am. Dec. 250.

Connecticut. — *Stoyel v. Lawrence*, 3 Day (Conn.) 1; *Burlingham v. Wylee*, 2 Root (Conn.) 152; *Stoddard v. Bird*, Kirby (Conn.) 65. And see *Moulton v. Burbanks*, 1 Root (Conn.) 264.

District of Columbia. — *Bright v. Patton*, 5 Mackey (D. C.) 534, 60 Am. Rep. 396; *Benham v. Vernon*, 5 Mackey (D. C.) 18.

Georgia. — *Thorpe v. Wray*, 68 Ga. 359.

Illinois. — *Barnes v. Barber*, 6 Ill. 405.

Indiana. — *Taylor v. Moffatt*, 2 Blackf. (Ind.) 305; *Veneman v. Jones*, 118 Ind. 45, 10 Am. St. Rep. 100. And see *Davis v. Bush*, 4 Blackf. (Ind.) 330.

Kentucky. — *Webber v. Kenny*, 1 A. K. Marsh. (Ky.) 345.

Louisiana. — *Letzler v. Huntington*, 24 La. Ann. 330.

Michigan. — *Livingston v. Burroughs*, 33 Mich. 511.

Missouri. — *Taaffe v. Slevin*, 11 Mo. App. 507.

Nebraska. — *Painter v. Ives*, 4 Neb. 122.

New Hampshire. — *Gibbs v. Randlett*, 58 N. H. 407.

New York. — *Warren v. Dennett*, 17 Misc. Rep. (N. Y. City Ct.) 86; *Murray v. Friensberg*, (Supreme Ct.) 15 N. Y. Supp. 450; *Dodge v. Alger*, 53 N. Y. Super. Ct. 107; *Savacool v. Boughton*, 5 Wend. (N. Y.) 170, 21 Am. Dec. 181; *Sleight v. Leavenworth*, 5 Duer (N. Y.) 122; *Curry v. Pringle*, 11 Johns. (N. Y.) 444; *Comfort v. Fulton*, 13 Abb. Pr. (N. Y. Supreme Ct.) 276; *Wilson v. Robinson*, 6 How. Pr. (N. Y. Supreme Ct.) 110; *Gearon v. Savings Bank*, 50 N. Y. Super. Ct. 264.

Rhode Island. — *McGarrahan v. Lavers*, 15 R. I. 302.

Texas. — *Pratt v. Brown*, 80 Tex. 608.

West Virginia. — *Ogg v. Murdock*, 25 W. Va. 139.

Wisconsin. — *Gelzenleuchter v. Niemeyer*, 64 Wis. 320, 54 Am. Rep. 616; *Fenelon v. Butts*, 53 Wis. 344.

A Person Who Instigates, Directs, and Demands the arrest of another by an officer for an alleged offense committed out of the presence of the officer is liable in damages for false imprisonment. *Warren v. Dennett*, 17 Misc. Rep. (N. Y. City Ct.) 86. Likewise it is held in 2 *Addison on Torts* (Wood's ed.), § 831, that every private unofficial person not acting in a judicial capacity or in the authorized execution of legal process is responsible in damages for a wrongful imprisonment ordered, directed, or authorized by him. And in the case of *McGarrahan v. Lavers*, 15 R. I. 302, the court said: "The law is well settled that every private person is responsible for a wrongful imprisonment directed or authorized by him." *Citing Barker v. Braham*, 2 W. Bl. 866; *Collett v. Foster*, 2 H. & N. 356; *Burnap v. Marsh*, 13 Ill. 535; *Clifton v. Grayson*, 2 Stew. (Ala.) 412.

A Person Who Procures an Attorney to sue out an illegal and void *capias* against another is liable in an action for damages for false imprisonment. *Barker v. Braham*, 2 W. Bl. 866.

Arrest, Incarceration, and Trial — One Continuous Imprisonment. — In the case of *Shea v. Manhattan R. Co.*, 15 Daly (N. Y.) 528, it was held that the illegal arrest of the plaintiff at the instigation of one of the defendants' employees and his subsequent incarceration in a station house and the proceedings before a magistrate the next day, at the conclusion of which the plaintiff was discharged, constituted one continuous act of imprisonment for which the defendants were liable. And see *Rown v. Christopher*, etc., R. Co., 34 Hun (N. Y.) 471.

By Merely Testifying as a Witness in a Cause no liability for false imprisonment can be incurred. *Gifford v. Wiggins*, 50 Minn. 401; *Wagstaff v. Schippel*, 27 Kan. 450.

Expression of Opinion as to Prisoner's Identity. — Where the only connection of the defendant with the plaintiff's arrest and imprisonment

not in person impose the restraint upon the plaintiff, if he is the moving cause of the imprisonment he will be held responsible for it.¹ Nor is it necessary to the liability of a defendant in false imprisonment that express authority or direction to imprison be shown.² But the fact that a party is present on the occasion of a false imprisonment and neither objects thereto nor seeks to prevent it is not sufficient to render him liable in damages therefor.³ And, on the other hand, a defendant may be liable although not present and participating.⁴

(2) *Procuring Arrest on Voidable Warrant* — (a) **Warrant Voidable for Irregularity in Procuring.** — Where a warrant is voidable by reason of some irregularity or misconduct of the person procuring its issuance and execution, a party imprisoned thereunder may maintain an action for damages for false imprisonment against the former.⁵ Thus where a person procured a *capias* to be issued without a compliance with certain statutory prerequisites, he was held liable

was the expression of an opinion as to the identity of the plaintiff, it was held that no liability in damages was incurred provided the defendant acted honestly and in good faith. *Farnam v. Feeley*, 56 N. Y. 451.

Evidence of Statements of Officer at Time of Arrest. — It has been held that where the officer making an arrest stated to the plaintiff at the time of the arrest that the defendant had accused the plaintiff of stealing, such fact is admissible as part of the *res gestæ*. *Rich v. McInerny*, 103 Ala. 345. And see also the case of *Rogers v. Wilson*, Minor (Ala.) 407, 12 Am. Dec. 61, wherein it was held that the declarations of the defendant, made at the time that the plaintiff was in custody by virtue of a warrant, were admissible in evidence. But see in this connection *Hawkins v. Manston*, 57 Minn. 323, wherein it was held that the mere declaration of one of the persons who arrested the plaintiff that it was done under the orders of the defendant is not sufficient to render the latter liable in damages for false imprisonment.

Declarations Subsequent to Arrest. — In an action for false arrest and imprisonment it has been held that the declarations of the defendant's employee, who participated in the alleged arrest, made thereafter, could not be introduced in evidence. *Geary v. Stevenson*, 169 Mass. 23.

1. **Need Not Personally Aid or Abet.** — *Warner v. Riddiford*, 4 C. B. N. S. 180, 93 E. C. L. 180. And see *Hackett v. King*, 6 Allen (Mass.) 58.

A party who procures an illegal arrest to be made is liable in trespass for false imprisonment though not personally aiding and abetting. *Clifton v. Grayson*, 2 Stew. (Ala.) 412.

2. *Burk v. Howley*, 179 Pa. St. 539; *Hurlehy v. Martine*, (Supreme Ct.) 10 N. Y. Supp. 92; *Glynn v. Houston*, 2 Scott N. R. 554. And see *Limbeck v. Gerry*, 15 Misc. Rep. (N. Y. Supreme Ct.) 663; *Hackett v. King*, 6 Allen (Mass.) 58.

No Express Authority — Arrest by Knowledge and Consent. — In an action for false imprisonment following an illegal arrest the defendant will be liable if the detention was by his knowledge and consent, though he may not have expressly directed the officer to take the plaintiff into custody. *Burk v. Howley*, 179 Pa. St. 539.

The Direction by an Attorney to an Officer to stop a witness about to leave the city does not, however, render the attorney liable for an

arrest and involuntary detention by the officer. See *Fire Assoc. v. Fleming*, 78 Ga. 733.

3. **Mere Presence of Defendant Not Sufficient to Render Liable.** — *Walker v. State*, 25 Tex. App. 443.

Conductor of Train Need Not Interfere to Prevent Wrongful Arrest of Passenger by Officers. — *Dugan v. Baltimore, etc., R. Co.*, 159 Pa. St. 248, 39 Am. St. Rep. 672.

4. *Clifton v. Grayson*, 2 Stew. (Ala.) 412; *Floyd v. State*, 12 Ark. 43, 54 Am. Dec. 250; *Stoddard v. Bird*, Kirby (Conn.) 65; *Burlingham v. Wylee*, 2 Root (Conn.) 152; *Stoyel v. Lawrence*, 3 Day (Conn.) 1; *Cooper v. Johnson*, 81 Mo. 483; *Coyles v. Hurtin*, 10 Johns. (N. Y.) 85; *Tenney v. Harvey*, 63 Vt. 520.

5. **Arrest under Voidable Warrant — England.** — *Parsons v. Lloyd*, 3 Wils. 341; *Barker v. Braham*, 3 Wils. 368; *Williams v. Smith*, 14 C. B. N. S. 596, 108 E. C. L. 596; *Philips v. Biron*, 1 Stra. 509.

Canada. — *Carter v. Purrington*, 7 New Bruns. 226; *Bannatyne v. Canada Paper Co.*, 3 Leg. N. (Quebec) 207; *Craig v. Giberson*, 7 New Bruns. 207; *Marois v. Bolduc*, 7 Rev. Lég. 148; *Huard v. Dunn*, 3 Rev. Lég. 28; *Blanchet v. Jalbert*, Quebec L. R. 9 Super. Ct. 333; *Shaw v. McKenzie*, 4 Leg. N. (Quebec) 89.

Kentucky. — *Webber v. Kenny*, 1 A. K. Marsh. (Ky.) 345.

Maine. — *Virgin, J.*, in *Winchester v. Everett*, 80 Me. 535, 6 Am. St. Rep. 228.

New Hampshire. — *Gibbs v. Randlett*, 58 N. H. 407.

New York. — *Brown v. Demont*, 9 Cow. (N. Y.) 263; *Chapman v. Dyett*, 11 Wend. (N. Y.) 31, 25 Am. Dec. 598; *Curry v. Pringle*, 11 Johns. (N. Y.) 444; *Sleight v. Leavenworth*, 5 Duer (N. Y.) 122; *Sullivan v. Newman*, (Supreme Ct.) 17 N. Y. Supp. 424; *Ackroyd v. Ackroyd*, 3 Daly (N. Y.) 39; *Bergman v. Noble*, 45 Hun (N. Y.) 133; *Savacool v. Boughton*, 5 Wend. (N. Y.) 170, 21 Am. Dec. 181.

Oregon. — *Neimitt v. Conrad*, 22 Oregon 164.

Vermont. — *Pierson v. Gale*, 8 Vt. 509, 30 Am. Dec. 487.

West Virginia. — *Ogg v. Murdock*, 25 W. Va. 139.

And see *Davis v. Bush*, 4 Blackf. (Ind.) 330; *Day v. Bach*, 87 N. Y. 56.

Unwarranted Body Execution. — Where the plaintiff in an action for damages for false imprisonment had been imprisoned under a body

in an action to the person imprisoned.¹ But, it has been held, before such liability can be enforced the warrant must be declared void and set aside by the proper tribunal,² as the proceeding will not be declared void in a collateral attack.³

Imprisonment for One Reason Not to Be Justified on Another Ground. — A wrongful imprisonment consequent upon an arrest made for a cause specified in an insufficient warrant cannot, in an action for damages therefor, be justified as

execution issued upon a judgment of a class in which such executions were not authorized, it was held that the clerk and attorney at law instrumental in causing the execution to be issued might be liable in damages for false imprisonment although the execution was not void because of any irregularity in its form. *Sullivan v. Newman*, (Supreme Ct.) 17 N. Y. Supp. 424.

Imprisonment of One Not Party to Suit for Violation of Injunction. — Where a person not a party to a suit in which an injunction issued was wrongfully imprisoned for a violation of the injunction, it was held that he had a right of action against those at whose instance and for whose benefit the order of imprisonment was made and obtained. *Barthe v. Larquie*, 42 La. Ann. 131.

Responsibility of Both Attorney and Client. — Where a person has been arrested and imprisoned under authority of legal process which has been set aside as irregular, both the attorney who sued out the process and the client who employed the attorney are responsible in damages in an action for false imprisonment. 2 Addison on Torts (Wood's ed.), § 831.

Arrest by Forging Magistrate's Name on Writ. — If a person procures the arrest of a person by forging a magistrate's name on the writ, he will be held liable in damages for false imprisonment. See *Moulton v. Burbanks*, 1 Root (Conn.) 264.

1. Noncompliance with Statutory Prerequisites. — *Whitcomb v. Cook*, 39 Vt. 585; *Ogg v. Murdock*, 25 W. Va. 139. And see *Davis v. Bush*, 4 Blackf. (Ind.) 330.

Arrest on Mesne Process Without Requisite Affidavit. — It has been held in *Massachusetts* that a person who causes another to be arrested on mesne process in an action of tort, without first making the affidavit required by the statute of 1854, c. 63, is liable to an action by the person arrested. *Cody v. Adams*, 7 Gray (Mass.) 59.

One Who Directs a Constable in Whose Hands Is a Replevin Writ authorizing an arrest only in case there is insufficient property to satisfy the judgment, to arrest the plaintiff although there was property ample upon which levy might have been made, is liable in damages for the unlawful imprisonment. *Pinkerton v. Gilbert*, 22 Ill. App. 568.

Warrant Not Justified by Statute. — In the case of *Gold v. Bissell*, 1 Wend. (N. Y.) 210, it was held that a party procuring the issuance of a warrant without oath founded on the return of a summons served by copy issued one year after the summons would be liable in damages for false imprisonment, such warrant not being justified by the statute. And see *Sleight v. Leavenworth*, 5 Duer (N. Y.) 122.

Under a Writ of Execution authorizing the

officer to arrest the plaintiff only in case the judgment should not be paid or an amount of personal property sufficient to satisfy it should not be found, it is a false imprisonment to take a person into custody where, though the property levied on has been subsequently replevied, the execution has never been set aside, vacated, discharged, or relinquished, and no further effort has been made to enforce it. *Matter of Grey*, 41 Kan. 461.

Evidence Admissible. — In an action for damages for false imprisonment under an execution against the person issued in disregard of the statutory requirement that execution should have been first issued against the debtor's property, the plaintiff was permitted to testify that before his arrest he did not even know that a judgment had been rendered against him. It was held to be reversible error to exclude evidence in rebuttal that the judgment had been rendered after fair trial. *Bergman v. Noble*, 45 Hun (N. Y.) 133.

2. Warrant Voidable for Irregularity Must Be Declared Void by Proper Tribunal. — *Connecticut.* — *Wooster v. Parsons*, Kirby (Conn.) 110. *Maine.* — *Winchester v. Everett*, 80 Me. 535, 6 Am. St. Rep. 228.

Michigan. — *Johnson v. Morton*, 94 Mich. 1. *Nebraska.* — *Miller v. Woods*, 23 Neb. 200.

New York. — *Brown v. Crowl*, 5 Wend. (N. Y.) 298; *Searll v. McCracken*, 16 How. Pr. (N. Y. Supreme Ct.) 262; *Chapman v. Dyett*, 11 Wend. (N. Y.) 31, 25 Am. Dec. 598; *Hallock v. Dominy*, 69 N. Y. 238; *Bergman v. Noble*, 45 Hun (N. Y.) 133. And see *Brown v. Demont*, 9 Cow. (N. Y.) 263; *Day v. Bach*, 87 N. Y. 56. *Oregon.* — *Neimitz v. Conrad*, 22 Oregon 164.

South Carolina. — *Wilkins v. Hall*, 2 McCord L. (S. Car.) 205.

West Virginia. — *Ogg v. Murdock*, 25 W. Va. 139.

Canada. — *Marois v. Bolduc*, 7 Rev. Lég. 148; *Huard v. Dunn*, 3 Rev. Lég. 28. And see *Blanchet v. Jalbert*, Quebec L. R. 9 Super. Ct. 333.

Where the Supreme Court Has Reversed the Proceedings under a warrant issued at the instance of a creditor for the arrest of his debtor, for the want of jurisdiction in the judge who issued the warrant, such judgment is conclusive between the parties in an action for false imprisonment brought by the debtor against the creditor who directed the arrest. *Vredenburg v. Hendricks*, 17 Barb. (N. Y.) 179.

3. Proceedings Not Held Void on Collateral Attack. — *Winchester v. Everett*, 80 Me. 535, 6 Am. St. Rep. 228; *Johnson v. Morton*, 94 Mich. 1; *Miller v. Woods*, 23 Neb. 200; *Hallock v. Dominy*, 69 N. Y. 238; *Small v. Benfield*, 66 N. H. 206. Compare *Deyo v. Van Valkenburgh*, 5 Hill (N. Y.) 242.

an arrest for a different offense,¹ even though an arrest on such latter account might not have been unlawful.² And likewise in an action for damages for false imprisonment consequent upon an illegal arrest under a warrant, evidence of circumstances which would have justified an arrest without a warrant is inadmissible.³

(b) **Warrant Voidable for Error Simply.** — Where a warrant of arrest is voidable for error simply, the person procuring its issuance and execution is not liable in an action for false imprisonment.⁴ That which was legally done at the time, it has been held, cannot be converted into a wrong by relation after the process has by judicial action been set aside.⁵ The rule of exemption above referred to is founded in public policy and is applicable alike to civil and criminal remedies and proceedings, that parties may freely resort to the courts for the enforcement of their rights without the risk of punishment for their ignorance of the law, or for the errors of courts and judicial officers.⁶

(c) **Distinction Between Invalidity for Error and for Irregularity.** — There is a manifest distinction, it has been held, between setting aside a process for irregularity and reversing a proceeding for error on appeal. In the one case a man acts irregularly and improperly without the sanction of any court. He therefore takes the consequences of his own unauthorized act. But where he relies upon the judgment of a competent court, however erroneous that judgment may be, the party acting upon the faith of it ought to be protected.⁷

(3) **Procuring Arrest on Void Warrant.** — A person who procures the issue-

1. *Malcolmson v. Gibbons*, 56 Mich. 459; *Murphy v. Kron*, 20 Abb. N. Cas. (N. Y. Supreme Ct.) 259. And see *Wait v. Green*, 5 Park. Cr. Rep. (N. Y. Supreme Ct.) 185.

2. *Murphy v. Kron*, 20 Abb. N. Cas. (N. Y. Supreme Ct.) 259.

3. *Holmes v. Blyler*, 80 Iowa 365. That the arrest might have been made, said the court in this case, by an authority other than that under which the officer claimed to act, is wholly immaterial.

4. **Writ Not Void Because Wrongfully Issued.** — *Philips v. Biron*, 1 Stra. 509; *Williams v. Smith*, 14 C. B. N. S. 596, 108 E. C. L. 596; *Smith v. Sydney*, L. R. 5 Q. B. 203; *Carman v. Emerson*, 71 Fed. Rep. 264, 36 U. S. App. 388; *Wagstaff v. Schippel*, 27 Kan. 450; *Winchester v. Everett*, 80 Me. 535, 6 Am. St. Rep. 228; *Schultz v. Huebner*, 108 Mich. 274; *Marks v. Townsend*, 97 N. Y. 590; *Nebenzahl v. Townsend*, 61 How. Pr. (N. Y. C. Pl.) 353; *Campbell v. Ewalt*, 7 How. Pr. (N. Y. Supreme Ct.) 399; *Hallock v. Dominy*, 69 N. Y. 328; *Fisher v. Langbein*, 62 How. Pr. (N. Y. Supreme Ct.) 238; *Brown v. Crowl*, 5 Wend. (N. Y.) 298; *Wood v. Kinsman*, 5 Vt. 589. And see *Nowak v. Waller*, (Supreme Ct.) 10 N. Y. Supp. 199; *Chapman v. Dyett*, 11 Wend. (N. Y.) 31, 25 Am. Dec. 598; *Ackerly v. Parkinson*, 3 M. & S. 411; *Doswell v. Impey*, 1 B. & C. 163, 8 E. C. L. 70; *Miller v. Adams*, 52 N. Y. 409.

5. *Marks v. Townsend*, 97 N. Y. 590.

Execution on Judgment and Imprisonment After Discharge in Bankruptcy. — Where a plaintiff, notwithstanding an insolvent discharge exempting the defendant from execution, obtained a general judgment and procured an execution on which the defendant was arrested, the judgment was held to be simply erroneous and protected the plaintiff from an action for false imprisonment. *Brown v. Crowl*, 5 Wend. (N. Y.) 298. And see *Day v.*

Bach, 87 N. Y. 56; *Marks v. Townsend*, 97 N. Y. 590.

Arrest on Invalid Warrant of Commissioner in Bankruptcy. — Where attorneys conducting the business of a fiat in bankruptcy take out a summons to attend before a commissioner, which is disobeyed, and they afterwards obtain a warrant of the commissioner to arrest and bring before him for examination the party summoned, which warrant proves invalid, the persons are not liable in trespass, the issuance of the warrant of arrest being the judicial action of the commissioner. *Cooper v. Harding*, 7 Q. B. 928, 53 E. C. L. 928.

The Order of an Appellate Court that a Capias be Vacated and the proceedings thereunder quashed is a proceeding in the nature of a review of the action of the court below, and not an adjudication that the proceedings are absolutely void so as to afford no protection in an action for false imprisonment to the officer who executed the writ or the person who procured its issuance. *Johnson v. Morton*, 94 Mich. 1.

In Order to Entitle a Person Against Whom Process Has Issued to maintain an action for false imprisonment, he must show that the process has been set aside by reason of some misconduct or at least some irregularity on the part of the person suing it out. The acts of a court, though erroneous, cannot be made the foundation for such an action of damages. *Williams v. Smith*, 14 C. B. N. S. 596, 108 E. C. L. 596. "If it were otherwise," said *Willes, J.*, in this case, "suits would incur responsibilities which it would be fearful to contemplate," and "every person enforcing the execution of a judgment would be held responsible for its correctness."

6. *Marks v. Townsend*, 97 N. Y. 590; *Virgin, J.*, in *Winchester v. Everett*, 80 Me. 535, 6 Am. St. Rep. 228.

7. *Byles, J.* in *Williams v. Smith*, 14 C. B. N. S. 596, 108 E. C. L. 596.

ance by a judicial officer of a void warrant of arrest is liable in damages for false imprisonment.¹

Mere Fact of Party to Suit. — But the fact that a person is a party to a suit before a magistrate in the course of which a void warrant of arrest was issued and executed is not alone sufficient to render him liable in damages therefor.²

Calling on Judicial Officer to Exercise Jurisdiction. — And indeed it seems that in order to render a person liable in damages for false imprisonment for an arrest on void warrant there must be something more than a mere calling upon a magistrate to exercise his jurisdiction.³

Merely Stating Facts. — Where a person merely states facts to a judicial officer, upon which a warrant issues, the former will not be liable though the facts stated constitute no crime,⁴ or the arrest was for the violation of an invalid

1. **Where Warrant Void.** — *Shergold v. Hol-loway*, 2 Stra. 1002; *Barker v. Braham*, 2 W. Bl. 866; *Thorpe v. Wray*, 68 Ga. 359; *Barnes v. Barber*, 6 Ill. 405; *Livingston v. Burroughs*, 33 Mich. 511; *Boeger v. Langenberg*, 97 Mo. 390, 10 Am. St. Rep. 322; *Painter v. Ives*, 4 Neb. 122; *Savacool v. Boughton*, 5 Wend. (N. Y.) 170, 21 Am. Dec. 181; *Wilson v. Robinson*, 6 How. Pr. (N. Y. Supreme Ct.) 110; *Curry v. Pringle*, 11 Johns. (N. Y.) 444; *Comfort v. Fulton*, 13 Abb. Pr. (N. Y. Supreme Ct.) 276; *Frazier v. Turner*, 76 Wis. 562; *Gelzen-leuchter v. Niemeyer*, 64 Wis. 320, 54 Am. Rep. 616.

Where Magistrate Issuing Warrant Has No Jurisdiction. — *Curry v. Pringle*, 11 Johns. (N. Y.) 444.

Illegal Imprisonment for Violation of Injunction. — *Taylor v. Moffatt*, 2 Blackf. (Ind.) 305.

Arrest on Insufficient Affidavit. — *Boeger v. Langenberg*, 97 Mo. 390, 10 Am. St. Rep. 322.

Procuring Warrant of Arrest Without Any Competent Evidence of Guilt. — *Comfort v. Fulton*, 13 Abb. Pr. (N. Y. Supreme Ct.) 276; *Wilson v. Robinson*, 6 How. Pr. (N. Y. Supreme Ct.) 110.

Arrest on Void Information and Warrant. — *Hewitt v. Newburger*, 141 N. Y. 538.

Statutory Provisions. — The Code of Georgia, § 3852 (Code 1882, § 2991) provides: "If the imprisonment is by virtue of a warrant, neither the party *bona fide* suing out, nor the officer who in good faith executes the same, is guilty of false imprisonment, though the warrant be defective in form, or be void for want of jurisdiction." See *Manning v. Mitchell*, 73 Ga. 660.

2. **Mere Fact of Party to Suit.** — *Kreiser v. Scofield*, 10 Misc. Rep. (N. Y. C. Pl.) 350; *Brown v. Demont*, 9 Cow. (N. Y.) 263; *Gold v. Bissell*, 1 Wend. (N. Y.) 210. And see *Von Latham v. Libby*, 38 Barb. (N. Y.) 339; *Von Latham v. Rowan*, 17 Abb. Pr. (N. Y. Supreme Ct.) 237; *Burns v. Erben*, 26 How. Pr. (N. Y. Super. Ct.) 273.

Parties to a Suit Before a Justice are not liable in damages for false imprisonment by the issuance and execution of a void warrant, unless they directed or sanctioned it. *Gold v. Bissell*, 1 Wend. (N. Y.) 210. And see *Percival v. Jones*, 2 Johns. Cas. (N. Y.) 51; *Taylor v. Trask*, 7 Cow. (N. Y.) 249; *Kreiser v. Scofield*, 10 Misc. Rep. (N. Y. C. Pl.) 350.

The Plaintiff in Proceedings in the course of which an execution against the person after

judgment issues is not liable in damages for the arrest of such person where he neither directed, aided, nor abetted the illegal arrest. *Kreiser v. Scofield*, 10 Misc. Rep. (N. Y. C. Pl.) 350.

Improper Execution of Warrant on Sunday. — In the case of *Neimitz v. Conrad*, 22 Oregon 164, it was held that the defendants in an action for damages for false imprisonment were not liable for the improper execution of a warrant of arrest on Sunday unless the officer who executed the process was acting by their direction at the time. See, however, in this connection, *Ocean Steamship Co. v. Williams*, 69 Ga. 251; *Roth v. Smith*, 41 Ill. 314; *Adams v. Freeman*, 9 Johns. (N. Y.) 118.

3. **Calling on Judicial Officer to Exercise Jurisdiction.** — *Brown v. Chapman*, 6 C. B. 365, 60 E. C. L. 365; *Brown v. Moore*, 15 New Bruns. 407; *Smith v. Evans*, 13 U. C. C. P. 60; *McKinley v. Munsie*, 15 U. C. C. P. 230; *Langford v. Boston*, etc., R. Co., 144 Mass. 431; *Johnson v. Morton*, 94 Mich. 1; *Gifford v. Wiggins*, 50 Minn. 401; *Boeger v. Langenberg*, 97 Mo. 390, 10 Am. St. Rep. 322; *Booth v. Kurrus*, 55 N. J. L. 370; *Wheeler v. Gavin*, 5 Ohio Cir. Ct. Rep. 246, 3 Ohio Cir. Dec. 123; *Marks v. Sullivan*, 9 Utah 12.

Where No Request for Issuance of Warrant or Participation in Service. — Where a person merely makes a statement before a magistrate of facts which he regards as constituting an offense, but does not request that a warrant issue or participate in its service, he is not liable in an action for damages for false imprisonment consequent upon the arrest of such person. *Nowak v. Waller*, (Supreme Ct.) 10 N. Y. Supp. 199.

Defendant Not Liable. — In the case of *Brown v. Chapman*, 6 C. B. 365, 60 E. C. L. 365, the facts were that the plaintiff voluntarily went before a police magistrate to meet a charge of embezzlement which was about to be made against him by the defendant. There was a hearing on the charge and the plaintiff was held to bail. It was decided, however, that the defendant was not liable in damages for false imprisonment, his acts amounting to no more than calling upon the magistrate to exercise his jurisdiction.

4. *Murphy v. Walters*, 34 Mich. 180; *Mitchell, J.*, in *Gifford v. Wiggins*, 50 Minn. 401; *Nowak v. Waller*, (Supreme Ct.) 10 N. Y. Supp. 199. And see *Barker v. Stetson*, 7 Gray (Mass.) 53, 66 Am. Dec. 457; *Fenelon v. Butts*, 49 Wis. 342.

municipal ordinance.¹

Entering Complaint. — It has also been held in this connection that the mere entering of a complaint is not sufficient to render the complainant liable even though the magistrate had no jurisdiction to issue the warrant.²

Some Additional Circumstance Requisite. — In order to render a defendant under such circumstances liable in damages for a false imprisonment there should be some participation in the issuance and execution of the warrant in addition to the mere making of the affidavit or complaint.³

Knowledge that Facts Stated Constitute No Crime. — And it has been said that even though the person making an affidavit upon which a warrant of arrest issued knew that the facts stated therein did not constitute an indictable offense, no liability in false imprisonment would thereby result, the complainant having the right to submit the facts to the judgment of the justice who issued the warrant, no matter what the former's notion was as to their legal value.⁴

It Has, However, Been Held Generally in Some Cases that the party who makes an affidavit upon which a warrant of arrest issues for another is liable in an action for damages for false imprisonment, where the affidavit made gives no jurisdiction for the issuance of the warrant.⁵

If a Person Merely Communicates Facts or Circumstances of Suspicion to officers, leaving them to act on their own judgment and responsibility, he is not liable in an action for damages for false imprisonment. *Brown v. Chadsey*, 39 Barb. (N. Y.) 253.

1. Imprisonment for Violation of Void Ordinance. — In the case of *Gifford v. Wiggins*, 50 Minn. 401, the defendant made complaint before a magistrate for the violation of a village ordinance which was in fact invalid. The plaintiff was arrested thereon and subsequently discharged on habeas corpus proceedings. It was held in this case that the defendant was not liable, as the justice had general jurisdiction over the subject-matter, to wit, prosecutions for the violations of city ordinances.

2. Liability of Person Merely Entering Complaint. — *West v. Smallwood*, 3 M. & W. 418; *Carratt v. Morley*, 1 Q. B. 18, 41 E. C. L. 417; *Brown v. Chapman*, 6 C. B. 365, 60 E. C. L. 365; *Brown v. Moore*, 15 New Bruns. 407; *Smith v. Evans*, 13 U. C. C. P. 60; *McKinley v. Munsie*, 15 U. C. C. P. 230; *Dusy v. Helm*, 59 Cal. 188; *Langford v. Boston*, etc., R. Co., 144 Mass. 431; *Murphy v. Walters*, 34 Mich. 180; *Gifford v. Wiggins*, 50 Minn. 401; *Von Latham v. Libby*, 38 Barb. (N. Y.) 345; *Fenelon v. Butts*, 49 Wis. 342; *Gelzenleuchter v. Niemeyer*, 64 Wis. 316, 54 Am. Rep. 616. And see *Barker v. Stetson*, 7 Gray (Mass.) 53, 66 Am. Dec. 457.

3. Some Additional Circumstance Requisite. — *Cooper v. Harding*, 7 Q. B. 928, 53 E. C. L. 928; *Stephens v. Stephens*, 24 U. C. C. P. 424; *Langford v. Boston*, etc., R. Co., 144 Mass. 431; *Murphy v. Walters*, 34 Mich. 180; *Boeger v. Langenberg*, 97 Mo. 390, 10 Am. St. Rep. 322. And see *West v. Smallwood*, 3 M. & W. 418.

Liability Where Participation in Issuance or Execution of Warrant. — Though a private person cannot be held civilly liable for the orders or decrees of judicial officers before whom he has made a complaint or made a charge, yet if he officiously interferes and gives orders or directions to police constables for the imprisonment of a plaintiff he will be held liable in

damages if he is not able to excuse or justify the act. 2 Addison on Torts (Wood's ed.), § 831. And see *Stephens v. Stephens*, 24 U. C. C. P. 424.

Going with Officer to Point Out Person to Be Arrested. — Though a person who procured the issuance of a void warrant of arrest only went with the officer to point out the person thereunder at the officer's request, he is not exempt from liability in false imprisonment. *Coffin v. Varila*, 8 Tex. Civ. App. 417.

4. *Booth v. Kurrus*, 55 N. J. L. 370.

5. *Paulus v. Grobben*, 104 Mich. 42; *Comfort v. Fulton*, 13 Abb. Pr. (N. Y. Supreme Ct.) 276; *Coffin v. Varila*, 8 Tex. Civ. App. 417. And see *Boeger v. Langenberg*, 97 Mo. 390, 10 Am. St. Rep. 322.

In the case of *Swart v. Rickard*, 148 N. Y. 264, the liability of the defendant in an action for false imprisonment, he having given the deposition to the magistrate upon which the warrant of arrest issued, was made to depend upon the right of the magistrate to cause the plaintiff's arrest upon the evidence furnished by the deposition. In other words, if the facts stated were, in the exercise of the magistrate's judicial discretion, sufficient to give him jurisdiction, it was held that the defendant could not be held liable. But this case does not, it would seem, quite go to the extent of the text proposition, for if the facts stated in the affidavit were sufficient to give jurisdiction to the magistrate, then it was not a case of no jurisdiction, and the warrant issuing was valid. If the affidavit or deposition had not given jurisdiction to the magistrate, then the question would seem to be, according to the weight of authority, the extent of the defendant's participation in the arrest and imprisonment. The true rule is believed to be this: Though the warrant on which the arrest was made is invalid for insufficiency of the affidavit, the affiant is not, however, liable in false imprisonment unless he participated in the issuance or execution of the warrant beyond the mere making of the affidavit. See cases cited in foregoing notes.

It has been held that where a judicial officer is not liable because the act done is within the

Not Necessary to Be Formally Set Aside. — It is not necessary that process void and not merely voidable should be set aside before bringing an action for false imprisonment.¹

(4) *Procuring Arrest Without Warrant.* — A private person who improperly procures an arrest without warrant is liable in damages for false imprisonment.²

But There Is a Difference between directing and authorizing an arrest or giving a person into an officer's custody and the mere giving of information upon which an officer of his own motion takes a person into custody without warrant.³ In the former case the person so directing and authorizing or actually giving into custody will be liable in false imprisonment,⁴ but in the latter instance, where the defendant does no more than give the information which leads to the arrest, he is not liable.⁵

scope of his judicial duties, the party instigating the act can never be held liable. *Pierson v. Gale*, 8 Vt. 509, 30 Am. Dec. 487. This is too broad a statement of the rule, for, as will be seen hereafter, where a warrant of arrest is voidable for some fault or irregularity of the person procuring its issuance, the latter may be held liable in false imprisonment after the warrant has been set aside.

1. *Bergman v. Noble*, 45 Hun (N. Y.) 133. And see *Day v. Bach*, 87 N. Y. 56.

2. *Procuring Arrest Without Warrant.* — *Pearce v. Needham*, 37 Ill. App. 93; *Veneman v. Jones*, 118 Ind. 45, 10 Am. St. Rep. 100; *Taafe v. Slevin*, 11 Mo. App. 507; *Murray v. Friensberg*, (Supreme Ct.) 15 N. Y. Supp. 450; *Warren v. Dennett*, 17 Misc. Rep. (N. Y. City Ct.) 86; *Farnam v. Feeley*, 56 N. Y. 451; *Dodge v. Alger*, 53 N. Y. Super. Ct. 107; *Karner v. Stump*, 12 Tex. Civ. App. 460; *Whitcomb v. Cook*, 39 Vt. 585; *Patterson v. Scott*, 38 U. C. Q. B. 642. And see *Collett v. Foster*, 2 H. & N. 356; *Griffin v. Coleman*, 4 H. & N. 265; *Fraser v. Gagnon*, 11 Rev. Lég. 517; *Ross v. Leggett*, 61 Mich. 445, 1 Am. St. Rep. 608; *McGarrahan v. Lavers*, 15 R. I. 302.

In case of a wrongful arrest by an officer without warrant it is not error to instruct the jury that if such arrest was made at the instigation, suggestion, or request of the defendant, or either of them, or that they or either of them counselled, advised, encouraged, consented to, or aided and abetted in having said arrest made, the plaintiff is entitled to recover against the defendant or defendants as participants, for it is plainly intelligible to the jury that the "consenting" mentioned in such instruction is something very different from mere submission to another person's decision, or from subsequent approval of an act done. The context plainly indicates that co-operative consent is meant. *Bright v. Patton*, 5 Mackey (D. C.) 534, 60 Am. Rep. 306.

Defenses to Action for Imprisonment. — Where private persons cause an arrest without process upon a charge of forgery and larceny, they are liable in some form of action, unless it appears that those crimes have been committed, and that they had reasonable cause to believe that the person actually arrested was the guilty person. But the law does not require them to go so far as to show that the person arrested is actually guilty of the charge. *Benham v. Vernon*, 5 Mackey (D. C.) 18.

In the case of *Taafe v. Slevin*, 11 Mo. App. 507, it was held that the person at whose request an officer makes an arrest without warrant for an alleged misdemeanor not committed in the officer's presence must, to justify himself, show that the charge which led to the arrest was well founded.

A Prima Facie Case of Imprisonment will be established against a defendant by showing that the plaintiff was taken into custody by a policeman and that the defendant came down to the station house and signed a charge sheet accusing the plaintiff of having committed a felony. *Harris v. Dignum*, 29 L. J. Exch. 23. But compare in this connection the case of *Grinham v. Willey*, 4 H. & N. 499, wherein it was held that where the defendant only gave information to an officer upon which an arrest was made the signing of the charge sheet in addition did not make him liable.

3. *Hopkins v. Crowe*, 4 Ad. & El. 774, 31 E. C. L. 177; *Wheeler v. Whiting*, 9 C. & P. 262, 38 E. C. L. 111; *Burns v. Erben*, 26 How. Pr. (N. Y. Super. Ct.) 273. And see also cases cited in succeeding notes.

4. *Hopkins v. Crowe*, 4 Ad. & El. 774, 31 E. C. L. 177; *Wheeler v. Whiting*, 9 C. & P. 262, 38 E. C. L. 111; *Patterson v. Scott*, 38 U. C. Q. B. 642; *Corbett v. Twenty-third St. R. Co.*, 42 Hun (N. Y.) 587.

Instructions to Take Charge Same as Giving into Custody. — In the case of *Wheeler v. Whiting*, 9 C. & P. 262, 38 E. C. L. 111, it was held that the defendant's telling a policeman to take charge of the plaintiff was the same as his telling the policeman to take him into custody and was sufficient to support an action for false imprisonment against the defendant.

Where the Driver of a Street Car wrongfully delivered a person into the custody of a police officer, who confined him in a station house until the following day, it was held that the defendant, the driver's employer, was liable in damages therefor. *Corbett v. Twenty-third St. R. Co.*, 42 Hun (N. Y.) 587.

5. *Grinham v. Willey*, 4 H. & N. 499; *Rich v. McNerny*, 103 Ala. 345; *Veneman v. Jones*, 118 Ind. 45, 10 Am. St. Rep. 100; *Burns v. Erben*, 26 How. Pr. (N. Y. Super. Ct.) 273; *Limbeck v. Gerry*, 15 Misc. Rep. (N. Y. Supreme Ct.) 663. And see *Taafe v. Slevin*, 11 Mo. App. 507; *Lark v. Bande*, 4 Mo. App. 186.

Defendant Is Not Liable though Information Given Is Incorrect. — The mere fact that the information given to the officer upon which he

Where the Defendant Took an Officer with Him to the plaintiff's house and stayed by while the officer made the arrest, it was held that he was liable in damages therefor.¹ But one who only stated to an officer what he knew of a supposed offense, even though he expressed the opinion that there was ground for an arrest, but did not make any charge or request any arrest, was held not thereby to make himself liable in an action for false imprisonment.²

Where though Defendant Directs Arrest, Officers Act of Their Own Volition. — And, it has been held, a defendant will not be liable in damages for a false imprisonment, though he directed the plaintiff's arrest, if, notwithstanding such direction, it can be shown that the persons arresting acted entirely of their own volition.³

(5) *Procuring Arrest of Wrong Person.* — One who causes the arrest of the wrong person under a warrant is liable in damages for false imprisonment.⁴

(6) *Whether Defendant Procured Imprisonment Question of Fact for Jury.* — The issue as to whether or not the defendant in an action for damages for false imprisonment ordered, procured, or directed the arrest of the plaintiff is in general one of fact for the determination of the jury.⁵

b. LIABILITY OF JUDICIAL OFFICERS — (1) *In General.* — The general rule that a judicial officer is not to be held liable in a civil suit for any act done in the performance of his judicial duties will apply to exempt such officials from liability for damages for false imprisonment.⁶ And it has also

arrests a party turns out to be untrue does not make the informer liable in trespass to the party arrested. *Benham v. Vernon*, 5 Mackey (D. C.) 18.

1. *Warner v. Riddiford*, 4 C. B. N. S. 202, 93 E. C. L. 202. Compare *West v. Smallwood*, 3 M. & W. 418.

But the Mere Fact that a Person Follows an Officer about to make an arrest without warrant upon information given him by the former, with the secret intention that under certain conditions he will assist the officer in making the arrest, there being no arrangement or understanding for co-operation with the officer in making the arrest, does not constitute such a participation in the arrest as would make the defendant guilty of a trespass. *Benham v. Vernon*, 5 Mackey (D. C.) 18.

Charging with Felony in Presence of Officer. — If the defendant charges the plaintiff with a felony in the presence of a policeman and stands by and sees the plaintiff taken into custody therefor, this is evidence of the defendant's having authorized or directed the policeman to act in the matter. *Warner v. Riddiford*, 4 C. B. N. S. 200, 93 E. C. L. 200. And see *Grinham v. Willey*, 4 H. & N. 499.

2. *Burns v. Erben*, 1 Robt. (N. Y.) 555.

3. *Rich v. McInerney*, 103 Ala. 345.

4. *Sugg v. Pool*, 2 Stew. & P. (Ala.) 196.

5. *Defendant's Participation Question of Fact.* — *West v. Smallwood*, 3 M. & W. 418; *Conway v. Shibly*, 39 U. C. Q. B. 519; *Pearce v. Needham*, 37 Ill. App. 93; *Spoor v. Spooner*, 12 Met. (Mass.) 281; *Sullivan v. Newman*, (Supreme Ct.) 17 N. Y. Supp. 424; *Carson v. Desau*, 142 N. Y. 445; *Cunningham v. Seattle Electric R., etc., Co.*, 3 Wash. 471.

6. *Liability of Judicial Officers — England.* — See *Carratt v. Morley*, 1 Q. B. 18, 41 E. C. L. 417; *Houlden v. Smith*, 14 Q. B. 841, 68 E. C. L. 841; *Taaffe v. Downes*, 3 Moo. P. C. 36, note; *Calder v. Halket*, 3 Moo. P. C. 28.

Canada. — *Stewart v. Hazen* 7 New Bruns. 254. And see *Sewell v. Olive*, 9 New Bruns. 394; *Marter v. Pryor*, 16 Nova Scotia 498; *Marois v. Bolduc*, 7 Rev. Lég. 148.

United States. — *Allec v. Reece*, 39 Fed. Rep. 341; *Cooke v. Bangs*, 31 Fed. Rep. 640.

Alabama. — *Busted v. Parsons*, 54 Ala. 393. 25 Am. Rep. 688; *Heard v. Harris*, 68 Ala. 43.

Arkansas. — *Trammell v. Russellville*, 34 Ark. 105, 36 Am. Rep. 1.

California. — *Going v. Dinwiddie*, 86 Cal. 637. And see *Turpen v. Booth*, 56 Cal. 68, 38 Am. Rep. 48; *Downer v. Lent*, 6 Cal. 94.

Illinois. — *Flack v. Ankeny*, 1 Ill. 187.

Indiana. — *Cooper v. Adams*, 2 Blackf. (Ind.) 294; *Dietrichs v. Schaw*, 43 Ind. 175; *State v. Wolever*, 127 Ind. 306.

Kansas. — *Gillett v. Thiebold*, 9 Kan. 427.

Massachusetts. — See *Pratt v. Gardner*, 2 Cush. (Mass.) 68, 48 Am. Dec. 652.

Michigan. — *Van Deusen v. Newcomer*, 40 Mich. 90; *Schultz v. Huebner*, 108 Mich. 274; *Brooks v. Mangan*, 86 Mich. 576, 24 Am. St. Rep. 137.

Minnesota. — See *Gifford v. Wiggins*, 50 Minn. 401.

Nebraska. — *Atwood v. Atwater*, 43 Neb. 147.

New Jersey. — *Hann v. Lloyd*, 50 N. J. L. 1; *Booth v. Kurrus*, 55 N. J. L. 370; *Mangold v. Thorpe*, 33 N. J. L. 134.

New York. — *Stewart v. Hawley*, 21 Wend. (N. Y.) 552; *Lange v. Benedict*, 8 Hun (N. Y.) 362; *Butler v. Potter*, 17 Johns. (N. Y.) 145; *Campbell v. Ewalt*, 7 How Pr. (N. Y. Supreme Ct.) 399; *Bocock v. Cochran*, 32 Hun (N. Y.) 521; *Ayers v. Russell*, 50 Hun (N. Y.) 282; *Nowak v. Waller*, (Supreme Ct.) 10 N. Y. Supp. 199; *Austin v. Vrooman*, 128 N. Y. 229; *Swart v. Rickard*, 148 N. Y. 264. And see *Yates v. Lansing*, 5 Johns. (N. Y.) 282; *Horton v. Auchmoody*, 7 Wend. (N. Y.) 200.

Ohio. — *Wheeler v. Gavin*, 5 Ohio Cir. Ct. Rep. 246, 3 Ohio Cir. Dec. 123.

Utah. — *Marks v. Sullivan*, 9 Utah 12.

Vermont. — *Rudd v. Darling*, 64 Vt. 456; *Pierson v. Gale*, 8 Vt. 509, 30 Am. Dec. 487.

Virginia. — *Johnston v. Moorman*, 80 Va. 131.

West Virginia. — *Tavener v. Morehead*, 41 W. Va. 116.

been held that officers having *quasi-judicial* powers are not liable for injury resulting from acts done understandingly and in good faith within the limits of an authority expressly granted to them.¹

Mistake of Law. — A judicial officer, therefore, is not liable in damages for an imprisonment, though it be the result of a mistake of law, or error of judgment, where there is jurisdiction of the person and subject-matter.²

Drawing Stronger Inferences than Testimony Warrants. — Nor will the fact that a justice of the peace, in issuing a warrant of arrest for the plaintiff in an action for false imprisonment, drew stronger inferences from the testimony of the complaining witness than such testimony warranted, or that the facts testified to were not established by the best evidence, render him liable in damages for false imprisonment.³

Where Officer Acts Maliciously or Corruptly. — And though a judicial officer act maliciously⁴ or even corruptly,⁵ he will be held exempt from liability if the act done be within the exercise of his jurisdiction.

Wisconsin. — *Carter v. Dow*, 16 Wis. 298.

The Mayor of a Town, having authority to punish disorderly persons by imprisonment for a short time, is not liable in damages where he has a person arrested for disorderly conduct in his presence and causes him to be imprisoned from one evening until the following morning. *Boutte v. Emmer*, 43 La. Ann. 980. Unless, it was held in this case, such official acts "arbitrarily and beyond the pale of his office, he cannot be made to pay damages." And see *Johnston v. Moorman*, 80 Va. 131.

A City Recorder having authority to hear, try, and determine in a summary way violations of city ordinances and the laws of the state has jurisdiction to try misdemeanors committed under the fire-limit ordinance, and is not liable in an action for damages for false imprisonment for acts committed in the exercise of such power. *Brunner v. Downs*, (Supreme Ct.) 17 N. Y. Supp. 633.

A Prosecutor of the Pleas who directs the execution of a writ calling for the arrest of a person, issued out of a court of general jurisdiction having cognizance over the class of cases to which it appertains, is not liable therefor in an action for damages for false imprisonment. *Hann v. Lloyd*, 50 N. J. L. 1.

Members of a State Legislature who, under the provisions of the state constitution that "each house may punish by imprisonment, during its sessions, any person not a member * * * for obstructing any of its proceedings, provided such imprisonment shall not at any one time exceed forty-eight hours," vote for a resolution pursuant to which a person is imprisoned cannot be held liable in an action for false imprisonment, for the reason that it is for the members of the legislature themselves to determine whether or not the acts of the person imprisoned were an obstruction to its proceedings within the meaning of the above provision of the constitution. *Canfield v. Gresham*, 82 Tex. 10.

See also *infra*, this section, *Acts Which, as Judicial, Exempt from Liability*.

1. Superintendent of Insane Asylum. — In the case of *Van Deusen v. Newcomer*, 40 Mich. 90, the principle stated in the text was applied and the superintendent of an insane asylum held not liable for a false imprisonment.

2. Liability in Case of Mistake as to the Law —

United States. — *Allec v. Reece*, 39 Fed. Rep. 341; *Cooke v. Bangs*, 31 Fed. Rep. 640.

Alabama. — *Busteed v. Parsons*, 54 Ala. 393, 25 Am. Rep. 688. And see *Heard v. Harris*, 68 Ala. 43.

Illinois. — *Flack v. Ankeny*, 1 Ill. 187.

Indiana. — *Cooper v. Adams*, 2 Blackf. (Ind.) 294.

Kansas. — See *Gillett v. Thiebold*, 9 Kan. 427.

New Jersey. — *Booth v. Kurrus*, 55 N. J. L. 370.

New York. — *Stewart v. Hawley*, 21 Wend. (N. Y.) 552; *Nowak v. Waller*, (Supreme Ct.) 10 N. Y. Supp. 199; *Ayers v. Russell*, 50 Hun (N. Y.) 282; *Butler v. Potter*, 17 Johns. (N. Y.) 145; *Bocock v. Cochran*, 32 Hun (N. Y.) 521; *Lange v. Benedict*, 8 Hun (N. Y.) 362; *Campbell v. Ewalt*, 7 How. Pr. (N. Y. Supreme Ct.) 399. See also *Horton v. Auchmoody*, 7 Wend. (N. Y.) 200.

Utah. — *Marks v. Sullivan*, 9 Utah 12.

Virginia. — *Bolton v. Vellines*, 94 Va. 393.

Wisconsin. — *Carter v. Dow*, 16 Wis. 298.

Where Action Grossly Erroneous. — The case of *Allec v. Reece*, 39 Fed. Rep. 341, was an action for damages against a justice of the peace in San Diego County, California, who had caused the arrest and imprisonment of a resident of Los Angeles county for having failed to obey a subpoena issued by the defendant, although the subpoena was insufficient to require the attendance of the person served and the warrant of arrest was directed to the sheriff or constable, when by the statute it should have been directed to the sheriff only. The court held that in issuing the subpoena and warrant and in adjudging the witness guilty of contempt of court in failing to obey the subpoena the justice acted in his judicial capacity, and the grossness of the error of such determination and of the judgment following it did not render him liable in a civil action for damages.

3. *Marks v. Sullivan*, 9 Utah 12. And see *Gillett v. Thiebold*, 9 Kan. 427.

4. Where Officer Acts Maliciously. — *Cooke v. Bangs*, 31 Fed. Rep. 640; *State v. Wolever*, 127 Ind. 306; *Pratt v. Gardner*, 2 Cush. (Mass.) 63, 48 Am. Dec. 652; *Mangold v. Thorpe*, 33 N. J. L. 134.

5. Officer Acting Corruptly. — *State v. Wolever*, 127 Ind. 306.

(2) *Acts Which, as Judicial, Exempt from Liability — Arrest on Void Ordinance.* — The act of the mayor of a town or a justice of the peace in issuing a warrant of arrest, though for the violation of a void ordinance, is a judicial act, for which he cannot be held liable in damages for false imprisonment.¹ So also the judge of a court having authority to imprison for contempt cannot be held liable in an action for false imprisonment, when acting within his jurisdiction.² And it has also been held that a justice of the peace who, though having authority only to examine the plaintiff and hold him for trial, nevertheless tries and disposes of the case himself, acting in good faith, is not liable for false imprisonment.³ But a direction to a policeman by a board of police commissioners to arrest any one who violates a certain ordinance, punishable only by fine, and not by imprisonment, is not a judicial act a liability in damages for which can be avoided for such reason.⁴

(3) *Where Magistrate Has No Jurisdiction.* — Where the magistrate who issues a warrant of arrest has no jurisdiction of the person or subject-matter, he is liable in an action of damages for false imprisonment.⁵ Where, there-

1. Trammell v. Russellville, 34 Ark. 105, 36 Am. Rep. 1; Brooks v. Mangan, 86 Mich. 576, 24 Am. St. Rep. 137; Wheeler v. Gavin, 5 Ohio Cir. Ct. Rep. 246, 3 Ohio Cir. Dec. 123. See also *supra*, this subsection, *In General*.

A Justice of the Peace Having Jurisdiction of the Person and Subject-matter of the suit is not liable to respond in damages because in the exercise of his honest judgment he holds an unconstitutional ordinance constitutional and attempts to enforce it by the arrest and imprisonment of one who violates its provisions. Brooks v. Mangan, 86 Mich. 576, 24 Am. St. Rep. 137.

2. Rudd v. Darling, 64 Vt. 456; Tavenner v. Morehead, 41 W. Va. 116. See also *supra*, this subsection, *In General*.

The Judgment of a County Commissioner's Court declaring an overseer of roads guilty of contempt of court in filing an annual report insulting to the court in its character is a purely judicial act for which the members of the court cannot be held responsible in a civil action for damages for false imprisonment. Gaines v. Newbrough, 12 Tex. Civ. App. 466.

Commitment for Contempt to Improper Place of Imprisonment. — But if a judicial officer commits a person for contempt to an improper place of imprisonment he will be liable in damages therefor. Armstrong v. McCaffrey, 12 New Bruns. 525.

Determination upon Application to Hold to Bail. — The determination by a circuit judge upon an application to hold to bail is a judicial decision, and as such protects the judge, officer, and the party making the affidavit in application for the issuance of the writ in an action for false imprisonment. Johnson v. Morton, 94 Mich. 1.

Decision upon Motion for Change of Venue. — A refusal of a magistrate upon the trial of an alleged offense of selling liquor to a minor to grant a change of venue after the defendant had made a motion therefor, which, by statute, must be granted on proper affidavit of either party, will not render him liable in an action for damages for false imprisonment, even though such refusal was corrupt and malicious. State v. Wolever, 127 Ind. 306.

3. Austin v. Vrooman, 128 N. Y. 229.

Where an appeal was taken from a conviction

imposing imprisonment with hard labor, which the magistrate had no power to award, the judgment being modified by striking out "hard labor," it was held that this modification was not a quashing of the conviction so as to render the justice liable in trespass for false imprisonment. McLellan v. McKinnon, 1 Ont. Rep. 219.

4. Bolton v. Vellines, 94 Va. 393.

5. Where Magistrate Without Jurisdiction — England. — Hill v. Bateman, 1 Stra. 710; Smith v. Bouchier, 2 Stra. 993; Carratt v. Morley, 1 Q. B. 18, 41 E. C. L. 417; Marshalsea Case, 10 Coke 76; Groome v. Forrester, 5 M. & S. 314; Morgan v. Hughes, 2 T. R. 225.

Canada. — Wetmore v. Harding, 18 New Bruns. 338; Lacombe v. St. Marie, 3 Rev. Lég. 449; Garrison v. Harding, 14 New Bruns. 166. And see Bissonnette v. Bornais, 16 L. C. Rep. 377. Compare Smith v. Simmons, 15 New Bruns. 203.

United States. — Baldwin, J., in Johnson v. Tompkins, 1 Baldw. (U. S.) 571.

Alabama. — Woodall v. McMillan, 38 Ala. 622.

Arkansas. — See Vanderpool v. State, 34 Ark. 174.

California. — De Courcey v. Cox, 94 Cal. 665.

Connecticut. — Tracy v. Williams, 4 Conn. 107, 10 Am. Dec. 102. And see Grumon v. Raymond, 1 Conn. 40, 6 Am. Dec. 200.

Illinois. — Flack v. Ankeny, 1 Ill. 187; Barnes v. Barber, 6 Ill. 405; Newton v. Locklin, 77 Ill. 103; Moore v. Watts, 1 Ill. 42. And see Hull v. Blaisdell, 2 Ill. 332.

Indiana. — Dietrichs v. Schaw, 43 Ind. 175; State v. Wolever, 127 Ind. 306. And see Davis v. Bush, 4 Blackf. (Ind.) 330.

Kansas. — Prell v. McDonald, 7 Kan. 426, 12 Am. Rep. 423.

Kentucky. — Shreshley v. Fisher, Hard. (Ky.) 257.

Louisiana. — Boutte v. Emmer, 43 La. Ann. 980.

Maine. — Grace v. Teague, 81 Me. 559.

Michigan. — Sheldon v. Hill, 33 Mich. 171; Page v. Mitchell, 13 Mich. 63, 86 Am. Dec. 75. And see Thompson v. Ellsworth, 39 Mich. 719; Matter of Morton, 10 Mich. 208.

Mississippi. — Wilcox v. Williamson, 61 Miss. 310.

fore, a magistrate issues a warrant of arrest upon an affidavit or complaint the facts of which as alleged constitute no crime, he is liable to the person imprisoned in damages therefor,¹ and *a fortiori* is such an officer liable where the warrant is issued without any complaint or information.² And where a magistrate issued a warrant upon a complaint insufficient because only stating facts upon information and belief he was held liable in damages for false imprisonment.³

(4) *Where Magistrate Acts Beyond His Jurisdiction.* — The act of a judicial officer beyond his jurisdiction will render him liable in false imprisonment in the same manner as where he has no jurisdiction.⁴ In fact, the two things

New York. — *Burns v. Erben*, 26 How. Pr. (N. Y. Super. Ct.) 273; *Comfort v. Fulton*, 13 Abb. Pr. (N. Y. Supreme Ct.) 276; *Wilson v. Robinson*, 6 How. Pr. (N. Y. Supreme Ct.) 110; *Savacool v. Boughton*, 5 Wend. (N. Y.) 170, 21 Am. Dec. 181; *Percival v. Jones*, 2 Johns. Cas. (N. Y.) 49. And see *Horton v. Auchmoody*, 7 Wend. (N. Y.) 200; *Scott v. Ely*, 4 Wend. (N. Y.) 555.

Ohio. — *Taylor v. Alexander*, 6 Ohio 144.

Tennessee. — *Touhey v. King*, 9 Lea (Tenn.) 422.

Wisconsin. — *Carter v. Dow*, 16 Wis. 298.

Rule as Stated Explained. — When it is said that in order to render a judicial officer liable in false imprisonment the act complained of must be without and beyond his jurisdiction, it is meant that the authority which is assumed is a usurped authority. *State v. Wolever*, 127 Ind. 306.

1. *De Courcey v. Cox*, 94 Cal. 665; *Moore v. Watts*, 1 Ill. 42; *Burns v. Erben*, 26 How. Pr. (N. Y. Super. Ct.) 273. And see *Hiday v. Gilmore*, 3 Blackf. (Ind.) 48.

If the Facts Sworn to by a Malicious Prosecutor do not furnish *prima facie* grounds to infer that a crime has been committed, the magistrate issuing a warrant is guilty of false imprisonment. *Burns v. Erben*, 26 How. Pr. (N. Y. Super. Ct.) 273.

2. **Arrest on Warrant Without Complaint or Information.** — *Morgan v. Hughes*, 2 T. R. 225; *Lacombe v. St. Marie*, 3 Rev. Lég. 449; *Tracy v. Williams*, 4 Conn. 107, 10 Am. Dec. 102; *Wilcox v. Williamson*, 61 Miss. 310. And see *Davis v. Bush*, 4 Blackf. (Ind.) 330; *Prell v. McDonald*, 7 Kan. 426, 12 Am. Rep. 423; *Touhey v. King*, 9 Lea (Tenn.) 422.

Loss of Affidavit or Complaint — Proof of Loss and Contents. — On the trial of an action for false imprisonment, consequent upon an arrest under warrant issued by a justice of the peace, it is competent to prove by the justice who issued the warrant the fact that a written affidavit was made before he issued the warrant; and the loss of the affidavit being shown, its contents may be proved by parol. *Ashley v. Johnson*, 74 Ill. 392.

Commitment Without Legal Examination. — A justice of the peace is liable if he commits a person for trial without conducting an examination respecting the charge as required by law. *Nary v. Owen*, 2 New Bruns. 377.

Liability for Ratification of Illegal Arrest by Constable. — In the case of *McGilvery v. Gault*, 19 New Bruns. 217, it appeared that a justice of the peace had issued and placed in the hands of a constable a warrant directing a levy on the plaintiff's goods and for want of goods

to take the body of the plaintiff. The constable, however, arrested the plaintiff without searching for the goods. The plaintiff applied to a judge for his discharge, and the magistrate who issued the warrant appeared before the judge and opposed the application, whereby it was held that he adopted the act of the constable in arresting the plaintiff and rendered himself liable in damages therefor.

3. *Comfort v. Fulton*, 13 Abb. Pr. (N. Y. Supreme Ct.) 276.

Belief Versus Suspicion. — In the case of *Smith v. Bouchier*, 2 Stra. 993, an action was adjudged to lie against the vice chancellor of Oxford, who had issued a warrant upon a defective oath. He was not authorized to issue a warrant unless the plaintiff swore that he "believed" the defendant would run away. The plaintiff swore that he "suspected" the plaintiff would run away, whereupon the warrant issued.

Imprisonment by Magistrate Without Competent Evidence of Guilt. — For an imprisonment under such circumstances the magistrate may be held liable. *Comfort v. Fulton*, 13 Abb. Pr. (N. Y. Supreme Ct.) 276; *Wilson v. Robinson*, 6 How. Pr. (N. Y. Supreme Ct.) 110.

4. **Magistrate Acting Beyond His Jurisdiction.** — *Thompson v. Whipple*, 54 Ark. 203; *Tracy v. Williams*, 4 Conn. 107, 10 Am. Dec. 102; *Barnes v. Barber*, 6 Ill. 405; *Sheldon v. Hill*, 33 Mich. 171; *Percival v. Jones*, 2 Johns. Cas. (N. Y.) 49. And see *Hill v. Bateman*, 1 Stra. 710; *Smith v. Bouchier*, 2 Stra. 993; *Pooler v. Reed*, 75 Me. 488. Compare *Smith v. Simmons*, 15 New Bruns. 203.

Where the Mayor of a City Council, as presiding officer thereof, exceeded his authority by ordering the arrest of a member of the council for improper conduct, it was held that the former as well as the officer who arrested the plaintiff were liable in damages for false imprisonment. *Thompson v. Whipple*, 54 Ark. 203.

Evidence Admissible. — The case of *Kendall v. Powers*, 4 Met. (Mass.) 553, was an action for damages against a magistrate for the alleged false imprisonment of the plaintiff in the house of correction. It appeared by the record of proceedings before the magistrate that the plaintiff had been duly convicted of being a common drunkard and was thereupon sentenced to the house of correction; that the plaintiff appealed from the sentence to the Court of Common Pleas, as permitted by statute, but that upon his failure to procure sureties for the prosecution of his appeal the defendant issued a mittimus pursuant to the sentence. It was held in this case that the defendant could not be permitted to show by

are exactly the same in principle and effect. Where, therefore, though there has been a lawful arrest without warrant, the prisoner is bound over by the justice of the peace to a higher court for trial without a written complaint or information, it is a false imprisonment for which there is a liability in damages at law.¹ And where a justice of the peace has power only to fine, and not to imprison for contempt of court, he will be liable in damages for false imprisonment for ordering the incarceration of a person for such offense.²

(5) *Where Warrant of Arrest Void on Face*. — A judicial officer who issues a warrant of arrest void on its face is, however, liable in damages for false imprisonment,³ although he acts in good faith, and there is before him sufficient proof to have authorized the issuance of a valid warrant.⁴

(6) *Imprisonment After Term of Office Expired*. — If a judicial officer, after his commission expires, issues a warrant under which a person is imprisoned, he is liable in damages for false imprisonment although he acts in good faith and in ignorance of the fact that his term of office has come to an end.⁵

c. LIABILITY OF EXECUTIVE OFFICERS — (1) *Arrest Without Warrant*. — As has been already stated, an executive officer is not liable in false imprisonment for an arrest without warrant where there has been a misdemeanor committed in his presence, or he has reasonable ground to believe that a felony has been committed and that the person arrested is the guilty party.⁶

(2) *Arrest on Warrant Void on Its Face*. — If an officer executes a warrant of arrest invalid on its face, he is liable in damages for false imprisonment.⁷

Where Magistrate Has No Jurisdiction. — Where, therefore, it appears on the face of the process that the magistrate issuing it has no jurisdiction of the person of the plaintiff or the subject-matter of the suit, the officer executing it is a

parol evidence in justification of his proceeding that the plaintiff, for failure to procure sureties, waived and withdrew his appeal.

1. *Tracy v. Williams*, 4 Conn. 107, 10 Am. Dec. 102.

Justice Who Tries and Disposes Instead of Binding Over Not Liable. — Where a justice of the peace with authority only to hold the person to answer to a court having jurisdiction to try, instead proceeds to trial and disposes of the case himself, acting in good faith, it is not such an act beyond his jurisdiction as will render him liable in damages for false imprisonment, as the justice had in the first place jurisdiction of the subject-matter and the person of the plaintiff. The justice's error in deciding that he had jurisdiction to proceed was an error of judgment on a question of law, it was held, committed in the course of a proper exercise of the original jurisdiction given. *Austin v. Vrooman*, 128 N. Y. 229.

2. *Newton v. Locklin*, 77 Ill. 103.

But if the Proper Fine Is First Assessed there may be an incarceration for failure to pay the fine, without the incurrance of liability in false imprisonment. *Newton v. Locklin*, 77 Ill. 103; *Brown v. People*, 19 Ill. 613; *Matter of Bollig*, 31 Ill. 88.

3. *Blythe v. Tompkins*, 2 Abb. Pr. (N. Y. Supreme Ct.) 468; *Vaughn v. Congdon*, 56 Vt. 111, 48 Am. Rep. 758.

Where Mittimus Does Not Show Cause of Commitment. — A justice of the peace who issues a mittimus for the commitment of a person, the mittimus not showing the cause of commitment, is liable in damages for false imprisonment. *Hiday v. Gilmore*, 3 Blackf. (Ind.) 48.

4. *Blythe v. Tompkins*, 2 Abb. Pr. (N. Y. Supreme Ct.) 468.

5. *Grace v. Teague*, 81 Me. 559.

6. See *supra*, this title, *What Constitutes False Imprisonment*, subdiv. 3. b. (1) *Arrest Without Warrant*.

7. *Where Warrant Void on Its Face — England*. — *Shergold v. Holloway*, 2 Stra. 1002; *Carratt v. Morley*, 1 Q. B. 18, 41 E. C. L. 417; *Clark v. Woods*, 2 Exch. 395; *Marshalsea Case*, 10 Coke 76. And see *Hill v. Bateman*, 1 Stra. 710; *Smith v. Bouchier*, 2 Stra. 993.

Connecticut. — *Wooster v. Parsons, Kirby* (Conn.) 110. And see *Rosen v. Fischel*, 44 Conn. 371.

Illinois. — *Moore v. Watts*, 1 Ill. 42. And see *Hull v. Blaisdell*, 2 Ill. 332.

Indiana. — *Hiday v. Gilmore*, 3 Blackf. (Ind.) 48. And see *American Express Co. v. Patterson*, 73 Ind. 430.

Maine. — *Gurney v. Tufts*, 37 Me. 130, 58 Am. Dec. 777; *Vinton v. Weaver*, 41 Me. 430; *Harwood v. Siphers*, 70 Me. 464; *Pooler v. Reed*, 75 Me. 488. And see *Thurston v. Adams*, 41 Me. 419; *Brown v. Howard*, 86 Me. 342.

Massachusetts. — *Pearce v. Atwood*, 13 Mass. 324.

Michigan. — *Sheldon v. Hill*, 33 Mich. 171. *New Hampshire*. — *Batchelder v. Currier*, 45 N. H. 460.

New York. — *Murphy v. Kron*, 20 Abb. N. Cas. (N. Y. Supreme Ct.) 259; *Blythe v. Tompkins*, 2 Abb. Pr. (N. Y. Supreme Ct.) 468; *Savacool v. Boughton*, 5 Wend. (N. Y.) 170, 21 Am. Dec. 181.

Ohio. — *Taylor v. Alexander*, 6 Ohio 144. *Tennessee*. — *McLendon v. State*, 92 Tenn. 520.

Wisconsin. — *Gelzenleuchter v. Niemeyer*, 64 Wis. 316, 54 Am. Rep. 616; *Frazier v. Turner*, 76 Wis. 562.

trespasser, and is liable in an action for damages for false imprisonment.¹

Officer Presumed to Know Jurisdiction. — It has been said, indeed, that an officer is bound or will be presumed to know the jurisdiction of the court whose officer he is, and that if he acts in obedience to a precept which the court has no jurisdiction to issue he will not be protected in false imprisonment.²

Execution of Lawful Writ at Unlawful Time. — It has been decided that where an arrest for misdemeanor could not lawfully be made by night unless by direction of the magistrate indorsed upon the warrant, an arrest at night on a warrant for misdemeanor upon which a direction for such arrest is not indorsed by the magistrate will render the officer liable in false imprisonment.³

Liability of Sureties on Official Bond. — But though the officer arresting is liable where the warrant is void on its face, it has been held that the sureties on his official bond are not so, the act of the officer being regarded as entirely without the scope of his official character.⁴

(3) **Arrest on Warrant Valid on Its Face** — (a) **General Rule.** — The general rule undoubtedly is that an executive officer is protected from liability in false

1. **Where Magistrate Has No Jurisdiction.** — *Carratt v. Morley*, 1 Q. B. 18, 41 E. C. L. 417; *Hill v. Bateman*, 1 Stra. 710; *Smith v. Bouchier*, 2 Stra. 993; *Moore v. Watts*, 1 Ill. 42; *Pooler v. Reed*, 75 Me. 488; *Pearce v. Atwood*, 13 Mass. 324; *Fisher v. McGirr*, 1 Gray (Mass.) 44, 61 Am. Dec. 381; *Savacool v. Boughton*, 5 Wend. (N. Y.) 170, 21 Am. Dec. 181; *Smith v. Shaw*, 12 Johns. (N. Y.) 257. And see *Marshalsea Case*, 10 Coke 76; *Artega v. Connor*, 88 N. Y. 403, 47 N. Y. Super. Ct. 494.

Illustration. — For example, it was said in *Taylor v. Alexander*, 6 Ohio 144, that if a justice of the peace were to issue a writ in slander that process would not protect the officer in false imprisonment, because the justice had no jurisdiction of the subject.

Trespass Lies Against a Collector of Taxes for imprisoning a party who is taxed as an inhabitant of a town if he is not an inhabitant, for the assessors have no right to tax a party not an inhabitant, and for them to do so is an excess of jurisdiction. *Thurston v. Martin*, 5 Mason (U. S.) 499.

Statutory Provisions. — The Code of Georgia, § 3852 (Code 1882, § 2991), provides: "If the imprisonment is by virtue of a warrant, neither the party *bona fide* suing out nor the officer who in good faith executes the same is guilty of false imprisonment, though the warrant be defective in form, or be void for want of jurisdiction." See *Manning v. Mitchell*, 73 Ga. 660.

2. **Officer Presumed to Know Jurisdiction.** — *Shergold v. Holloway*, 2 Stra. 1002; *Watson v. Bodell*, 14 M. & W. 57; *Hull v. Blaisdell*, 2 Ill. 332; *Smith v. Shaw*, 12 Johns. (N. Y.) 257. And see *Marshalsea Case*, 10 Coke 76; *Taylor v. Alexander*, 6 Ohio 144.

In the case of *Shergold v. Holloway*, 2 Stra. 1002, a justice issued a warrant on a complaint for not paying wages, and the defendant, a constable, arrested Shergold on it. The officer was sued for this arrest. The court said that the justice had no authority in any instance to proceed by warrant, the summons being the only process. The constable could not therefore justify. He was presumed to know that under no circumstances could a warrant be issued in such a case; therefore the court said there was "no pretense for such a jurisdiction." With reference to this case, Marcy, J.,

in *Savacool v. Boughton*, 5 Wend. (N. Y.) 170, 21 Am. Dec. 181, said that "the decision would doubtless have been different if it had appeared that under any state of things a proceeding by warrant was allowable in such a case; for then the court would assume for the officer's protection that such a state of things did exist, or at least he should not be required to judge whether it did or not."

Imprisonment by Sergeant at Arms under Warrant Wrongfully Issued by Speaker of House of Representatives. — In the case of *Kilbourn v. Thompson*, 103 U. S. 168, the plaintiff had been imprisoned by the sergeant at arms of the House of Representatives at Washington under a warrant issued by the speaker of the House. It being shown, however, that the warrant was wrongfully issued in excess of the jurisdiction of the house, the sergeant at arms was held liable in false imprisonment. See also *Kilbourn v. Thompson*, *MacArthur & M.* (D. C. 401); *Canfield v. Gresham*, 82 Tex. 10, the facts of which latter case are set forth *infra*, this subsection, *Arrest on Warrant Valid on Its Face*.

Disqualification of Magistrate from Interest. — The fact that a justice of the peace has no jurisdiction because of interest will not necessarily render the constable liable in damages for the imprisonment of the person named in the warrant, although the fact of his interest in the result may appear on the face of the warrant. *Pearce v. Atwood*, 13 Mass. 324.

3. *Murphy v. Kron*, 20 Abb. N. Cas. (N. Y. Supreme Ct.) 259.

Arrest After Return Day of Process. — An officer who makes an arrest after the return day of the execution is not protected thereby and is liable in damages for false imprisonment. *Stoyel v. Lawrence*, 3 Day (Conn.) 1; *Adams v. Freeman*, 9 Johns. (N. Y.) 117. It has been held, however, that for the retaking of an escaped prisoner after the return of the writ the officer was not liable in false imprisonment. *Strong v. Ives*, 1 Root (Conn.) 388.

An Officer Cannot Justify an Arrest and Imprisonment under a Returnable Process unless the process has been returned. *Kent v. Miles*, 65 Vt. 582; *Davis v. Bush*, 4 Blackf. (Ind.) 330. And see *Hackett v. King*, 6 Allen (Mass.) 58.

4. *McLendon v. State*, 92 Tenn. 520.

imprisonment by a warrant which is valid on its face and issues from a court having general jurisdiction of the subject-matter; ¹ and this rule, it seems, so

1. **Where Warrant Valid on Its Face** — *England*. — Lord Kenyon, C. J., in *Belk v. Broadbent*, 3 T. R. 183; *Thomas v. Hudson*, 14 M. & W. 353; *Andrews v. Marris*, 1 Q. B. 3, 41 E. C. L. 409; *Marshalsea Case*, 10 Coke 76; *Ashhurst, J.*, in *Morgan v. Hughes*, 2 T. R. 225; *Barker v. Braham*, 2 W. Bl. 866; *Parsons v. Lloyd*, 2 W. Bl. 845. And see *Hill v. Bateman*, 1 Stra. 710; *Cameron v. Lightfoot*, 2 W. Bl. 1190.

Canada. — *Carter v. Purrington*, 7 New Bruns. 226. And see *Longueuil v. Brais*, 11 Rev. Lég. 503.

United States. — *Hofschulte v. Doe*, 78 Fed. Rep. 436. And see *Ersine v. Hohnbach*, 14 Wall. (U. S.) 613.

Connecticut. — *Wooster v. Parsons, Kirby* (Conn.) 110. And see *Watson v. Watson*, 9 Conn. 140, 23 Am. Dec. 324; *Neth v. Crofut*, 30 Conn. 580.

Illinois. — *Ressler v. Peats*, 86 Ill. 275; *Tuttle v. Wilson*, 24 Ill. 553; *McDonald v. Wilkie*, 13 Ill. 25, 54 Am. Dec. 423; *Tefft v. Ashbaugh*, 13 Ill. 602; *Lattin v. Smith*, 1 Ill. 362; *Stafford v. Low*, 20 Ill. 152; *Flack v. Ankeny*, 1 Ill. 187. And see *Wentworth v. People*, 5 Ill. 550.

Indiana. — *Davis v. Bush*, 4 Blackf. (Ind.) 330; *Cooper v. Adams*, 2 Blackf. (Ind.) 294.

Louisiana. — See *Brainard v. Head*, 15 La. Ann. 489.

Maine. — *Winchester v. Everett*, 80 Me. 535, 6 Am. St. Rep. 228. And see *Gray v. Kimball*, 42 Me. 299; *State v. McNally*, 34 Me. 210, 56 Am. Dec. 650.

Massachusetts. — *Hubbard v. Garfield*, 102 Mass. 72; *Chase v. Ingalls*, 97 Mass. 524; *Cassier v. Fales*, 139 Mass. 461; *Martin v. Collins*, 165 Mass. 256; *Langford v. Boston*, etc., R. Co., 144 Mass. 431. And see *Nichols v. Thomas*, 4 Mass. 232; *Clarke v. May*, 2 Gray (Mass.) 413, 61 Am. Dec. 470; *Coupal v. Ward*, 106 Mass. 289; *Wilmarth v. Burt*, 7 Met. (Mass.) 257; *Fisher v. McGirr*, 1 Gray (Mass.) 1, 61 Am. Dec. 381; *Blake's Case*, 106 Mass. 501; *Underwood v. Robinson*, 106 Mass. 296; *Twitchell v. Shaw*, 10 Cush. (Mass.) 46. *Compare Tellefsen v. Fee*, 168 Mass. 188.

Michigan. — *Wheaton v. Whittemore*, 49 Mich. 348; *Brooks v. Mangan*, 86 Mich. 576, 24 Am. St. Rep. 137; *Schultz v. Huebner*, 108 Mich. 274. And see *Tarlton v. Fisher*, 2 Doug. 671; *Ortman v. Greenman*, 4 Mich. 291.

Minnesota. — *Collins v. Brackett*, 34 Minn. 339.

Missouri. — *Merchant v. Bothwell*, 1 Mo. App. Rep. 131.

Nebraska. — *Atwood v. Atwater*, 43 Neb. 147.

New Hampshire. — *State v. Weed*, 21 N. H. 262, 53 Am. Dec. 188. And see *Keniston v. Little*, 30 N. H. 318, 64 Am. Dec. 297.

New Jersey. — *Hann v. Lloyd*, 50 N. J. L. 1; *Jennings v. Thompson*, 54 N. J. L. 55; *Mangold v. Thorpe*, 33 N. J. L. 138.

New York. — *People v. Warren*, 5 Hill (N. Y.) 440; *Nowak v. Waller*, (Supreme Ct.) 10 N. Y. Supp. 199; *Stewart v. Hawley*, 21 Wend. (N. Y.) 552; *Percival v. Jones*, 2 Johns. Cas. (N. Y.) 49; *Hallock v. Dominy*, 69 N. Y. 240;

Warner v. Shed, 10 Johns. (N. Y.) 138. And see *Savacool v. Boughton*, 5 Wend. (N. Y.) 170, 21 Am. Dec. 181; *Shaw v. Davis*, 55 Barb. (N. Y.) 389.

Ohio. — *Taylor v. Alexander*, 6 Ohio 144.

Tennessee. — *Herzog v. Graham*, 9 Lea (Tenn.) 152.

Texas. — *Gaines v. Newbrough*, 12 Tex. Civ. App. 466. And see *Canfield v. Gresham*, 82 Tex. 10.

Utah. — *Marks v. Sullivan*, 9 Utah 12.

Vermont. — *Pierson v. Gale*, 8 Vt. 509, 30 Am. Dec. 487; *Churchill v. Churchill*, 12 Vt. 661; *Aldrich v. Weeks*, 62 Vt. 89. And see *Kent v. Miles*, 65 Vt. 582.

Wisconsin. — *McLean v. Cook*, 23 Wis. 364. And see *Grace v. Mitchell*, 31 Wis. 533, 11 Am. Rep. 613.

Detention by Jailer under Error in Mittimus. — The keeper of a workhouse who detains a prisoner committed two months beyond his term of imprisonment by reason of an error in the attested copy of the mittimus is not liable in an action for damages for false imprisonment in the absence of bad faith or negligence on his part in failing to ascertain whether the attested copy was a correct copy of the original mittimus. *Martin v. Collins*, 165 Mass. 256.

Where a Sergeant at Arms of one of the houses of a state legislature was, in doing the acts complained of, acting under a valid resolution and by command of the house, it has been decided that he cannot be held liable in an action for damages for false imprisonment. *Canfield v. Gresham*, 82 Tex. 10. And see *Kilbourn v. Thompson*, 103 U. S. 168.

What Is Judicial Process. — It has been held that an indorsement made by the sheriff upon an undertaking given by a defendant upon his arrest remanding him to jail for nonjustification of his bail is not a judicial process, and affords no protection to the officer executing the direction or to the jailer who confined the person thereunder. *Arteaga v. Connor*, 88 N. Y. 403, 47 N. Y. Super. Ct. 494.

Evidence Admissible — Copy of Indictment. — In the case of *McCully v. Malcom*, 9 Humph. (Tenn.) 187 which was an action for damages for false imprisonment against a sheriff, the justification pleaded being a valid state's warrant against the plaintiff, it was held that a copy of the bill of indictment found against the plaintiff on the charge for which he was arrested is not admissible. In this connection the court observed that if the fact of the finding of the indictment against the plaintiff were admissible at all the whole of the proceedings should have been offered.

Genuineness of Warrant — How Proved. — In an action for damages for false imprisonment against an officer who executed a warrant of arrest, the genuineness of the warrant and the judgment of a justice of the peace committing the defendant for trial may be proved by third persons as well as by the justice himself, though the latter be present in court. *McCully v. Malcom*, 9 Humph. (Tenn.) 187.

It Is No Justification of an Imprisonment that the defendant was a police officer and acted in

far as the officer is concerned, applies as well in courts of limited as of general jurisdiction.¹ Not only, it is held, is an officer not bound to look behind the face of the writ placed in his hands to be executed,² or take notice of extrinsic facts,³ but he will not be permitted to question the validity of a writ neither void nor voidable on its face.⁴ Although, therefore, the proceedings prior to the issuance of the writ may have been irregular,⁵ on account, for example, of an insufficient or defective affidavit or complaint,⁶ the officer will not be liable in false imprisonment;⁷ and the same is true although the magistrate issuing the warrant committed an error of judgment in so doing,⁸ or even

what he believed to be the discharge of his duty, if there was no process valid on its face and issuing from a court of competent jurisdiction. *Moore v. Devoy*, 37 How. Pr. (N. Y. Super. Ct.) 18. Nor is it a complete defense to the action that the officer executing supposed he had a *capias*, when in fact he did not, though, it has been held, the jury may consider such circumstance in mitigation of damages. *Hall v. O'Malley*, 49 Tex. 70.

Proof of Warrant at Time of Arrest. — An executive officer who is sued in damages for false imprisonment may introduce his return on a state's warrant in evidence to prove that he had a warrant in his hands at the time of the imprisonment complained of. *McCully v. Malcom*, 9 Humph. (Tenn.) 187.

1. **Where Court Is of Limited Jurisdiction.** — *Barnes v. Barber*, 6 Ill. 405; *Savacool v. Boughton*, 5 Wend. (N. Y.) 170, 21 Am. Dec. 181.

2. **Officer Not Required to Look Beyond Face of Writ.** — *Davis v. Bush*, 4 Blackf. (Ind.) 330; *Wheaton v. Whittemore*, 49 Mich. 348; *Warner v. Shed*, 10 Johns. (N. Y.) 138; *Pierson v. Gale*, 8 Vt. 509, 30 Am. Dec. 487; *Grace v. Mitchell*, 31 Wis. 533, 11 Am. Rep. 613. And see *Ortman v. Greenman*, 4 Mich. 291; *Keniston v. Little*, 30 N. H. 318, 64 Am. Dec. 297.

It is sufficient to justify the officer executing the process to know that the court has jurisdiction of the subject-matter. He is not bound to examine into the validity of the proceedings or the regularity of the process. Even if it had been erroneous he would not have been liable as a trespasser for executing it. *Lattin v. Smith*, 1 Ill. 362. And see *Hill v. Bateman*, 1 Stra. 710; *Marshalsea Case*, 10 Coke 76; *Warner v. Shed*, 10 Johns. (N. Y.) 138.

3. *State v. Weed*, 21 N. H. 262, 53 Am. Dec. 188; *People v. Warren*, 5 Hill (N. Y.) 440.

4. *Jennings v. Thompson*, 54 N. J. L. 55; *Mangold v. Thorpe*, 33 N. J. L. 138; *Taylor v. Alexander*, 6 Ohio 144; *Gaines v. Newbrough*, 12 Tex. Civ. App. 466.

Qualification of General Rule. — Although, as has been stated, an executive officer will not, in general, be permitted to question the validity of process placed in his hands or addressed to him if fair on its face, yet it has been held that a sheriff is not liable for false imprisonment for refusing to discharge a debtor on a defective order, although had the officer made the discharge he would have been protected by the order. *Hayes v. Bowe*, 12 Daly (N. Y.) 193. And it has also been decided that although an officer executing a *ca. sa.* upon an insufficient affidavit may protect himself by pleading the process, yet should he refuse to

execute it he would not be liable. *Tuttle v. Wilson*, 24 Ill. 553.

5. *Illinois.* — *Tuttle v. Wilson*, 24 Ill. 553; *Lattin v. Smith*, 1 Ill. 362; *Flack v. Ankeny*, 1 Ill. 187; *Ressler v. Peats*, 86 Ill. 275.

Indiana. — *Cooper v. Adams*, 2 Blackf. (Ind.) 294.

Massachusetts. — *Underwood v. Robinson*, 106 Mass. 296; *Langford v. Boston*, etc., R. Co., 144 Mass. 431.

Michigan. — *Wheaton v. Whittemore*, 49 Mich. 348.

Minnesota. — *Collins v. Brackett*, 34 Minn. 339.

Missouri. — *Merchant v. Bothwell*, 1 Mo. App. Rep. 131.

New Jersey. — *Mangold v. Thorpe*, 33 N. J. L. 138.

New York. — *Nowak v. Waller*, (Supreme Ct.) 10 N. Y. Supp. 199.

Ohio. — *Taylor v. Alexander*, 6 Ohio 144.

And see *Marshalsea Case*, 10 Coke 76; *Hill v. Bateman*, 1 Stra. 710; *Longueuil v. Brais*, 11 Rev. Lég. 503; *Brainard v. Head*, 15 La. Ann. 489; *Coupal v. Ward*, 106 Mass. 289; *Warner v. Shed*, 10 Johns. (N. Y.) 138.

6. *Ressler v. Peats*, 86 Ill. 275, *Tuttle v. Wilson*, 24 Ill. 553; *Langford v. Boston*, etc., R. Co., 144 Mass. 431; *Nowak v. Waller*, (Supreme Ct.) 10 N. Y. Supp. 199. And see *Brainard v. Head*, 15 La. Ann. 489; *Coupal v. Ward*, 106 Mass. 289.

Magistrate Acting as Plaintiff's Attorney. — In the case of *Underwood v. Robinson*, 106 Mass. 296, it appeared that the affidavit upon which the writ issued was sworn to before the same person as magistrate who filled out the writ as attorney for the plaintiff therein, and that the officer executing, by reason of his private knowledge of the magistrate's handwriting and relation to one of the parties to the action, had knowledge of the circumstances. This, however, it was held, did not deprive the officer of the "conclusive protection which the law attributes to a process regular on its face and issued by a court of competent jurisdiction." See also *Chase v. Ingalls*, 97 Mass. 524; *Webber v. Gay*, 24 Wend. (N. Y.) 485; *People v. Warren*, 5 Hill (N. Y.) 440; *State v. Weed*, 21 N. H. 262, 53 Am. Dec. 188.

7. See cases cited in foregoing notes.

8. *Erskine v. Hohnbach*, 14 Wall. (U. S.) 613; *Trammell v. Russellville*, 34 Ark. 105, 36 Am. Rep. 1; *Brooks v. Mangan*, 86 Mich. 576, 24 Am. St. Rep. 137; *Stewart v. Hawley*, 21 Wend. (N. Y.) 552. See also *Hofschulte v. Doe*, 78 Fed. Rep. 436. *Compare State v. Hunter*, 106 N. Car. 796; *Sumner v. Beeler*, 50 Ind. 341, 16 Am. Rep. 718. And see the preceding subdivision, *Liability of Judicial Officers*.

though the writ has been fraudulently or irregularly issued.¹

The Officer's Exemption Continues, also, as well after as before the setting aside of the writ for irregularity.²

Officer's Actual Knowledge of Irregularities. — An officer's exemption from liability for false imprisonment is, it has been held, unaffected by his actual knowledge of antecedent defects or irregularities in the proceedings in which the writ issued,³ or by his cognizance of the fact that there are valid defenses to the action.⁴

Nature and Extent of Jurisdiction Required. — The requirement that, in order to afford exemption in false imprisonment, the court or judicial officer issuing the process shall have a general jurisdiction of the subject-matter is satisfied by the circumstance of a general jurisdiction to issue process of the nature of the one in question, though in point of fact the issuance of the particular warrant may have been wholly unauthorized.⁵

(b) **Policy of Rule.** — The rule by which an executive officer is not required to consider antecedent errors or irregularities in the execution of a legal process, and exempting him from liability in damages for false imprisonment where the warrant is valid on its face, has its foundation in sound policy.⁶ Such a rule is, it has been well said, essential to the prompt and orderly administration of

1. *Cassier v. Fales*, 139 Mass. 461. And see *Wilmarth v. Burt*, 7 Met. (Mass.) 257; *Twitchell v. Shaw*, 10 Cush. (Mass.) 46; *Fisher v. McGirr*, 1 Gray (Mass.) 1, 61 Am. Dec. 381; *Blake's Case*, 106 Mass. 501; *Tarleton v. Fisher*, 2 Doug. 671.

Where Writ Voidable for Irregularity or Mistake. — An executive officer is justified in executing a process valid on its face, even though it is voidable for irregularity or mistake in issuing it. *Taylor v. Alexander*, 6 Ohio 144. And see *Flack v. Ankeny*, 1 Ill. 187.

Omission of Statement as to Character of Offense Charged. — In the case of *Mangold v. Thorpe*, 33 N. J. L. 138, which was an action for damages for false imprisonment, it was held that the fact that a warrant of arrest did not state the character of the offense with which the person against whom it was directed was charged would not render it void so as to make the officer executing liable in damages for false imprisonment. It was observed in this case, however, that such a statement was essential to the validity of a warrant of commitment.

Omission of Statements as to Legal Prerequisites. — A ca. sa. issued upon a judgment is not void on its face though it does not recite that the oath required by law to be made was made before it issued. *Lattin v. Smith*, 1 Ill. 362.

2. *Parsons v. Lloyd*, 2 W. Bl. 845; *Barker v. Braham*, 2 W. Bl. 866.

Discharge on Habeas Corpus Immaterial. — A person arrested and imprisoned for the violation of a void ordinance of a municipal corporation may be discharged therefrom on habeas corpus, but it does not follow that the officer executing the process of the court regular on its face is liable in a civil action for damages. *Hofschulte v. Doe*, 78 Fed. Rep. 436.

3. *Marks v. Sullivan*, 9 Utah 12. And see *Underwood v. Robinson*, 106 Mass. 296; *Brainard v. Head*, 15 La. Ann. 489. Compare *Tellefsen v. Fee*, 168 Mass. 188.

4. **Effect of Officer's Knowledge of Defenses.** — *O'Shaughnessy v. Baxter*, 121 Mass. 515.

Arrest of Bankrupt After Discharge. — It has been held that the arrest of a bankrupt on a warrant valid on its face will not render the officer executing it liable in false imprisonment though he has knowledge of the facts of the discharge. *Wilmarth v. Burt*, 7 Met. (Mass.) 257. And see *Twitchell v. Shaw*, 10 Cush. (Mass.) 46, where there was a levy of execution on property for a debt for which the officer was made aware that the debtor had a receipt.

Arrest of Infant for Debt. — Pursuant to the same principle, the arrest of an infant for debt will not render the officer liable in false imprisonment. *Cassier v. Fales*, 139 Mass. 461.

5. *Percival v. Jones*, 2 Johns. Cas. (N. Y.) 49; *Marcy, J.*, in *Savacool v. Boughton*, 5 Wend. (N. Y.) 170, 21 Am. Dec. 181; *Jennings v. Thompson*, 54 N. J. L. 55. And see *Warner v. Shed*, 10 Johns. (N. Y.) 138; *Hill v. Bateman*, 1 Stra. 710.

Nature of Jurisdiction Required. — In the case of *Hill v. Bateman*, 1 Stra. 710, the plaintiff had been confined under the game law and was immediately sent to Bridewell without any attempt to levy the penalty upon his goods. This the justice had no right to do, and he was held liable for the imprisonment; but the constable was held justified because the matter was within the jurisdiction of the justice. *Marcy, J.*, commenting on this case in *Savacool v. Boughton*, 5 Wend. (N. Y.) 175, 21 Am. Dec. 181, said: "I understand by this case that the justice had not authority, or, in other words, had not jurisdiction, to issue process to commit the party until he had attempted to levy the fine upon his goods; but that after he had made that attempt without success he had authority to commit him. The process, though unauthorized by the circumstances of the case, would under other circumstances have been proper. The issuing of the process was a matter within the justice's jurisdiction. This was enough for the officer's justification."

6. **Policy and Rationale of Rule.** — *Wheaton v. Whittemore*, 49 Mich. 348; *Hann v. Lloyd*, 50 N. J. L. 1.

the law.¹

(c) **Information to Officer that Court Has Not Jurisdiction of Person.** — An exception has been made to the rule above announced, that an executive officer is not liable in false imprisonment for the execution of a writ valid on its face, in cases where the officer in whose hands such a writ is placed is informed of facts which, if true, would render the court issuing the process without jurisdiction of the person.² Thus where an officer arrested the captain of a Norwegian vessel after information that the controversy with reference to which the process of arrest issued was one within the exclusive jurisdiction of the consul of Norway and Sweden, it was held that he would be liable for damages for false imprisonment although the process was fair on its face.³ The propriety of this exception has, however, been denied,⁴ and so the question cannot be considered as settled.

(4) **Where Warrant Contains Misnomer.** — Though the person imprisoned be in reality the person intended by the warrant, yet if such person is improperly designated by name therein it will be a false imprisonment.⁵

1. *Wilmarth v. Burt*, 7 Met. (Mass.) 259; *Sandford v. Nichols*, 13 Mass. 288, 7 Am. Dec. 151; *Wheaton v. Whittemore*, 49 Mich. 348; *Hann v. Lloyd*, 50 N. J. L. 1.

Prosecutions Against Officers for Bona Fide Acts Not Favored. — "It is the policy of the law as well to encourage as to protect its officers in the faithful and efficient discharge of their official duties. Prosecutions against them for acts done by them in the *bona fide* performance of such duties should therefore find no favor in courts of justice, although for any neglect of duty or abuse of power they should be held to a strict accountability." Thomas, J., in *Barnes v. Barber*, 6 Ill. 401.

2. **Notice Aliunde of Jurisdictional Defect.** — *Leachman v. Dougherty*, 81 Ill. 324; *Tellefsen v. Fee*, 168 Mass. 188; *Sprague v. Birchard*, 1 Wis. 457, 60 Am. Dec. 393; *Grace v. Mitchell*, 31 Wis. 533, 11 Am. Rep. 613; *Walworth, C.*, in *Parker v. Walrod*, 16 Wend. (N. Y.) 514, 30 Am. Dec. 124; *Suydam v. Keys*, 13 Johns. (N. Y.) 444; *Wise v. Withers*, 3 Cranch (U. S.) 331; *McDonald v. Wilkie*, 13 Ill. 25, 54 Am. Dec. 423; *Barnes v. Barber*, 6 Ill. 405; *Tefft v. Ashbaugh*, 13 Ill. 602.

Notice of Want of Jurisdiction of Subject-matter. — In the case of *People v. Warren*, 5 Hill (N. Y.) 440, it was held that a ministerial officer is protected in the execution of process regular and legal on its face though he has knowledge of facts rendering it void for want of jurisdiction of the subject-matter.

3. *Tellefsen v. Fee*, 168 Mass. 188. In this case the court said: "Several cases have been called to our attention in which there are dicta to the effect that an officer is not bound to look beyond his precept, even if he has knowledge that the court has no jurisdiction; but an examination of these cases shows that the facts known to the officer did not affect the jurisdiction of the court, but related to irregularities in the prior proceedings or to matters merely of defense to the action."

4. *Marshalsea Case*, 10 Coke 76; *Sheldon, J.*, dissenting, in *Leachman v. Dougherty*, 81 Ill. 324; *People v. Warren*, 5 Hill (N. Y.) 440; *Webber v. Gay*, 24 Wend. (N. Y.) 485. And see *Erskine v. Hohnbach*, 14 Wall. (U. S.) 613; *Watson v. Watson*, 7 Conn. 140, 23 Am. Dec. 324; *Twitchell v. Shaw*, 10 Cush. (Mass.) 48;

Wilmarth v. Burt, 7 Met. (Mass.) 257; *Wall v. Trumbull*, 16 Mich. 234; *Taylor v. Alexander*, 6 Ohio 147.

Want of Personal Jurisdiction Must Appear on Face of Process. — Where the subject-matter is within the jurisdiction of the court, but the want of jurisdiction is as to the person, unless such want of jurisdiction appears on the face of the process the officer who executes it is not a trespasser. *Marshalsea Case*, 10 Coke 76. To the same effect see *Smith v. Shaw*, 12 Johns. (N. Y.) 257, in which case it was held that where the subject-matter of a suit is not within the jurisdiction of a court all proceedings are absolutely void and the person executing the process is liable in damages for false imprisonment. But where the subject-matter is within the jurisdiction of the court, and the want of jurisdiction is as to the person or place, the officer is excused unless want of jurisdiction appears on the face of the process.

5. *Griswold v. Sedgwick*, 6 Cow. (N. Y.) 456; *Scott v. Ely*, 4 Wend. (N. Y.) 555; *Mead v. Haws*, 7 Cow. (N. Y.) 332; *Lee, J.*, in *Parsons v. Harper*, 16 Gratt. (Va.) 64. And see *Shadgett v. Clipson*, 8 East 328; *Campbell v. McDonell*, 27 U. C. Q. B. 343.

The Arrest of the Right Person by the Wrong Name through a misnomer in the process, without an allegation that the true name is unknown, is false imprisonment. *Gelzenleutcher v. Niemeyer*, 64 Wis. 316, 54 Am. Rep. 616. And see *Hoye v. Bush*, 1 M. & G. 775, 39 E. C. L. 649; *Scheer v. Keown*, 29 Wis. 586.

Warrant for Arrest of Unknown Person. — Where a person was taken into custody under a warrant directing the arrest of "a person whose name is unknown, but whose person is well known, of Vassalboro, in the county of Kennebec," it was held that the officer arresting was liable in false imprisonment, no protection being afforded by such a writ. *Harwood v. Siphers*, 70 Me. 464.

Where Person Arrested Insufficiently Designated. — In the case of *Nichols v. Thomas*, 4 Mass. 232, on an execution against "the president, directors, and company" of a corporation, the officer arrested and committed one of the proprietors, and it was held that he incurred liability therefore, because the plaintiff

(5) *Where Wrong Person Arrested.* — If an officer, in executing a warrant, arrests the wrong person, he will be held liable for false imprisonment at the suit of the person taken into custody,¹ unless, indeed, the arrest be upon the representation of the person taken that he is the person named.² But even in such case the officer would be liable for any detention after learning of the true state of facts.³

(6) *Arrest Beyond Territorial Limits of Jurisdiction.* — As a general rule an officer who makes an arrest beyond the territorial limits of his jurisdiction is liable in damages for false imprisonment.⁴

(7) *Where Officer Acts Wantonly and Oppressively.* — Of course if an officer, though in the execution of a valid process, acts wantonly and oppressively, he may be held liable in damages therefor.⁵ But the liability in such cases is

was not named nor described in his precept, the corporate name not being the description or designation of any natural person whatever.

1. **Wrong Person Arrested.** — *Dunston v. Paterson*, 2 C. B. N. S. 495, 89 E. C. L. 495; *Mitchell v. Malone*, 77 Ga. 301; *Holmes v. Blyler*, 80 Iowa 365; *Filer v. Smith*, 96 Mich. 351, 35 Am. St. Rep. 603; *Hays v. Creary*, 60 Tex. 445; *Wolf v. Perryman*, 82 Tex. 112; *Ryburn v. Moore*, 72 Tex. 85.

But if a Judgment Is Rendered Against a Person and he is taken in execution, the officer executing the process is not liable in false imprisonment although the judgment was rendered against the wrong person. *Hallowell*, etc., *Bank v. Howard*, 14 Mass. 181. And see opinion of Gray, C. J., in *O'Shaughnessy v. Baxter*, 121 Mass. 515.

Extent of Liability — Arrest by One Officer — Continuance of Imprisonment by Another. — In the case of *Wolf v. Perryman*, 82 Tex. 112, the plaintiff had been arrested by the sheriff of one county on a capias issued out of another county, and by such sheriff delivered over to the custody of a deputy sheriff of the county out of which the warrant issued. It was held in this case that the sheriff who made the arrest in the first instance was, upon proof that the party arrested was not the one named in the warrant, liable to such person for the entire consequences of the arrest, including the continuation of the imprisonment and the acts of the officer to whom he had been delivered, until liberated by the latter.

2. *Dunston v. Paterson*, 2 C. B. N. S. 495, 89 E. C. L. 495; *Hays v. Creary*, 60 Tex. 445.

3. *Dunston v. Paterson*, 2 C. B. N. S. 495, 89 E. C. L. 495.

4. **Arrest Beyond Territorial Limits of Jurisdiction.** — The case of *Mitchell v. Malone*, 77 Ga. 301, was an action for damages for false imprisonment where the arrest had been made by an officer without the limits of his proper county and without warrant, the person taken into custody being innocent of the crime of which he was accused. It was held in this case that the facts shown constituted a cause of action for false imprisonment, though it might be that the fact that the officer was honestly mistaken as to the identity of the party accused, or that he acted prudently or cautiously in ascertaining the truth of the matter, should go in mitigation of damages.

Arrest on Warrant Addressed to Sheriff of Any County. — The arrest by a sheriff outside of his county will not, it seems, constitute a false imprisonment where it is made by virtue of a

bench warrant addressed to the sheriff of any county in the state. *Knight v. International*, etc., R. Co., 61 Fed. Rep. 87, 23 U. S. App. 356.

5. *Atwood v. Atwater*, 43 Neb. 147.

Extent of Protection which Warrant Affords. — An officer in the execution of the process of the law is entitled to protection so long as he keeps himself within the pale of his authority, but no longer. The process is a sufficient warrant for the execution of its commands, but affords no authority to go beyond or contrary to its injunctions, and when the officer does so he ceases to be the minister of the law and becomes its violator. *Wentworth v. People*, 5 Ill. 554.

Special Officer Refusing to Show Warrant Liable in False Imprisonment. — In the case of *Frost v. Thomas*, 24 Wend. (N. Y.) 418, it was held that a special deputy is bound to show his warrant if requested to do so, and if he omits to show it the party against whom the warrant is issued may resist arrest, and the warrant under such circumstances is no protection in an action against the special officer for an assault, battery, and false imprisonment.

Removal of Prisoner Out of Court to Place of Temporary Confinement. — In the case of *Hopner v. McGowan*, 116 N. Y. 405, the plaintiff was arrested without a warrant and taken into a police court by a policeman in the city of New York on the complaint of another person that the plaintiff had assaulted him. The police justice was engaged, and the plaintiff was taken to the desk of the defendant, who was the assistant clerk. While the officer was stating the case, the defendant, apparently annoyed by the plaintiff's interruption, directed the officer to put him in a room in which prisoners were kept. This was done, and the plaintiff remained there for a few minutes, until a complaint was prepared. He was then brought before the justice and discharged from custody on giving bail. It did not appear that the defendant, in ordering the plaintiff's removal from his room, was acting pursuant to any rules or regulations of the court or board of police justices, or in the performance of any specific authority conferred upon him by his superior. But it was held to be within the power of the police officer, and that it was his duty, until the plaintiff could be presented for examination, if the orderly proceedings of the court required it, without any direction of the court or its officer, to remove the prisoner to a place prepared for the detention of persons taken into custody arraigned.

not, in general, for a false imprisonment. It would more likely be for assault and battery.¹

(8) *Liability of Person Instigating Arrest Though Officer Not Liable.* — It has been laid down as a general principle that where an arrest is made upon warrant the complainant can be held liable for false imprisonment only where the officer making the arrest may be, though, it is admitted, the animus of the former may aggravate his liability.² But this is not, it is believed, a rule of universal application, for where a warrant is declared void, not for error, but for irregularity, the person procuring its issuance and execution may, as has been seen, be held liable, though the officer executing would be protected if the warrant were regular on its face.³ There is no doubt that where the arrest is without warrant, the person at whose instance the plaintiff has been taken into custody by an officer may be held liable for false imprisonment, though the officer be not so.⁴ And where there was an action for damages for false imprisonment against two who pleaded jointly, one of whom was the officer executing a *capias* under an irregular judgment and the other the plaintiff therein, it was held that the officer would be held liable, although if he had severed in his defense he might have been protected by the judgment.⁵

ing the action of the court, and that the verdict was properly directed for the defendant.

But where a solicitor was improperly removed from the court room by the police and confined for a time in the detention room, it was held a false imprisonment. *Bulmer v. O'Sullivan*, 28 Nova Scotia 406.

Where an Execution Debtor Refuses to Relinquish Property when demanded, declaring at the same time that the proceedings are illegal, the officer is excused if he levies on the person of the debtor, though the latter may have abundant personal property. *Allen v. Gleason*, 4 Day (Conn.) 376. And if a debtor states that he has no property wherewith to satisfy an execution, the constable is justified in arresting him without searching for goods and chattels. *Marks v. Newcombe*, 22 New Bruns. 419. But an officer is liable in trespass for false imprisonment if he arrests a debtor under an execution issued out of a justice's court before he has used reasonable diligence to find goods to levy on. *Hunter v. Maddox*, 12 New Bruns. 162.

1. See generally the title ASSAULT AND BATTERY vol. 2, p. 952.

2. *Doctrine that Warrant Which Protects Officer Will Protect Person Procuring.* — *Hill v. Taylor*, 50 Mich. 549. See also the case of *Wheaton v. Whittemore*, 49 Mich. 348 wherein it was held that a civil action for damages for trespass to the person in false imprisonment will not lie against one who has made a criminal complaint or against his attorney in the case, where the warrant issued thereon is sufficiently regular on its face to protect the officer who executes it.

3. *Contrary Doctrine.* — *Percival v. Jones*, 2 Johns. Cas. (N. Y.) 49; *Savacool v. Boughton*, 5 Wend. (N. Y.) 171, 21 Am. Dec. 181; *Cassier v. Fales*, 139 Mass. 461. And see also in this connection the case of *Deyo v. Van Valkenburgh*, 5 Hill (N. Y.) 242, holding that a *ca. sa.* issued on a judgment which had been previously paid would protect the officer, but not the party nor the attorney who procured its issuance.

And in the case of *Parsons v. Lloyd*, 2 W. Bl. 845, it was held that where a term has in-

tervened between the teste and the return of a *capias* an action for damages for false imprisonment lies against the persons procuring an arrest thereunder, although the officer executing the writ is protected.

In the same connection the case of *Savacool v. Boughton*, 5 Wend. (N. Y.) 171, 21 Am. Dec. 181, is an authority in point. This was an action for damages for false imprisonment against an officer who sought to justify under a process valid on its face. To this defense it was urged that the justice had no jurisdiction of the person and that therefore the writ would not afford protection to the officer. It was held in this case that though the justice who issued the warrant and the person who procured its issuance might be liable to the person arrested thereunder, the officer would not be liable if nothing appeared to show that the justice had no jurisdiction of the defendant's person.

4. *Burroughs v. Eastman*, 93 Mich. 433; *Carson v. Dessau*, 142 N. Y. 445. And see *Holley v. Mix*, 3 Wend. (N. Y.) 351, 20 Am. Dec. 702; *Burns v. Erben*, 40 N. Y. 463.

Person Procuring Arrest Without Warrant. — If one man charges another with felony and requests an officer to take him into custody and carry him before a magistrate, it would be most mischievous, said Lord Mansfield in *Samuel v. Payne*, 1 Doug. 359, that the officer should be bound first to try and at his peril exercise his judgment on the truth of the charge. He that makes the charge should alone be answerable. The officer does his duty in carrying the accused before a magistrate who is authorized to examine and commit or discharge.

It Will Be Observed that the case of *Burroughs v. Eastman*, 93 Mich. 433, was a *Michigan* adjudication, in which state, as shown above, the rule in the case of an arrest on warrant is different.

5. *Phillips v. Biron*, 1 Stra. 509. And see *Dunham v. Powell*, 5 U. C. Q. B. O. S. 675. Compare *Friel v. Ferguson*, 15 U. C. C. P. 584.

Must be Verdict on General Issue. — In the case of *Gold v. Bissell*, 1 Wend. (N. Y.) 210, which was an action for damages for false imprison-

(9) *Persons Assisting Officer.* — It has been held that a person who, when called upon, comes to the assistance of one whom he knows to be an officer, if in his acts he confines himself to the orders and directions of the officer, is protected against suits for trespass and false imprisonment, whether the officer was acting legally or not.¹ Where, however, the party making the arrest is not a known public officer, but only assumes to be authorized to act in the particular case by special appointment, the persons aiding the supposed officer are bound to know whether or not he is authorized to make the arrest, and if not, may be liable in false imprisonment.² And likewise a volunteer is "held to knowledge of his right to interfere."³

The True Rule Is Believed to Be, however, that persons assisting an officer at his request, simply stand upon the same ground as the officer himself and are subject to the same liability.⁴

Where Officer Attempts to Execute Void Warrant. — The rule that persons assisting an officer at his request, in the making of an arrest, are not liable in false imprisonment though the officer was acting illegally, has been held subject to the qualification that if the warrant attempted to be executed is a void warrant the persons assisting in its execution may be liable.⁵

Attempt to Execute Merely Voidable Warrant. — Where a warrant of arrest is voidable merely, and not void, a person assisting an officer in its execution is not liable in false imprisonment.⁶

d. LIABILITY OF PRINCIPAL FOR IMPRISONMENT BY AGENT — (1) *General Rule.* — The general rule is that the principal is liable in damages for a false imprisonment committed by his agent in the exercise of the authority conferred.⁷

ment, it was held that though a party having a justification will lose his defense by joining in his plea with another not entitled to justify, yet a verdict cannot be sustained against the former unless he is proved guilty on the general issue.

1. Persons Assisting Officers. — *Dietrichs v. Schaw*, 43 Ind. 175; *Firestone v. Rice*, 71 Mich. 377, 15 Am. St. Rep. 266; *Taylor v. Alexander*, 6 Ohio 144; *Kirbie v. State*, 5 Tex. App. 62; *McMahan v. Green*, 34 Vt. 69.

Those Called upon to Act as an Officer's Posse have no right to examine into the regularity of the proceedings of a court whose process they are called upon to execute and proceed or forbear as they may deem proper. *Taylor v. Alexander*, 6 Ohio 144.

Officer Need Not Be Personally Present. — Where a sheriff having a warrant to apprehend several persons who had riotously assembled together and committed an assault came to the house where the assemblage was, and, being resisted and unable to make the arrests, commanded A. and others to guard the house in which the persons were assembled and prevent their escape while he went to summon a sufficient force to enable him to execute the warrant, it was held that the sheriff would, during his absence, be deemed constructively present so as to justify A. and the others in an action for damages for false imprisonment. *Coyles v. Hurtin*, 10 Johns. (N. Y.) 85.

2. *Dietrichs v. Schaw*, 43 Ind. 175. And see *Oystead v. Shed*, 12 Mass. 506; *Elder v. Morrison*, 10 Wend. (N. Y.) 128, 25 Am. Dec. 548; *Hooker v. Smith*, 19 Vt. 151, 47 Am. Dec. 679.

3. *Kirbie v. State*, 5 Tex. App. 60.

4. Doctrine of Identity of Liability of Officer and Persons Assisting. — In the case of *Vinton v. Weaver*, 41 Me. 430, which was an action for damages for false imprisonment, *Appleton, J.*,

delivering the opinion of the court said: "It is insisted that a distinction exists between the aids and servants of the officer and the officer himself, and that, while it is conceded that the latter may be liable, the former should be exempted from liability. But such seems not to be regarded as the law. They must both stand or fall together." And see *Oystead v. Shed*, 12 Mass. 506; *Leonard v. Stacy*, 6 Mod. 69; *Savage, C. J.*, in *Elder v. Morrison*, 10 Wend. (N. Y.) 139, 25 Am. Dec. 548; *Mitchell v. State*, 12 Ark. 50, 54 Am. Dec. 253.

Imprisonment Unlawful in Inception or Only by Reason of Subsequent Act — Distinction Between. — In the case of *Oystead v. Shed*, 12 Mass. 506, a distinction is made between cases where the act of the officer was originally unlawful and those where he is subsequently guilty of conduct which renders him a trespasser *ab initio*. In the first instance private persons aiding or assisting an officer are liable as joint trespassers with the officer, but in the latter they are exempt.

5. *Batchelder v. Currier*, 45 N. H. 460.

Mittimus Void for Showing No Cause of Commitment. — Persons who, at a constable's command, assist in the execution of a mittimus which shows no cause of commitment are liable in damages for false imprisonment. *Hiday v. Gilmore*, 3 Blackf. (Ind.) 48.

6. *Goodwine v. Stephens*, 63 Ind. 112.

7. Liability of Principal for Acts of Agent — England. — *Goff v. Great Northern R. Co.*, 3 El. & El. 672, 107 E. C. L. 672.

United States. — *Wells v. Washington Market Co.*, 19 D. C. 385; *Southern Pac. Co. v. Hamilton*, 54 Fed. Rep. 468.

Indiana. — *Evansville, etc., R. Co. v. McKee*, 99 Ind. 519, 50 Am. Rep. 102.

Kansas. — *Wheeler, etc., Mfg. Co. v. Boyce*, 36 Kan. 350.

Express Authority Unnecessary. — It is not, however, necessary to a principal's liability in false imprisonment that the agent's authority should be expressly conferred¹ or that the particular act complained of should have been authorized.²

Act Within General Scope of Authority. — It is sufficient if the agent's act is within the general scope of his authority³ or done within the exercise of the discre-

Maryland. — *National Bank of Commerce v. Baker*, 77 Md. 462.

Massachusetts. — *Shattuck v. Bill*, 142 Mass. 56; *Krulevitz v. Eastern R. Co.*, 143 Mass. 228.

New York. — *Warren v. Dennett*, 17 Misc. Rep. (N. Y. City Ct.) 86; *Lynch v. Metropolitan El. R. Co.*, 90 N. Y. 77, 43 Am. Rep. 141; *Mallach v. Ridley*, 43 Hun (N. Y.) 336; *Clark v. Starin*, 47 Hun (N. Y.) 345; *Shea v. Manhattan R. Co.*, (City Ct.) 7 N. Y. Supp. 497.

Texas. — *Galveston, etc., R. Co. v. Donahoe*, 56 Tex. 162.

West Virginia. — *Gillingham v. Ohio River R. Co.*, 35 W. Va. 588, 29 Am. St. Rep. 827.

See generally the title AGENCY, vol. 1, p. 930.

No Recovery Against Agent After Compromise with Principal. — Where a person unlawfully imprisoned by the acts of an agent has effected a compromise with the principal by the entry of satisfaction of the judgment under which the arrest was made, there can be no recovery in damages against the agent, either by the person imprisoned or by the principal, to whom by the terms of the compromise, the former's claim for damages against the agent had been assigned. *Baker v. Secor*, (Supreme Ct.) 4 N. Y. Supp. 303.

Liability of Agent. — A person is liable in false imprisonment though the act complained of be done as the agent of another. *Josselyn v. McAllister*, 22 Mich. 300. See generally the title AGENCY, vol. 1, p. 930.

1. **Express Authority Unnecessary.** — *Wells v. Washington Market Co.*, 19 D. C. 385; *Wheeler, etc., Mfg. Co. v. Boyce*, 36 Kan. 350; *Shattuck v. Bill*, 142 Mass. 56; *Warren v. Dennett*, 17 Misc. Rep. (N. Y. City Ct.) 86; *Duggan v. Baltimore, etc., R. Co.*, 159 Pa. St. 248, 39 Am. St. Rep. 672; *Eichengreen v. Louisville, etc., R. Co.*, 96 Tenn. 229; *Galveston, etc., R. Co. v. Donahoe*, 56 Tex. 162.

2. **Authority for Particular Act Not Necessary.** — *Wells v. Washington Market Co.*, 19 D. C. 385; *Evansville, etc., R. Co. v. McKee*, 99 Ind. 519, 50 Am. Rep. 102; *Pennsylvania Co. v. Weddle*, 100 Ind. 138; *Wheeler, etc., Mfg. Co. v. Boyce*, 36 Kan. 350; *Shattuck v. Bill*, 142 Mass. 56; *Shea v. Manhattan R. Co.*, (City Ct.) 7 N. Y. Supp. 497; *Lynch v. Metropolitan El. R. Co.*, 90 N. Y. 77, 43 Am. Rep. 141; *Warren v. Dennett*, 17 Misc. Rep. (N. Y. City Ct.) 86; *Duggan v. Baltimore, etc., R. Co.*, 159 Pa. St. 248, 39 Am. St. Rep. 672; *Eichengreen v. Louisville, etc., R. Co.*, 96 Tenn. 229; *Galveston, etc., R. Co. v. Donahoe*, 56 Tex. 162; *Gillingham v. Ohio River R. Co.*, 35 W. Va. 588, 29 Am. St. Rep. 827.

In an action for damages for a false imprisonment by a detective in the employ of a railroad company, who made an arrest without warrant, it was held not to be necessary that the authority should have been express to make the arrest without warrant. If, said the court in this case, such person "had the general authority, actual or apparent, to act for

the defendant in the capacity of detective officer, and such authority included, expressly or by general usage and consent, the power to make an arrest in their behalf, then the mode of execution of such power, with warrant or without, was immaterial, and the defendant was liable in either event." *Duggan v. Baltimore, etc., R. Co.*, 159 Pa. St. 248, 39 Am. St. Rep. 672.

Where a Corporation Employs an Agent to detect and arrest offenders against its property, and such agent, acting within the general scope of his employment, arrests an innocent man, such corporation is liable therefor although the particular act was not directly authorized. *Pennsylvania Co. v. Weddle*, 100 Ind. 138.

3. **Where Imprisonment Within General Scope of Authority.** — *Wells v. Washington Market Co.*, 19 D. C. 385; *Evansville, etc., R. Co. v. McKee*, 99 Ind. 519, 50 Am. Rep. 102; *Pennsylvania Co. v. Weddle*, 100 Ind. 138; *Wheeler, etc., Mfg. Co. v. Boyce*, 36 Kan. 350; *Shattuck v. Bill*, 142 Mass. 56; *Lynch v. Metropolitan El. R. Co.*, 90 N. Y. 77, 43 Am. Rep. 141; *Warren v. Dennett*, 17 Misc. Rep. (N. Y. City Ct.) 86; *Duggan v. Baltimore, etc., R. Co.*, 159 Pa. St. 248, 39 Am. St. Rep. 672; *Eichengreen v. Louisville, etc., R. Co.*, 96 Tenn. 229; *Galveston, etc., R. Co. v. Donahoe*, 56 Tex. 162; *Gillingham v. Ohio River R. Co.*, 35 W. Va. 588, 29 Am. St. Rep. 827.

The case of *Clark v. Starin*, 47 Hun (N. Y.) 345, was an action for damages for false imprisonment, the plaintiff having been illegally arrested and imprisoned by the defendant's son and a special police officer. The defendant was the proprietor of a public pleasure resort, and his son, who participated in the arrest, was general manager of the place. The plaintiff was a ticket taker, arrested on suspicion of having stolen tickets, the charge, however, not being proved to be true. The defendant, it was held, was liable in damages for the acts of his son as general manager and of the officer acting by the latter's direction. In this connection the court observed that the question was not whether the particular act was authorized, but whether the servant was engaged in his master's business and acted within the general scope of his authority. The act in question was, it was held, one within the scope of the agent's authority, rendering the principal liable although the particular act was not authorized.

A Common Carrier of Passengers is liable for the false imprisonment of a passenger made or caused to be made by its conductor in charge of a train. *Gillingham v. Ohio River R. Co.*, 35 W. Va. 588, 29 Am. St. Rep. 827. Thus, where the employees of a railroad company wrongfully caused the arrest and imprisonment of a person who was endeavoring to enter one of the stations of the company in violation of its rules, it was held that the company was liable in damages therefor. *Lynch*

tion vested in him.¹

And Though the Agent, in a Particular Case, in Fact Exceeds His Authority in imprisoning or causing the plaintiff's imprisonment, yet the principal may be liable.²

What Sufficient to Charge Principal. — The mere fact that a person is the defendant's commercial agent or employee is not alone sufficient to charge the defendant with liability in damages for false imprisonment.³ And where it appeared that though an employee of the defendant participated in a wrongful arrest and imprisonment, he was acting at the time under the direction and control of a police officer, it was held that the defendant could not be held liable.⁴

Liability of Private Corporations. — The statement to be made hereinafter that private corporations may be held liable in false imprisonment implies that such

v. Metropolitan El. R. Co., 90 N. Y. 77, 43 Am. Rep. 141. And where a passenger had been wrongfully arrested without warrant at the instance of the defendant's conductor for an alleged attempt to evade payment of fare, the alleged offense, however, not having been committed in the presence of the officers arresting, it was held that the railroad company might be liable in damages for false imprisonment. *Krulevitz v. Eastern R. Co.*, 143 Mass. 228.

Liability of Employer for Acts of Private Detective. — Where a railroad company employs an agent to detect, arrest, and prosecute persons who unlawfully obstruct its track, and the agent, acting in the scope of his employment, arrests an innocent person, the railroad company is liable in damages for false imprisonment. *Evansville, etc., R. Co. v. McKee*, 99 Ind. 519, 50 Am. Rep. 102.

Where Imprisonment Outside Scope of Authority. — The master is not liable for an arrest and imprisonment by a servant outside the scope of his authority. *Mallach v. Ridley*, 43 Hun (N. Y.) 336; *Clark v. Starin*, 47 Hun (N. Y.) 345.

A corporation is not liable for a false imprisonment committed by its manager where the by-laws which prescribe the duties of the manager do not authorize the act or the institution of the proceedings during the course of which the plaintiff was arrested and imprisoned, and in the absence of any other express or implied authority from the corporation. *Miller v. Manitoba Lumber, etc., Co.*, 6 Manitoba L. Rep. 487.

Liability of Partner for Imprisonment by Copartner. — Where the arrest and detention of the plaintiff has been without the knowledge or ratification of one or more members of a copartnership, such member or members will not be liable in an action for damages for false imprisonment. *Kirk v. Garrett*, 84 Md. 383.

1. *Goff v. Great Northern R. Co.*, 30 L. J. Q. B. 148; *Wells v. Washington Market Co.*, 19 D. C. 385; *Warren v. Dennett*, 17 Misc. Rep. (N. Y. City Ct.) 86; *Duggan v. Baltimore, etc., R. Co.*, 159 Pa. St. 248, 39 Am. St. Rep. 672; *Evansville, etc., R. Co. v. McKee*, 99 Ind. 522, 50 Am. Rep. 102.

Where the Defendant's Employee Had Authority to cause arrests in case of disorderly conduct, the defendant will be liable in an action for damages for false imprisonment by an arrest of a plaintiff wrongfully charged with creating a disturbance. *Shea v. Manhattan R. Co.*, (City Ct.) 7 N. Y. Supp. 497.

Question Is Actual Authority Conferred, Not Agent's Supposed Authority. — *Mallach v. Ridley*, 43 Hun (N. Y.) 336.

Unless, However, the Act Complained of as a False Imprisonment is within the scope of the agent's authority, or the exercise of some discretion vested in him, "it must be shown either that there was express precedent authority for doing the act, or that the act has been ratified and adopted." *National Bank of Commerce v. Baker*, 77 Md. 462, quoting *Carter v. Howe Mach. Co.*, 51 Md. 298, 34 Am. Rep. 311.

2. Liability of Principal Though Agent Exceeds Authority. — The false imprisonment of an innocent person on a charge of attempting to pass counterfeit money, which is procured by a railroad detective while acting in the scope of his authority, renders the railroad company liable although on the particular occasion the railroad detective exceeded his authority by not following his instructions respecting the caution to be exercised in making arrests. *Eichengreen v. Louisville, etc., R. Co.*, 96 Tenn. 229.

Where Agent Violates Instructions. — The master may be liable for a false imprisonment by an agent though he not only did not authorize the particular act, but it was in violation of instructions given. *Harris v. Louisville, etc., R. Co.*, 35 Fed. Rep. 116.

Imprisonment on Insufficient Evidence. — In the case of *Mallach v. Ridley*, 24 Abb. N. Cas. (N. Y. Supreme Ct.) 172, it was held that a "floorwalker" in a mercantile establishment who had the authority to arrest and apprehend shoplifters would render his employers liable in an action for false imprisonment if he caused the arrest and detention of an innocent person. In this connection the court observed that employers cannot "confer such an authority upon the employee and claim the benefits of his action when he acts advisedly and absolve themselves from all risk when he acts on insufficient evidence."

Liability of Agent. — Authorized agents of a *de jure* government must, in their treatment of citizens, confine themselves to the scope of their legal authority, and if they transcend that limit, and in so doing impose a restraint upon the liberty of a private individual, they become liable in damages for false imprisonment. *Whitmore v. Allen*, 33 Tex. 355.

3. *Travis v. Standard L., etc., Ins. Co.*, 86 Mich. 288.

4. *Geary v. Stevenson*, 169 Mass. 23.

organizations may be held for the acts of agents in such connection, as corporations can act in no other way.¹

Not Necessary that Agent's Authority Should Be under Seal. — And in order to hold a corporation liable in damages for a false imprisonment committed by its agent, it is not necessary that the authority so to act should be under seal.²

(2) *Effect of Subsequent Ratification.* — A principal may be rendered liable in damages for a false imprisonment committed by an agent by subsequent ratification of the act as well as by precedent authorization.³ It is believed, however, that the circumstance of a subsequent ratification is more generally considered as evidence of previous authority than as an independent equivalent.⁴ Of course it is not necessary to show subsequent ratification of an imprisonment where, though there has been no express authority therefor, the agent's act was within the general scope of his authority.⁵

(3) *What Is Within Scope of Employment.* — It is neither practicable nor proper in this connection to lay down rules by which it can be determined whether any given imprisonment is or is not within the scope of the agent's employment so as to render the principal liable in damages therefor. In the first place, the question is mainly one of fact for the determination of a jury.⁶ In the next, such rules as the subject is susceptible of are for the most part simply those applicable to the general law of principal and agent, a complete treatment of which will be found elsewhere in this work.⁷ But it will not be out of place to refer here to some illustrative cases wherein it was specifically determined whether the scope of the agent's authority embraced the imprisonment complained of.⁸ It will be observed from the cases that some rather

1. See *infra*, this subsection, *Liability of Private Corporations*.

2. *Goff v. Great Northern R. Co.*, 3 El. & El. 672, 107 E. C. L. 672.

3. *Effect of Ratification by Principal.* — *Roe v. Birkenhead, etc., R. Co.*, 7 Exch. 36; *Callahan v. Searles*, 78 Hun (N. Y.) 238; *McSorley v. St. John*, 6 Can. Sup. Ct. Rep. 532. And see *Tolchester Beach Imp. Co. v. Steinmeier*, 72 Md. 313; *Clark v. Starin*, 47 Hun (N. Y.) 345. See generally the title AGENCY, vol. 1, p. 930.

What Is Ratification — Instruction to Detain After Wrongful Arrest. — In the case of *Callahan v. Searles*, 78 Hun (N. Y.) 238, though it did not appear that the plaintiff had been illegally arrested by a distinct order of the defendant, it was held that the act of the officer was ratified so as to render the defendant liable when the latter instructed the officer after the arrest to detain the plaintiff a few moments for further investigation.

Illegal Tax — Reception and Retention of Money Paid to Secure Discharge from Custody. — In the case of *McSorley v. St. John*, 6 Can. Sup. Ct. Rep. 532, it was held that the corporation of the city of St. John was liable in damages for a false imprisonment committed by the reception of taxes in default, in the collection of an invalid assessment upon the plaintiff. The collector of the delinquent taxes, it was held, was, at the time when he caused the arrest to be made, a servant of the corporation, under its control, and specially appointed by it to collect and levy the amount so assessed. And further it was held that the corporation had adopted the act of such officer as its own by receiving and retaining the money paid and authorizing the plaintiff's discharge from custody only after such payment.

Municipal Corporation — Payment of Officer's Fees for Service of Illegal Warrant Not Ratifica-

tion. — *Perley v. Georgetown*, 7 Gray (Mass.) 464.

4. Thus in the case of *Shattuck v. Bill*, 142 Mass. 56, which was an action for damages for a false imprisonment caused by the defendant's attorney though without specific authority from the defendant for so doing, it was held that evidence of the defendant's participation in the proceedings subsequent to the wrongful arrest of the plaintiff was admissible as having a tendency to show that the plaintiff's arrest was authorized by the defendant.

5. See *Wheeler, etc., Mfg. Co. v. Boyce*, 36 Kan. 350.

6. **Question of Fact for Determination of Jury** — *Mallach v. Ridley*, (Supreme Ct.) 6 N. Y. St. Rep. 651; *Duggan v. Baltimore, etc., R. Co.*, 159 Pa. St. 248, 39 Am. St. Rep. 672; *Galveston, etc., R. Co. v. Donahoe*, 56 Tex. 162.

7. See the title AGENCY, vol. 1, p. 930.

8. **The Superintendent of Cotton Mills** having merely a general oversight of the operation of the mills and the power of employing or discharging operators has as a rule no authority to institute suits or prosecute suits on behalf of the company. The company, therefore, is not liable in an action for damages for a false imprisonment so caused by the superintendent. *Pinkerton v. Gilbert*, 22 Ill. App. 568.

A Foreman Porter who in the absence of the station master is in charge of a station has no implied authority to give into custody a person whom he suspects to be stealing the company's property, and if he causes the arrest of an innocent person on suspicion the company is not liable in damages. *Edwards v. London, etc., R. Co.*, L. R. 5 C. P. 445.

The Action of Train Hands in arresting and detaining a person suspected of placing obstructions upon the track has been held to be not such an act within the scope of their

fine distinctions have been made, especially with reference to the duty of the agent after the wrong to the principal has been accomplished.¹ Other authorities seemingly incline to the position that what the principal himself could not legally do, he cannot be impliedly held to have conferred authority for, so as to render himself liable in damages.² In other cases the consideration that the agent was, in the act complained of, governed more by a desire to bring to justice an offender against the public law than to protect his principal's private rights has influenced the conclusion that the agent or employee was not acting within the scope of his agency or employment.³

authority as will render the railway corporation liable in damages therefor. *Porter v. Chicago, etc., R. Co.* 41 Iowa 358.

Authority of Cashier of Bank. — In the case of *Wachsmuth v. Merchants Nat. Bank*, 96 Mich. 426, which was an action for damages for false imprisonment against a banking corporation it was held that the cashier of the bank would be presumed, *prima facie*, to have had authority to direct the commencement by *capias* of a suit for libel where, in the affidavit upon which the order to hold to bail was made, he averred his official character and authority to make the affidavit, and the regular attorneys of the bank, employed and paid by it, one of whom was a director therein, acted for the bank, and the bank itself applied for a mandamus to compel the Circuit Court to set aside an order quashing the *capias*, and paid the expenses of the proceeding.

A Collecting Clerk of a Bank has no such authority to order the arrest of another as would render the bank liable in an action for damages for false imprisonment. *National Bank of Commerce v. Baker*, 77 Md. 462.

Liability of Carrier for Act of Conductor in Causing Arrest of Passenger for Alleged Nonpayment of Fare. — In the case of *Rown v. Christopher, etc., R. Co.*, 34 Hun (N. Y.) 471, it was held that the act of a street-car conductor in attempting to eject and deliver into the custody of an officer a passenger charged with nonpayment of fare was within the apparent scope of his authority, rendering the defendant company, his employers, liable for the damages thereby occasioned. *Compare Little Rock Traction, etc., Co. v. Walker*, 65 Ark. 144.

Arrest of Passenger Who Attempts to Reimburse Himself from Other Passengers After the Inadvertent Payment of Excessive Fare. — In the case of *Corbett v. Twenty-third St. R. Co.*, 42 Hun (N. Y.) 587, the defendants were held liable for the unlawful arrest and imprisonment of a passenger on one of its street-railway cars, caused by the driver thereof, the passenger having inadvertently placed one too many fares in the box, and reimbursed himself by collecting the fare of a passenger who subsequently entered. The driver of the car, after an altercation with the passenger, removed him from the car and delivered him into the custody of a policeman, who confined him in a station house until the following morning, when he was discharged by the court.

Alleged Attempt to Pass Counterfeit Coin. — In the case of *Lafitte v. New Orleans, etc., R. Co.*, 43 La. Ann. 34, it was held that a street-railroad company was not liable for arrest and imprisonment caused by one of its drivers for an alleged attempt to pass a counterfeit coin.

Arrest of Passenger for Alleged Disorderly Conduct. — In *Cunningham v. Seattle Electric R. Co., Co.*, 3 Wash. 471, where a conductor on a street-railway car procured the arrest of a passenger for alleged disorderly conduct, the railway company was held not liable in damages for false imprisonment, such act not being within the scope of the conductor's authority and the railway company not having adopted his action after it was done.

Presumption of Agent's Authority. — Where a railroad company had authority to arrest and apprehend persons attempting to evade the payment of fare, it was held that it would be presumed, in the absence of evidence to the contrary, that a ticket collector, the only representative of the company at a certain station, was authorized to exercise this power, and if in attempting so to exercise it he arrested and imprisoned an innocent person the railroad company would be held liable in damages therefor. *Moore v. Metropolitan R. Co., L. R. 8 Q. B. 36.*

1. See *Abrahams v. Deakin*, (1891) 1 Q. B. 516; *New South Wales Bank v. Owston*, L. R. 4 App. 270; *Allen v. London, etc., R. Co.*, L. R. 6 Q. B. 65; *Walker v. South Eastern R. Co., L. R. 5 C. P. 640.* *Compare Mulligan v. New York, etc., R. Co.*, 129 N. Y. 506, 26 Am. St. Rep. 539; *Palmeri v. Manhattan R. Co.*, 133 N. Y. 261, 28 Am. St. Rep. 632; *Galveston, etc., R. Co. v. Donahoe*, 56 Tex. 162.

2. *Poulton v. London, etc., R. Co., L. R. 2 Q. B. 534*; *Mali v. Lord*, 39 N. Y. 381, 100 Am. Dec. 448; *Whitmore v. Allen*, 33 Tex. 355.

3. **Imprisonment by Agent in Attempt to Bring Public Offender to Justice.** — The case of *Mulligan v. New York, etc., R. Co.*, 129 N. Y. 506, 26 Am. St. Rep. 539, was an action for damages against a railroad company for an alleged false imprisonment consequent upon an illegal arrest procured by a railroad ticket agent who believed that the plaintiffs had passed a counterfeit bill. It was held in this case that the defendant was not liable, upon the ground that the taking of the counterfeit bill and the causing of the arrest of the plaintiffs could not be regarded as an act within the scope of the agent's authority. In this case stress was laid upon the fact that the agent suspected that the bill was not genuine before he took it and gave the tickets in exchange for it, immediately thereafter causing the plaintiffs' arrest, the contention being that the duty of the agent was to have refused to accept the bill in payment for the tickets.

Foregoing Case Distinguished. — In the case of *Palmeri v. Manhattan R. Co.*, 133 N. Y. 261, 28 Am. St. Rep. 632, it was held that the defendant was liable for the action of its agent in

(4) *Whether Defendant Liable as Principal Question of Fact for Jury.* — Where the facts are in dispute, the question whether or not the defendant authorized the imprisonment is one for the determination of the jury.¹

(5) *Burden of Proof.* — In an action against a principal for an alleged false imprisonment committed by an agent, the burden of proof has been held to be upon the plaintiff to show that the act done was expressly authorized or within the scope of the agent's authority.²

(6) *Imprisonment by Special Police Officer — Whether Agent of Employer or State.* — The answer to this question is believed to depend simply upon the character in which the agent acts in committing the false imprisonment, in general a question of fact.³ Where, in making a wrongful arrest, the person taking into custody is acting as a public official, and not as a private agent, the alleged private principal will not be held liable in damages for the imprisonment.⁴ On the other hand, the fact that a private agent is clothed with public authority to make arrests, the better to protect his principal's property or rights, will not relieve the principal from liability for the acts of the agent in committing a false imprisonment.⁵

e. LIABILITY OF CLIENT FOR IMPRISONMENT BY ATTORNEY. — A person

wrongfully detaining the plaintiff for a period of about half an hour on the charge of passing counterfeit money. In this case the circumstances were that the plaintiff, intending to ride upon one of the defendant's elevated railway trains, purchased a ticket and tendered in payment thereof a twenty-five cent piece. After the plaintiff had passed through the defendant's gate and reached the platform, the defendant's agent approached and demanded another coin upon the ground that the one received was counterfeit. The plaintiff refused to comply with this demand, asserting the genuineness of the coin paid. The defendant's agent thereupon detained the plaintiff for over half an hour, called her "a counterfeiter and a common prostitute," subsequently releasing her, however, without procuring her arrest by an officer. The court distinguished this case from that of *Mulligan v. New York, etc., R. Co.* 129 N. Y. 506, 26 Am. St. Rep. 539, *supra*, by stating that in the latter case "the servant of the company was not acting for the protection of the company's interests, but went quite outside of the line of his duty to perform a supposed service to the community by procuring the arrest of criminals whom he knew the authorities were endeavoring to apprehend."

See the case of *Galveston, etc., R. Co. v. Donahoe*, 56 Tex. 162, where a conductor caused the arrest of a passenger who had offered in payment of his fare what the conductor supposed to be a counterfeit banknote, and it was held that the company was liable.

1. *Duggan v. Baltimore, etc., R. Co.*, 159 Pa. St. 248, 39 Am. St. Rep. 672.

Evidence Admissible. — In the case of *Goff v. Great Northern R. Co.*, 3 El. & El. 672, 107 E. C. L. 672, it was held that evidence that an imprisonment was by authority of the superintendent of the defendant corporation, to whom before the arrest the matter had been referred by other of the defendant's officers and agents, the latter seeming to regard the superintendent as having authority to decide the matter, was sufficient evidence to go to the jury on the question as to whether or not the arrest and imprisonment were authorized by the company.

Place Where Arrest Was Made. — In an action for damages for false imprisonment against a corporation where the evidence is conflicting as to the agency of the persons causing the arrest, the fact that the place where the arrest was made was under the defendant's control is admissible in evidence. *Fitzpatrick v. New York, etc., R. Co.* (Supreme Ct.) 5 N. Y. Supp. 685.

Where No Evidence of Authority or Ratification, Error to Submit to Jury. — Where a principal is sued for an unlawful arrest and imprisonment made or caused by an alleged agent, and there is no evidence of prior authority or subsequent ratification, it is error to leave it to the jury to say whether or not there was such authority or ratification. *National Bank of Commerce v. Baker*, 77 Md. 462.

2. *Goff v. Great Northern R. Co.*, 3 El. & El. 672, 107 E. C. L. 672; *Roe v. Birkenhead, etc., R. Co.*, 7 Exch. 36.

3. *Where a Conductor, a Railroad Police Officer,* wrongfully directed the arrest of a passenger for an alleged attempt to evade the payment of fare, it was held to be for the jury to say whether he acted therein in the capacity of a railroad police officer or the servant and agent of the defendant, rendering the latter liable in damages for false imprisonment. *Krulevitz v. Eastern R. Co.*, 143 Mass. 228.

4. *Wells v. Washington Market Co.*, 19 D. C. 385; *Tolchester Beach Imp. Co. v. Steinmeier*, 72 Md. 313.

Where Special Officer Invalidly Appointed. — In the case of *Norfolk, etc. R. Co. v. Galliher*, 59 Va. 639, the arrest and imprisonment were by a person sworn in by the mayor of a town as night watchman for the defendant railroad company. The mayor having no power to appoint a special police officer, it was held that the railroad company was liable, as the arrest was within the scope of the employment of the person who made it.

5. *Train Conductor — Conservator of Peace.* — *Gillingham v. Ohio River R. Co.*, 35 W. Va. 588, 29 Am. St. Rep. 827.

Railroad Station Agent — Arrest for Disorderly Conduct. — *Illinois Cent. R. Co. v. King*, 69 Miss. 852.

may be liable in damages for a false imprisonment caused by his attorney expressly or impliedly authorized or within the scope of the authority conferred.¹ The relation of client and attorney in such cases is, it has been held, simply that of principal and agent.²

f. **LIABILITY OF ATTORNEY.** — An action of false imprisonment lies against an attorney who sues out an illegal and void *capias* against the defendant and delivers it to the officer, who by his order makes an arrest thereon.³

g. **LIABILITY OF PRIVATE CORPORATIONS.** — An action for damages for false imprisonment may be maintained against a private corporation.⁴

h. **LIABILITY OF MUNICIPAL CORPORATIONS.** — The general rule is that a municipal corporation is not rendered liable in damages for false imprisonment by the acts of its officers or agents,⁵ even though the imprisonment be in an attempt to enforce a void ordinance.⁶ In such case, indeed, the very reason is that the corporation cannot be construed to have authorized the enforce-

1. **Client's Liability for Acts of Attorney.** — *Wilson v. Brecker*, 11 U. C. C. P. 268; *Collett v. Foster*, 2 H. & N. 356; *Barker v. Braham*, 2 W. Bl. 866; *Shattuck v. Bill*, 142 Mass. 56; *Sleight v. Leavenworth*, 5 Duer (N. Y.) 122; *Guillaume v. Rowe*, 94 N. Y. 268, 46 Am. Rep. 141.

Liability for Imprisonment by Attorney Though After Judgment and Execution. — *Shattuck v. Bill*, 142 Mass. 56.

Evidence of Client's Participation in Proceedings Consequent upon Unauthorized Arrest by Attorney. — Where an attorney, after judgment and execution against a debtor, wrongfully caused his arrest without specific authority from the judgment creditor, it was held that evidence of the latter's participation in the proceedings subsequent to the arrest, the object of which was to secure the debtor's release therefrom, was admissible as having a tendency to show that the debtor's arrest was initiated by the creditor's authority. *Shattuck v. Bill*, 142 Mass. 56.

The Directions by an Attorney to an Officer to stop a witness about to leave the city do not justify an arrest and involuntary detention, and such action, if had, was not in the line of duty of such attorney so as to bind his client. *Fire Assoc. v. Fleming*, 78 Ga. 733. This case seems to hold in the first place that such a direction by an attorney to an officer did not warrant an arrest or an involuntary detention; that therefore the attorney himself would not be liable in damages; and that even if such direction had authorized an arrest, it would have been beyond the scope of the attorney's authority, and therefore his client would not be liable.

Not Liable for Attorney's Unauthorized Acts. — *Neimitz v. Conrad*, 22 Oregon 164; *Burnap v. Albert*, Taney's Dec. (U. S.) 244.

Unless Subsequently Ratified. — *Burnap v. Albert*, Taney's Dec. (U. S.) 244.

2. *Guillaume v. Rowe*, 63 How. Pr. (N. Y. Supreme Ct.) 175.

A Person Who Procures an Attorney to Sue Out an Illegal and Void *Capias* against another is liable in an action for damages for false imprisonment. *Barker v. Braham*, 2 W. Bl. 866. And there may be a liability in false imprisonment on the part of the client through the arrest be made without the defendant's actual knowledge. *Sleight v. Leavenworth*, 5 Duer (N. Y.) 122.

3. *Barker v. Braham*, 2 W. Bl. 866; *Thompson v. Hatch*, 4 New Bruns. 425.

4. *Goff v. Great Northern R. Co.*, 3 El. & El. 672, 107 E. C. L. 672; *Pennsylvania Co. v. Weddle*, 100 Ind. 138; *Tolchester Beach Imp. Co. v. Steinmeier*, 72 Md. 313; *Carter v. Howe Mach. Co.*, 51 Md. 290; 34 Am. Rep. 311; *Krulvitz v. Eastern R. Co.*, 140 Mass. 573.

If a Corporation Through Its Officers or Agents requests or causes an arrest which is wrongful, there may be a liability in damages for false imprisonment. *Cox, J.*, in *Wells v. Washington Market Co.*, 19 D. C. 385.

5. **Liability of Municipal Corporations.** — *Trescott v. Waterloo*, 26 Fed. Rep. 592; *Trammell v. Russellville*, 34 Ark. 105, 36 Am. Rep. 1; *Perley v. Georgetown*, 7 Gray (Mass.) 464; *Worley v. Columbia*, 88 Mo. 106. And see *Longueuil v. Brails*, 11 Rev. Lég. 503. Compare *McSorley v. St. John*, 6 Can. Sup. Ct. Rep. 532; *Walker v. Montreal*, 4 Leg. N. (Quebec) 215. See generally the title MUNICIPAL CORPORATIONS.

In the case of *Trammell v. Russellville*, 34 Ark. 105, 36 Am. Rep. 1, which was an action for damages against the town of Russellville for an alleged false imprisonment under a void ordinance, the court said that "for neither the act of the council in passing the ordinance, the acts of the mayor in issuing the warrants, nor those of the marshal and his deputy in making the arrests was the town liable to the plaintiff."

Power to Imprison for Violation of Ordinances. — The power conferred on a municipal corporation to adopt ordinances and enforce violations thereof by prescribed fines does not confer the power of imprisonment before trial for a violation of an ordinance nor after trial for failure to pay the fine. And the imprisonment of a person for such cause will render those participating therein liable in an action for damages. *Bolton v. Vellines*, 94 Va. 393. And see also *Lynch v. Metropolitan El. R. Co.*, 90 N. Y. 85, 43 Am. Rep. 141, wherein Earl, J., observed that a municipal corporation authorized to make by-laws and to pass ordinances and to inflict penalties for their violation cannot enforce obedience to them by imprisonment unless expressly authorized so to do by statute. And see *Clark's Case*, 5 Coke 64.

6. *Trammell v. Russellville*, 34 Ark. 105, 36 Am. Rep. 1; *Worley v. Columbia*, 88 Mo. 106.

ment of an invalid ordinance.¹

The Officers and Agents of municipal corporations are, however, subject to the same rules of liability for false imprisonment as other persons, and are entitled to the same but no other exemptions.²

2. LIABILITY WHERE SEVERAL ACT JOINTLY. — All who participate in an unlawful arrest and imprisonment are jointly and severally liable in damages therefor.³ Thus for an imprisonment under a void mittimus it has been held that the lawyer who drew up the mittimus, the justice who issued it, and the constable who served it were all liable in damages.⁴ And it has also been held that the persons aiding and assisting in the unlawful confinement of another are responsible in damages for the trespass though they had nothing to do with the original arrest and had no knowledge that the imprisonment was unlawful at the time when they participated therein.⁵

General Rule in False Imprisonment Same as in Other Actions. — The general rule prescribing the liability of joint wrongdoers for the acts of each other applies in actions for damages for false imprisonment. Each is responsible for the acts of the others done in pursuance of a mutual understanding or in furtherance of a common plan, until the termination of the enterprise.⁶ Or, as it has been expressed, any one who aids and assists in the imprisonment of another is chargeable as principal.⁷

But It Is Not Necessary to Prove a Conspiracy to imprison unlawfully to render

1. *Worley v. Columbia*, 88 Mo. 106.

2. See *Bolton v. Vellines*, 94 Va. 393.

Violation of Ordinances Must Be Judicially Ascertained. — Before the power of imprisonment for the violation of a municipal ordinance can be exercised, the violation of such ordinance must be judicially ascertained. If not so ascertained there will be liability in damages for false imprisonment. *Bolton v. Vellines*, 94 Va. 393.

3. Liability Joint and Several. — *Griffin v. Coleman*, 4 H. & N. 265; *Thompson v. Hatch*, 4 New Bruns. 425; *Grantham v. Severs*, 25 U. C. Q. B. 468; *Bright v. Patton*, 5 Mackey (D. C.) 534, 60 Am. Rep. 396; *Clyma v. Kennedy*, 64 Conn. 310, 42 Am. St. Rep. 194; *Bath v. Metcalf*, 145 Mass. 274, 1 Am. St. Rep. 455; *Hackett v. King*, 6 Allen (Mass.) 58; *Taaffe v. Slevin*, 11 Mo. App. 507; *Winn v. Hobson*, 54 N. Y. Super. Ct. 330; *Coffin v. Varila*, 8 Tex. Civ. App. 417; *Zeller v. Martin*, 84 Wis. 4.

4. *Clyma v. Kennedy*, 64 Conn. 310, 42 Am. St. Rep. 194.

5. *Griffin v. Coleman*, 4 H. & N. 265; *Aaron v. Alexander*, 3 Campb. 35.

If an Arrest by a Constable Is in Its Inception Wrongful, all other constables who act and assist in the continuance of the wrongful imprisonment are responsible for the entire damages thereby caused to the plaintiff, although they had no knowledge of the unlawfulness of the imprisonment and intended to act in the strict discharge of their official duties. *Griffin v. Coleman*, 4 H. & N. 265.

Liability of Jailer Receiving Prisoner. — In the case of *Aaron v. Alexander*, 3 Campb. 35, it was held that not only the persons making an arrest through mistake, but the keeper of the watch house, who received the prisoner in equal ignorance of his identity, were guilty of a trespass. But see the case of *Johnston v. Vanamringe*, 5 Blackf. (Ind.) 311, which was an action for damages for false imprisonment against a person authorized by the governor

of one state to receive a fugitive from justice captured in another state for whom requisition papers had been duly made out and sent to the governor of the latter state. It was urged that the warrant under which the plaintiff had been arrested was irregular, and for this reason the defendant was sought to be held liable. But the court held that as the defendant had nothing to do with the warrant under which the plaintiff was arrested, but only received the prisoner after his arrest, he would not be liable though the warrant might in fact have been irregular. In this case it was said that "if the defendant in a civil suit be arrested and the officer deliver him to the jailer, the latter is not liable for any irregularity in the arrest; the sheriff alone is liable for that," citing *Brandling v. Kent*, 1 T. R. 60. And in the case of *Folger v. Hinckley*, 5 Cush. (Mass.) 263, *Metcalf, J.*, said that a jailer is not answerable for a false imprisonment "unless he acts under the mandate of an inferior court which has not jurisdiction of the cause, or by virtue of a warrant which on its face shows the magistrate's want of jurisdiction."

6. *Johnson v. Tompkins*, 1 Baldw. (U. S.) 578; *Johnson v. Bouton*, 35 Neb. 898; *Brown v. Chadsey*, 39 Barb. (N. Y.) 253; *Wolf v. Perryman*, 82 Tex. 112; *Coffin v. Varila*, 8 Tex. Civ. App. 417.

7. *Johnson v. Bouton*, 35 Neb. 898; *Brown v. Chadsey*, 39 Barb. (N. Y.) 253.

All Participators Liable as Principals. — All who personally participate in a false imprisonment, or who counsel, advise, encourage, consent to, aid, or abet therein, are liable as principals in an action for assault and battery and false imprisonment. *Bright v. Patton*, 5 Mackey (D. C.) 534, 60 Am. Rep. 396. Similarly in the case of *Brown v. Chadsey*, 39 Barb. (N. Y.) 264, it was said: "If the defendant took any part in an unlawful imprisonment of the plaintiff he became a principal in the act and is liable for the trespass upon the plaintiff's person."

several defendants liable in an action for damages therefor.¹

j. **EXTENT OF LIABILITY**—(1) *Natural and Probable Consequences*.—A person causing a wrongful imprisonment is liable in damages for all the natural and probable consequences thereof.²

(2) *Liability for Independent Illegal Acts of Officers*.—A defendant in an action for damages for false imprisonment cannot be held responsible for the independent illegal acts of officers of the law.³ A person, therefore, making complaint to a magistrate is not necessarily answerable for whatever judicial action the magistrate may take of his own motion in the premises. If the magistrate misconceives the proper remedy, without the suggestion or intervention of the complainant in that particular, the latter is not liable for the error.⁴ And it is likewise where a magistrate puts a wrong construction on facts stated, mistaking the law applicable thereto.⁵ Nor in an action for damages for false imprisonment will the defendant be liable for the consequences of an arrest improperly made without warrant, where the defendant went before the magistrate accompanied by counsel, expecting to make a complaint in writing and have a warrant issued in the usual way, the magistrate alone insisting on arresting the plaintiff without a warrant.⁶

1. *Johnson v. Bouton*, 35 Neb. 898.

2. *McCall v. McDowell*, 1 Abb. (U. S.) 212; *Atchison, etc., R. Co. v. Rice*, 36 Kan. 593; *Bath v. Metcalf*, 145 Mass. 274, 1 Am. St. Rep. 455; *Frost v. De Lury*, 54 N. Y. Super. Ct. 113; *Wolf v. Perryman*, 82 Tex. 112. And see *Murphy v. Countiss*, 1 Harr. (Del.) 143; *Powell v. Hodgetts*, 2 C. & P. 432, 12 E. C. L. 206.

Imprisonment of Seaman by Captain of Vessel.—Where the captain of a vessel wrongfully causes the imprisonment of a seaman until his effects on board are lost or sold, he will be liable for their value. *Jay v. Almy*, 1 Woodb. & M. (U. S.) 262.

Where Officer Acts Pursuant to Defendant's Instigation and Request.—Though the detention of a person be in part the act of a police official before whom the plaintiff was taken after the arrest by an officer in the defendant's employ, the defendant may be held liable for the entire consequences if the detention by the police official was procured by the instigation or urgency of an officer in the employment of the defendant. *Newman v. New York, etc., R. Co.*, 54 Hun (N. Y.) 338.

3. **Independent Illegal Acts of Officers**—*England*.—*Lock v. Ashton*, 12 Q. B. 876, 64 E. C. L. 876; *Hubley v. Boak*, 16 Nova Scotia 82; *Stoness v. Lake*, 40 U. C. Q. B. 320.

United States.—*Southern Pac. Co. v. Hamilton*, 54 Fed. Rep. 468.

Indiana.—*Veneman v. Jones*, 118 Ind. 41, 10 Am. St. Rep. 100.

Massachusetts.—*Bath v. Metcalf*, 145 Mass. 274, 1 Am. St. Rep. 455.

Michigan.—*Linnen v. Banfield*, 114 Mich. 93; *Poupard v. Dumas*, 105 Mich. 326.

Missouri.—*Boeger v. Langenberg*, 97 Mo. 390, 10 Am. St. Rep. 322.

New Hampshire.—*Small v. Benfield*, 66 N. H. 206.

New York.—*Newman v. New York, etc., R. Co.*, 54 Hun (N. Y.) 338; *Taylor v. Trask*, 7 Cow. (N. Y.) 249; *Adams v. Freeman*, 9 Johns. (N. Y.) 117. And see *Percival v. Jones*, 2 Johns. Cas. (N. Y.) 51; *Brown v. Crowl*, 5 Wend. (N. Y.) 298.

Texas.—*Pratt v. Brown*, 80 Tex. 608.

Utah.—*Marks v. Sullivan*, 9 Utah 12.

4. *Boeger v. Langenberg*, 97 Mo. 390, 10 Am. St. Rep. 322; *Percival v. Jones*, 2 Johns. Cas. (N. Y.) 51; *Taylor v. Trask*, 7 Cow. (N. Y.) 249; *Brown v. Crowl*, 5 Wend. (N. Y.) 298.

One Who Procures the Issuance of Process does not thereby authorize or become liable for acts in excess of his lawful authority of an officer acting thereunder. *Baker v. Secor*, (Supreme Ct.) 4 N. Y. Supp. 303. And see *Welsh v. Cochran*, 63 N. Y. 181, 20 Am. Rep. 519; *Curry v. Pringle*, 11 Johns. (N. Y.) 444. See also *supra*, this section, *Liability of Person Causing, Instigating, or Procuring Imprisonment*.

5. *Marks v. Sullivan*, 9 Utah 12. And see *Taylor v. Trask*, 7 Cow. (N. Y.) 249.

6. *Poupard v. Dumas*, 105 Mich. 326.

Where a Justice Acts Officially and transcends his jurisdiction, he alone is liable, and not the plaintiff before him, unless it appears to be the act of the latter. And whether it is his act or not should depend on the general intendment of law, but a positive request or direction should be shown. *Taylor v. Trask*, 7 Cow. (N. Y.) 250.

The Employers of a Special Police Officer who arrests a person suspected of crime will not be responsible for a detention of the prisoner by the examining magistrate who, in the exercise of his authority, regards such a course as warranted by the circumstances. *Newman v. New York, etc., R. Co.*, 54 Hun (N. Y.) 338.

Remand of Prisoner by Magistrate.—Where the plaintiff in an action for assault and false imprisonment sought to make the defendant responsible for the consequences of a remand by a magistrate, it was held that he was liable only for the first imprisonment and taking before the magistrate, and not for the remand or any consequent detention thereunder, they being the acts of the justice. *Lock v. Ashton*, 12 Q. B. 876, 64 E. C. L. 876. See also the case of *Bauer v. Clay*, 8 Kan. 580, where the plaintiff was permitted to recover damages against the defendant only up to the time of the preliminary hearing by the magistrate. It is not quite clear, however, from the report of this latter case whether the action was tried as one for false imprisonment or malicious prosecution, or both combined.

A Person Properly Instigating an Arrest is not responsible for the independent acts of officers of the law in improperly detaining the prisoner before presentment to the examining magistrate.¹ Nor is one liable for the illegal acts of an officer in confining the person arrested among convicts and criminals, though the issuance of a body execution was unlawfully procured, the officer alone being responsible for such wrong.²

k. MEASURE OF DAMAGES AND ELEMENTS OF RECOVERY — (1) *In General.* — The general rule is that a plaintiff in an action for false imprisonment is entitled to recover such damages as will fairly compensate him for the injuries suffered as a natural consequence of the defendant's act.³

(2) *Punitive Damages in Actions for False Imprisonment* — (a) *General Rule.* — The rule allowing the recovery of punitive damages applies to actions for false imprisonment,⁴ though a jury has not the right to award such damages

1. *Bath v. Metcalf*, 145 Mass. 274, 1 Am. St. Rep. 455; *Pratt v. Brown*, 80 Tex. 608.

Intimation of Distinction Between Cases Where Arrest Is Lawful and Those Where It Is Unlawful — While, it has been held, if an arrest is originally lawful, a person causing it will not be liable for the independent acts of the officers in improperly delaying the arraignment of the prisoner, yet, if the arrest was originally illegal the person causing it might perhaps be liable for all the consequent acts and consequences of the arrest until the termination of the imprisonment. *Pratt v. Brown*, 80 Tex. 608.

2. *Baker v. Secor*, (Supreme Ct.) 4 N. Y. Supp. 303.

It has been held that a person causing an imprisonment is not, however, liable in damages for the suffering caused by the harsh regulations of the prison during confinement. *Stoness v. Lake*, 40 U. C. Q. B. 329.

One Who Has Procured an Order for the Arrest of a Certain Designated Person is not liable in false imprisonment for the wrongful arrest by mistake of another person by the officer in whose hands the warrant was placed. *Gearon v. Savings Bank*, 50 N. Y. Super. Ct. 264.

3. *Compensation the General Rule.* — *Kilbourn v. Thompson*, *MacArthur & M. (D. C.)* 401; *Harris v. Louisville, etc., R. Co.*, 35 Fed. Rep. 116; *Beckwith v. Bean*, 98 U. S. 266; *Arteaga v. Connor*, 88 N. Y. 403, 47 N. Y. Super. Ct. 494; *Ball v. Horrigan*, 65 Hun (N. Y.) 621, 19 N. Y. Supp. 913; *Whitmore v. Allen*, 33 Tex. 355; *Karner v. Stump* 12 Tex. Civ. App. 460; *Taylor v. Coolidge*, 64 Vt. 506; *Ogg v. Murdock*, 25 W. Va. 146; *Bonesteel v. Bonesteel*, 30 Wis. 511. See also *Page v. Mitchell*, 13 Mich. 63, 86 Am. Dec. 75; *Josselyn v. McAllister*, 22 Mich. 300.

Punitive Damages Are Not Recoverable in false imprisonment in the absence of malice or other circumstances of aggravation. *Williams v. Garrett*, 12 How. Pr. (N. Y. Supreme Ct.) 456; *Newman v. New York, etc., R. Co.*, 54 Hun (N. Y.) 335. See also *infra*, this section. *Punitive Damages in Actions for False Imprisonment.*

Injury to Character or Reputation. — A false imprisonment does not necessarily include injury to the character or reputation. Damages on such score, therefore, are not general but special damages, and if a recovery is sought therefor they must be specially claimed. *Comer v. Knowles*, 17 Kan. 436. Continuing,

the court said: "If there could be a case of false imprisonment where the resulting injuries to the character and reputation of the plaintiff would produce some pecuniary loss, and this loss was not too remote from the wrongful act, and the special facts concerning such injuries and such loss were properly set forth in the plaintiff's petition, and were then proved, the plaintiff would unquestionably be entitled to recover for such loss."

Discomforts of Prison. — In an action for damages for false imprisonment the plaintiff, it seems, may testify as to the discomforts of the prison in which he was confined. *Taylor v. Davis*, (Tex. 1890) 13 S. W. Rep. 642; *McCall v. McDowell*, 1 Abb. (U. S.) 212; *Abrahams v. Cooper*, 81 Pa. St. 232. Compare *Stoness v. Lake*, 40 U. C. Q. B. 320.

Verdict for the Defendant — *Exclusion of Evidence on Measure of Damages.* — Where, in an action for damages for false arrest and imprisonment, the verdict was for the defendant, it was held that the court would not consider as error the exclusion of evidence with reference merely to the measure of damages. *Geary v. Stevenson*, 160 Mass. 23. And see *Poland v. Brownell*, 131 Mass. 138, 41 Am. Rep. 215; *Sullivan v. Lowell, etc., St. R. Co.*, 162 Mass. 536; *Oak Island Hotel Co. v. Oak Island Grove Co.*, 165 Mass. 260.

Nominal Damages. — Where an imprisonment is without legal authority the plaintiff as a matter of law is entitled to recover some damages therefor. *McCall v. McDowell*, 1 Abb. (U. S.) 212. And see *Page v. Mitchell*, 13 Mich. 63, 86 Am. Dec. 75. But the jury is not limited to nominal damages because there is no allegation or proof of special damage. *Josselyn v. McAllister*, 22 Mich. 300.

4. *Punitive Damages in False Imprisonment* — *England.* — *Huckle v. Money*, 2 Wils. 206. And see *Gilbert v. Burtenshaw*, 1 Cowp. 230.

United States. — *McCall v. McDowell*, 1 Abb. (U. S.) 212; *Kilbourn v. Thompson*, *MacArthur & M. (D. C.)* 401; *Beckwith v. Bean*, 98 U. S. 266; *Clarke v. American Dock, etc., Co.*, 35 Fed. Rep. 478; *Roza v. Smith*, 65 Fed. Rep. 592; *Day v. Woodworth*, 13 How. (U. S.) 363. And see *Johnson v. Tompkins*, 1 Baldw. (U. S.) 578.

Alabama. — *Woodall v. McMillan*, 38 Ala. 622.

Georgia. — *Potter v. Swindle*, 77 Ga. 419.

Illinois. — *Pearce v. Needham*, 37 Ill. App. 93.

Iowa. — *Holmes v. Blyler*, 80 Iowa 365.

"to an arbitrary amount."¹ Accordingly, where, in an action for false imprisonment, it is shown that the defendant's conduct has been malicious or oppressive, punitive or exemplary damages may be awarded.² The rule being, therefore, that malice will warrant the assessment of punitive damages, evidence that the defendant acted in good faith and without malice is admissible where such damages are claimed,³ though a contrary rule prevails where only

Kansas. — *Comer v. Knowles*, 17 Kan. 436; *Wheeler, etc., Mfg. Co. v. Boyce*, 36 Kan. 350.
Louisiana. — *Mortimer v. Thomas*, 23 La. Ann. 165.

Maryland. — *Kirk v. Garrett*, 84 Md. 383.

Massachusetts. — *Krulevitz v. Eastern R. Co.*, 140 Mass. 573.

Michigan. — *Ross v. Leggett*, 61 Mich. 445, 1 Am. St. Rep. 608; *Livingston v. Burroughs*, 33 Mich. 511; *Brushaber v. Stegemann*, 22 Mich. 266.

New York. — *Dodge v. Alger*, 53 N. Y. Super. Ct. 107; *Arteaga v. Connor*, 88 N. Y. 403; *Limbeck v. Gerry*, 15 Misc. Rep. (N. Y. Supreme Ct.) 663; *Kolzem v. Broadway, etc., R. Co.*, 1 Misc. Rep. (N. Y. C. Pl.) 148; *Williams v. Garrett*, 12 How. Pr. (N. Y. Supreme Ct.) 456; *Brown v. Chadsey*, 39 Barb. (N. Y.) 253; *Fuller v. Redding*, 16 Misc. Rep. (N. Y. Supreme Ct.) 634. And see *Newman v. New York, etc., R. Co.* 54 Hun (N. Y.) 335.

Pennsylvania. — *Flinn v. Graham*, 3 Pittsb. (Pa.) 195; *McCarthy v. De Armit*, 99 Pa. St. 71. And see *Neall v. Hart*, 115 Pa. St. 347, 2 Am. St. Rep. 559; *Barnett v. Reed*, 51 Pa. St. 191, 88 Am. Dec. 574.

Texas. — *Whitmore v. Allen*, 33 Tex. 355; *Hall v. O'Malley*, 49 Tex. 70; *Karner v. Stump*, 12 Tex. Civ. App. 460.

Virginia. — *Bolton v. Vellines*, 94 Va. 393.

West Virginia. — *Ogg v. Murdock*, 25 W. Va. 146; *Gillingham v. Ohio River R. Co.*, 35 W. Va. 588, 29 Am. St. Rep. 827.

Wisconsin. — *Hamlin v. Spaulding*, 27 Wis. 360. And see *Bonesteel v. Bonesteel*, 30 Wis. 511.

See generally the title EXEMPLARY DAMAGES, *ante*.

Waiver of Right to Punitive Damages. — A plaintiff may, of course, waive his right to the recovery of punitive damages. *Holmes v. Blyler*, 80 Iowa 365.

1. *Brown v. Chadsey*, 39 Barb. (N. Y.) 259.

2. **Where Defendant's Conduct Malicious or Oppressive** — *England.* — *Huckle v. Money*, 2 Wils. 206.

United States. — *Roza v. Smith*, 65 Fed. Rep. 592; *Day v. Woodworth*, 13 How. (U. S.) 363; *McCall v. McDowell*, 1 Abb. (U. S.) 212.

Illinois. — *Pearce v. Needham*, 37 Ill. App. 93.

Kansas. — *Wheeler, etc., Mfg. Co. v. Boyce*, 36 Kan. 350.

Louisiana. — *Mortimer v. Thomas*, 23 La. Ann. 165.

Michigan. — *Ross v. Leggett*, 61 Mich. 445, 1 Am. St. Rep. 608; *Brushaber v. Stegemann*, 22 Mich. 266; *Livingston v. Burroughs*, 33 Mich. 511.

New York. — *Williams v. Garrett*, 12 How. Pr. (N. Y. Supreme Ct.) 456; *Kolzem v. Broadway, etc., R. Co.*, 1 Misc. Rep. (N. Y. C. Pl.) 148; *Limbeck v. Gerry*, 15 Misc. Rep. (N. Y. Supreme Ct.) 663; *Dodge v. Alger*, 53 N. Y. Super. Ct. 107. And see *Newman v. New York, etc., R. Co.*, 54 Hun (N. Y.) 335.

Pennsylvania. — *Flinn v. Graham*, 3 Pittsb. (Pa.) 195; *McCarthy v. De Armit*, 99 Pa. St. 71. And see *Barnett v. Reed*, 51 Pa. St. 191, 88 Am. Dec. 574; *Neall v. Hart*, 115 Pa. St. 347, 2 Am. St. Rep. 559.

Texas. — *Whitmore v. Allen*, 33 Tex. 355.

Virginia. — *Bolton v. Vellines*, 94 Va. 398.

West Virginia. — *Ogg v. Murdock*, 25 W. Va. 139.

Wisconsin. — *Hamlin v. Spaulding*, 27 Wis. 360.

Liability of Officer for Handcuffing Prisoner. — Where an imprisonment is not illegal the officer will not be held liable in damages for handcuffing the person in custody unless it was done from malice or wantonness or indifference to the common dictates of humanity. *Firestone v. Rice*, 71 Mich. 377, 15 Am. St. Rep. 266.

Injuries to Character or Reputation. — Where a false imprisonment is wilful or malicious the jury may consider injuries affecting the character and reputation of the plaintiff as a foundation for awarding exemplary damages. *Comer v. Knowles*, 17 Kan. 436.

Drunkenness in Aggravation of Damages. — In an action for a false imprisonment, the fact that the officer who made the arrest was drunk at the time may be regarded by the jury as an aggravation of the offense. *Hall v. O'Malley*, 49 Tex. 70.

3. **Evidence of Good Faith.** — *Woodall v. McMillan*, 38 Ala. 622; *Holmes v. Blyler*, 80 Iowa 365; *Comer v. Knowles*, 17 Kan. 436; *Hill v. Taylor*, 50 Mich. 549; *Livingston v. Burroughs*, 33 Mich. 511; *Tenney v. Harvey*, 63 Vt. 520. And see *De Courcy v. Cox*, 94 Cal. 665; *Mortimer v. Thomas*, 23 La. Ann. 165; *Josselyn v. McAllister*, 22 Mich. 300; *Brushaber v. Stegemann*, 22 Mich. 266; *Neall v. Hart*, 115 Pa. St. 347, 2 Am. St. Rep. 559; *French v. White*, 4 W. Va. 170; *Bonesteel v. Bonesteel*, 30 Wis. 511.

Defendant's Provocation. — In the case of *Thomas v. Powell*, 7 C. & P. 807, 32 E. C. L. 746, which was an action for damages for false imprisonment, the defendant having given the plaintiff into the custody of a police officer, it was held that the defendant might, in mitigation of damages, give evidence that the plaintiff had for several days been pursuing and annoying him.

Arrest Made on Void Warrant. — In an action for damages for false imprisonment a void warrant of arrest is admissible in evidence in mitigation of punitive or vindictive damages. *Woodall v. McMillan*, 38 Ala. 622.

Innocent Person Accused Through Mistake. — The case of *Fair v. Himmel*, 50 Ill. App. 215, was an action for damages for a false imprisonment by a person on the charge of shoplifting. The plaintiff was a saleswoman in a large mercantile establishment, and was charged with taking a scarf that did not belong to her. One of the managers of the establish-

actual or compensatory damages are sought.¹

(b) **What Is "Malice" in This Connection.** — The malice required as an element for the recovery of punitive damages in actions of false imprisonment need not amount to hatred, ill will, or vindictiveness of purpose. It is sufficient if there is a wanton disregard of the rights of the injured party.²

(c) **Several Defendants Sued Jointly.** — In an action for damages for false imprisonment against several defendants sued jointly, some of whom acted maliciously and others without malice, it was held that no recovery could be had for exemplary damages, the rule being to assess the recovery "according to the acts of the most innocent of the defendants."³

(d) **Existence of Elements for Punitive Damages Question of Fact for Jury.** — It is for the jury to say whether the circumstances of an arrest and imprisonment show malice, oppression, or wantonness so as to warrant a recovery in punitive damages.⁴

Liability of Corporations in Exemplary Damages. — The general rule is that a corporation may be held liable in exemplary damages for a false imprisonment committed by an agent, involving the requisite elements of malice or wantonness.⁵

(3) **To What Extent Damages in Discretion of Jury.** — Inasmuch as the elements going to make up a recovery in false imprisonment are not all susceptible of pecuniary measurement,⁶ the amount of recovery is largely a mat-

ment placed his hand on the woman's shoulder and told her to go to the office. She went there and remained for some considerable time of her own volition, because, as she testified, the scarf in dispute was her own and she desired to retain it. The jury returned a verdict for a thousand dollars damages, which the court held was excessive. In this connection the court said: "On the whole evidence whether there was, on the most technical doctrine any imprisonment at all is debatable. * * * It is common knowledge that shopkeepers are constantly plundered by shoplifters, and an innocent mistake, accompanied by no circumstances of indignity beyond making the mistake, should not be so heavily punished."

1. **Malice or Motive Immaterial Where Punitive Damages Not Claimed.** — *Comer v. Knowles*, 17 Kan. 436; *Karner v. Stump*, 12 Tex. Civ. App. 460.

2. **Need Not Be Hatred or Ill Will.** — *Fotheringham v. Adams Express Co.*, 36 Fed. Rep. 252; *Pearce v. Needham*, 37 Ill. App. 93; *Bolton v. Vellines*, 94 Va. 393. And see the title MALICE.

Anger, Malevolence, or Vindictiveness Unnecessary. — In an action for false imprisonment it was held that an instruction that "an improper motive may be inferred from a wrongful act based upon no reasonable ground, and that such improper motive constitutes malice in law. And to constitute such malice it is not necessary that such wrongful act should be prompted by anger, malevolence, or vindictiveness," correctly defined malice in such connection. *Bolton v. Vellines*, 94 Va. 393.

Malice in Law and Malice in Fact. — Where, in actions for false imprisonment, the malice is such only as results from a groundless act, and there is no actual malice or design to injure the rule is to allow compensatory damages, but when actual malice exists, a formed design to injure and oppress, the jury may give vindictive damages. *Ogg v. Murdock*, 25

W. Va. 139; *Barnett v. Reed*, 51 Pa. St. 191, 88 Am. Dec. 574.

3. **Several Defendants Sued Jointly — Different Liabilities.** — In the case of *McCarthy v. De Armit*, 99 Pa. St. 72, which was an action for damages for false imprisonment against the mayor and certain police officers of a city, the court said with reference to the recovery of punitive damages that the general rule, to which there were a few exceptions, was that in trespass all the defendants alike were guilty, each being liable for the damages sustained without regard to the different degrees or shades of guilt; but that when exemplary damages were claimed against a defendant, his intent must be considered. "Two persons may be liable," said the court, "one for punitive damages and the other only for compensatory. As where the plaintiff was arrested by a police officer and another, one acting in good faith and the other maliciously, the true criterion of damages is the whole injury which the plaintiff sustained from the joint trespass. In such case if the plaintiff means to get exemplary damages he should proceed against the party which ought to be punished in that way." *Citing Clark v. Newsam*, 1 Exch. 131. Compare, however, *Friel v. Ferguson*, 15 U. C. C. P. 584.

4. *Pearce v. Needham*, 37 Ill. App. 93; *Dodge v. Alger*, 53 N. Y. Super. Ct. 107. And see generally the title EXEMPLARY DAMAGES, ante.

5. **Liability of Corporations in Punitive Damages.** — *Wheeler, etc., Mfg. Co. v. Boyce*, 36 Kan. 350; *Krulevitz v. Eastern R. Co.*, 140 Mass. 573; *Gillingham v. Ohio River R. Co.*, 35 W. Va. 588, 29 Am. St. Rep. 827.

6. **Damages Not Limited to Actual Money Losses.** — *Clarke v. American Dock, etc., Co.*, 35 Fed. Rep. 478; *Hewlett v. George*, 68 Miss. 703; *Landrum v. Wells*, 7 Tex. Civ. App. 625.

Compensatory damages in an action for false imprisonment are not necessarily limited

ter of discretion with the jury,¹ the exercise of which will not be interfered with by the court unless it is plainly abused.² The mere fact, therefore, that a jury should, in the opinion of the court, have awarded heavier damages for a false imprisonment will not warrant the setting aside of the verdict on the ground of inadequacy,³ nor will the circumstance that the court would, on the evidence, have favored a smaller verdict justify judicial interference on the ground of excess.⁴ But if the amount of the verdict seems to have been the result of passion, prejudice, or corruption,⁵ or if, in a case where the evidence would have warranted punitive damages, the verdict is so small as to seem designed "to teach the plaintiff by sad experience not to bring any more such actions,"⁶ it will be set aside.

A Few Illustrative Instances of verdicts set aside or maintained will be found in the notes below.⁷

to actual money losses. Thus for an unlawful incarceration of the plaintiff by the defendant in an insane asylum compensation may be had not only for money expended in procuring a release, but for the consequent humiliation, shame, disgrace, and injury to reputation. *Hewlett v. George*, 68 Miss. 703.

As there is no precise measure of damages for mental or physical pain, where, in an action for false imprisonment, there are elements of damages to be estimated by a jury the verdict will not be set aside unless the damages are so great as to suggest that the jury has been influenced by passion or prejudice. *Bolton v. Vellines*, 94 Va. 393.

1. Jury's Discretion. — *Edgell v. Francis*, 1 Scott N. R. 121; *Harris v. Louisville, etc., R. Co.*, 35 Fed. Rep. 116; *McCall v. McDowell*, 1 Abb. (U. S.) 212; *Marsh v. Smith*, 49 Ill. 396; *Pastor v. Regan*, 9 Misc. Rep. (N. Y. Supreme Ct.) 547; *Taylor v. Davis*, (Tex. 1890) 13 S. W. Rep. 642; *Coffin v. Varila*, 8 Tex. Civ. App. 417; *Bolton v. Vellines*, 94 Va. 393. And see *Price v. Bailey*, 66 Ill. 48.

2. *Edgell v. Francis*, 1 Scott N. R. 121; *Newton v. Locklin*, 77 Ill. 103; *Webber v. Kenny*, 1 A. K. Marsh. (Ky.) 345; *Pastor v. Regan*, 9 Misc. Rep. (N. Y. Supreme Ct.) 547; *Taylor v. Davis*, (Tex. 1890) 13 S. W. Rep. 642. See also *Marshall v. Heller*, 55 Wis. 392.

3. Refusal of Court to Disturb Verdict as Inadequate Damages. — *Taylor v. Davis*, (Tex. 1890) 13 S. W. Rep. 642. And see *Price v. Bailey*, 66 Ill. 48; *Young v. Rossi*, 30 Fed. Rep. 231.

4. *Harris v. Louisville, etc., R. Co.*, 35 Fed. Rep. 116; *Newton v. Locklin*, 77 Ill. 103; *Pastor v. Regan*, 9 Misc. Rep. (N. Y. Supreme Ct.) 547. And see *Gee v. Patterson*, 63 Me. 49.

5. *Newton v. Locklin*, 77 Ill. 103; *Webber v. Kenny*, 1 A. K. Marsh. (Ky.) 345; *Woodward v. Glidden*, 33 Minn. 108; *Yost v. Tracy*, 13 Utah 431; *Ogg v. Murdock*, 25 W. Va. 139. See also *Fotheringham v. Adams Express Co.*, 36 Fed. Rep. 252.

6. Verdict Set Aside for Inadequacy. — *Potter v. Swindle*, 77 Ga. 419.

7. Damages Held Not Excessive. — *Detention Over Night.* — In the case of *Ball v. Horrigan*, (Supreme Ct.) 19 N. Y. Supp. 913, 65 Hun (N. Y.) 621, mem., it was held that four hundred and fifty dollars damages was not excessive for the unlawful arrest and detention over night in a police station of a girl sixteen years old.

Detention for Eighteen Hours. — In the case of *Roza v. Smith*, 65 Fed. Rep. 592, a verdict for five hundred dollars damages for an unlawful detention lasting about eighteen hours was held not to be excessive, although the plaintiff had suffered no physical injuries and no actual damage was shown.

Detention for Two Days. — A verdict for two hundred and fifty dollars for an unlawful imprisonment for two days is not excessive. *Brosde v. Sanderson*, 86 Wis. 368.

Detention for Few Minutes. — Where the plaintiff's detention lasted only a few minutes, it was held that a verdict for six cents damages would not be set aside as inadequate. *Henderson v. McReynolds*, (Supreme Ct.) 14 N. Y. Supp. 351.

Damages Held Excessive. — For an imprisonment which lasted only a few hours, though accompanied by an assault and battery upon the person of the plaintiff, it was held that a verdict for eight thousand dollars was excessive and should be set aside notwithstanding a remittitur of two thousand dollars. *Fadner v. Filer*, 27 Ill. App. 506.

Imprisonment for a Few Minutes. — In the case of *Miller v. Ashcraft*, 98 Ky. 314, the court held that a verdict for five hundred dollars for an unlawful arrest and false imprisonment was excessive, the wrongful acts not having been done, however, under such circumstances as to humiliate or degrade the plaintiff, nor continued for such length of time (being only a few minutes) as to put the plaintiff to any expense or inconvenience whatever, the only appreciable effect being to ruffle his temper and cause loud talking and an angry altercation between the plaintiff and the defendant acting under color of authority as town marshal.

Imprisonment for Three Hours. — It has been held that for an arrest and detention in the lockup for three hours, with no circumstances of special indignity, a verdict for two thousand nine hundred and seventeen dollars was excessive. *Woodward v. Glidden*, 33 Minn. 108.

Imprisonment for Several Days. — In the case of *Ogg v. Murdock*, 25 W. Va. 139, which was an action for damages for the alleged false imprisonment from Friday to the succeeding Monday of a person who had neither property nor business, it was held that four hundred and seventy-five dollars was excessive damages.

(4) *Damages for Physical Suffering.* — There may be a recovery for physical suffering where it is a consequence of an unlawful imprisonment.¹

(5) *Damages for Mental Suffering.* — In actions for false imprisonment there may be a recovery for the mental suffering endured by the plaintiff.² A person, therefore, who by reason of a false imprisonment has suffered indignity, shame, humiliation, or disgrace may recover damages therefor,³ although, it is conceded, such injuries are insusceptible of pecuniary measurement.⁴

Such Damages Compensatory and Not Vindictive. — Damages in actions for false imprisonment for humiliation, insult, and wounded sensibilities, though, as has been seen, not susceptible of pecuniary estimate, are regarded in law as actual and compensatory and not punitive or vindictive damages.⁵

(6) *Loss of Time and Interruption of Business.* — In actions for damages for false imprisonment there may be a recovery for loss of time and interruption of business.⁶

1. **Physical Suffering.** — *Kilbourn v. Thompson*, MacArthur & M. (D. C.) 401; *Wheeler, etc., Mfg. Co. v. Boyce*, 36 Kan. 350; *Coffin v. Varila*, 8 Tex. Civ. App. 417; *Bolton v. Vellines*, 94 Va. 393; *Parsons v. Harper*, 16 Gratt. (Va.) 64.

2. **Mental Suffering** — *United States*. — *Roza v. Smith*, 65 Fed. Rep. 592; *Clarke v. American Dock, etc., Co.*, 35 Fed. Rep. 478; *Kilbourn v. Thompson*, MacArthur & M. (D. C.) 401.

Iowa. — *Yount v. Carney*, 91 Iowa 559.

Kansas. — *Wheeler, etc., Mfg. Co. v. Boyce*, 36 Kan. 350.

Maryland. — *Kirk v. Garrett*, 84 Md. 383.

Mississippi. — *Hewlett v. George*, 68 Miss. 703.

New York. — *Ball v. Horrigan*, 65 Hun (N. Y.) 621, 19 N. Y. Supp. 913; *Corbett v. Twenty-third St. R. Co.*, 42 Hun (N. Y.) 587; *Rown v. Christopher, etc., R. Co.*, 34 Hun (N. Y.) 471; *Dodge v. Alger*, 53 N. Y. Super. Ct. 107.

Pennsylvania. — *Duggan v. Baltimore, etc., R. Co.*, 159 Pa. St. 248, 39 Am. St. Rep. 672; *Abrahams v. Cooper*, 81 Pa. St. 232.

Texas. — *Taylor v. Davis*, (Tex. 1890) 13 S. W. Rep. 642; *Coffin v. Varila*, 8 Tex. Civ. App. 417; *Landrum v. Wells*, 7 Tex. Civ. App. 625.

Virginia. — *Bolton v. Vellines*, 94 Va. 393; *Parsons v. Harper*, 16 Gratt. (Va.) 64; *Johnston v. Moorman*, 80 Va. 131.

Canada. — *Robinson v. Tapley*, 20 New Bruns. 361.

Damages for Personal Inconvenience. — In the case of *Kilbourn v. Thompson*, MacArthur & M. (D. C.) 401, which was an action for damages for false imprisonment, the court in charging the jury said that in estimating the compensation, damages the jury might allow for personal inconvenience.

3. **Shame, Humiliation, and Disgrace.** — *Roza v. Smith*, 65 Fed. Rep. 592; *Clarke v. American Dock, etc., Co.*, 35 Fed. Rep. 478; *Kirk v. Garrett*, 84 Md. 383; *Hewlett v. George*, 68 Miss. 703; *Rown v. Christopher, etc., R. Co.*, 34 Hun (N. Y.) 471; *Corbett v. Twenty-third St. R. Co.*, 42 Hun (N. Y.) 587; *Ball v. Horrigan*, 65 Hun (N. Y.) 621, 19 N. Y. Supp. 913; *Duggan v. Baltimore, etc., R. Co.*, 159 Pa. St. 248, 39 Am. St. Rep. 672; *Taylor v. Davis*, (Tex. 1890) 13 S. W. Rep. 642. Compare *Comer v. Knowles*, 17 Kan. 436.

Evidence Admissible — **Evidence of Domestic Relations.** — In an action for damages for false

imprisonment the plaintiff may testify that he has a family, as such circumstance may affect the kind and degree of mortification and inconvenience caused by the arrest. *Dodge v. Alger*, 53 N. Y. Super. Ct. 107.

Evidence in Mitigation of Damages. — In mitigation of damages in an action for false imprisonment, it is allowable in cross-examination to prove that the plaintiff had boasted that he had gained a great reputation from his arrest and imprisonment, damages being sought on the score of humiliation and disgrace. *Johnston v. Moorman*, 80 Va. 131.

4. *Clarke v. American Dock, etc., Co.*, 35 Fed. Rep. 478; *Hewlett v. George*, 68 Miss. 703; *Landrum v. Wells*, 7 Tex. Civ. App. 625.

Evidence of Specific Damages for Mental Suffering Inadmissible. — Evidence by the plaintiff in an action for false imprisonment that his damages by reason of mental suffering were at least fifty dollars per day is objectionable, on account of the fact that there can in the nature of things be no pecuniary estimate put upon such element of recovery. *Landrum v. Wells*, 7 Tex. Civ. App. 625.

5. *Hewlett v. George*, 68 Miss. 703; *Ball v. Horrigan*, 65 Hun (N. Y.) 621, 19 N. Y. Supp. 913.

Recovery for Mental Suffering Against Executor of Wrongdoer. — The case of *Hewlett v. George*, 68 Miss. 703, was an action for damages for a false imprisonment in an insane asylum brought against the executor of the alleged wrongdoer. It was held in this case that while the right to recover punitive damages in such cases ceased as a general rule with the death of the wrongdoer, recovery therefor might be had notwithstanding the death of the person causing the confinement, as compensation for shame, humiliation, and disgrace were not punitive but actual damages.

6. **Loss of Time** — **Interruption of Business.** — *McCall v. McDowell*, 1 Abb (U. S.) 212; *Kilbourn v. Thompson*, MacArthur & M. (D. C.) 401; *Wheeler, etc., Mfg. Co. v. Boyce*, 36 Kan. 350; *Thompson v. Ellsworth*, 39 Mich. 719; *Blythe v. Tompkins*, 2 Abb Pr. (N. Y. Supreme Ct.) 468; *Bolton v. Vellines*, 94 Va. 393; *Parsons v. Harper*, 16 Gratt. (Va.) 64.

Destruction of Business. — In the case of *Kilbourn v. Thompson*, MacArthur & M. (D. C.) 401, the court charged the jurors that if they found that the plaintiff had an existing business of value at the time of his arrest, which was de-

(7) *Expenses Incurred to Secure Release.*—A plaintiff may, in general, recover in damages for false imprisonment expenses necessarily incurred to secure his release from the illegal confinement,¹ as such damages, it is held, are a natural and direct result of the wrongful act.²

Expenses of Litigation in Habeas Corpus Proceedings.—Thus it has been held that there may be a recovery of expenses of litigation incurred in habeas corpus proceedings whereby the plaintiff secured his discharge,³ or in the proceedings

stroyed by the fact of his arrest and confinement by the defendant, they might allow for the loss so occasioned.

No Recovery for Speculative or Conjectural Gains.—But while the jury may allow for loss of time and destruction of business, in actions for damages for false imprisonment, they are not to allow damages for the loss of mere possible speculative or conjectural gains, which might have been realized but for the detention complained of. *Kilbourn v. Thompson*, MacArthur & M. (D. C.) 401.

Loss of Employment.—In the case of *Taylor v. Davis*, (Tex. 1890) 13 S. W. Rep. 642, the plaintiff was permitted to testify that when unlawfully arrested and imprisoned he had employment at a certain amount per month which would last for a specified time. Specific objection was not, however, made to this evidence. In *American Express Co. v. Patterson*, 73 Ind. 430, it seems to be intimated that the plaintiff in an action for damages for unlawful arrest and false imprisonment might introduce evidence of the loss of a situation of employment by reason of said arrest and imprisonment. Such evidence in this case was excluded because hearsay. It may well be doubted however, whether evidence of such circumstance would have been admissible on account of the remoteness of such loss as a consequence of the injury complained of. But see, however, the case of *Thompson v. Ellsworth*, 39 Mich. 719, where it was held that the plaintiff in an action of false imprisonment might testify that he had lost work thereby, and that there might be a recovery of such damages not only up to the time of the suit, but also for time lost after suit brought, if by the arrest and imprisonment the plaintiff failed to secure work which he would otherwise have obtained.

1. Expenses to Secure Release Recoverable.—*Pritchett v. Boevey*, 1 *Crompt. & M.* 778; *McCall v. McDowell*, 1 *Atb. (U. S.)* 212; *Ocean Steamship Co. v. Williams*, 69 *Ga.* 251; *Hewlett v. George*, 68 *Miss.* 703; *Forbes v. Hicks*, 27 *Neb.* 111; *Williams v. Garrett*, 12 *How. Pr. (N. Y. Supreme Ct.)* 456; *Blythe v. Tompkins*, 2 *Abb. Pr. (N. Y. Supreme Ct.)* 468; *Strang v. Whitehead*, 12 *Wend. (N. Y.)* 64; *Taylor v. Coolidge*, 64 *Vt.* 506; *Parsons v. Harper*, 16 *Gratt. (Va.)* 64; *Bolton v. Vellines*, 94 *Va.* 393; *Bonesteel v. Bonesteel*, 30 *Wis.* 511. And see *Sandback v. Thomas*, 1 *Stark.* 306, 2 *E. C. L.* 121.

Payment of Illegal Tax to Procure Release.—The case of *Taylor v. Coolidge*, 64 *Vt.* 506, was an action for damages for false imprisonment under an illegal warrant attached to a tax bill, the plaintiff having, in order to procure his release from confinement, paid the amount unlawfully required of him. It was held that the plaintiff was entitled in this action as an element of the damages recoverable to the money so paid out to procure his release.

Statute of Limitations.—The case of *Taylor v. Coolidge*, 64 *Vt.* 506, was an action for damages for false imprisonment under an illegal warrant attached to a tax bill, the plaintiff, however, having to pay the amount demanded of him in order to secure his release. The action was brought more than a year after the cause of action accrued, and the plaintiff sought to recover the amount of taxes illegally required of him under the warrant. The *Vermont* statute of limitations provided that such suits to recover money paid under protest for taxes should be commenced within one year after the accrual of the cause of action, and this defense was interposed to the recovery of the amount so claimed. The court held, however, that the action was for the wrongful arrest and detention, and the money paid was recoverable merely as an element of damages, and not as having been paid out under protest for taxes so as to come within the operation of the statute referred to.

Plaintiff Entitled to Procure Complete State of Freedom.—Where a plaintiff by the giving of bail obtained only an imperfect release, being under the bonds and at the mercy of a person who might at any time render him back to jail, it was held that the expense of removing himself from that position was only one of the steps necessary for completing his discharge from the original imprisonment, and that if it was necessary for the plaintiff to set aside an inquisition in order to restore himself to complete freedom he was entitled to recover the expense thereof as part of the damages of the original act. *Foxall v. Barnett*, 2 *El. & Bl.* 928, 75 *E. C. L.* 928.

Illness from False Imprisonment—Expenses Incurred in Attempt to Regain Health.—In an action for damages for false imprisonment where the plaintiff became ill in consequence thereof, it was held that there might be a recovery of such expenses as were incurred in regaining his health. *Kilbourn v. Thompson*, MacArthur & M. (D. C.) 401.

Recovery of Interest on Amount Paid to Procure Release.—It has been held to be within the discretion of the jury to allow, in addition to the amount paid by the plaintiff to procure his release from an unlawful confinement, interest thereon from the date of the payment. *Taylor v. Coolidge*, 64 *Vt.* 506.

2. *Pritchett v. Boevey*, 1 *Crompt. & M.* 778.

Doctrine that Such Expenses Are Not General Damages.—Money paid by a plaintiff to procure his release from an unlawful imprisonment is not, however, general damage, but may be recovered as special damage where specifically claimed in the declaration. *Pritchett v. Boevey*, 1 *Crompt. & M.* 778; *Strang v. Whitehead*, 12 *Wend. (N. Y.)* 64.

3. *Forbes v. Hicks*, 27 *Neb.* 111; *Williams v. Garrett*, 12 *How. Pr. (N. Y. Supreme Ct.)* 456.

to set aside the process under which the plaintiff was arrested and held.¹

Recovery of Counsel Fees. — The foregoing rule includes the recovery of fees paid to counsel, or, rather, a reasonable counsel fee.²

What Is a Reasonable Attorney's Fee is a question of fact for the jury,³ in which connection it has been held unobjectionable to introduce in evidence proof of what has been actually paid.⁴

V. FALSE IMPRISONMENT AS A CRIMINAL OFFENSE. — The civil injury consequent upon a false imprisonment is, as has been seen, redressed in an action for damages against the wrongdoer.⁵ But in addition to being a private injury, a false imprisonment is also a public wrong, for which the offender is subject to indictment and punishment.⁶

To What Extent Defendant's Intent Material. — As a general rule the guilt of the defendant on the trial of an indictment for false imprisonment is determined irrespective of the intent with which the imprisonment was committed.⁷ But where there was an imprisonment by a private person consequent upon an arrest without warrant under circumstances not justifying such a course, it was held that the *bona fide* belief of the defendant that a crime had been committed and that the prosecutor was the guilty party might go in mitigation of the offense and the punishment therefor.⁸

Admissibility in Evidence of Docket Containing Habeas Corpus Proceedings. — Where, in an action for damages for false imprisonment, the plaintiff seeks to recover court costs and counsel fees in habeas corpus proceedings by which he secured his release from custody, the docket of the County Court containing the entries of such proceedings is admissible in evidence. *Forbes v. Hicks*, 27 Neb. 111.

1. *Parsons v. Harper*, 16 Gratt. (Va.) 64.

2. **Recovery of Counsel Fees.** — *Ocean Steamship Co. v. Williams*, 69 Ga. 251; *Forbes v. Hicks*, 27 Neb. 111; *Parsons v. Harper*, 16 Gratt. (Va.) 64; *Bolton v. Vellines*, 94 Va. 393; *Bonesteel v. Bonesteel* 30 Wis. 511. And see *Sandback v. Thomas*, 1 Stark. 306, 2 E. C. L. 121; *Jay v. Almy*, 1 Woodb. & M. (U. S.) 262; *Strang v. Whitehead*, 12 Wend. (N. Y.) 64.

3. *Parsons v. Harper*, 16 Gratt. (Va.) 64.

4. *Parsons v. Harper*, 16 Gratt. (Va.) 64.

5. See *supra*, this title, *False Imprisonment as Civil Wrong*.

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6. 4 Black. Com. 218; *Campbell v. State*, 48 Ga. 353; *Com. v. Blodgett*, 12 Met. (Mass.) 56; *Boyd v. State*, 11 Tex. App. 80. See also the various statutes.

In Addition to Civil Liability a defendant is, as for all other injuries committed with force, or *vi et armis*, liable to pay a fine to the king for the violation of the public peace. 3 Black. Com. 137.

By the Penal Code of California (1897), § 237, false imprisonment is a misdemeanor punishable by a fine not exceeding five thousand dollars or by imprisonment in the county jail not more than one year, or both.

Right of Appearance Before Grand Jury. — It has been held that a justice of the peace has no right of appearance and to be heard before the grand jury on the finding of an indictment for false imprisonment under color of legal process. *Campbell v. State*, 48 Ga. 353.

7. *Staples v. State*, 14 Tex. App. 136.

8. *Staples v. State*, 14 Tex. App. 136.

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BY JOSEPH WALKER MAGRATH.

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CROSS-REFERENCES.

For matters of PROCEDURE, see the title FALSE PERSONATION, ENCYCLOPÆDIA OF PLEADING AND PRACTICE, vol. 8, p. 855.

For other matters of SUBSTANTIVE LAW and EVIDENCE related to this subject, see the following titles in this work: CHEAT, vol. 5, p. 1025; FALSE PRETENSES AND CHEATS, post; FRAUD AND DECEIT.

I. DEFINITION. — False personation, in criminal law, is the offense of falsely personating another or representing one's self to be another, and acting in the character thus assumed, either with the view of obtaining some property or exercising some right belonging to such person, or with the view or effect of subjecting such person to some legal liability.¹

II. THE OFFENSE AT COMMON LAW. — The bare fact of personating another, though for the purpose of fraud, can in no instance amount to more than a cheat or misdemeanor at common law, and can be punished only as such.²

1. Burrill's Law Dict.; Black's Law Dict. 4 Steph. Com. 181, 290, is cited as authority for the definition in both works.

To Personate another is to assume the character of such person without lawful authority, and in such character to do something to his prejudice or to the prejudice of another, without his will or consent. 2 Bouv. L. Dict.

To 'personate' means to pretend to be a particular person." Crompton, J., in Reg. v. Hague 4 B. & S. 720, 116 E. C. L. 720, construing the statute as to personating voters.

2. Offense at Common Law. — 2 East P. C. 1010; 2 Russ. on Cr. (9th Am. ed.) 1011. After using the language quoted in the text, Mr.

East continued: "It was so considered in the case of John Hevey, who was acquitted on the first indictment against him for forgery, it appearing that he had merely passed himself off for the person whose real signature appeared on the instrument, in concert with that person. Neither, indeed, did the second indictment against him for the misdemeanor turn singly on the fact of such false personating for a fraudulent purpose, but was framed against him and his associates for the conspiracy, as well as cheat, upon which they were all convicted. [Rex v. Hevey, 1 Leach C. C. 229.] So where a woman living in the service of her master conspired with another man that he

III. THE STATUTORY OFFENSE — 1. In General. — The statutes of *England* and of several of the *United States* have created the distinct offense of false personation, and provided for the punishment thereof either as a felony or as a misdemeanor.¹

2. Obtaining Property by False Personation. — To constitute the offense of obtaining property by false personation, under a statute providing for the punishment of "whoever falsely personates or represents another, and in such assumed character receives any property intended to be delivered to the party so personated, with intent to convert the same to his own use," it is necessary, in addition to the defendant's intention to convert such property to his own use,² that the person from whom the property was obtained should have believed the defendant to be the person whom he pretended to be;³ that the intention of the person deceived should have been to deliver the property to the person whose character was assumed;⁴ and that there should have been some such relation between the person whose character was assumed and the person from whom the property was obtained as would induce the latter to deliver the property to the former.⁵

3. Some Particular Individual Must Be Personated. — It is an essential element of the offense of false personation that the name and character of some particular person be assumed.⁶ A false representation that one belongs to

should personate her master, and in that character should solemnize a marriage with her, which was accordingly done, for the purpose of afterwards raising a specious title to the property of the master, the gist of the indictment was for the conspiracy, and the conviction was founded on that ground. [*Rex v. Robinson*, 1 Leach C. C. 37.] * * * In *Dupee's Case*, 2 Sess. Cas. 11, however, where the indictment only charged that he [the defendant] personated one A. B., clerk to H. H., a justice of the peace, with intent to extort money from several persons in order to procure their discharge from certain misdemeanors for which they stood committed, the court would not quash it on motion, but put the defendant to demur to it. It might probably have occurred to the court that this was something more than a bare endeavor to commit a fraud by means of falsely personating another; it was an attempt to pollute and render odious the public justice of the kingdom by making it a handle and pretense for corrupt practices."

1. Aiding and Abetting. — Under the statute of 57 Geo. III., c. 127, § 4, all persons personating or aiding and abetting another in the personation and falsely assuming the name of a seaman, with intent to obtain any benefits to which he is entitled by reason of services performed, are principals; and the offense is not confined to the individual by whom the seaman is actually personated. *Rex v. Potts*, R. & R. C. C. 262. See also *Reg. v. Lake*, 11 Cox C. C. 333.

Offense Must Be Proved as Charged in Indictment. — In *Kirtlev v. State*, 38 Ark. 543 the defendant was indicted for falsely personating one A, and in such character unlawfully receiving money. On the trial the evidence left it uncertain whether the representation had been that the defendant was A or that another person who was acting in concert with the defendant was A. It was held that as the personation had not been proved as laid in the indictment a conviction would not be allowed to stand.

2. Intention to Convert Property a Necessary Part of Offense. — *Jones v. State*, 22 Fla. 532; *Goodson v. State*, 29 Fla. 511, 30 Am. St. Rep. 135.

3. Belief of Person Delivering Property. — *Jones v. State*, 22 Fla. 532.

4. Intention to Deliver to Person Personated. — *Goodson v. State*, 29 Fla. 511, 30 Am. St. Rep. 135; *Williams v. State*, 49 Ind. 367.

5. Relation Between Person Personated and Person Delivering Property. — *Jones v. State*, 22 Fla. 532.

In *Rex v. Tannet*, R. & R. C. C. 261, the defendant was indicted for falsely personating and assuming the name and character of Peter M'Cann, a person entitled to prize money for services performed on board a certain ship called the "Tremendous," such personation being for the purpose of fraudulently obtaining such prize money. There was no person by the name of Peter M'Cann on the prize list and muster book of the "Tremendous," but there was a person by the name of "Peter M'Carn." It was held that a conviction in this case was wrong, because the indictment did not charge the personating of any person who had belonged to the ship.

6. Character of Some Particular Person Must Be Assumed. — *Reg. v. Hague*, 4 B. & S. 720, 116 E. C. L. 720; *People v. Knox*, 119 Cal. 73.

In *Anonymous*, 1 Stra. 384, it was held that persons who put in bail in feigned names could not be prosecuted for personating bail, because the names assumed were not those of any particular persons.

In *Hodecker v. Strickler*, 20 N. Y. App. Div. 245, it was held that a woman who lived with the husband of another woman, and assumed his name and held herself out as his wife, but did not pretend to be the woman who was his real wife, was not within the meaning of section 562 of the Penal Code of *New York*, which provides for the punishment of "a person who falsely personates another, and in such assumed character marries or pretends to

a certain class or station in life, or is engaged in a certain profession or calling, is not a false personation, but a false pretense.¹

4. Personating Another Person of Same Name. — One who, with fraudulent intent, represents himself to be another person, whose name is the same as his own, is guilty of false personation; but it has been held in *Texas* that one who innocently receives money intended for another person, under the belief that it is intended for himself, cannot be convicted of such offense.²

5. Personating Officer. — An exception to the rule that to constitute false personation the name and character of some particular individual must be assumed exists in some jurisdictions, when it is by statute made punishable as false personation for a person falsely to represent himself to be an officer invested with either civil or military authority. To warrant a conviction for obtaining money or property by such false personation the jury must find: first, that the defendant assumed to be an officer under authority of the government;³ second, that the assumption was false; third, that it was made with the intent to defraud the person from whom the money or property was received;⁴ and fourth, that such intent was carried out, and that the defendant did, in his assumed character, or because of his false assumption, defraud or attempt to defraud such person.⁵

Where Prosecutor Parted with Property for Unlawful Purpose. — In *New York* it is held that a person cannot be convicted of obtaining property by false personation of an officer where the prosecutor parted with such property for what he believed to be an unlawful purpose;⁶ but in *Indiana* the prosecutor's purpose in parting with his property does not affect the offense.⁷

marry or to sustain the marriage relation towards another."

1. Example of False Pretenses. — In *Rex v. Barnard*, 7 C. & P. 784, 32 E. C. L. 736, a person adopted the costume of a commoner of Oxford university, and obtained property by falsely representing that he was a member of the university. He was convicted, not of false personation, but of obtaining goods by false pretenses. See generally the title FALSE PRETENSES AND CHEATS, *post*.

2. Absence of Fraudulent Intent. — *Thompson v. State*, (Tex. Crim. App. 1893) 24 S. W. Rep. 298.

3. Authority of Government. — *U. S. v. Curtain*, 43 Fed. Rep. 433.

The crime described by the statute now embodied in Pub. Stat. *Massachusetts*, 1882, c. 205, § 23, of falsely assuming or pretending to be a sheriff or other officer, is the false personation of a sheriff or other officer of that commonwealth. A person cannot be convicted of falsely assuming to be a sheriff where it is shown that his representation was that he was a sheriff of another state, and it is not shown that he was not actually a sheriff of such other state or that he pretended to be a sheriff of *Massachusetts*. *Com. v. Wolcott*, 10 Cush. (Mass.) 61.

Sufficiency of Evidence — Question for Jury. — In *Com. v. Connolly*, 97 Mass. 591, the defendant was indicted for falsely assuming and pretending to be a "deputy of the constable of the commonwealth" and unlawfully searching a house for liquors. The testimony showed that he demanded admittance to the house, saying that he came to search for liquors and that he was "a state constable," and that he did search the house. It was held that the defendant was properly convicted, as it was for the jury to interpret the language and conduct

of the defendant, and to judge whether his statement that he was a "state constable" and his actions amounted to a pretense that he was a "deputy of the constable of the commonwealth."

4. Intent to Defraud. — *U. S. v. Curtain*, 43 Fed. Rep. 433.

In *U. S. v. Bradford*, 53 Fed. Rep. 542, the defendant was indicted under the Act of Congress of April 18, 1884 (23 Stat. at L. 11), for falsely pretending to be an employee of the United States in order to defraud the United States or a railroad company. It appeared that the defendant concealed himself in a mail car, and, upon being discovered by the postal clerk, stated that he was in the postal service, and endeavored to ride on the train in that character without paying fare. It was held that as the defendant had not formed any intent to defraud the United States, and as in pursuance of his design to defraud the railroad company he had not represented falsely to any agent of such company that he was an employee of the United States, he could not be convicted under the act.

5. Intent Must Be Carried Out. — *U. S. v. Curtain*, 43 Fed. Rep. 433.

Must Act as Officer. — The offense of falsely personating an officer under How. Annot. Stat. *Michigan*, § 9252, is not complete unless the person alleged to have falsely assumed to be an officer also took upon himself to act as such officer. *People v. Cronin*, 80 Mich. 646.

6. Unlawful Purpose of Prosecutor — New York Doctrine. — *People v. Stetson*, 4 Barb. (N. Y.) 151; *McCord v. People*, 46 N. Y. 470. See the title FALSE PRETENSES AND CHEATS, *post*.

7. Indiana Doctrine. — Persons who falsely pretended to be state marshals and to have a warrant for the arrest of another person, and who obtained property from him upon their

6. Personating Party to Judicial Proceedings. — Under a statute providing a punishment for falsely personating a party to a judicial proceeding, and confessing a judgment or doing any other act in the course of such proceeding by which the party personated may be injured, no actual injury to such party is necessary to complete the offense.¹

7. Personating Bail. — It has been held, under a statute making the personation of bail a felony, that the bare personating of bail before a judge at chambers, or the acknowledging thereof in another name, was no felony unless the bail bond was filed, but only a misdemeanor.²

8. Personating Owner of Stock. — Under the *English* statutes providing a punishment for falsely personating the owner of stocks and transferring or endeavoring to transfer them, or receiving or endeavoring to receive dividends due thereon, it is not necessary to complete the offense that an actual transfer or receipt of dividends should be accomplished.³

9. Personating Voter. — There was no such offense known to the common law as false personation of voters,⁴ but it is now, by statute, made an offense.⁵ The offense is complete when the person offers to vote under the name of another; it is not necessary that he should actually vote, or even that

promise not to arrest if such property was delivered to them, were rightfully convicted of false personation, under section 27 of the Felony Act (Rev. Stat. Indiana, 1876, p. 436). *Perkins v. State*, 67 Ind. 270, 33 Am. Rep. 89. See the title FALSE PRETENSES AND CHEATS, *post*.

1. Not Necessary that Party Personated Should Be Actually Injured. — In a prosecution under Mill. & V. Code *Tennessee*, § 5621 (Code 1896, § 6731), for falsely personating another in judicial proceedings, it is not necessary that it should be shown how such false personation by the defendant would or could affect the right or interest of the person personated. Nor is it any defense to the indictment for such personation that the action was dismissed before final judgment on account of the fraud therein by the false personation, nor that a judgment obtained in such proceeding against the person personated would be void and might be shown to be so in any collateral proceeding, where upon its face such judgment would be good. *Edgar v. State*, 96 Tenn. 690.

2. Bail Bond Not Filed. — *Timberly's Case*, 2 Sid. 90, 2 East P. C. 1009. The statute under which this decision was rendered (21 Jac. I., c. 26, § 2, now repealed) made the personation of bail a felony without benefit of clergy. The present *English* statute is 24 & 25 Vict., c. 98, § 34. See also *Beasley's Case*, 1 Vent. 301.

3. No Property Need Be Obtained. — 2 East P. C. 1005.

In *Rex v. Parr*, 1 Leach C. C. 434, 2 East P. C. 1005, it was held that the offense of falsely personating the owner of stocks under 31 Geo. II., c. 22, § 77, was complete where the defendant had applied to the clerk whose business it was to issue dividend warrants, and, representing himself to be another person who owned stocks, had received a warrant for the dividend in the name of such person; although he was apprehended before he had made any application at the pay office, or had taken any step towards obtaining the actual payment of the money made payable by such warrant.

Later *English* Statutes providing as set forth in the text are 24 & 25 Vict., c. 98, § 3; 26 & 27

Vict., c. 28, § 15. See 33 & 34 Vict., c. 58, § 4, as to personation of owners of bank stock.

Under the Statutes of the United States this offense, as a matter of special legislation, is confined to assuming the character of the holder of any public stock or indebtedness. Rev. Stat. U. S. (1878), § 5435.

4. Personation of Voters No Offense at Common Law. — Reg. v. Bent 2 C. & K. 179 61 E. C. L. 179, 1 Den. C. C. 157; Reg. v. Hogg, 25 U. C. Q. B. 66.

5. Statutory Offense. — 35 & 36 Vict., c. 33, § 24 (Ballot Act 1872); Pub. Stat. Mass., Supp., 1884, c. 298, § 52.

Strict Construction of Statutes. — Reg. v. Sankey, 3 Q. B. Div. 379.

In Reg. v. Bent, 2 C. & K. 179, 61 E. C. L. 179, 1 Den. C. C. 157, it was held that the statute 5 & 6 Wm. IV., c. 76, providing that a person offering to vote at an election might be required to answer certain questions as to whether he was the person whose name was signed to the voting papers and who was registered in the burgess roll and that his falsely answering any of such questions was a misdemeanor, did not describe any such offense as "false personation." The court, *per* Williams, J., said: "It is true that wilfully giving a false answer to the three allowable questions has acquired the popular appellation of the 'false personation' of a voter, but in the statute itself there is no language in any degree resembling that which has been used in describing the supposed offense contained in those two last counts."

Punishment. — In Reg. v. Rose, 27 Ont. Rep. 195, the defendant was convicted, under section 167 of the Consolidated Municipal Act of 1892, of applying for a ballot paper in the name of another person, and was sentenced to one month's imprisonment. In habeas corpus proceedings it was held that as section 210 of the same act provided a pecuniary penalty instead of imprisonment for persons convicted of such offense, the conviction and sentence under the earlier section were illegal, and the defendant should be discharged from custody.

he should state that he is the person whose character he assumes.¹

Personation Must Be at a Valid Election. — It has been held that, in order to support an indictment for falsely personating a voter, it must be shown that the election at which the alleged personation took place was a valid one.²

10. Personating Dead Person. — The offense of false personation may be committed although the person whose name and character are assumed is dead,³ but there can be no personation of one who never existed.⁴

IV. RELATION TO OTHER OFFENSES — 1. As a False Pretense. — Although the offenses of false personation and false pretenses are quite distinct,⁵ there have been cases in which convictions of obtaining goods by false pretenses have been had where the alleged false pretense consisted in what might more properly be called a false personation. The theory of these cases seems to be that the visible presence of the person who represents himself to be another is a token, and the representation being false, it is a false token.⁶

2. As Part of Larceny. — The offense of obtaining property by false personation is entirely distinct from that of larceny at the common law; for in the former the property is delivered to the false personator with the intent to give him some title thereto, while in the latter the title remains in the original owner, and one who deprives him of the property acquires a mere felonious possession thereof.⁷ Nevertheless it is provided by statute in some states

1. What Constitutes False Personation of a Voter. — Reg. v. Hague, 9 Cox C. C. 412, 4 B. & S. 715, 116 E. C. L. 715, 33 L. J. M. C. 81.

2. Election Must Be a Valid One. — Reg. v. Vaile, 6 Cox C. C. 470.

3. Personation of Dead Person. — Rex v. Martin, R. & R. C. C. 240; Rex v. Cramp, R. & R. C. C. 242.

Exception. — In *Whiteley v. Chappell*, L. R. 4 Q. B. 147, 38 L. J. M. C. 51, 19 L. T. N. S. 355, 17 W. R. 175, it was held that under the statute of 14 & 15 Vict., c. 105, § 3, providing that if any person should wilfully and fraudulently "personate any person entitled to vote at such election" he should be liable to imprisonment not exceeding three months, a man could not be convicted for personating a person who was dead at the time when the alleged personation took place.

4. Personation of One Who Never Existed Not Punishable. — *Brown's Case*, 2 East P. C. 1007. See also *M'Annelly's Case*, 2 East P. C. 1009.

5. Distinction Between False Personation and False Pretenses. — See *supra* this title, *The Statutory Offense — Some Particular Individual Must Be Personated*. And see the title FALSE PRETENSES AND CHEATS, *post*.

6. False Personation as a False Pretense. — If a man calls himself by a false name, he merely utters a lie, but if he represents himself to be another person, whereby he accomplishes a cheat, his visible presence is a token, which, if false, is a false token. 2 Bish. New Crim. Law, § 152. But see *State v. Renick*, (Oregon 1899) 56 Pac. Rep. 275.

In *Rex v. Story*, R. & R. C. C. 60, it was held that where the prisoner obtained money from the keeper of a post office by assuming to be the person mentioned in a money order which he presented for payment, it was a false pretense, though he did not make any false declaration or assertion in order to obtain the money.

In *State v. Goble*, 60 Iowa 447, it was held that a conviction of obtaining money by a false pretense was warranted where the defendant

represented that he was one B, and thereby induced another person to pay him a debt which was due to B, even though the defendant never stated that his name was B.

7. Larceny by False Personation. — In *Rex v. Longstreth*, 1 Moo. C. C. 137, the defendant went to a carrier's servant and obtained from him a parcel by falsely pretending to be the person to whom it was directed. This was held to be larceny, because the servant had no authority to deliver the parcel to the defendant, so that no property passed to him, but the mere possession, feloniously obtained.

In *Com. v. Collins*, 12 Allen (Mass.) 181, one S. had left his watch at the watchmaker's to be repaired. The defendant went to the shop, pretending to be S., asked for the watch, paid for the repairing, and took the watch with a felonious intent. This was held to be larceny, the court saying, *per Chapman, J.*: "The watchmaker had no authority to deliver the watch to the defendant, and the latter obtained no property in it, not even the qualified property of a bailee, but a mere felonious possession, which is the essence of the crime of larceny."

In *Com. v. Lawless*, 103 Mass. 425, the defendant was convicted of larceny of the bounty money and discharge papers of one G, where he had obtained them from the office of the surgeon-general by falsely representing that he was G.

Discussing the obtaining of goods by false personation as larceny, Mr. Wharton says: "Suppose A goes to B and says, 'I am C, sell me these goods,' and B delivers the goods to A, believing A to be C, this being an essential incident of the contract; does any property pass to A? The better view is in the negative, there being no contract between A and B. [*Citing Reg. v. Little*, 10 Cox C. C. 559; *Reg. v. Gillings*, 1 F. & F. 36, *State v. Brown*, 25 Iowa 561, and other cases.] If this be correct, then it is larceny in A to take goods on this false personation, though there are authorities to the effect that the case is not larceny

that a person who obtains property by the false personation of another shall be deemed to have committed, or to be guilty of, larceny,¹ and in other states it is provided that the obtaining of property by false personation shall be punished in the same manner and to the same extent as larceny of the money or property so received.²

3. As Part of Forgery. — A person who assumes the character of another person, and in that character writes the name of such other person, is guilty of forgery.³ But there can be no conviction of forgery when the instrument alleged to have been forged was in reality signed by the person whose signature appeared thereon, and the defendant, in concert with that person, fraudulently passed himself off for the signer.⁴

It is not False Personation, *per se*, to sign the name of another person to a writing without such other person's consent.⁵

4. As Part of Rape. — At common law it was not rape to have carnal knowledge of a woman through deception by personating her husband, but by statute in *England* and in several of the *United States* connection obtained by such deception is declared to be rape.⁶

5. As Part of Perjury. — In *Canada* it has been held that a person who applies for a ballot paper at an election, falsely representing himself to be another person, who is a qualified elector, and falsely swears that he is such person, may be convicted of perjury.⁷

but false pretenses. [Citing *Reg. v. Adams*, 1 Den. C. C. 38, etc.] * * * Suppose A, pretending to be C, goes to B and fraudulently obtains from B certain goods of C, which are in B's hands as bailee. Is this larceny? It certainly is, because B has no intention of passing the property in the goods to A, or to any one; he (B) considering himself to have no property in the goods to pass." 1 Whart. Crim. Law (10th ed.), § 888.

See the title LARCENY.

1. Obtaining Property by False Personation Larceny. — Pub. Stat. *Massachusetts*, 1882, c. 203, § 58; Howell's Annot. Stat. *Michigan*, 1882, § 9160. See the title LARCENY.

Common-law Doctrine as to Larceny Done Away With. — Section 4241 of the *Iowa* Crim. Code (Annot. Code Iowa, 1897, § 4838), providing that any person who obtained any property by falsely personating another should be guilty of larceny, was enacted for the purpose of doing away with the technical doctrine of the common law that there could be no larceny without a trespass. *State v. Brown*, 25 Iowa 561.

2. False Personation Punished as Larceny. — *New York* Penal Code, 1898, § 564; *California* Penal Code, 1897, § 530.

3. As Part of Forgery. — *Reg. v. Dixon*, 2 Lew. C. C. 178. See also *Martin v. State*, 1 Tex. App. 586.

In *People v. Peacock*, 6 Cow. (N. Y.) 72, a certain quantity of coal was consigned to a person of the same name as the defendant. The defendant, knowing that the coal was intended for such other person, claimed the coal, and obtained from another person an advance thereon, signing over to him the permit for the delivery of the coal. He did not imitate the handwriting of the true owner, nor did he

represent himself as residing in any particular place. It was held that an indictment for forgery could be sustained.

False Personation for Purpose of Authenticating Instruments. — The offense described by article 450 of the Penal Code of *Texas*, providing for the punishment of any person, who shall "falsely personate another, whether bearing the same name or not, and in such assumed character shall, before any officer authorized by law to authenticate instruments of writing for registration, acknowledge the execution of any instrument of writing purporting to convey or in any manner affect any interest in property, such instrument purporting to be the act of the person whose name is so assumed, and the acknowledgment thereof being such as would entitle the instrument to be registered," is near of kin to forgery. *Martin v. State*, 1 Tex. App. 586.

4. Personation of Real Signer. — *Rex v. Hevey*, 1 Leach C. C. 229; 2 East P. C. 856, 1010. See the title FORGERY.

5. Where There Is No Personation. — In *People v. Maurin*, 77 Cal. 436, the defendant was indicted for false personation in signing the name of a physician to a certificate of death. It was shown that he had signed the physician's name without any authority to do so, but it was not shown that he had pretended to any person that he was such physician. It was held that there was no false personation, and that on the indictment he could not be convicted of forgery.

6. As Part of Rape. — 48 & 49 Vict., c. 69, § 4; *California* Penal Code, 1897, § 261. For a full treatment of this subject see the title RAPE.

7. False Personation as a Part of Perjury. — *Reg. v. Chamberlain*, 14 Can. L. T. 283. See the title PERJURY.

FALSE PRETENSES AND CHEATS.

BY FRANCIS J. BYRNE.

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CROSS-REFERENCES.

For matters of *PROCEDURE*, see *ENCYCLOPÆDIA OF PLEADING AND PRACTICE*, vol. 8, p. 857.

For other matters of *SUBSTANTIVE LAW* and *EVIDENCE* related to this subject, see the following titles in this work: *ACCOMPLICES*, vol. 1, p. 389; *AIDER AND ABETTOR*, vol. 2, p. 29; *ATTEMPTS TO COMMIT CRIME*, vol. 3, p. 250; *COMPOUNDING OFFENSES*, vol. 6, p. 399; *CONFESIONS*, vol. 6, p. 520; *CONSPIRACY*, vol. 6, p. 830; *COUNTERFEITING*, vol. 7, p. 875; *FALSE PERSONATION*, ante; *FORGERY*; *FRAUD AND DECEIT*; *HANDWRITING*; *INNS AND INN-KEEPERS*; *LARCENY*.

I. CHEATS AT COMMON LAW — 1. Definition. — A cheat at common law is "the fraudulent obtaining the property of another by any deceitful and illegal practice or token, short of felony, which affects or may affect the public."¹

2. Nature and Classification — a. IN GENERAL. — A cheat or fraud, to be indictable at common law, must affect the public, be such as is public in its nature, calculated to defraud numbers, to deceive the people in general.²

1. Definition of Cheat. — 2 East P. C. 818, adopted in 2 Russ. on Cr. (9th Am. ed.) 613; *Middleton v. State*, Dudley L. (S. Car.) 283; *People v. Fish, Sheld.* (N. Y.) 543. Compare *State v. Renick*, (Oregon 1899) 56 Pac. Rep. 275, wherein the court objects to the above definition as being too broad.

Sir J. F. Stephen Says: "Every one commits the misdemeanor called cheating who fraudulently obtains the property of another by any deceitful practice not amounting to felony, which practice is of such a nature that it directly affects, or may directly affect, the public at large." Steph. Dig. Cr. Law, art. 338.

Blackstone Says: "Cheating is another offense more immediately against public trade, as that cannot be carried on without a punctilious regard to common honesty and faith between man and man. Hither, therefore, may be referred that prodigious multitude of statutes which are made to restrain and punish deceits in particular trades, and which are enumerated by Hawkins and Burn, but are chiefly of use among the traders themselves. The offense also of breaking the assize of bread, or the rules laid down by law, and particularly by the statutes 31 Geo. II., c. 29, 3 Geo. III., c. 11, and 13 Geo. III., c. 62, for ascertaining its price in every given quantity, is reducible to this head of cheating; as is likewise, in a peculiar manner, the offense of selling by false weights and measures." 4 Black. Com. 157.

Hawkins's Definition. — "Deceitful practices

in defrauding or endeavoring to defraud another of his known right by means of some artful device, contrary to the plain rules of common honesty." 1 Hawk. P. C., c. 71, § 1. But this definition has been observed upon as not sufficiently distinct or accurate; and many of the authorities whence it seems to have originated have been said to be founded either in conspiracy or forgery, which were in themselves substantive offenses, and the latter of which was usually, when successful, prosecuted as a cheat before the various statutes by which forgeries were, in so many instances, made capital offenses. 2 East P. C. 817. See also *Middleton v. State*, Dudley L. (S. Car.) 283.

2. California. — *People v. Garnett*, 35 Cal. 472, 95 Am. Dec. 125.

Maine. — *Cross v. Peters*, 1 Me. 387, 10 Am. Dec. 78.

Massachusetts. — *Com. v. Warren*, 6 Mass. 72; *Com. v. Eastman*, 1 Cush. (Mass.) 227, 48 Am. Dec. 596; *Com. v. Shedd*, 7 Cush. (Mass.) 514; *Com. v. Prius*, 9 Gray (Mass.) 127.

New Jersey. — *State v. Vanderbilt*, 27 N. J. L. 332.

New York. — *People v. Stone*, 9 Wend. (N. Y.) 187; *People v. Babcock*, 7 Johns. (N. Y.) 201, 5 Am. Dec. 256; *People v. Johnson*, 2 Johns. (N. Y.) 292; *Lambert v. People*, 9 Cow. (N. Y.) 613; *People v. Gates*, 13 Wend. (N. Y.) 316; *People v. Sully*, 5 Park. Cr. Rep. (N. Y. Super. Ct.) 165; *People v. Fish, Sheld.* (N. Y.) 543.

East says: "There are also instances to be found in the books of cheats in their nature private, which have been yet adjudged to be indictable at common law; but upon examination they will either appear to be founded in conspiracy or forgery, or * * * to implicate considerations of public justice, public trade, or public policy." ¹

b. PUBLIC CHEATS. — Comprehended within the class of frauds of a public nature are frauds affecting the course of justice ² and those immediately injuring the interests of the crown or the public, although arising in the course of some particular transaction or contract with private individuals. ³ In the latter class of frauds are included the selling of unwholesome provisions ⁴ and cheats by officials. ⁵

Pennsylvania. — *Com. v. Hickey*, 2 Pars. Eq. Cas. (Pa.) 319.

In *Indiana* "there are no common-law offenses. All crimes and misdemeanors must be defined, and punishment therefor fixed by statutes of this state, and not otherwise." *Stewart v. Jessup*, 51 Ind. 415, 19 Am. Rep. 739.

1. **Classification of Cheats.** — 2 East P. C. 823.

2. **Married Woman Pretending to Be Widow Executing Bail Bond.** — 2 East P. C. 821, *citing* *Rex v. Blackburn*, M. 36 Car. II.; *Trem. P. C.* 101; *Cro. Circ. Comp.* 78.

Debtor Counterfeiting Discharge from Creditor. — *Fawcett's Case*, 2 East P. C. 862, 952.

Procuring Order to Hold to Bail upon Illegal Affidavit. — *Omealy v. Newell*, 8 East 364, *citing* *Rex v. Mawbey*, 6 T. R. 619.

Fraudulently Personating an Officer. — 2 East P. C. 820. For a full discussion of the principles of false personation, see the titles **FALSE PERSONATION**, *ante*.

3. **Apprentice Enlisting Without Master's Consent.** — *Rex v. Jones*, 1 Leach C. C. 174; 2 East P. C. 822.

Minor Pretending to Be of Age. — *Barl.* 100.

Married Woman Pretending to Be Single. — *Rex v. Hanson*, *Say.* 229.

Pretense of Power to Discharge Soldiers. — *Serlestead's Case*, 1 *Latch* 202.

Maiming One's Self. — If a person maims himself in order to have a more specious pretense for asking charity, or to prevent his being impressed as a sailor, or enlisted as a soldier, he may, on conviction, be fined and imprisoned. 1 *Hawk. P. C.*, c. 55, § 4; 1 *Hale* 412; *Co. Litt.* 127a.

False News. — Writers of false news are indictable for its publication at common law, when such publication is likely to affect the public injuriously, or to provoke a breach of the peace; and it may also be held that the fabrication of false news, calculated to produce any general detriment, is an indictable offense. 2 *Whart. Cr. Law*, § 1120, *citing* *Stark*, on *Libel* 546; 2 *Russ.* on *Cr.* 278. See also *Steph. Dig. Cr. Law*, art. 95.

The false but skillful dissemination of a report of the loss of a steamer, so as to make money out of the depression of the stock, would be a cheat at common law. 2 *Whart. Cr. Law*, § 1121.

4. **Selling Unwholesome Provisions.** — Where the defendant, under a contract with the government, delivered to and for prisoners of war bread which was made and baked in an unwholesome and insufficient manner, and contained dirt, filth, and other unwholesome and

pernicious matters, all the judges held that the defendant was guilty of a cheat; for the giving to any person unwholesome provisions not fit for man to eat, *lucri causa*, or from malice or deceit, is in itself an indictable offense. *Treeve's Case*, 2 East P. C. 821.

So also where the defendant supplied bread strongly impregnated with alum, although the alum was put in the bread to make it look white, and even though he gave directions to his employee so to mix it as to render it harmless. *Rex v. Dixon*, 4 *Campb.* 12, 3 *M. & S.* 11.

In a discussion of the case of *Reg. v. Mackarty*, 2 *Ld. Raym.* 1179, *Lord Ellenborough* said that vending unwholesome wine which was not fit to drink is clearly indictable as a public fraud. *Rex v. Southerton*, 6 East 133.

5. **Cheats Relating to the Public Revenue.** — Where two persons were indicted for enabling persons to pass their accounts with the pay office in such a way as to enable them to defraud the government, and it was objected that it was only a private matter of account, and not indictable, the court held otherwise, as it related to the public revenue. *Rex v. Bembridge*, *cited* in *Rex v. Southerton*, 6 East 136, 22 *How. St. Tr.* 1. See also *Rex v. Comings*, 5 *Mod.* 179.

And if an overseer of the poor receive from the putative father of a bastard child born within the parish a sum of money as a composition with the parish for the maintenance of the child, he is liable to an indictment for presenting a false account in which he fraudulently omitted to give credit for this sum in his accounts with the parish. *Rex v. Martin*, 2 *Campb.* 268.

So a superintendent of the county constabulary force is indictable for rendering false accounts of the moneys received by the constables and by them accounted for to him, it being his duty to render such accounts to the chief constable as a means for ascertaining the sum to be paid to himself for the pay of the constables. 1 *Russ.* on *Cr.* (9th ed.) 207, *citing* *Reg. v. Baxter*, 5 *Cox C. C.* 302. See also *Reg. v. Dale*, 1 *Dears. C. C.* 37.

So if the captain and purser of a man of war deliver to the commissioners for victualing the navy a false bill of exchange, and false accounts, certificates, and vouchers, they may be indicted for an offense against the interest of the public service. *Rex v. Brisac*, 4 East 164.

And where an officer of the government of the United States, not intrusted with public money, got it into his hands by fraud, and appropriated it to his own use, it was held that the offense was not an official misdemeanor,

c. **PRIVATE CHEATS.** — Cheats of a private nature at common law are such as arise in the course of dealings between individuals, and are usually effected by conspiracy, forgery, or the use of false tokens or symbols having the semblance of public authenticity and calculated to deceive the public at large, and such as common prudence cannot guard against.¹

Cheats by Forgery and by Conspiracy. — Although in themselves substantive offenses, cheats effected by forgery² and by conspiracy are indictable as cheats at common law.³

Cheats by Symbol or Token. — The false symbol or token by which an indictable cheat or fraud at common law was committed, and against which it was considered that common prudence could not guard, seems to have been confined

but an offense at common law; and the fact that he obtained it in his official capacity was immaterial. *U. S. v. Watkins*, 3 Cranch (C. C.) 442.

1. **Private Cheats.** — 2 East P. C. 813, 817, 820; *Rex v. Wheatly*, 2 Burr. 1125. See also *Rex v. Lara*, 2 Leach C. C. 652, 6 T. R. 565.

2. **Forgery as a Common-law Cheat.** — Pretending to be a merchant and obtaining goods on credit as such, by means of forged letters and commissions, constitute a cheat. *Rex v. Govers*, Say. 206; 2 East P. C. 824.

Before forgery was made a capital offense, it was usually, when successfully accomplished, prosecuted as a cheat. 2 East P. C. 525; 2 Russ. on Cr. (9th Am. ed.) 611.

At common law a forgery could not be prosecuted as a cheat unless there was a prejudice received; but it was immaterial to the specific offense of forgery whether or not any person was prejudiced. *Rex v. Ward*, 2 Ld. Raym. 1461; 2 Stra. 747; 2 East P. C. 860.

Uttering a Forged Instrument the forgery of which is an offense at common law is no offense, unless some fraud was actually perpetrated by it. *Reg. v. Boulton*, 2 C. & K. 604, 61 E. C. L. 604.

Uttering a bank bill with the name of a fictitious cashier countersigned thereto, with intent to deceive and defraud, is a cheat at common law. But unless the note purports to be countersigned by a cashier of the bank whose note is counterfeited, it is not within the *Massachusetts* statute of March 6, 1801. *Com. v. Boynton*, 2 Mass. 77.

Passing a note bearing the likeness and similitude of a common banknote, with knowledge that it is worthless, is an indictable cheat at common law; for banknotes represent the coin of the country and pass currently as money. *State v. Patillo*, 4 Hawks. (11 N. Car.) 349. See also *State v. Stroll*, 1 Rich. L. (S. Car.) 244.

Passing as a true note a note purporting to be payable on demand by the Ohio Exporting and Importing Company at its bank in Cincinnati, but which bank never existed, was an indictable cheat at common law, if the defendant knew that the note was false. *Com. v. Speer*, 2 Va. Cas. 65. See the title **COUNTERFEITING**, vol. 7, p. 875.

Severing an Indorsement from a Note, leaving the note entire, is a misdemeanor at common law, but is not forgery. *State v. McLearn*, 1 Aik. (Vt.) 311.

For a Full Discussion of the Law of Forgery see the title **FORGERY** in this work.

3. Instances of Conspiracies Punished as Cheats.

— The case mentioned where the suppression of a will was held to be indictable as a cheat (1 Hawk. P. C., c. 71, § 1, *citing Rex v. Brereton*, Noy 103), is said to have been probably a case of conspiracy or combination. 2 East P. C. 823, where also the same explanation is given of *Rex v. Skirret*, 1 Sid. 312, *cited in 1 Hawk. P. C., c. 71, § 1*, and *Rex v. Parris*, 1 Sid. 431, where several persons were indicted for causing an illiterate person to execute a deed to his prejudice, by reading it over to him in words different from those in which it was written; also of *Reg. v. Orbell*, 6 Mod. 42, *cited in the note to 1 Hawk. P. C., c. 71, § 1*, where a person was convicted upon a charge of having run a foot race fraudulently, and with a view to cheat a third person, by a previous understanding with the running competitor to win.

A case which has undergone considerable discussion by reason of being so near the border line of those offenses which are and those which are not indictable as cheats at common law is that of *Reg. v. Macarty*, 6 Mod. 301. Macarty and Fordenborough effected a cheat, the former by pretending to be a merchant and to trade as such in Portuguese wines, the latter by pretending to be a broker of London; whereby they induced one Chowne to barter a quantity of hats for so many hogsheds of wine, which they pretended to be true, new Lisbon wine of Portugal, and that it belonged to Fordenborough; all of which representations were untrue. It was held that this was indictable as a conspiracy. *Reg. v. Macarty*, 2 East P. C. 823, 6 Mod. 301, 2 Ld. Raym. 1179, 3 Ld. Raym. 325, *cited in Rex v. Wheatly*, 2 Burr. 1129; 1 W. Bl. 275.

In *Rex v. Wheatley*, 1 W. Bl. 275, Mr. Justice Dennison is reported as saying that the indictment in Macarty's case was quashed because there was no false token, though this is not supported by the report of the same case in 2 Burr. 1128; for the same learned judge is there made to say that there were false tokens, or what were considered such. In *Rex v. Govers*, 2 Say. 206, speaking of Macarty's case, Lord C. J. Ryder is made to say (borrowed probably from the report in 6 Mod. 302) that "the pretending to be a merchant was there holden to be a false token."

A conspiracy to cheat by offering to sell forged foreign banknotes of a denomination the circulation of which is prohibited in *Pennsylvania* is indictable. *Twitchell v. Com.*, 9 Pa. St. 211; *Rhoads v. Com.*, 15 Pa. St. 272.

to the use of false weights and measures,¹ the selling of goods by counterfeit marks,² and playing with false dice.³

Only a Civil Injury. — Where the cheat was effected by other means it was considered to amount only to an unfair dealing, and an imposition on a particular individual by which he could not have suffered but for his own carelessness, and was regarded as only a civil injury for which an action to recover damages would lie.⁴

1. Selling by False Weights and Measures. — *Young v. Rex*, 3 T. R. 104; *Rex v. Wheatly*, 2 Burr. 1125; *Rex v. Dunnage*, 2 Burr. 1130; *Rex v. Lewis*, Say. 205; *Rex v. Combrun*, P. 1751, 24 G. 2, B. R.; *Rex v. Nicholson*, cited in *Rex v. Wheatly*, 2 Burr. 1130; *Rex v. Driffeld*, Say. 146; 2 East P. C. 820; 3 Chitty's Cr. Law 994; 2 Russ. on Cr. (9th Am. ed.) 610. See also *People v. Gates*, 13 Wend. (N. Y.) 319; *Com. v. Warren*, 6 Mass. 72.

If a person selling corn measure it in a bushel short of the statute measure, or measure it in a fair bushel, but put something into the bushel to fill it up, it seems to be an indictable offense. *Rex v. Pinkney*, cited in *Rex v. Wheatly*, 2 Burr. 1130, 2 East P. C. 820.

2. Counterfeit Marks. — Where cloth was sold with the alnager's seal counterfeited thereon, this was held to be an indictable cheat. *R. v. Edwards*, Trem. P. C. 103, 2 East P. C. 820.

So also where there was a general seal or mark of the trade on cloth of a certain description and quality, which was deceitfully counterfeited, it was held that an indictment would lie. *Rex v. Worrel*, Trem. P. C. 106, 2 East P. C. 820.

Selling goods which falsely bear the mark of a particular manufacturer, or counterfeiting the name of a celebrated artist on a spurious picture, and selling it as and for the original, is a cheat at common law. *Reg. v. Closs*, Dears. & B. C. C. 460, 7 Cox C. C. 494, 3 Jur. N. S. 1309.

Where a goldsmith was indicted for falsifying plate by putting in too much alloy and then corrupting one of the assay master's servants to help him to the proper marks, with which he stamped his plate, afterwards selling it to the goldsmiths, he was convicted. 1 Russ. on Cr. (9th Am. ed.) 111, citing *Fabian's Case*, 1 East P. C. 194, Kel. 39.

3. Playing with False Dice. — If there be no statute against playing with dice in public places, it is an indictable offense at common law to employ false dice, offering to play with whomsoever may come; for a common gamester is a public nuisance. *Leeser's Case*, Cro. Jac. 497; *Maddocke's Case*, 2 Rolle 107, 2 Roll. Abr. 78.

This offense is further punishable by penalties recoverable under the statute 16 Car. II., c. 7, and 9 Anne, c. 14, by forfeiture of treble the value of the money or other thing won, to be recovered as the act directs. 2 East P. C. 820.

4. When Private Cheat at Common Law Is Only a Civil Injury. — *Rex v. Wheatly*, 2 Burr. 1125; *Reg. v. Eagleton*, Dears. C. C. 515, 33 Eng. L. & Eq. 540, 24 L. J. M. C. 158, 1 Jur. N. S. 940.

If a shopkeeper who deals in cloth pretends to sell ten yards and delivers only six, this is not an indictable offense. *Rex v. Pinkney*, cited in *Rex v. Wheatly*, 2 Burr. 1130, 2 East P. C. 820.

Nor is putting a brickbat into butter on the sale of the butter indictable. *Weierbach v. Trone*, 2 W. & S. (Pa.) 408.

Knowingly exposing to sale and selling wrought gold, under the sterling alloy, as and for gold of the true standard weight was held not to be an indictable offense, but a private imposition only, where no false weight or measure was used. But if a goldsmith had done so it would be indictable under statute. *Rex v. Bower*, 1 Cowp. 323, 2 East P. C. 820.

But in *Respublica v. Powell*, 1 Dall. (Pa.) 47, an indictment was sustained against a baker in the employ of the United States army for baking two hundred and nineteen barrels of bread and marking them as weighing eighty-eight pounds each, when in fact they severally weighed but sixty-eight pounds. But here there was a false token placed by the defendant upon the barrels as a mark, and this false token was equivalent to a false measure.

Borrowing Money on Promise to Send a Pledge, and failing to do so, is not an indictable cheat. *Nehuff's Case*, 1 Salk. 151.

Fraudulently Obtaining Goods on Credit otherwise than by false tokens, and removing and secreting them with intent to defraud creditors, are not indictable offenses at common law; but in *Pennsylvania* such acts are made penal by the statute to abolish imprisonment for debt. *Hartmann v. Com.*, 5 Pa. St. 60.

Procuring Conveyance of Land. — Where a person presented to another a written instrument which he represented as a mere receipt, but which was an absolute deed conveying land to the defendant for a consideration, the grantor having signed it without reading or requiring it to be read, the act was held not indictable, because it did not involve a fraud upon the public, nor had it been perpetrated by any deceitful practice or false token. *State v. Justice*, 2 Dev. L. (13 N. Car.) 199.

Procuring Illiterate Person to Sign Instrument to His Prejudice. — It is not an indictable offense to cause an illiterate person to execute a deed to his prejudice, by reading it over to him in words different from those in which it is written, unless there be a conspiracy. 2 East P. C. 823.

But in *Tennessee*, where a party was indicted for forgery for inducing an illiterate man to sign a note for one hundred dollars by reading it to him as a note for sixty-five dollars, it was held that while not guilty of forgery he had committed an indictable cheat. *Hill v. State*, 1 Yerg. (Tenn.) 76, 24 Am. Dec. 441. See also *Com. v. Sankey*, 22 Pa. St. 390, 60 Am. Dec. 91.

Selling an Unsound Horse as and for a sound one is not indictable as a cheat. *Rex v. Wheatley*, 1 W. Bl. 274, 2 Burr. 1129; *Rex v. Pywell*, 1 Stark. 402, 2 E. C. L. 156.

Bailee Delivering Different Substance. — That a miller received good barley to grind at his

Fraud Backed by False Affirmation. — The fact that the fraud was backed by a false affirmation to give it greater efficiency, as where a person selling under measure falsely affirmed that the measure was correct, or that the commodity he was selling was of a different quality from that which it really possessed, did not make it any the less a mere private injury.¹

Naked Lie. — Accordingly, a fraud effected by a false affirmation or naked lie was not an indictable cheat, but a mere private injury.²

Accompanied by Apparent False Token. — And where the defendant at the time of the false affirmation made use of an apparent false token which in reality was of no more credit than his own assertion, this was considered as only adding another lie.³

mill, and delivered a mixture of oatmeal and barley meal, different from the produce of the barley, which was musty and unwholesome, was held not to be an indictable offense. But Lord Ellenborough, C. J., said that if the miller had been owner of a soke mill, to which the inhabitants of the vicinage were bound to resort in order to get their corn ground, and the miller, abusing the confidence of his situation, had made it a color for practising a fraud, this might have presented a different aspect. *Rex v. Haynes*, 4 M. & S. 214.

And in *Rex v. Wood*, 1 Sess. Cas. 217, the defendant, a miller, was indicted for changing corn delivered to him to be ground, and giving bad corn instead of it. It was held that this was a cheat in the way of trade; that it concerned the public, and was not simply a private cheat.

Fraudulently Keeping Part of Wheat Delivered to Be Ground. — Where the keeper of a common grist-mill, being employed to grind three bushels of wheat, unlawfully detained a part, it was held to be a matter of a private nature. *Rex v. Channell*, 2 Stra. 793, 2 East P. C. 818.

Obtaining a Merchant's Books of Account, by false representations, from the counting house of a merchant is only a private injury. *U. S. v. Carico*, 2 Cranch (C. C.) 446.

Separating the Condition from the Penalty of a Bond. — It is not an indictable fraud to separate the condition from the penalty of a bond, which is written underneath, for this is a fraud against which common prudence can guard, by taking an instrument expressive of the condition upon which the obligation is given, or by having the condition inserted in the body of the obligation. *Wright v. People*, 1 Ill. 102.

1. Fraud Backed by False Affirmation. — Where the defendant sold a sack of corn and falsely affirmed that it was a Winchester bushel, the indictment was quashed on the ground that this was no more than telling a lie. *Pinkney's Case*, 2 East P. C. 818, cited in 2 Burr. 1129.

And an indictment was also quashed which charged the defendant with depositing as a security for money advanced a quantity of gum, at the price of seven pounds by the hundredweight, falsely pretending and affirming that it was gum seneca, and that it was worth seven pounds by the hundredweight, whereas, in truth, it was not gum seneca, but a gum of an inferior kind, and was not worth more than three pounds by the hundredweight. *Rex v. Lewis*, Say. 205.

"No stress can be laid on several cases to be found in the books, particularly in *Mod.*

Rep., where similar indictments were refused to be quashed on motion, because it was the practice of the court, as often declared, not to quash on motion indictments for offenses founded in fraud or oppression, but leave the defendants to plead." 2 East P. C. 818, note (b), citing *Rex v. Wadsworth*, 5 Mod. 13; *Reg. v. Orbell*, 6 Mod. 42; *Rex v. Orbeville*, 12 Mod. 499.

2. Bare Lies Not Indictable as Cheats. — Obtaining goods by pretending to be the servant of another, and to have been sent for them, is not an indictable offense at common law, but a bare lie. *Rex v. Bryan*, 2 Stra. 866.

Nor is obtaining money by pretending to have been sent to borrow it by a third person, *Reg. v. Jones*, 1 Salk. 379, 2 Ld. Raym. 1013; *Reg. v. Grantham*, 11 Mod. 222, or by pretending to be sent to receive payment of money, *Anonymous*, 6 Mod. 105, an indictable offense.

Selling bull beef for steer beef is not indictable as a cheat. *Rex v. Botwright*, Say. 147.

It is not indictable to get possession of a note, under pretense of wishing to look at it, and carrying it away and refusing to return it. *People v. Miller*, 14 Johns. (N. Y.) 371.

Nor is it indictable to pretend to have money ready to pay a debt, and thereby to obtain a receipt in discharge of the debt without paying the money. *People v. Babcock*, 7 Johns. (N. Y.) 201, 5 Am. Dec. 256.

Nor to obtain, in violation of an agreement, and by false pretenses, possession of a deed lodged in a third person's hands as an escrow. *Com. v. Hearsey*, 1 Mass. 137.

Nor to obtain goods on credit by falsely pretending to be in trade, and to keep a grocery shop, and giving a note for the goods in a fictitious name. *Com. v. Warren*, 6 Mass. 72.

3. Giving a Worthless Check. — Where a person, pretending that he wanted to purchase lottery tickets for a valuable consideration, delivered a fictitious order for payment, purporting to be a draft on his banker, knowing that he had no authority to make such draft, and that it would not be paid, but falsely pretending that it was a good order, and that he had money in his banker's hands, and that it would be paid, it was held that this was only adding another lie, as the check was of no more credit than his own assertion. *Rex v. Lara*, 6 T. R. 565, 2 Leach C. C. 647, 2 East P. C. 819.

But such an act would now be punishable as a false pretense. See *infra*, this title, *False Pretenses—Statutes*, subdiv. 9. a. (3) *Giving Check*.

3. Grade of Offense and Punishment. — A cheat at common law is a misdemeanor.¹ The punishment for a cheat at common law, as in other cases of misdemeanor, was by fine, imprisonment, or, further, by infamous corporal pain, in aggravated cases.²

4. Attempt to Cheat. — Since an attempt to commit the offense of false pretenses is indictable, there is no reason why an attempt to commit a cheat at common law may not also be indictable.³ But an attempt to commit, if neither by false tokens nor by conspiracy, is not indictable.⁴

II. FALSE PRETENSES — STATUTES — 1. General Review of the Statutes —
Statute 33 Hen. VIII. — In order to remedy the serious defect which existed in the common law, which, as has been seen, punished only such frauds of a private nature as were effected by a symbol or token calculated to defraud the public, the statute of 33 Hen. VIII., c. 1, was enacted, providing for the punishment of frauds effected by means of privy tokens or counterfeit letters in other men's names.⁵ This statute is common law in several of the United States, while in others it never has been in force.⁶ It has also been considered as creating a new offense, although there are decisions to the contrary.⁷ It did not, however, affect those cases against which common

Selling Goods Marked as Containing a Certain Quantity. — In *Rex v. Wilders*, M. 6 Geo. I., B. R. cited by Lord Mansfield in *Rex v. Wheatly*, 2 Burr. 1128, the defendant, a brewer, was indicted for a cheat in sending to the keeper of an alehouse so many vessels of ale, marked as containing such a measure, and writing a letter to him assuring him that they did contain that measure, when, in fact, they did not contain such measure, but so much less, etc. The indictment was quashed upon motion, after argument, as containing no criminal charge. Foster, J., in *Rex v. Wheatly*, 2 Burr. 1129, doubted concerning this case when it was cited, because it seemed to him that the vessels, being marked as containing a greater quantity than they really did, were false tokens. But it is possible that the marks in this instance were not considered as the semblance of public authority, but only as private tokens. 2 East P. C. 820.

1. Cheat a Misdemeanor at Common Law. — 2 East P. C. 838.

2. Punishment for Cheat at Common Law. — 1 Hawk. P. C., c. 71, § 3; 2 East P. C. 838.

By statute 14 & 15 Vict., c. 100, § 29, the court may sentence any person convicted of "any cheat or fraud punishable at common law" to be imprisoned for any term now warranted by law, and to be kept at hard labor during the whole or any part of such term of imprisonment. 2 Russ. on Cr. (9th Am. ed.) 617.

3. Attempt to Cheat. — 2 Bish. Cr. L., § 168. See generally the title ATTEMPTS TO COMMIT CRIME, vol. 3, p. 250.

4. 1 Russ. on Cr. (9th ed.) 89. See *infra*, this title, *False Pretenses — Statutes — Attempt to Commit*.

5. Cheats Effected by Privy Tokens and Counterfeit Letters. — The statute of 33 Hen. VIII., c. 1, recites that "many light and evil-disposed persons, not minding to get their livings by truth, * * * but compassing and devising daily how they may unlawfully get into their hands and possession goods, chattels, and jewels of other persons, * * * and also knowing that if they come to any of the same goods, chattels, and jewels by stealth, that then they,

being thereof lawfully convicted, * * * shall die, therefore [larceny then being a capital offense] have now of late falsely and deceitfully contrived, devised, and imagined privy tokens and counterfeit letters in other men's names * * * for the obtaining of money, goods," etc., and enacts that "if any person falsely and deceitfully obtain or get into his hands or possession any money, goods, chattels, jewels, or other things of any other person, by color and means of any such false token or counterfeit letter, * * * [he] shall have and suffer such correction and punishment by imprisonment," etc. 1 Hawk. P. C., c. 71, § 4; 3 Chitty Crim. Law 996; 2 East P. C. 826.

6. Massachusetts. — The statute of 33 Hen. VIII., c. 1, is part of the common law of Massachusetts. *Com. v. Warren*, 6 Mass. 72.

New York. — It was never in terms re-enacted in New York until 1830, nor in substance any further than it is embraced in the subsequent statute of 30 Geo. II., c. 24. *People v. Gates*, 13 Wend. (N. Y.) 311.

In *Pennsylvania* the statute was never in force. *Com. v. Hutchinson*, 2 Pa. L. J. 250, 1 Clark (Pa.) 302, 2 Pars. Eq. Cas. (Pa.) 311.

7. New Offense Created. — 3 Chitty's Cr. Law 996; *People v. Gates*, 13 Wend. (N. Y.) 316. See also *State v. Vanderbilt*, 27 N. J. L. 332.

In *People v. Johnson*, 12 Johns. (N. Y.) 292, it was said that this statute extended the common-law rule; and in *State v. Phifer*, 65 N. Car. 321, Reade, J., said: "This statute, added to the common law, makes all cheats by false tokens, whether of a public or private nature, indictable."

In 2 East P. C. 833, it is said: "Nothing appears either by the title or preamble of the statute to show that it was passed to obviate any doubts in the common law; neither is it so considered by Lord Coke; but rather it purports to provide for offenses which had then lately sprung up in order to evade the punishment of larceny. The title of the act is 'A bill against them that counterfeit letters or privy tokens to receive money or goods in other men's names.' The use of false public tokens for defrauding others was clearly pun-

prudence would be a sufficient security.¹

Statute 30 Geo. II. — As trade increased, the common law and the statute of 33 Hen. VIII. were ineffectual to prevent many frauds which could with facility be committed without either a public or a privy token, namely, by false pretenses or verbal representations, and it was therefore enacted by the statute 30 Geo. II., c. 24, that all persons who knowingly and designedly, by false pretense or pretenses, should obtain from any person or persons money, goods, wares, or merchandise, with intent to cheat or defraud, should be deemed offenders against law and the public peace.² This statute created a new offense,³ and the principles of it, as well as of the subsequent English statutes enacted to supply its deficiencies, have, with few minor differences, been generally re-enacted in the United States.⁴

ishable at common law as a cheat. The necessity then of the statute was to reach frauds which were accomplished by means of privy tokens. These privy tokens and counterfeit letters must also, as appears from the title, the preamble, and the enacting part, be made in other men's names. An argument then arises upon the particular wording of the statute 33 Hen. VIII. against the supposition that cheating by means of every species of false token was punishable at common law without the aid of that statute; for then, so far from there being any necessity for it in suppression of fraud, which the preamble assumes, it was even restrictive of the common law; and the reason given for it in Ward's and Obrian's case, namely, that it went only to enhance the punishment, is not well founded, the punishments inflicted by the statute being no more than would be warranted by a judgment at common law for a misdemeanor of such a nature."

Contra. — In *Rex v. Ward*, 2 Ld. Raym. 1366, and in *Rex v. O'Brian*, 7 Mod. 378, it was said that this statute created no new offense, but only enhanced the punishment of such as were offenses at common law. But in each of these cases the matter in judgment was forgery, and as to that it is true. The counterfeit letters mentioned in the statute were always indictable as forgeries, and the statute, as to such an offense, is therefore only in affirmation of the common law.

1. *Cross v. Peters*, 1 Me. 387, 10 Am. Dec. 78.

2. **Statute 30 Geo. II., c. 24, Concerning Cheats by False Pretense.** — See *Young v. Rex*, 3 T. R. 98; *Cross v. Peters*, 1 Me. 387, 10 Am. Dec. 78; *State v. Vanderbilt*, 27 N. J. L. 332; *People v. Gates*, 13 Wend. (N. Y.) 316; *People v. Johnson*, 12 Johns. (N. Y.) 292; *State v. Phifer*, 65 N. Car. 321.

The case of *Young v. Rex*, 3 T. R. 98, was the first reported under the statute of 30 Geo. II.

3. **New Offense Created.** — *Young v. Rex*, 3 T. R. 104; 2 East P. C. 831; *People v. Johnson*, 12 Johns. (N. Y.) 292; *State v. Sumner*, 10 Vt. 587, 33 Am. Dec. 219.

In *State v. Hewett*, 31 Me. 398, it was erroneously said that cheating by false pretenses was an offense at common law. Such a fraud was not punishable until the above statute was passed.

4. **Connecticut.** — The statute of Connecticut, 1835, tit. 21, § 114, against cheating by false

pretenses, embraces the provisions of the statutes 33 Hen. VIII., 30 Geo. II., and 52 Geo. III., and the decisions in Great Britain under those statutes are held strictly applicable to cases arising under the Connecticut statute. *State v. Rowley*, 12 Conn. 101.

District of Columbia — Maryland. — The statute of Geo. II., by the Constitution of Maryland, adopted in the year 1776, was carried to the state of Maryland, and made as much a part of the law as though her assembly had expressly enacted it, when she adopted as the law of Maryland all English statutes then in force in England or Great Britain, which had been introduced, used, and practised by the courts of law or equity; and it being an offense in Maryland on the 27th day of February, 1801, when that part of Maryland was ceded to the United States, the crime of false pretenses may be committed in the District of Columbia. *In re Wolf*, 27 Fed. Rep. 613.

But in *Jones v. U. S.*, 5 Cranch (C. C.) 654, which was appealed from the Criminal Court of the District of Columbia for the County of Washington, Cranch, C. J., said, in alluding to the statute of 33 Hen. VIII., c. 1, as to false tokens, and the statute of 30 Geo. II., c. 24, as to false pretenses: "It is true that those statutes were not extended in practice to the state of Maryland, and were never in force in this county; but they were known to every lawyer in that state and this county, and there can be no doubt that Congress had them in view when they passed the penitentiary law for this district."

In *Massachusetts* there was no such statute as that of 30 Geo. II., until the statute of 1815, c. 136, was enacted, making the obtaining by false pretenses of "money, goods, wares, merchandise, or other things, with intent to cheat and defraud," an indictable offense. See *Com. v. Warren*, 6 Mass. 72. That statute was a copy of the statute of 30 Geo. II., c. 24, § 1, and was revised and combined with some provisions in relation to other similar offenses in Rev. Stat., c. 126, § 32, in force in 1837. *Com. v. Drew*, 19 Pick. (Mass.) 179.

In *New York* the principle of the statute of 30 Geo. II., c. 24, was first enacted in 1787, and was not materially changed by the revisions of 1801 and 1813. *People v. Gates*, 13 Wend. (N. Y.) 316.

In *Pennsylvania*, Gibson, C. J., in delivering judgment in *Com. v. Burdick*, 2 Pa. St. 163, 44 Am. Dec. 186, said that the Pennsylvania Act of July 12, 1842, § 21, seems to have been

In Construing the Statutes against false pretenses, they must, as against the defendants, be strictly construed, and nothing not within their words may be held within their meaning; on the other hand, in favor of the defendants the construction is liberal.¹

Offense Jointly Committed. — Where the words are spoken by one, but the defendants act together, and share in the same transaction, the offense is jointly committed.²

Bare Lie Sufficient. — Under the statute of 30 Geo. II. and similar statutes in the United States it is not essential to constitute the offense that a false symbol or token should be made use of; for the term "false pretenses" includes such frauds as may be accomplished by a bare lie without the use of any token or contrivance fitted to deceive.³

taken from 20 Geo. II., c. 29 (presumably he meant 30 Geo. II., c. 24), and the 7 Geo. IV., c. 92, § 53. The first of these, he said, declares it an indictable offense to get money, checks, chattels, or securities from another "by false pretense or pretenses." In this the court erred. The statute of Geo. II. did not extend to securities and choses in action, and it was to supply this defect that the statute 52 Geo. III., c. 64, was enacted. See *infra*, this section, *The Property or Thing Obtained*.

In *Com. v. Hutchinson*, 2 Pa. L. J. 250, 1 Clark (Pa.) 302, 2 Pars. Eq. Cas. (Pa.) 311, it was said that the Act of July 12, 1842, is a consolidation of the old statute 33 Hen. VIII., c. 1, of the 30 Geo. II., c. 24, neither of which was ever in force in Pennsylvania, and of the 8 Geo. IV., c. 29, § 53.

In *Tennessee* the Code 1858, § 4701 (Code 1896, § 6568), is borrowed from the original English statute. *Rothschild v. State*, 13 Lea. (Tenn.) 296.

1. **Construction of Statutes.** — 2 Bish. N. Cr. Law, § 415.

2. **Offense Jointly Committed.** — *Young v. Rex*, 3 T. R. 98. All that is necessary to cause the liability of having participated in making the false pretenses to attach to an individual is his co-operation and concert in the general purpose; and the concert and co-operation may be shown although such person said nothing by way of assenting to, or expressing his concurrence in, the false pretense. *Com. v. Harley*, 7 Met. (Mass.) 465.

3. **Bare Lie Sufficient.** — *Reg. v. Woolley*, 1 Den. C. C. 559, 3 C. & K. 98; *Jones v. U. S.*, 5 Cranch (C. C.) 653, citing *Young v. Rex*, 3 T. R. 98; *State v. Phifer*, 65 N. Car. 321; *State v. Dixon*, 101 N. Car. 742.

In the case of *Young v. Rex*, 3 T. R. 98, four men came to the prosecutor and represented that one of them had made a bet with a colonel in the army then at Bath, that a certain person would, on the next day, run on the high road leading from Gloucester to Bristol, ten miles in length, within one hour. By means of this false pretense they obtained from the prosecutor, as a part of the pretended bet, twenty guineas. Lord Kenyon, C. J., in delivering judgment said: "Undoubtedly this indictment, being founded on the statute of 30 Geo. II., c. 24, is different from a common-law indictment. When it passed it was considered to extend to every case where a party had obtained money by falsely representing himself to be in a situation in which he was not, or

any occurrence that had not happened, to which persons of ordinary caution might give credit. * * * In the present case four men came to the prosecutor, representing a case as about to take place, that William Lewis should go a certain distance within a limited time; that they had betted upon the event, and they should probably win; he was perhaps too credulous, and gave confidence to them, and advanced his money; and afterwards the whole story proved to be an absolute fiction. Then the defendants, morally speaking, have been guilty of an offense. I admit that there are certain irregularities which are not the subject of criminal law. But when the criminal law happens to be auxiliary to the law of morality I do not feel any inclination to explain it away." It was accordingly held that the offense was within the statute.

In *Pennsylvania* it has been held to be a false pretense to state falsely, upon the sale of a refreshment privilege at a coming concert for the sum of fifty dollars in cash, that a third party had offered seventy-five dollars for the same privilege, to be paid after the concert. *Com. v. Jones, Vaux* (Pa.) 96.

It was there also held to be an indictable offense to obtain the possession of goods by the presentation of an envelope falsely represented as containing money. *Com. v. Warner*, 1 York Leg. Rec. (Pa.) 35. See also *Com. v. Burdick*, 2 Pa. St. 164, 44 Am. Dec. 186.

But in *Com. v. Mullen*, 4 Pa. Dist. Rep. 656, *Barker, P. J.*, in construing the Pennsylvania statute against obtaining by any false pretense, said: "A mere naked lie is not false pretense under the Act of Assembly. * * * Usually the cases that come up are those where some person purchases goods and says, 'I am the owner of a farm,' and if it is proven he does not own any farm, it is a representation of a fact which is not true."

And in *Com. v. Barker*, 8 Phila. (Pa.) 613, where a party obtained money from a woman by representing that her husband had just been arrested, and was about to be sent to prison, but that he could get him out of the difficulty if he was paid forty dollars for his services, it was held that this was a mere naked lie, and not a false pretense; that in order to make out the offense the statement made must be one of possession of property by the defendant as a basis of credit which proves untrue. See also *Com. v. Hutchinson*, 2 Pa. L. J. 250, 1 Clark (Pa.) 302, 2 Pars. Eq. Cas. (Pa.) 311; *Com. v. Hickey*, 3 Pa. L. J. 86.

False Symbol or Token. — Statutes in some of the United States punish the obtaining by a "false symbol or token" or "false writing," as well as by a "false pretense."¹

General Clause. — And where such statute, punishing the obtaining of a thing by a false symbol or token, or false writing, etc., also contains a general clause against obtaining it by "any false pretense," or a clause of equivalent import, the offense may be committed in words, without the use of such false symbol or token or false writing, etc., for such general clause is not restricted to acts committed by the particular means specified, but embraces other acts not included within the family of such particular means; and therefore a fraud accomplished by a bare lie is, under such statutes, sufficient to constitute the offense.²

Every Case of Fraud Not Within the Statute. — Though the term "false pretense" is very general, it is not intended to apply to every case of fraud and dis-

1. In **Indiana**, obtaining money or property or the signature of any person to a written instrument by false pretenses under the Indiana statute may be committed by two means: first, by color of any false token or writing; second, by any false pretense. *Jones v. State*, 50 Ind. 473. In construing this statute it was held that the phrase "by color of any false token or writing" does not mean that the property or signature to an instrument must be obtained by color of a false token or writing alone, unaided by any verbal pretense or representation; that, fairly construed, it means by making a false token or writing to appear different from what it is, or by representing such false token or writing to be true and genuine. *Wagoner v. State*, 90 Ind. 504.

The Iowa Revised Statutes, § 4394 (Code 1897, § 5041), providing that "if any person designedly and by false pretense * * * and with intent to defraud, obtain from another any money, goods, or other property," he shall be punished, etc., has altered the common law as to cheats, and is not in affirmance of it; and therefore the offense of obtaining money or property by a false pretense may be committed though no false public token be made use of. *State v. Reidel*, 26 Iowa 430.

In **New Jersey** the obtaining may be done by color of any false token, counterfeit letter or writing, or by a false pretense. *State v. Vanderbilt*, 27 N. J. L. 332.

In **Pennsylvania** the property may be obtained by color of any false token, or by any false pretense. *Com. v. Hutchinson*, 2 Pa. L. J. 250, 1 Clark (Pa.) 302, 2 Pars. Eq. Cas. (Pa.) 311.

Under the New York Penal Code, § 528, declaring that a person is guilty of larceny where he obtains property "by color or aid of fraudulent or false representation or pretense, or of any false token or writing," the offense may be committed without a false token or writing. *People v. Rice*, (Supreme Ct.) 13 N. Y. Supp. 161, affirmed 128 N. Y. 649.

Mr. Bishop says that under statutes not adding the words "symbol or token" to "pretense," the latter word alone must doubtless be construed as coextensive in meaning with the three combined, on the ground that whatever is a false symbol or token is plainly a false pretense. 2 Bish. N. Cr. Law, § 416.

2. **General Clause — Bare Lie — Michigan.** —

Higler v. People, 44 Mich. 299, 38 Am. Rep. 267.

New York. — *People v. Haynes*, 14 Wend. (N. Y.) 558, 28 Am. Dec. 530, per Walworth, C. Senator Tracy in the same case held that a lie unaccompanied by any artful contrivance fitted to deceive, although intentionally and fraudulently told, is not within the general words "other false pretense."

North Carolina. — *State v. Phifer*, 65 N. Car. 321 [criticising and explaining *State v. Simpson*, 3 Hawks (10 N. Car.) 622]; *State v. Dixon*, 101 N. Car. 742.

Washington. — *State v. Reiff*, 14 Wash. 664.

In **Indiana**, the words "or any false pretense" in section 27 of the old act, omitted from the new, must be deemed to have been purposely omitted; for Rev. Stat. 1881, § 2204, was intended to be, and is, a complete revision of the law of obtaining goods under false pretenses. *Wagoner v. State*, 90 Ind. 504.

Under the **Indiana Act**, Rev. Stat. 1881, § 2204, which provides that "whoever, with intent to defraud another, designedly, by color of any false token or writing, obtains," etc., and which omits the words "or any false pretense," as contained in section 27 of the act defining felonies, approved June 10, 1852 (2 Rev. Stat. 1876, p. 436), there can be no prosecution for obtaining any money, etc., by false pretense unless it consist of a false token or writing, nor at all unless section 27 is in that respect unrepealed. *Shaffer v. State*, 82 Ind. 225.

Under the Vermont Statute providing that "if any person shall by false tokens, messages, letters, or by other fraudulent, swindling, or deceitful practices, obtain or procure from any person or persons any money, goods, or chattels," etc., it was held that the words "other fraudulent, swindling, or deceitful practices" were added, not for the purpose of enlarging the definition of the offense from positive acts to mere declarations, but from the difficulty of extending the description to all other acts or practices of a like nature which might be resorted to as means for effecting the same criminal object; and accordingly that a person obtaining goods by a false and fraudulent representation of having property did not commit an offense under the statute. *State v. Sumner*, 10 Vt. 587, 33 Am. Dec. 219.

honesty by which one person gets advantage over another.¹

No General Rule Applicable. — But no general rule can be laid down by which to establish the true boundary line between those frauds which amount to indictable false pretenses and those which do not. Each particular case must be determined upon its own facts.²

Cheats by Particular Persons. — Various other statutes for the punishment of particular kinds of frauds or cheats by particular persons were passed in *England* at different times.³

1. Every Case of Fraud Not Within the Statute. — *Clifford v. State*, 56 Ind. 249; *Com. v. Hutchinson*, 2 Pa. L. J. 242, 1 Clark (Pa.) 304; *Chapman v. State*, 2 Head (Tenn.) 42.

When the Act, Though Fraudulent, Is Not a False Pretense. — *S.* had *W.*'s note for one hundred and fifty dollars, and agreed with him if he would purchase land of *N.* he would credit his note for that amount. *W.* purchased the land at one hundred and thirty dollars, but represented to *S.* that *N.* had raised the price to one hundred and fifty dollars, and *S.* agreed to take it at that price if *W.* could not get it for less. *N.* conveyed the land as *S.* directed, and *S.* gave up the note to *W.* It was held that though this was a gross fraud, it was not a false pretense in the legal sense; for *S.* knew the land as well as *W.*, and he got the title, and paid only the price that was agreed upon. He was deceived only as to the price *W.* had given for the property, but not as to the ownership, the title, or the value of it. *Wallace v. State*, 11 Lea (Tenn.) 542.

Giving Money to Be Applied to the Payment of a Note. — In *State v. Moore*, 111 N. Car. 667, the prosecutor gave a note to the defendant in payment for goods, and the defendant discounted the note at a bank, but it was subsequently renewed. A third renewal of the same note was given on July 1, negotiable and payable at the same bank. No payment was made on either note until December, when the prosecutor made several payments to the defendant to be applied in extinguishment of the debt, but the prosecutor did not ask the defendant for the note until after making the last payment. It was held that the defendant was not guilty of obtaining money under false pretenses, for he had not represented himself to be the owner of the note, which the prosecutor must have known was in other hands, and the prosecutor trusted to the defendant to apply the payments on the note.

Insignificance of the Pretense. — Where a person was indicted for obtaining a quart of whiskey by falsely pretending to have been sent for it by another, the court said: "We are not disposed to open the doors so wide in the construction of this severe and penal act as to convert every case of falsehood and dishonesty by which one may get the advantage of another in the most insignificant matter into a felony." *Chapman v. State*, 2 Head (Tenn.) 36.

Defendant Collecting Wages Due After Giving Order to Another to Collect. — Where a person obtained goods by giving an order on his employer for wages to become due, and he afterwards collected the wages himself, concealing the fact that he had given the order, he did not commit the offense of obtaining money under false pretenses by receiving the wages.

He resorted to no false pretense. *Moulden v. State*, 5 Lea (Tenn.) 579.

"Pretense" — "False Pretense." — In *State v. De Lay*, 93 Mo. 98, it was said: "The word 'pretense,' when used in a criminal statute, is to be understood in its legal and technical sense, it having a well-defined as well as a peculiar and appropriate meaning in law."

In *Chapman v. State*, 2 Head (Tenn.) 36, it was said that the term "false pretense" is to be taken in its legal, not its literal sense.

The Phrase "by a False Pretense" and the Phrase "under False Color and Pretense" are substantially equivalent to the words "by means of a false pretense." *Com. v. Walker*, 108 Mass. 309.

2. Each Case to Be Determined upon Its Own Facts. — *Young v. Rex*, 3 T. R. 98; *Com. v. Haughey*, 3 Metc. (Ky.) 225; *Com. v. Poulson*, 2 Pars. Eq. Cas. (Pa.) 326; *Rothschild v. State*, 13 Lea (Tenn.) 296; *State v. De Hart*, 6 Baxt. (Tenn.) 223.

3. Statutory Cheats by Particular Persons. — Among the offenses specified in these statutes are cheats by goldsmiths, etc., in working up plate; embezzlements and frauds by servants, by officers of the bank and of other public companies, by persons in the post office, by manufacturers, by lodgers, by persons intrusted with the king's naval and military stores, and by those intrusted with ships and goods. By the statute 6 Geo. I., c. 18, the entering into public subscriptions for certain schemes of commerce, etc., is made indictable as a nuisance; and the statute 37 Geo. III., c. 143, gives a summary jurisdiction to justices of the peace in petty sessions to punish retailers in whose possession false weights and balances shall be found. 2 East P. C. 834.

Fraudulent Conveyances. — The statute of 13 Eliz., c. 5, against fraudulent conveyances for the purpose of hindering, delaying, or defrauding creditors, in addition to the penalty and forfeiture it imposes upon the party so conveying, recoverable by a civil action also makes him liable, on conviction therefor, to suffer imprisonment for one-half year without bail or mainprize. And the statute of 27 Eliz., c. 4, against fraudulent conveyances, etc., to defeat or prejudice purchasers, provides for a like punishment. 2 East P. C. 834. See generally the title FRAUDULENT SALES AND CONVEYANCES.

Witchcraft, Conjurament, etc. — The statute 9 Geo. II., c. 5, repeals certain acts relating to conjuration, witchcraft, etc., and then provides for the more effectual preventing and punishing of any pretense to any acts or powers of witchcraft, sorcery, enchantment, or conjuration, whereby ignorant persons are frequently deluded and defrauded. 2 Russ. on Cr. (9th Am. ed.) 703.

2. Definition of False Pretense. — A false pretense is a false and fraudulent representation or statement of a fact as existing or having taken place, made with knowledge of its falsity, with intent to deceive and defraud, and which is adapted to induce the person to whom it is made to part with something of value.¹

3. Distinguished from Other Offenses — *a.* FROM CHEATS AT COMMON LAW. — It has been seen that a cheat at common law, to be indictable, must be effected by conspiracy or by forgery, or by a deceitful practice or token calculated to defraud the people in general.² But under the statutes against false pretenses, the obtaining of money or goods, or the signature to an instrument, etc., by any false statement of a fact calculated under the circumstances of the case to deceive, is indictable. Accordingly the leading distinction between a cheat at common law and a fraud under the statutes against false pretenses is that while under the former a fraud effected by a bare lie without a deceitful or illegal practice or false token calculated to deceive the public in general is not punishable, it is generally punishable under the latter.³

b. FROM FORGERY. — A forgery necessarily is also a false pretense, but the latter, when embodied in a writing, does not necessarily involve the former. The crime of forgery consists in the forging or counterfeiting the act of another; the alteration or making of a false document with intent to defraud.⁴

Giving False Character to Servants—Pretense of Having Served. — The statute 32 Geo. III., c. 56, provides for the punishment of any person giving false characters to servants, or pretending or falsely asserting in writing that a servant had been hired for a period of time, or in a station, or was discharged at any other time, or had not been hired in any person's service; and enacts that any person offering himself or herself as a servant, falsely pretending to have served, or with a false certificate of character, or altering such certificate, shall on conviction before two justices forfeit the sum of twenty pounds. 2 Russ. on Cr. (9th Am. ed.) 703.

1. False Pretense Defined. — See *State v. Vandimark*, 35 Ark. 400; *People v. Jordan*, 66 Cal. 13, 56 Am. Rep. 73; *People v. Wasservogle*, 77 Cal. 173; *Jackson v. People*, 126 Ill. 139; *State v. Grant*, 86 Iowa 217, citing 7 Am. AND ENG. ENCYC. OF LAW (1st ed.) 700; *Taylor v. Com.*, 94 Ky. 281; *State v. De Lay*, 93 Mo. 98; *State v. Haines*, 23 S. Car. 173; *State v. Knowlton*, 11 Wash. 512.

"A representation of some fact or circumstance calculated to mislead, which is not true." *Com. v. Drew*, 19 Pick. (Mass.) 179, cited in *State v. Grant*, 86 Iowa 222; *People v. Jordan*, 66 Cal. 13, 56 Am. Rep. 73. See also *Reg. v. Radcliffe*, 12 Cox C. C. 474, 6 Moak 324.

A pretense is "the holding out or offering to others something false and feigned." *State v. Joaquin*, 43 Iowa 132.

Swindling is defined to be "the acquisition of personal or movable property, money, or instrument of writing conveying or securing a valuable right, by means of some false or deceitful pretense or device, or fraudulent representation, with intent to appropriate the same to the use of the party so acquiring, or of destroying or impairing the rights of the party justly entitled to the same." *Matthews v. State*, 10 Tex. App. 285.

2. See *supra*, this title, *Cheats at Common Law*.

3. See *supra*, this title, *Cheats at Common Law*; and *supra*, this section, *General Review of the Statutes*.

4. Distinguished from Forgery. — *Reg. v. Smith, Dears. & B. C. C.* 566, 8 Cox C. C. 32, 27 L. J. M. C. 225, 4 Jur. N. S. 1003; *Mann v. People*, 15 Hun (N. Y.) 169, affirmed 75 N. Y. 484.

The offense of forgery is complete whether any third person be actually injured thereby or not; but in the case of false pretense there would be no crime unless some one received a prejudice from the act. *Tyler v. State*, 2 Humph. (Tenn.) 39, 36 Am. Dec. 298.

It does not necessarily follow that a person obtaining property by false writings is guilty of forgery, or of uttering a forged document. The test to be applied is whether he presented the forged writing as the document of the apparent maker, in which case he would be guilty of uttering a forged instrument, or presented it as his own, executed upon the authority of the sender, in which case he would be guilty of false pretense. *Mann v. People*, 15 Hun (N. Y.) 169, affirmed 75 N. Y. 484.

Forged Request for Goods. — Where a person obtained goods on delivering a forged request, it was held that he was not indictable for a false pretense, but for a felony for uttering a forged request, under section 10 of the statute 1 Wm. IV., c. 66. *Rex v. Evans*, 5 C. & P. 553, 24 E. C. L. 453.

Under the Texas Penal Code, art. 794 (Penal Code 1895, art. 947), a person obtaining money by means of a forged indorsement on his own check does not commit the offense of swindling, but of uttering a forged instrument under the statute since embodied in art. 542 of the Penal Code. *Hirshfield v. State*, 11 Tex. App. 207.

Where a person made false pretenses which were believed, but the prosecutor refused to deliver the goods except upon an order from a certain person, and the defendant thereupon went out and returned with an order purporting to be signed by such person, but the fraud

c. FROM COUNTERFEITING. — Where counterfeiting is a distinct offense from that of false pretenses, the passing of spurious metal representing coin having the representation of a genuine coin on one side only is not counterfeiting, but a false pretense; for in order to constitute the former offense the piece of metal must be a representation of a genuine coin on both sides.¹

d. FROM LARCENY — (1) *In General*. — In determining whether property

was discovered before the goods were delivered, this was held not to be swindling, under article 2426 of the Texas Criminal Code in force in 1870, but an attempt to pass a forged instrument under article 2105. Mathews v. State, 33 Tex. 102.

Tendering Receipt Purporting to Be Signed by Another. — A servant of A applied to B for payment of seventeen shillings due from B to A. B refused to pay it without A's receipt. The servant went away and returned with a document, whereupon B paid the debt. It was held a question for the jury whether the servant tendered the receipt as the handwriting of A, which would make him liable on an indictment for forgery, or as his own, which would make his act a false pretense. Reg. v. Inder, 1 Den. C. C. 325, 2 C. & K. 635, 61 E. C. L. 635.

Selling Spurious Powders under Imitation Labels. — A person was in the habit of selling powders, wrapped in printed papers, some called "Borwick's baking powders," and others "Borwick's metropolitan egg powder of vegetable compound," and having his printed signature at the end. The prisoner had printed a quantity of wrappers, in imitation, but leaving off the signature, so as to deceive persons of ordinary observation, and sold spurious powders wrapped up in these labels as such person's powders. It was held that the prisoner was not guilty of forging the wrappers, or uttering forged wrappers, though he would be indictable for the fraud, on a charge of obtaining money by false pretenses; for the fraud was produced by the powder being supposed to be the genuine powder, and not by the wrapper being supposed to be the genuine wrapper. Pollock, C. B., remarked that "it might as well be said that if one tradesman uses for wrappers brown paper like another tradesman's brown paper, he may be charged with forging the brown paper." Reg. v. Smith, Dears. & B. C. C. 566, 8 Cox C. C. 32, 27 L. J. M. C. 225, 4 Jur. N. S. 1003.

Forged Certificate of Stock in Name of Defrauded Party. — A person is guilty of obtaining money by false pretenses where he obtains money on a loan from a person, on the false pretense that a forged certificate of stock which he gives as security is a good, valid, and genuine certificate, although the certificate is in the lender's name. The offer of the certificate, for the purpose of obtaining the loan, is a representation that it is what it purports to be upon its face, and the offense is committed even though the certificate was made in the name of the lender. Com. v. Coe, 115 Mass. 499.

Forged Receipt for Lodge Dues. — Where the defendant falsely pretended that he was a member of a certain Masonic lodge in Ohio, and was on his way to his father-in-law's funeral, and was out of money to travel, and exhibited a forged receipt from the Ohio lodge

for dues, upon which representations he received the sum of three dollars and eighty-five cents on a promise to repay, he committed the offense of obtaining money under false pretenses. Strong v. State, 86 Ind. 208, 44 Am. Rep. 292.

Forged Order. — Where a woman presented a forged order to a bank in the name of her husband, by means of which she obtained the amount deposited to his credit therein, she committed the offense of false pretenses. Reg. v. Prince, L. R. 1 C. C. 150.

Presenting a forged order in the name of another, by which goods are obtained, is the crime of false pretenses, and not forgery, under the Tennessee Act of 1729, c. 34, § 50; and in such case it is not necessary that the person purporting to be the drawer of the order should have an interest in the goods obtained. Tyler v. State, 2 Humph. (Tenn.) 37, 36 Am. Dec. 298.

Under the Pennsylvania statute obtaining money on a forged draft constitutes the crime of obtaining money by false pretenses. Com. v. Clarkson, Vaux (Pa.) 152.

Signing and Issuing Instrument as Agent in Name of Principal. — Where one executes and issues an instrument purporting on its face to be executed by him as the agent of a principal therein named, he is not guilty of forgery, either at common law or under the statutes of New York, even though he has in fact no authority from such principal to execute the instrument. But such act is the crime of false pretense under 3 Rev. Stat., § 58, in force in 1878. The fact that such principal is a corporation incapable of acting, except through its officers, by one of whom the instrument is executed, does not alter the rule. Mann v. People, 15 Hun (N. Y.) 155.

Merger of False Pretense in Forgery. — A person being charged with forging, uttering, and publishing a bank check, it was urged that the evidence tended to show that he attempted to obtain goods by false pretenses. It was held that his attempt to obtain goods by means of the forged check was in a minor sense the crime of false pretenses, and if the evidence tended to prove the minor offense, it would cause the greater crime in this instance to include the lesser. The court further said: "The fact that neither the persons purporting to be the drawers nor the indorsers of the check had any account with the bank by which the check purported to be certified is a part of the history of the check alleged to have been forged, and so becomes connected with the alleged crime." Watson v. People, 64 Barb. (N. Y.) 130.

For a Full Discussion of the law of forgery see the title FORGERY.

1. Distinguished from Counterfeiting. — Robt. v. State, 2 Head (Tenn.) 501. See the title COUNTERFEITING, vol. 7, p. 875.

has been obtained by false pretenses or by larceny, the distinction to be observed is: Where the property is delivered with the intention of parting with it altogether, that is, by giving the title as well as the possession, the offense is that of false pretenses; but where the owner is induced to deliver possession only, with a preconceived design on the part of the taker to convert it to his own use when obtained, it will be implied that the taking is against the will of the owner, and in such case the offense is larceny.¹

The Intention of the Owner to part with his property is the vital point upon which the crime hinges, and is to be determined.²

Instances. — In the notes will be found illustrations of instances in which the offense committed was held to have been that of false pretenses³ or

1. Distinction Between Larceny and False Pretense — *England*. — Reg. v. Prince, L. R. 1 C. C. 150; Reg. v. Radcliffe, 12 Cox C. C. 474, 6 Moak 324; Rex v. Patch, 1 Leach C. C. 238; Reg. v. Russett, (1892) 2 Q. B. 314; 2 Russ. on Cr. (9th Am. ed.) 200, and cases cited.

Arkansas. — Haley v. State, 49 Ark. 147.

California. — People v. Martin, 102 Cal. 558.

Illinois. — Welsh v. People, 17 Ill. 339.

Indiana. — Grunson v. State, 89 Ind. 533, 46 Am. Rep. 178.

Iowa. — State v. Anderson, 47 Iowa 142.

Kentucky. — Miller v. Com., 78 Ky. 18, 39 Am. Rep. 194.

New York. — Loomis v. People, 67 N. Y. 329, 23 Am. Rep. 123; Thorne v. Turck, 10 Daly (N. Y.) 329, affirmed 94 N. Y. 94, 46 Am. Rep. 126; Smith v. People, 53 N. Y. 111, 13 Am. Rep. 474; Weyman v. People, 4 Hun (N. Y.) 516, affirmed 62 N. Y. 623; Ross v. People, 5 Hill (N. Y.) 294; Zink v. People, 77 N. Y. 114, 33 Am. Rep. 589.

Ohio. — Kellogg v. State, 26 Ohio St. 15.

Pennsylvania. — Com. v. M'Crossin, 3 Pa. L. J. 224.

Tennessee. — Canter v. State, 7 Lea (Tenn.) 349; Collins v. State, 15 Lea (Tenn.) 68. The law of Tennessee seems formerly to have been otherwise, on the ground that the taking should be *invito domino*, to constitute larceny. Felter v. State, 9 Verg. (Tenn.) 397, citing note to State v. Long, 1 Hayw. (2 N. Car.) 154.

Texas. — State v. Vickery, 19 Tex. 330; Cline v. State, 43 Tex. 497; Porter v. State, 23 Tex. App. 295; Taylor v. State, 32 Tex. Crim. Rep. 110.

Wisconsin. — State v. Kube, 20 Wis. 225, 91 Am. Dec. 390.

Wyoming. — Haines v. Territory, 3 Wyoming 168.

Consent to Deliver Temporary Possession. — While the element of trespass is wanting, and the offense is not larceny, where consent to the taking is given, and the owner intends to part with his property absolutely, even though such consent was procured by fraud and the person obtaining it had the *animus furandi*, yet it is different where, with the *animus furandi*, a person obtains consent to his temporary possession of property, and then converts it to his own use. The act goes further than the consent, and may be fairly said to be against it. Consent to deliver the temporary possession is not consent to deliver the property in a thing, and if a person, *animo furandi*, avails himself of a temporary possession for a specific purpose, obtained by consent, to convert the property in the thing to himself and defraud the

owner thereof, he certainly has not the consent of the owner. He is therefore acting against the will of the owner, and is a trespasser, because a trespass upon the property of another is only doing some act upon that property against the will of the owner. Loomis v. People, 67 N. Y. 327, 23 Am. Rep. 123.

Reason for the Distinction. — In Reg. v. Prince, L. R. 1 C. C. 150, Blackburn, J., delivering judgment, said: "The distinction drawn between larceny and false pretenses, one being made a felony and the other a misdemeanor — and yet the same punishment attached to each — seems to me, I must confess, unmeaning and mischievous. The distinction arose in former times, and I take it that it was then held in favor of life that in larceny the taking must be against the will of the owner, larceny then being a capital offense."

Theft — Texas Statute. — Theft is among the offenses consisting of different degrees, and includes swindling, embezzlement, and all unlawful acquisitions of personal property punishable by the Texas Penal Code. Mathews v. State, 10 Tex. App. 279.

2. Intent of Owner the Vital Point. — Loomis v. People, 67 N. Y. 329, 23 Am. Rep. 123.

3. Instances in Which Offense Was Deemed to Be False Pretenses. — Where a person having a lawful right to demand a certain sum of money, by a false representation receives more money than he is entitled to, and appropriates the difference to his own use. Reg. v. Thompson, Leigh & C. 233, 9 Cox C. C. 222, 32 L. J. M. C. 57, 8 Jur. N. S. 1162, 7 L. T. N. S. 393, 11 W. R. 41.

Where a person whose duty it is to pay and receive moneys makes an overcharge of payments made by him, in rendering his accounts, and retains the amount overcharged. Reg. v. Green, Dears. C. C. 323, 6 Cox C. C. 296, 2 C. L. R. 603, 18 Jur. 158.

Pretending to have paid a certain amount for the use of another person, and receiving it upon his demand. Reg. v. Barnes, T. & M. 1123, 2 Den. C. C. 59, 20 L. J. M. C. 34, 14 Jur. 1123.

Receiving a package of money from an express agent by pretending to be the husband of the consignee. State v. Kube, 20 Wis. 217, 91 Am. Dec. 390.

In Reg. v. Solomons, 62 L. T. N. S. 672, 17 Cox C. C. 93, the defendant induced the prosecutor to give him a shilling for a purse into which he had dropped three coins, by first showing the prosecutor three shillings, and then making it appear as if he had put them into the purse. In the same way he obtained

larceny,¹ according as the title to the property was or was not deemed to have been parted with.

Delivery of Possession Incomplete. — Although the property be delivered, the possession given will, in certain circumstances, be deemed to be incomplete, and in such case the offense is larceny.²

a half-crown for a purse into which he made it appear that he had dropped two half-crowns. Upon a case reserved it was held that, the prosecutor having parted with the property in his shilling and half-crown, in exchange for the purses and their contents, the prisoner had been guilty, if at all, of obtaining the coins by means of a false pretense, and could not be convicted of larceny.

In *Reg. v. Robinson*, 9 L. C. Rep. 278, the prisoner, who had been discharged from the service of A., went to the store of O., represented herself as still in the employ of A., who was in the habit of dealing there, and asked for goods in A.'s name, which were put up accordingly, but, instead of being delivered to the prisoner, were sent to A.'s house. The prisoner, however, went directly from the store to A.'s house, and, remaining in the kitchen with the servant until the clerk delivered the parcel, snatched it from the servant, saying, "This is for me." She then left the kitchen, saying that she was going to see A., but instead of going into the room where A. was, went out of the house with the parcel. It was held, on a reserved case, that the offense was false pretenses, and not larceny, for the servant had only the mere custody, and not the right of possession, and A. had no right whatever in relation to the goods.

1. Instances in Which It Has Been Held that the Offense Was Larceny. — Where the property was obtained for the purpose of being given to another, but was appropriated by the defendant to his own use, the offense was held to be larceny. *Smith v. People*, 53 N. Y. 111, 13 Am. Rep. 474.

And where two persons brought cotton to a cotton gin, and one, after the cotton was ginned and baled, claimed to own part of the other's cotton, and took it away with him, it was held that this was not obtaining goods under false pretenses, but was larceny if any offense. *Hughen v. State*, (Ark. 1889) 11 S. W. Rep. 603.

So also it was larceny where a party obtained the possession of a certificate and field notes, the property of another, from a surveyor, upon pretense of an interest in the land and a desire to return the certificate and field notes to the general land office for patent, but really with a fraudulent intent to convert them, or to suffer the time for their return to expire and then appropriate the land by other certificate or pre-emption claim. *State v. Vickery*, 19 Tex. 326.

So also where a person advertised for a clerk, and, under the pretense that a cash security of six hundred dollars for the faithful performance of the duties was required, obtained from the applicant and appropriated that sum, a conviction of grand larceny was sustained. *People v. Morse*, 99 N. Y. 662.

It has also been held to be larceny where the property is obtained by a trick, such as the practice of ring dropping. *Rex v. Patch*, 1

Leach C. C. 238, 2 East P. C. 678; *Rex v. Marsh*, 1 *Leach C. C.* 345; *Rex v. Watson*, 2 *Leach C. C.* 640, 2 East P. C. 680; *Rex v. Moore*, 1 *Leach C. C.* 314, 2 East P. C. 679. Or for the purpose of betting on a pretended game, and losing it to a confederate. *Miller v. Com.*, 78 Ky. 19, 39 Am. Rep. 194; *Loomis v. People*, 67 N. Y. 322, 23 Am. Rep. 123; *Porter v. State*, 23 Tex. App. 295. Or by giving a bogus bond to the defrauded party to hold till he should receive the amount with which he parted. *People v. Rae*, 66 Cal. 423, 56 Am. Rep. 102, the court being divided in opinion.

Property Obtained through Fraudulent Contract. — It has been held that even though the property was obtained through the medium of a contract made in pursuance of a previous design to obtain the property and cheat the prosecutor, yet if the indicia of ownership are conferred, the title passes, and the offense is false pretenses. *Zink v. People*, 77 N. Y. 114, 33 Am. Rep. 589, reversing 16 Hun (N. Y.) 396.

But where the guilty party had not fulfilled his part of the bargain under a contract induced by fraud, as where part of the purchase price of a horse was paid to the seller, and the balance was to be paid to him upon delivering the horse, which he did not do, but caused it to be removed under circumstances from which the inference might be drawn that he had never intended to deliver it, it was held that the title did not pass, and that the offense was larceny. *Reg. v. Russett*, (1892) 2 Q. B. 312, 67 L. T. N. S. 124, 40 W. R. 592, 56 J. P. 743.

Property Obtained from Which to Select a Part. — A person pretended that his master (whose service he had previously left) wanted some silver cream ewers, and desired the prosecutor to give him one, and to put it down to his master's account. The prosecutor gave him two ewers, in order that his master might select one to his liking. The prisoner took both, sold them, and absconded. At the trial the prosecutor testified that he did not charge the master (his customer) with the ewers, nor did he intend to charge him with either until he had first ascertained which of them he had selected. It was held that the offense was larceny, but that if he had sent only one ewer, and had charged the customer with it, the offense would have been otherwise. *R. v. Davenport*, 1 Arch. Peel Acts 5.

Obtaining Possession from Servant. — Where a servant is merely intrusted with the possession of goods for a special purpose, and is tricked out of that possession by fraud, the party thus obtaining the property is guilty of larceny, because the servant has no authority to part with the title to the property. But if the servant has general authority to act for his master, he may part with the title. *Reg. v. Prince*, L. R. 1 C. C. 150.

2. Giving Bill to Take Change Out of It. — The prosecutor handed the prisoner, who was a bartender in a saloon, a fifty-dollar bill out of which to take ten cents in payment for a glass

(2) *Conviction Where Facts Proved Amount to Larceny.* — Under the *English* statute of 7 and 8 Geo. IV., c. 29, § 53, a defendant charged with false pretenses might be convicted where the facts proved amounted to larceny. But this statute provided that where the defendant was tried on a charge of false pretenses he could not afterwards be prosecuted for larceny upon the same facts.¹ Similar statutes have been enacted in *Canada*² and in some of the *United States*.³

(3) *The Offense as a Statutory Larceny.* — Under the statutes of some of the *United States* the obtaining of property by false pretenses is larceny.⁴

4. **Essentials of the Cheat or Pretense** — *a.* THE TOKEN OR SYMBOL — (1) *Public Token or Symbol.* — It has been seen that in cheats of a public, as contradistinguished from those of a private, nature, an indictable offense was held to have been committed although it did not appear that a false symbol or token was made use of.⁵ In cheats of a private nature at common law, the token or symbol was, as has been seen, of a nature such as to defraud the public in general, such as false weights and measures, counterfeit marks, and false dice.⁶ But any token or symbol of a character possessing latency, subtlety, or generality of operation likely to affect all within its range is a public token or symbol at common law.⁷

of soda. The bartender put down a few coppers upon the counter, and, when asked for the change, took the prosecutor by the neck and shoved him out of doors, and kept the money. It was held that the prosecutor did not part with the possession of the bill or his property in it, that until the change was given back the delivery was incomplete, that the bill remained in legal contemplation under his control and in his possession, and that the crime was larceny. *Hildebrand v. People*, 56 N. Y. 394, 15 Am. Rep. 435.

For a Full Discussion of the law of larceny, see the title LARCENY.

1. This statute has been repealed, but the statute 24 & 25 Vict., c. 96, § 88, contains similar provisions. 2 *Russ. on Cr.* (9th Am. ed.) 618. See also *Reg. v. Kilham*, L. R. 1 C. C. 261, 39 L. J. M. C. 109, 22 L. T. N. S. 625, 11 Cox C. C. 561.

2. *Canada.* — *Reg. v. Robinson*, 9 L. C. Rep. 283; *Reg. v. Ewing*, 21 U. C. Q. B. 533.

3. *Pennsylvania.* — *Com. v. Moore*, 99 Pa. St. 575.

Texas. — *Maddox v. State*, 41 Tex. 205; *Cline v. State*, 43 Tex. 494; *Jones v. State*, 8 Tex. App. 640.

Conviction and Acquittal. — Under the English and Canadian statutes, where the obtaining by false pretenses is a misdemeanor, a party cannot be found guilty of larceny when indicted for false pretenses. They authorize a conviction only for the misdemeanor of obtaining by false pretenses where the facts proved amount to larceny. *Reg. v. Bulwer, Leigh & C.* 476, 9 Cox C. C. 402, 33 L. J. M. C. 171, 10 Jur. N. S. 684, 10 L. T. N. S. 580; *Reg. v. Ewing*, 21 U. C. Q. B. 533. And where the defendant is indicted for larceny and the facts prove that the obtaining amounts to false pretenses, he must be acquitted. 2 *Roscoe's Cr. Ev.* 684.

Under the *Texas Statutes* it would seem that swindling is an inferior degree of theft, and that an indictment for theft would support a conviction for swindling. *Mathews v. State*, 10 Tex. App. 284.

Acquittal in Bar. — Under the statute of 7 & 8 Geo. IV., c. 29, § 53, an acquittal of the

offense of larceny would not avail in bar of the offense of false pretenses. *Reg. v. Henderson*, 1 C. & M. 328, 41 E. C. L. 183, 2 Moo. C. C. 192.

Assumption that Taking Amounts to Larceny. — Where the defendant is convicted by the jury on a charge of obtaining a thing by false pretenses, the appellate court will not assume, without having the evidence before it, that the thing was obtained in such manner as to amount in law to larceny; for a general verdict of guilty upon the indictment is a finding only of the facts sufficiently pleaded. *Com. v. Moore*, 99 Pa. St. 575.

4. *Arkansas.* — *Woodruff v. State*, 61 Ark. 164. *New York.* — *People v. Jeffery*, (Supreme Ct.) 14 N. Y. Supp. 839.

Virginia. — *Dull v. Com.*, 25 Gratt. (Va.) 981.

Proof Where the Obtaining Is Made Larceny. — Where the obtaining of property by false pretenses is made a larceny, every ingredient of obtaining it by false pretenses must be shown. *Fay v. Com.*, 28 Gratt. (Va.) 912; *Trogdon v. Com.*, 31 Gratt. (Va.) 862.

5. **The Token in Cheats of a Public Nature.** — See *supra*, this title, *Cheats at Common Law — Nature and Classification.*

In *U. S. v. Watkins*, 3 Cranch (C. C.) 453, it was said that in order to render cheats by officials indictable it is not necessary that they should be effected by means of false public tokens, or by forgery, or by conspiracy, or by any particular sort of means.

Token — Definition. — A token is a document or sign of the existence of a fact. Tokens are either public or general, or privy tokens. They are either true or false. *Bouvier's Law Dictionary*; *Jones v. State*, 50 Ind. 473; *Midleton v. State*, *Dudley L.* (S. Car.) 283.

6. See *supra*, this title, *Cheats at Common Law — Nature and Classification.*

7. 2 *Whart. Cr. L.*, §§ 1123, 1130.

An Apprentice Enlisting in the Army and appearing without his indentures was considered a false token, because by so doing he forestalled inquiry. 2 *Bish. N. Cr. L.*, § 151, *citing Rex v. Jones*, 1 *Leach C. C.* 174. See also 2 *East P. C.*, § 822.

(2) *Privy Token*. — Equally as at common law, the use of a false token was essential to constitute a cheat of a private nature under the statute 33 Hen. VIII., c. 1, providing punishment for obtaining property by cheats effected by privy tokens.¹ What was such symbol or token was sometimes difficult to determine, but it was settled that it should be something real and visible, as distinguished from mere words, as a ring, a key, or a writing; and even a writing would not suffice unless it was in the name of another, and of such a character as to afford more credit than the mere assertion of the party defrauding.²

b. THE PRETENSE — (1) *In General*. — In order to constitute the offense

The Visible Presence of a Person representing himself to be another person, whereby he accomplishes a cheat, is a token which, if false, is a false token. 2 Bish. N. Cr. L., § 152, citing *Rex v. Govers*, 2 Say. 206. See the title FALSE PERSONATION, *ante*.

Banknotes Are Public Tokens, and it is not necessary for this purpose that they should have a common-law existence. "It is sufficient that they have, no matter when, invented or discovered the qualities of a public token, *i. e.*, calculated to inspire public confidence." *State v. Patillo*, 4 Hawks (11 N. Car.) 348.

Where a person gave in payment an instrument purporting to be a five-dollar banknote, the blanks of which were filled out except those opposite the words "cashier and president," in which blanks an illegible scrawl was written, which, on careless inspection might have been mistaken for the names of those officers, it was held that the defendants, having known the note to be worthless, were guilty at common law of cheating by a false token. *State v. Stroll*, 1 Rich. L. (S. Car.) 244.

Unsigned Bank Bill. — Under the *South Carolina* Act of 1791 relating to cheating and swindling, the construction of which has been that the fraud must be effected by means of the public tokens for which an indictment at common law would lie, the passing of a bill or paper in the ordinary printed form of a bank bill, which was not signed by any one as president or cashier, in which dates, etc., were blank, and which had the appearance of having been long used, is within such statute. *State v. Grooms*, 5 Strobb. L. (S. Car.) 158.

A Promissory Note payable by an individual, represented to be a genuine and valuable current banknote, is not a false token; for promissory notes are not public tokens of themselves unless they resemble banknotes. *State v. Patillo*, 4 Hawks (11 N. Car.) 348.

Giving One's Own Check on a bank in which the drawer had no funds is not a false token at common law. *Rex v. Lara*, 6 T. R. 565, 2 Leach C. C. 647, 2 East P. C. 827. See also *Casily v. State*, 32 Ind. 66. And see *infra*, this section. *Particular Instances of False Pretenses — Giving Check*.

"Dead Eyes that Look Alive are not false tokens, perhaps, and yet they may deceive as effectually as a skilfully executed work of art. They are a sort of counterfeit made by nature, and when offered in trade, with a representation of soundness, are apt to be accepted for what they appear to be." *Tatum v. State*, 58 Ga. 409. In this case the accused misrepresented

a blind horse as sound, the horse's eyes being apparently good.

1. False Token Essential under Statute 33 Hen. VIII. — *People v. Johnson*, 12 Johns. (N. Y.) 292; *State v. Phifer*, 65 N. Car. 321; *State v. Vanderbilt*, 27 N. J. L. 332.

2. What Is a False Privy Token. — 3 Chitty's Cr. L. 997; 2 East P. C. 827; *People v. Gates*, 13 Wend. (N. Y.) 311. See also *Middleton v. State*, *Dudley L.* (S. Car.) 284; *Fawcett's Case*, 2 East P. C. 862; *Rex v. Fowle*, 4 C. & P. 592, 19 E. C. L. 540.

A note purporting to be that of a certain bank, but which bank never existed, is not within the *Virginia* statute of Nov. 18, 1789, entitled "An act against those who counterfeit letters or privy tokens, to receive money or goods in other men's names." *Com. v. Speer*, 2 Va. Cas. 65.

Writing in Form of Bond but Without Signature. — Under the *New York* Rev. Stat. 1830, providing for the punishment of "every person who, with intent to cheat or defraud another, shall designedly by color of any false token or writing," etc., the words "false token or writing" embrace not only the counterfeit letters made in other men's names under the statute of 33 Hen. VIII., but any false instrument purporting on its face to be a genuine instrument of any description. The word "writing," as used in the statute, must mean some instrument, or at least letter — something in writing, purporting to be the act of another, or certainly of some person; and therefore a writing in the form of a bond, neither having the signature nor purporting to have the signature of any person attached to it, is not a false writing within the meaning of the statute. *People v. Gates*, 13 Wend. (N. Y.) 320.

False Use of Genuine Writing. — The false use of a genuine writing, as, for example, where a person under letter of authority to sell corn sells it, and afterwards, by means of the same letter, makes another sale to another purchaser, is not the use of a false token or writing within the meaning of Rev. Stat. *Indiana*, 1881, § 2204. *Shaffer v. State*, 82 Ind. 221.

A Printed Business Card, purporting to be that of a firm, but which is not a business card of such firm, is a token or writing. *Jones v. State*, 50 Ind. 473.

Question as to Token One of Fact. — The question whether or not the token or writing is or is not of such a character that a person of ordinary caution would give credit to it is a question of fact and not of law. *Wagoner v. State*, 90 Ind. 507.

there must be a false pretense or representation of an existing or past fact.¹

Question for Jury. — The question as to whether the representation was or was not false is for the jury to determine.²

Pretense Not False but Believed to Be So. — If the pretense be not false, though believed to be so by the person employing it, it is insufficient.³

Pretense False When Made, but True When Property Obtained. — It has been held that a pretense which is false when made, but which, by the act of the party making it, becomes true at the time when the prosecutor relies thereon and the property is obtained, is not a false pretense within the statute.⁴

(2) *Pretense as to a Future Event.* — A false representation as to a future event is not a false pretense within the statute; for as to that the party cannot claim to have been deceived.⁵ Procuring money or property, or other

1. **The Pretense Must Relate to an Existing or Past Fact** — *England.* — Reg. v. Hazelton, L. R. 2 C. C. 139; Reg. v. Giles 11 L. T. N. S. 643, 10 Cox C. C. 44; Reg. v. Woodman, 14 Cox C. C. 179, 28 Moak 561.

Canada. — Reg. v. Bertles, 13 U. C. C. P. 609; Reg. v. Gemmell, 26 U. C. Q. B. 314.

California. — People v. Jordan, 66 Cal. 10, 56 Am. Rep. 73.

Colorado. — Morris v. People, 4 Colo. App. 136.

Florida. — Scarlett v. State, 25 Fla. 719.

Indiana. — State v. Magee, 11 Ind. 154; Keller v. State, 51 Ind. 117.

Iowa. — State v. Dowe, 27 Iowa 275, 1 Am. Rep. 271.

Kansas. — Matter of Snyder, 17 Kan. 556; State v. Matthews, 44 Kan. 602; State v. Clark, 46 Kan. 65; State v. Metsch, 37 Kan. 222.

Kentucky. — Glackan v. Com., 3 Metc. (Ky.) 232; Com. v. Schwartz, 92 Ky. 510, citing 7 AM. AND ENG. ENCYC. OF LAW (1st ed.) 752-3.

Massachusetts. — Com. v. Drew, 19 Pick. (Mass.) 182.

Michigan. — People v. Reynolds, 71 Mich. 348.

Missouri. — State v. Evers, 49 Mo. 545; State v. De Lay, 93 Mo. 102.

New York. — People v. Johnson, 12 Johns. (N. Y.) 292; People v. Tompkins, 1 Park. Cr. Rep. (N. Y. Supreme Ct.) 224; Scott v. People, 62 Barb. (N. Y.) 71.

North Carolina. — State v. Phifer, 65 N. Car. 321; State v. Moore, 111 N. Car. 672; State v. Matthews, 121 N. Car. 604, citing 7 AM. AND ENG. ENCYC. OF LAW (1st ed.) 751.

Ohio. — Dillingham v. State, 5 Ohio St. 284; Redmond v. State, 35 Ohio St. 83.

Pennsylvania. — Com. v. M'Crossin, 3 Pa. L. J. 220; Com. v. Alsop, 1 Brews. (Pa.) 336; Com. v. Moore, 99 Pa. St. 574.

Tennessee. — Rothschild v. State, 13 Lea (Tenn.) 300; McCorkle v. State, 1 Coldw. (Tenn.) 336; Canter v. State, 7 Lea (Tenn.) 349.

Texas. — Blum v. State, 20 Tex. App. 592, 54 Am. Rep. 530; State v. Levi, 41 Tex. 564; Johnson v. State, 41 Tex. 65.

Wyoming. — Haines v. Territory, 3 Wyoming 168.

2. **Question for Jury Whether Representation False.** — Jackson v. People, 18 Ill. App. 513; People v. Cole, (Supreme Ct.) 20 N. Y. Supp. 505, 65 Hun (N. Y.) 624, affirmed 137 N. Y. 530. See also State v. Matthews, 121 N. Car. 604,

citing 7 AM. AND ENG. ENCYC. OF LAW (1st ed.) 751.

3. **If the Pretense Be Not False, No Offense Is Committed.** — People v. Reynolds, 71 Mich. 348.

The pretense must have been false when made. Garner v. State (Ga. 1897) 27 S. E. Rep. 24. And its falsity must be established. State v. Hurley, 58 Kan. 668; Drought v. State, (Ga. 1897) 28 S. E. Rep. 1013. See also Cunningham v. State, (N. J. 1898) 40 Atl. Rep. 696, affirming 38 Atl. Rep. 847.

In Rex v. Spencer, 3 C. & P. 420, 14 E. C. L. 376, the defendant was indicted for false pretenses in passing as good a note of a bank that had stopped payment. He knew that the bank had stopped payment, but it appeared that only two of the partners of the bank had become bankrupt, and that the third had not. The prisoner was acquitted.

4. **Pretense False When Made but True When Property Obtained.** — Matter of Snyder, 17 Kan. 555.

5. **Future Event.** — People v. Blanchard, 90 N. Y. 314; Rex v. Douglas, 1 Moo. C. C. 462; State v. Whidbee, (N. Car. 1899) 32 S. E. Rep. 318; Miller v. State, 99 Ga. 207, citing 7 AM. AND ENG. ENCYC. OF LAW (1st ed.) 714.

About to Be. — Where the defendant falsely represented to the prosecutor that the latter's goods and chattels were about to be attached unless he would put his property into the defendant's hands, it was held not to be a false pretense. Burrow v. State, 12 Ark. 66.

Would Do or Will Do. — A false representation by a party that he would do, or will do, an act has reference to a future event.

England. — Rex v. Bradford, 1 Ld. Raym. 366.

Arkansas. — McKenzie v. State, 11 Ark. 594.

Indiana. — State v. Magee, 11 Ind. 155.

Kentucky. — Glackan v. Com., 3 Metc. (Ky.) 232.

New York. — Ranney v. People, 22 N. Y. 414.

Pennsylvania. — Com. v. Burdick, 2 Pa. St. 164, 44 Am. Dec. 186.

Tennessee. — Rothschild v. State, 13 Lea (Tenn.) 300.

Intended to Marry. — An indictment for obtaining money from a woman under the false pretense that the prisoner intended to marry her and wanted the money to pay for a wedding suit he had purchased is not sufficient to sustain a conviction. Reg. v. Johnston, 2 Moo. C. C. 254.

Expecting a Check. — Where a woman went

thing of value, by falsely pretending that it is to be used for a certain purpose in the future is not a representation of an existing fact.¹

Application of Tests. — But although the pretense relates to a future event, yet if it be necessary, by the application of tests or otherwise, to ascertain whether the representation is false, and it is found not to be as represented, it then becomes a false pretense.²

Pretense Amounting to Promise. — False representations amounting to mere promises, or professions of intention, though they induce the defrauded party to part with his property, are not false pretenses, for they have reference to future events.³

to a hotel and was assigned a room, where she remained for two days and then sent for the manager and told him that she expected a remittance in about two weeks, and asked him if he would accept the check that she expected in payment for her board, to which he assented, without inquiring the name of the person from whom the check was expected, it was held that she could not be convicted of obtaining board by means of a trick, etc., for her representation was as to a future event. *State v. Kingsley*, 103 Mo. 135.

But Compare the following cases. *In re Greenough*, 31 Vt. 279. The syllabus in *Young v. Rex*, 3 T. R. 98, is misleading. The false pretense there was as to a past fact, namely, that a bet had been made. The fact that it had been made in reference to an event that was to occur in the future did not affect the pretense. None of the judges said anything about a false pretense as to a future event being within the statute, although the point was raised by the defendant's counsel. The *Greenough* Case, *supra*, cites this as authority.

In *Reg. v. Jones*, 6 Cox C. C. 467, it was said: "Although to constitute the statutable offense of obtaining money by means of false pretenses, the pretense must be false at the time, *semble*, it need not necessarily be of some alleged existing fact, capable of being disproved by positive testimony, but may depend on the *bona fide* intention and willingness of the defendant at the time of entering into a contract to perform it, or to do some act at a future period."

1. Note to Be Used in Renewal. — Procuring a signature to a note by false representations that it is to be used in renewal of a pre-existing note has reference to a future event. *Com. v. Warren*, 94 Ky. 615; *Com. v. Moore*, 99 Pa. St. 574.

Obtaining Note by Pretending that It Was to Be Used as a Jest and a Hoax. — Where the accused obtained the signatures of certain parties to a promissory note, stating that it was to be used as a jest and a hoax for the purpose of pastime and amusement by pretending that certain people of the town of New Hamburg had said that the town of Oran could not fill a note for one hundred and twenty-five dollars, and that he wanted to show them that they could fill out such a note, but the defendant used it to obtain money, it was held that though this was a gross breach of confidence, it was not a criminally false pretense within the meaning of the statute. *State v. De Lay*, 93 Mo. 68.

Was Going to Pay Rent. — In *Reg. v. Lee*, 9 Cox C. C. 304, *Leigh & C.* 309, 8 L. T. N. S.

437, 11 W. R. 761, the prosecutor lent ten pounds to the prisoner on the false pretense that he was going to pay his rent, and said that if the prisoner had not told him that he was going to pay his rent he would not have lent the money. It was held that this was not a false pretense of an existing fact.

Wanted a Loan for Purpose of Taking a House. — Where the defendant falsely pretended that he wanted a loan of thirty pounds to enable him to take a public house at Melksham, by means of which he obtained the loan, this was not a false pretense as to an existing fact. *Reg. v. Woodman*, 14 Cox C. C. 179, 28 Moak 561.

2. Pretense that by Means of a Recipe a Certain Thing Would Be Produced. — A person falsely represented that by means of a certain recipe in writing, of which he pretended to be the owner, a compound would be produced which would be a nonexplosive burning fluid and camphene of great value, and induced a person to purchase the recipe. This was held to be a false pretense, for the falsity of the representation was not to be discovered upon ocular inspection, but by the tests of chemical analysis or actual experiment. *In re Greenough*, 31 Vt. 290.

3. Promise to Do a Thing Is Not a False Pretense — *Arkansas*. — *Burrow v. State*, 12 Ark. 65.

Florida. — *Scarlett v. State*, 25 Fla. 717.

Indiana. — *State v. Magee*, 11 Ind. 154; *Keller v. State*, 51 Ind. 117; *Strong v. State*, 86 Ind. 210, 44 Am. Rep. 292.

Iowa. — *State v. Dowe*, 27 Iowa 273, 1 Am. Rep. 271.

Kansas. — *State v. Crane*, 54 Kan. 251; *State v. Cowdin*, 28 Kan. 270.

Kentucky. — *Com. v. Moore*, 89 Ky. 542.

New Hampshire. — *State v. King*, (N. H. 1892) 34 Atl. Rep. 467.

North Carolina. — *State v. Phifer*, 65 N. Car. 324.

Ohio. — *Dillingham v. State*, 5 Ohio St. 280.

Pennsylvania. — *Com. v. Moore*, 99 Pa. St. 574; *Com. v. Mullen*, 4 Pa. Dist. Rep. 656; *Com. v. Ferguson*, 4 Leg. & Ins. Rep. (Pa.) 147, 2 Luz. Leg. Obs. (Pa.) 347; *Com. v. Evans*, 28 Leg. Int. (Pa.) 310; *Com. v. Hickey*, 3 Pa. L. J. 86.

Tennessee. — *Canter v. State*, 7 Lea (Tenn.) 349.

Texas. — *Martin v. State*, 36 Tex. Crim. Rep. 125; *Allen v. State*, 16 Tex. App. 151.

Promise to Ship Cotton Being Planted. — Where a person obtained advances from a factor under the statement that he was then planting cotton and by a promise to ship his cotton to such

Purchasing Goods for Resale. — Under a statute punishing the obtaining of goods, etc., with intent to defraud under false color and pretense of carrying on business and dealing in the ordinary course of trade, a false and fraudulent representation by a person purchasing goods that he wants them for purposes of resale in the regular course of business is a statement of fact and not a promise or a mere expression of a purpose.¹

Pretense Consistent with Promise. — If the pretense is consistent with a promise, although it conveys to the mind of the defrauded party a statement of an existing fact, the offense is not committed.²

Pretense and Promise Combined or Concurrent. — Where a false representation of an existing or past fact, calculated to induce the confidence which led the prosecutor to part with his property, is accompanied by or blended with a promise to do something in the future, this is a sufficient false pretense, although the promise, as well as the false statement of fact, operated upon the mind of the prosecutor in inducing him to part with his property.³

factor when made, it was held that he could not be convicted of obtaining goods under false pretenses, unless he was not at that time planting cotton. *State v. Haines*, 23 S. Car. 170.

Promise to Bring Note to Have Indorsement Made. — In *Reg. v. Bertles*, 13 U. C. C. P. 607, the defendant, having another person's note, got goods from a firm on the agreement of all the parties that the price of the goods should be indorsed on the note, the maker agreeing to pay the amount of the goods thus obtained. The defendant, having called at the store without the note, induced the firm to let him have the goods on his promising to bring the note down within a day or two to have the amount indorsed thereon, but on the next day directed the maker not to pay anything more than the amounts indorsed on the note, which was never afterwards presented to have the amount last obtained indorsed thereon. It was held that the offense of obtaining goods under false pretenses was not committed.

Promise to Pay Cash on Delivery. — A promise to pay cash for goods upon delivery has been held not to be a false pretense. *Rex v. Goodhall*, R. & R. C. C. 343, 2 Russ. on Cr. (9th Am. ed.) 624; *Allen v. State*, 16 Tex. App. 151.

But in *Com. v. Eastman*, 1 Cush. (Mass.) 221, 48 Am. Dec. 596, it was held that obtaining possession of goods under the pretense of paying cash for them on delivery, the buyer knowing that he has no funds to pay with, is such a fraud or cheat as is punishable.

But a promise to pay cash on delivery, and, on the goods being delivered, giving a worthless check on a bank in which the party has no account is a false pretense; for the giving the check is a representation that there are funds to meet it. *Reg. v. Hazelton*, L. R. 2 C. C. 134, 44 L. J. M. C. 11, 31 L. T. N. S. 451, 23 W. R. 139; *Barton v. People*, 135 Ill. 409, 25 Am. St. Rep. 375. In the first of these cases Pollock, B., said: "It may be said that that is a representation as to a future event. But that is not really so. It means that the existing state of facts is such that in ordinary course the check will be met." And see *infra*, this section, *Particular Instances of False Pretenses — Giving Check*.

1. Purchasing Goods for Resale. — *Com. v. Walker*, 108 Mass. 312; *Com. v. Drew*, 153 Mass. 593.

Dealing in Regular Course of Trade. — The false pretense made punishable under the statute relates not merely to the general mode of dealing of him who makes it, but to the nature of the transaction in which he is then engaged. If he is the proprietor of a retail store, and buys goods in the usual way to be sold therein, he is "carrying on business and dealing in the regular course of trade;" but if he buys goods to be carried away and sold at wholesale for half their value, he is not "dealing in the ordinary course of trade." *Com. v. Drew*, 153 Mass. 588.

2. Pretense Consistent with Promise. — *Reg. v. Burrows*, 11 Cox C. C. 258, 20 L. T. N. S. 499, 17 W. R. 682.

3. Pretense and Promise Combined or Concurrent — *England*. — *Reg. v. Bates*, 3 Cox C. C. 201; *Reg. v. Fry, Dears. & B. C. C.* 449, 7 Cox C. C. 394, 27 L. J. M. C. 68, 4 Jur. N. S. 266; *Reg. v. Speed*, 15 Cox C. C. 24, 46 L. T. N. S. 174, 46 J. P. 451; *Rex v. Asterley*, 7 C. & P. 191, 32 E. C. L. 490; *Reg. v. Jennison, Leigh & C.* 157, 9 Cox C. C. 158, 31 L. J. M. C. 146, 8 Jur. N. S. 442, 6 L. T. N. S. 256, 10 W. R. 488; *Reg. v. West, Dears. & B. C. C.* 575, 8 Cox C. C. 12, 27 L. J. M. C. 227, 4 Jur. N. S. 514. Compare *Reg. v. Lee*, 9 Cox C. C. 304.

Arkansas. — *Donohoe v. State*, 59 Ark. 377.

Delaware. — *State v. Nichols*, 1 Houst. Cr. Cas. (Del.) 114.

Georgia. — *Thomas v. State*, 90 Ga. 437, citing 7 AM. AND ENG. ENCYC. OF LAW (1st ed.) 714-716.

Illinois. — *Jackson v. People*, 18 Ill. App. 513.

Iowa. — *State v. Fooks*, 65 Iowa 196. See also *State v. Dowe*, 27 Iowa 273, 1 Am. Rep. 271.

Kansas. — *State v. Gordon*, 56 Kan. 67; *State v. Cowdin*, 28 Kan. 270.

Minnesota. — *State v. Thaden*, 43 Minn. 326.

Missouri. — *State v. Janson*, 80 Mo. 98.

Pennsylvania. — *Com. v. Wallace*, 114 Pa. St. 413, 60 Am. Rep. 353.

Was a Physician and Would Cure. — In *Boscow v. State*, 33 Tex. Crim. Rep. 390, the defendant falsely represented that he was a physician, that he was a member of a medical institute in which there were other physicians, and that he was associated with a certain other physician in the practice of medicine; and pretended that he would cure the wife of the pros-

Promise to Procure Employment for a Person. — A false representation as to having a situation in view, or of an assurance of ability to procure a situation for another person, though accompanied by a promise to procure it, is a false pretense.¹

When the Promise Alone Is Relied Upon. — Although the promise be coupled with a statement of an existing fact, yet if the property was obtained by relying on the promise the offense is not committed.²

(3) **Pretense Amounting to Opinion.** — A representation which amounts merely to an expression of opinion, however false and fraudulent, is not an indictable false pretense; for it is not a statement of a fact, the essential requisite of a pretense, but rather a state of the mind.³

ecutor. It was held that the statements combined with the promise, were sufficient to constitute the offense of swindling.

1. Promise to Procure Employment for a Person. — *Com. v. Parker, Thach, Cr. Cas. (Mass.) 24; People v. Winslow, 39 Mich. 507; Com. v. Murphy, 96 Ky. 28. See also State v. Bayne, 88 Mo. 604. Contra, Ranney v. People, 22 N. Y. 413.*

2. Promise to Send Check. — *People v. Tompkins, 1 Park. Cr. Rep. (N. Y. Supreme Ct.) 238.*

3. False Pretense Amounting Only to an Opinion Not Indictable. — *Woodbury v. State, 69 Ala. 242, 44 Am. Rep. 515; State v. Webb, 26 Iowa 262; State v. Bradley, 68 Mo. 142. See also Reg. v. Williamson, 11 Cox C. C. 328, 21 L. T. N. S. 444.*

Statement as to Nature of Medicine. — Where a person obtained a bottle of medicine from another by the false representation that it was too strong to be applied to a sore on the face of such person, he was held not guilty of obtaining goods by false pretenses, because it was merely the expression of his judgment of the nature of the medicine. *State v. Daniel, 114 N. Car. 823.*

Pretense that Another Person Is Worth a Certain Amount. — Where the defendant was charged with inducing another to sign a lease to a third party by falsely representing that such third party was worth ten thousand dollars, it was held that this was not a representation of a material fact; that it might have been intended or understood as an expression of an opinion or judgment. *Com. v. Stevenson, 127 Mass. 448.*

Necessary to Own Stock in Corporation. — In *Com. v. Springer, 8 Pa. Co. Ct. Rep. 115*, the defendant made to the prosecutrix the false statement that it was necessary for her to be the owner of certain shares of stock in a corporation in order that she might participate in a drawing of lots. It was held that this statement, although made by the defendant for the purpose of inducing the prosecutrix to buy shares of the stock, was not a false pretense.

Could Buy on Credit. — A statement by the defendant that he could buy on credit all the goods he wanted and that his business was prosperous and increasing would be the mere expression of an opinion. *Rothschild v. State, 13 Lea (Tenn.) 300.*

Sufficiency of Mortgage to Secure Note. — A representation that a mortgage on land is sufficient security for a note is a mere expression of opinion. *People v. Gibbs, 98 Cal. 661.*

Statement that Land is "Nicely Located." — A

false representation that certain lots of land are "nicely located" is not a false pretense, but an expression of opinion, for such pretense could not convey or be understood as conveying any definite idea at all. "There is no standard for trying the accuracy of such a statement. What is a nice location to one may be far otherwise to another, and even to the mind of one using it the expression is vague and indeterminate. No one can be supposed to accept such a representation as an assertion of the existence of some fact or circumstance sufficient to cause him to change his situation in reliance on it, and the law cannot measure or weigh people's fancies." *People v. Jacobs, 35 Mich. 36.*

Cost or Value. — False representations as to the cost or value of property have been held to be mere expressions of opinion. *Reg. v. Durocher, 12 Rev. Lég. 697. See also Com. v. Alsop, 1 Brews. (Pa.) 340.*

False representations made in an application for a loan on mortgage, declaring that the land is worth a sum named, though unfounded, and made with fraudulent intent, cannot be construed as anything beyond mere matter of opinion, and it is not to be supposed that the expression would be understood in a sense more absolute. *People v. Jacobs, 35 Mich. 38.*

Pretenses as to Price of Stocks. — A false representation that stock of a corporation is worth a certain price is not indictable. *Com. v. Wood, 142 Mass. 461.*

But in *People v. Jordan, 66 Cal. 10, 56 Am. Rep. 73*, it was held that wilfully false representations, made to induce a sale of railroad bonds, that they were of the market value of six hundred dollars, that any bank in San Francisco would lend that amount on them, and that the railroad was in running order and paying expenses are indictable.

Did Not Think the Seller Would Take Less than a Certain Sum. — Where a person, in collusion with the owner of a patent right, induced another by false representations and pretenses to purchase jointly with him the patent right from the owner, and in the course of the negotiation informed him that he did not think the owner would take less than a certain sum, whereby the prosecutor was induced to execute notes for his half of the purchase price, which the parties in collusion divided between them, it was held that this did not constitute the offense of obtaining the signature to the promissory notes which were given for his half of the purchase price by the prosecutor; for although the price asked, and finally agreed to be paid by

(4) *Remote Pretense*. — The false pretense must be sufficiently proximate to the obtaining of the thing, in order to make it indictable; and therefore if it be too remote, as where a contract intervenes, or when it is not the direct cause of the obtaining, the offense is not committed.¹

(5) *Divisible Pretense*. — The false statement may be susceptible of division, and if the part which was untrue be in itself a statement which induced to the obtaining of the property, the offense is committed.²

the purchaser, was fixed by collusion between the owner of the property and the defendant, for the purpose of defrauding the purchaser, the motive in asking that price was of no consequence. *Scott v. People*, 62 Barb. (N. Y.) 69. In this case the court was divided in opinion.

Test. — In *Rothschild v. State*, 13 Lea (Tenn.) 294, an indictment under section 4701 of the Code of Tennessee, the court said: "The intent to defraud makes the felony, and its absence is a protection against danger from mere expressions of sanguine hopefulness or mistaken belief. 'There is always a point,' says Mr. Bishop, 'at which opinion ends and fact begins. The test must be the common sense of judge and jury, applied to the special facts of the case.' 2 Crim. Law, § 429."

Statement of Fact Distinguished from Opinion. — In *People v. Peckens*, 153 N. Y. 576, it was held that where the representations charged and proved consisted of positive assertions of existing conditions or facts, which were known by the defendant to be false, and were intended to deceive the party to whom made, by inducing reliance on them without investigation as to their truthfulness, they were affirmations of fact and not mere expressions of opinion.

1. Remote Pretense. — See *Hurst v. State*, (Tex. 1898) 45 S. W. Rep. 573.

Contract Intervening Between the Pretense and the Obtaining. — A person, by means of false pretenses of being a naval officer, engaged with the prosecutrix for lodging at ten shillings a week. He accordingly became a lodger in her house, and a few days afterwards expressed a wish to become a boarder. He was then supplied with board as well as lodging at a guinea a week. He was afterwards indicted for obtaining goods (the board) by means of false pretenses, and convicted. It was held that the conviction could not be supported, as the goods were supplied too remotely from the false pretense. *Reg. v. Gardner, Dears. & B. C. C.* 40, 7 Cox C. C. 136, 25 L. J. M. C. 100, 2 Jur. N. S. 598.

Representation by Competitor in Swimming Race of Being a Member of a Club. — In *Reg. v. Larnner*, 14 Cox C. C. 497, the prisoner was charged with obtaining a prize in a swimming race by false pretenses. He obtained his competitor's ticket for the race by representing himself to be a member of a certain club, and by a letter purporting to be written by the secretary of that club. On the faith of these representations, which turned out to be false, he was allowed twenty seconds' start in the race, and won the prize. It was held that the false pretenses were too remote.

Representation that a Certain Person Boarded at a Hotel. — Where a hotel keeper procured a guest to board with him and to pay him money

in advance for his board by telling him that a certain person, an acquaintance of the defrauded party, whose society the latter greatly desired, boarded at said hotel, this was not a false pretense for which he was criminally liable. The payment of the money for board was too remote a consequence of the false pretense. It was not made directly for the purpose of having money advanced, but to induce the party to become a guest. To get the custom or patronage of a guest is not to get property, but to induce a condition of things or relation of the parties out of which a contract to pay money for the value may arise. *Wagoner v. State*, 90 Ind. 507.

Pretenses by Which One Remains in a Position in Which He May Embezzle. — False pretenses by which one remains in a position in which he may obtain money, even if he does intend to abuse the facilities which that position gives him, are not false pretenses by which the money he embezzles is afterwards obtained, for the law regards primary or approximate, and not secondary or remote, causes as operating to the commission of the offense. *Watson v. People*, 27 Ill. App. 496.

When Pretense Not Too Remote. — In *Reg. v. Wilmot*, 12 Cox C. C. 68, 24 L. T. N. S. 758, the defendant falsely pretended that he had a lot of trucks of coal at a railway station on demurrage, that he required forty coal bags, and that he was largely in the timber and coal way. He inspected some coal bags, but objected to the price. The next day he called again, showed the prosecutor some correspondence, and said that he had a lot of trucks of coal at the railway station under demurrage, and that he wanted some coal bags immediately, which were given him upon his agreement to pay for them in a week. It was held that the false pretense was not too remote.

Where the False Pretense Alone Did Not Operate in the Obtaining. — Where goods were obtained by the false statement on the part of the buyer that he was the owner of certain property upon which he gave a mortgage to the seller, thereby inducing him to part with the goods, the false pretense is the direct and not the remote means of obtaining the goods, even if they would not have been delivered but for the giving of the mortgage. *Com. v. Lee*, 149 Mass. 184.

2. Divisibility of Pretense. — Where the accused was charged with obtaining goods by falsely pretending that he "then lived at, and was then the landlord of a certain beer house," but the evidence showed that he did not say that he was the landlord of the house, it was held that the statement was a statement of two facts which could be divided, and that the part that he "lived at" the beer house being false, he committed the offense. *Reg. v. Lince*, 12 Cox C. C. 451, 6 Moak 314.

(6) *Continuing Pretense.* — If the pretense be false when made, and property be subsequently obtained thereby, even though no pretense be made at the time when the property is obtained, the false pretense thus made will be deemed to be a continuing one.¹

Disconnected Statements. — Statements made on different occasions may constitute a continuing pretense, although what was said on any one occasion would not alone be sufficient.²

Applicable to Each Delivery of Property. — A continuing pretense is applicable to each delivery of property that may be made thereby.³

Question for Jury. — The question whether or not the representation is a continuing one is for the jury to determine.⁴

(7) *Pretense Arising Out of Contracts.* — A false pretense knowingly made to obtain money is indictable, though the money be obtained by means of a contract which the prosecutor was induced by the falsehood to make. The defrauded party is not confined to an action for the civil injury.⁵

1. *Obtaining Second Check After First One Destroyed.* — In *Reg. v. Greathead*, 38 L. T. N. S. 691, the defendant, by means of a false wages sheet, obtained from his master a check for the amount stated in the sheet to pay men's wages. The check being informally drawn, payment was refused at the bank. The defendant returned it to his master, telling him of the cause of its nonpayment, and the master tore it up and gave another, which the defendant cashed, and appropriated the difference between what was really due for wages and what was falsely stated to be due. Being charged with obtaining such amount by false pretenses, it was objected that he had obtained only a valueless piece of paper; but it was held that the false pretense was a continuing one, and that the second check was obtained thereby equally with the first.

Repetition of False Pretense. — Where the property is obtained in one county and the false pretense is made in another, every act of the criminal up to the taking possession of the property is in effect a repetition of the falsehoods by which the fraud is accomplished. *State v. House*, 55 Iowa 473.

Representation True When Made, but Conditions Afterwards Changed. — In *Morris v. People*, 4 Colo. App. 136, a person obtained goods on credit from a company and made a fair, honest and accurate statement in writing of his financial condition, and promised as follows: "If any change occurs to lessen my responsibility or materially change my condition, I hereby bind myself to give the Forbes Mercantile Company immediate notice; otherwise I shall be held for transactions thereafter made, as under this statement, this standing good until notice of change. Am doing business under the name of A. Morris. The firm is composed of Adolph Morris, in the business of retail groceries. Insured for \$3000, which I will keep good to this amount." It was held that he was not guilty of obtaining goods under false pretenses under *Gen. Stat. Colorado*, 1883, § 884, where his financial condition subsequently changed for the worse, and no statement was made subsequently to the written one, although he had obtained goods from time to time on credit. See also *Blum v. State*, 20 Tex. App. 594, 54 Am. Rep. 530.

2. *Disconnected Statements May Be a False Pretense.* — *Reg. v. Welman*, *Dears. C. C.* 188, 17

Jur. 421; *Rothschild v. State*, 13 Lea (Tenn.) 294.

3. *Continuing Pretense Applicable to Each Delivery of Property.* — *Com. v. Lee*, 149 Mass. 184; *State v. Wilkerson*, 98 N. Car. 696.

But in *Beasley v. State*, 59 Ala. 23, it was held that a pretense twice repeated on different days, goods being obtained each time, constitutes but one transaction.

4. *Continuing Pretense a Question for the Jury.* — *Reg. v. Martin*, L. R. 1 C. C. 56, 36 L. J. M. C. 20, 15 L. T. N. S. 54, 15 W. R. 358, 10 Cox C. C. 383; *Reg. v. Welman*, *Dears. C. C.* 188, 17 *Jur.* 421; *Rothschild v. State*, 13 Lea. (Tenn.) 294.

5. *Property Obtained by False Pretenses under Contract Indictable.* — *Reg. v. Kenrick*, 5 Q. B. 49, 48 E. C. L. 49, *Dav. & M.* 208; *Reg. v. Abbott*, 1 Den. C. C. 273, 2 C. & K. 630, 61 E. C. L. 630, 2 Cox C. C. 430; *Reg. v. Dark*, 1 Den. C. C. 276; *People v. Martin*, 102 Cal. 558.

Contra. — *Reg. v. Bryan*, 2 F. & F. 567. The learned judge who tried this case said he was bound by *Reg. v. Gardner*, *Dears. & B. C. C.* 40. But that case can scarcely be considered as an authority applicable to this principle, for there the contract was made subsequently to the false pretense, and the goods were obtained under the contract, but the contract intervening between the pretense and the obtaining, the pretense was held to be too remote.

Seller Entrapped by False Pretenses into Contract. — The distinction between obtaining goods by a false pretense directly made and obtaining goods at several times under a contract into which the seller has been entrapped by a false pretense has no force in a case where the goods are obtained at different times, the accused at each time repeating the false pretense. In such case the sale of the goods will be referred to the false pretense thus repeated rather than to the contract. *Smith v. State*, 55 Miss. 521.

Under the Alabama Statute (Crim. Code 1886, § 3812; Crim. Code 1896, § 4730) providing that "any person who, with intent to injure or defraud his employer, enters into a contract in writing for the performance of any act or service, and thereby obtains money or other personal property from such employer, and with like intent, and without just cause, and without refunding such money, or paying for

False Representations and Warranty. — Mere breaches of covenant or warranty where no false representations inducing to the parting with the thing obtained are made are not false pretenses. The remedy of the defrauded party in such a case is by a civil action for breach of warranty.¹ But although there be a warranty or contract on the part of the defendant, yet if there be also false representations of fact, made prior to or contemporaneously with the warranty, the offense is committed, provided the representation, and not the warranty or contract, induce the act of the other party; for a party may be willing to make a contract because of his belief in the representations of the facts made to him.²

Presumption as to Warranty. — Ordinarily the presumption would be that the party defrauded relied on the contract or warranty, and not on the representations made, but it would not be conclusive.³

Merger of Representations in Warranty. — And where false representations are made, they are not merged in a written warranty afterwards given.⁴

(8) *Pretense Must Be Calculated to Deceive.* — The pretense must be calculated to deceive, according to the ability or capacity of the person to whom it is made to detect the falsehood.⁵

such property, refuses to perform such act or service, must on conviction be punished as if he had stolen it," it must appear that the accused received the money at the time when the contract was made or thereafter. This does not mean that the money must have been paid at the time when or after the writing was signed. *Dorsey v. State*, 111 Ala. 40.

In *McQueen v. State*, 89 Ala. 91, it was held that on a prosecution for obtaining money by false pretenses (Code 1886, § 3811), there cannot be a conviction on proof of facts showing a failure by the defendant to perform labor or service as stipulated for his surety in a judgment confessed for fine and costs (section 3832); nor is evidence of such facts admissible.

Effect of Ratification of Contract. — A prisoner was indicted for obtaining hop poles from one C. by pretending that he was authorized by F. The prisoner hearing that F. wanted hop poles, went to him, and agreed to sell him a number at so much per hundred, to be delivered at a station. He then went to C., who had hop poles, said that he was commissioned by F. to buy them, and promised that F. would send a check for the price. A check was sent, but it did not appear by whom. C. sent the poles to the station, and F. got them. Then the prisoner got the money from F. It was urged that the prisoner never got the poles, but that he pretended to sell goods he had not, that C. had ratified the contract between F. and the prisoner, and if the prisoner was indictable at all, it was for obtaining money from F., not goods from C.; and *Wightman, J.*, so held, and directed an acquittal. *Reg. v. Martin*, 1 F. & F. 501.

1. Breaches of Covenant or Warranty. — *Rex v. Codrington*, 1 C. & P. 661, 11 E. C. L. 518; *State v. Chunn*, 19 Mo. 233; *State v. Butler*, 47 Minn. 483; *Com. v. Alsop*, 1 Brews. (Pa.) 339. See generally the titles COVENANTS, vol. 8, p. 43; IMPLIED WARRANTY; WARRANTY.

2. Maine. — *State v. Dorr*, 33 Me. 498.

Minnesota. — *State v. Butler*, 47 Minn. 483.

New York. — *Watson v. People*, 87 N. Y. 567, 41 Am. Rep. 397.

North Carolina. — *State v. Munday*, 78 N. Car. 460.

Pennsylvania. — *Com. v. Alsop*, 1 Brews. (Pa.) 339; *Com. v. Sebring*, 1 Pa. Dist. Rep. 163.

Contra. — *Rex v. Codrington*, 1 C. & P. 661, 11 E. C. L. 518. This case is *disapproved* in *State v. Butler*, 47 Minn. 483. It has been much doubted in England, and does not seem to have been followed. 2 Russ. on Cr. (9th Am. ed.) 653. See also *Com. v. Alsop*, 1 Brews. (Pa.) 340.

Reliance upon Warranty and Not upon Representations. — All cases where false statements are made in the sale of property and a warranty given are not, however, within the statute against false pretenses. When reliance is placed upon the promise or warranty, and not upon the representations, the case is clearly not within the statute; else every case of breach of warranty would be the basis of a criminal prosecution. *Jackson v. People*, 18 Ill. App. 513.

3. Presumption as to Warranty. — *State v. Butler*, 47 Minn. 483.

4. Merger of Representations in Warranty. — *Jackson v. People*, 126 Ill. 139; *Com. v. Sebring*, 1 Pa. Dist. Rep. 163.

5. Pretense Must Be Calculated to Deceive. — *Meek v. State*, (Ala. 1898) 23 So. Rep. 155; *Cowen v. People*, 14 Ill. 348; *Shaffer v. State*, 82 Ind. 224; *Watson v. People*, 87 N. Y. 566, 41 Am. Rep. 397; *People v. Sully*, 5 Fark. Cr. Rep. (N. Y. Super. Ct.) 167; *State v. Whidbee*, (N. Car. 1899) 32 S. E. Rep. 318; *Com. v. M'Crossin*, 3 Pa. L. J. 224; *Peckham v. State*, (Tex. Crim. App. 1894) 28 S. W. Rep. 533. In the first of these cases it was said: "Should an article the essential value of which consisted in its color be offered to a person fully possessed of the sense of sight, and with every opportunity of inspection, with the pretense that it was white when in fact it was black, under such circumstances the false pretense might be very innocent, because it was not calculated to deceive; while the same pretense made to a blind person would be calculated to deceive, and might subject the party to punishment."

Pretense of Not Being Able to Try on Goods in Store. — Where a person falsely pretended that another person owed him some money, and

An Absurd or Irrational Representation made to a person capable of perceiving it to be such is not an indictable offense.¹ But if, considering the degree of intelligence of the person defrauded, it was calculated to mislead him, an absurd representation is indictable.² But while the pretense must be calculated to deceive, yet as all persons are not equally prudent, the offense is committed even though the imposition might have been avoided by a person of ordinary prudence and caution; and therefore any pretense sufficient to impose upon the individual to whom it is made is sufficient.³ There are several

got goods from a merchant, fraudulently pretending that he could not try them on at the store, and in order to determine whether they would fit he would take them away and would return them as soon as he could try them on, when the person indebted to him would pay for them, it was held that he did not commit the offense. The pretense that he could not try on the articles in the store was one not likely to deceive any one, as the merchant was as well qualified to judge of this as the defendant. *Canter v. State*, 7 Lea (Tenn.) 349.

Defendant Pawning Watch Belonging to His Wife.—A person obtained a note by promising to deliver another note signed by himself, and his father as a substitute, and to induce a person to give up the note pawned a watch belonging to his wife, representing it to be worth a sum which exceeded its real value; but there being no representation of his being authorized to part with it, it was not a false pretense. The court said: "Under these circumstances, if the pawner is chargeable with turpitude, the pawnee is equally so with stupidity. The government cannot punish the one or protect the other." *State v. Estes*, 46 Me. 150.

Defendant May Show Course of Dealing Between Himself and Prosecutor.—Where the transactions are of a complicated nature, it is competent for the defendant to show the course of dealing between himself and the prosecutor, both before and after the date of the crime, as to whether the party was in fact deceived. *State v. Rivers*, 58 Iowa 108, 43 Am. Rep. 112.

1. Absurd or Irrational Pretense — *Alabama*. — *Woodbury v. State*, 69 Ala. 242, 44 Am. Rep. 515.

Missouri. — *State v. Cameron*, (Mo. 1893) 23 S. W. Rep. 767, citing 7 AM. AND ENG. ENCYC. OF LAW (1st ed.) 706.

New Jersey. — *State v. Vanderbilt*, 27 N. J. L. 336.

New York. — *People v. Crissie*, 4 Den. (N. Y.) 529; *Watson v. People*, 87 N. Y. 564, 41 Am. Rep. 397.

Pennsylvania. — *Com. v. Hutchinson*, 2 Pa. L. J. 250, 1 Clark (Pa.) 302, 2 Pars. Eq. Cas. (Pa.) 309.

Texas. — *Buckalew v. State*, 11 Tex. App. 352.

2. *Bowen v. State*, 9 Baxt. (Tenn.) 45, 40 Am. Rep. 71, in which case the defendant represented himself to an artless negro to be a practicing physician; that he had restored sight to a blind man; that the negro's house was infected with poison; that the poison was in the bed occupied by his granddaughter, and that said granddaughter was the person poisoned. He proposed to find the poison and remove it, and went through sleight-of-hand

performances for that purpose. It was held that this was a false pretense under the statute. The court said: "A child intrusted with a watch, money, or other valuable, to be borne to an artificer, merchant, or friend, might be induced, by the most flimsy and self-apparent falsehoods, to part with it; still, if these representations were of a character to secure the credit of the child and deprive it of the possession of the goods, however absurd such representations might seem to the more mature and experienced, yet it would be such false pretenses by one person to another as deprived that other of his personal property, as contemplated by the letter and spirit of the law." See also *infra*, this section, *Particular Instances of False Pretenses — As to Possessing Supernatural Power*.

But in *State v. Burnett*, (Ind. 1889) 21 N. E. Rep. 972, it was held where the accused represented that he was a witch doctor, and could kill and destroy witches, that they were bothering and tormenting the prosecutor, and that unless the prosecutor gave him certain property to exorcise the witches they would kill him and his family by means of which representations he obtained property, that the offense was not committed. This holding was based on the ground that mere expressions of opinion, not calculated to deceive a man of common understanding, are not false pretenses. The nature of the pretense is not set out in the report of this case in 119 Ind. 392.

3. The Pretense Need Not Be Such as Would Deceive a Person of Ordinary Caution — *England*. — *Young v. Rex*, 3 T. R. 103; *Reg. v. Wickham*, 10 Ad. & El. 34, 37 E. C. L. 29; *Reg. v. Woolley*, 1 Den. C. C. 559, 1 Eng. L. & Eq. 537; *Russ. on Cr.* (9th Am. ed.) 621.

Alabama. — *Woodbury v. State*, 69 Ala. 242, 44 Am. Rep. 515. See *Meek v. State*, (Ala. 1898) 23 So. Rep. 155.

Arkansas. — *Johnson v. State*, 36 Ark. 242.

California. — *People v. Skidmore*, (Cal. 1899) 55 Pac. Rep. 984; *People v. Cummings*, (Cal. 1899) 55 Pac. Rep. 898. See *People v. Bryant*, 119 Cal. 595.

Colorado. — *Miller v. People*, 22 Colo. 530, citing 7 AM. AND ENG. ENCYC. OF LAW (1st ed.) 708.

Georgia. — *Ryan v. State*, (Ga. 1898) 30 S. E. Rep. 678.

Illinois. — *Cowen v. People*, 14 Ill. 352.

Iowa. — *State v. Montgomery*, 56 Iowa 195; *State v. Fooks*, 65 Iowa 106. See also *State v. Moats*, (Iowa 1899) 78 N. W. Rep. 701.

Maine. — *State v. Mills*, 17 Me. 218.

Michigan. — *People v. Pray*, 1 Mich. N. P. 69; *People v. Summers*, (Mich. 1898) 73 N. W. Rep. 818.

Missouri. — *State v. Williams*, 12 Mo. App. 424.

authorities to the contrary, however, particularly the earlier decisions, which went upon the ground that it was not the intention of the statute to convert every case of fraud into a criminal offense and to protect every individual from the consequences of his own credulity, imprudence, or folly.¹

Means of Detection at Hand. — It has been held that where the defrauded party has, at the time when the false representation is made, the means of detection at hand for ascertaining its falsity, he cannot be said to be deceived by it, and it is therefore not a false pretense within the statute.²

New Jersey. — *State v. Vanderbilt*, 27 N. J. L. 332.

New York. — *Watson v. People*, 87 N. Y. 564, 41 Am. Rep. 397; *People v. Cole*, (Supreme Ct.) 20 N. Y. Supp. 506, 65 Hun (N. Y.) 624, affirmed 137 N. Y. 530; *People v. Sully*, 5 Park. Cr. Rep. (N. Y. Super. Ct.) 165.

Pennsylvania. — *Com. v. Daniels*, 2 Pars. Eq. Cas. (Pa.) 337; *Com. v. Poulson*, 2 Pars. Eq. Cas. (Pa.) 328; *Com. v. Henry*, 22 Pa. St. 256.

Tennessee. — *Bowen v. State*, 9 Baxt. (Tenn.) 49, 40 Am. Rep. 71; *Roberts v. State*, 2 Head. (Tenn.) 504.

Texas. — *Colbert v. State*, 1 Tex. App. 314; *Buckalew v. State*, 11 Tex. App. 352.

Vermont. — *In re Greenough*, 31 Vt. 290.

Washington. — *State v. Knowlton*, 11 Wash. 512.

See especially the observations of the court in *Bowen v. State*, 9 Baxt. (Tenn.) 49, 40 Am. Rep. 71; *People v. Sully*, 5 Park. Cr. Rep. (N. Y. Super. Ct.) 166, and of Lord Denman, C. J., in *Reg. v. Wickham*, 10 Ad. & El. 34, 37 E. C. L. 29.

Selling Gold Watch for Sixteen Dollars. — Where parties at an auction sold a watch for sixteen dollars, which they warranted to be gold, eighteen carats fine, and on the trial argued that nobody but a person extremely silly would believe that a gold watch could be bought for sixteen dollars, and therefore their false pretenses could have deceived no one of ordinary discretion, the court said: "Even persons deprived of ordinary discretion, children, or idiots, are entitled to the protection of the laws, and a man who is ineffably dull may not, for that reason alone, be robbed with impunity." *Bartlett v. State*, 28 Ohio St. 669.

Pretended Agent Collecting Money under Contract. — Under a contract for the purchase of an encyclopædia to be paid for in monthly instalments, it was provided that the "payments may be made" to an authorized collector exhibiting a badge with the name "P. T. C." engraved thereon. It was held that a person falsely and fraudulently representing himself as the collector of the encyclopædia and collecting an instalment due thereon by the purchaser was guilty of obtaining money under false pretenses, and could not set up in excuse for his own conduct the defense that the purchaser should not have paid without requiring a presentation of the badge, for the purchaser might properly have paid an agent without requiring presentation of the badge. *Hall v. Com.*, (Ky. 1888) 9 S. W. Rep. 409.

1. *Arkansas.* — *Burrow v. State*, 12 Ark. 65.
Kentucky. — *Com. v. Haughey*, 3 Metc. (Ky.) 223.

New York. — *People v. Williams*, 4 Hill (N. Y.) 9, 40 Am. Dec. 258; *People v. Stetson*, 4

Barb. (N. Y.) 158; *People v. Dalton*, 2 Wheel. Cr. Cas. (N. Y. Gen. Sess.) 179; *Skiff v. People*, 2 Park. Cr. Rep. (N. Y. Supreme Ct.) 147; *People v. Higbie*, 66 Barb. (N. Y.) 137.

North Carolina. — *State v. Simpson*, 3 Hawks. (10 N. Car.) 620; *State v. Young*, 76 N. Car. 258.

Pennsylvania. — *Com. v. Hutchinson*, 2 Pa. L. J. 245, 1 Clark (Pa.) 308, 2 Pars. Eq. Cas. (Pa.) 315.

South Carolina. — *State v. Stroll*, 1 Rich. L. (S. Car.) 244.

Tennessee. — *Delaney v. State*, 7 Baxt. (Tenn.) 28; *McCorkle v. State*, 1 Coldw. (Tenn.) 333.

In *Indiana* the rule is thus stated: "It is true that it is not every false pretense on which a criminal charge may be predicated; but such false representations of alleged existing facts as might deceive the man of common intelligence will support an indictment for obtaining goods under false pretenses, and in such a case the party indicted ought not to be permitted to escape the punishment prescribed for the offense, upon the plea that a prudent or cautious man would not have been deceived by his false representations." *Howk, J.*, in *Clifford v. State*, 56 Ind. 245, quoted approvingly in *State v. Snyder*, 66 Ind. 205; *Miller v. State*, 73 Ind. 91. To the same effect are *State v. Magee*, 11 Ind. 154; *Leobold v. State*, 33 Ind. 484; *Jones v. State*, 50 Ind. 473; *Bonnell v. State*, 64 Ind. 498; *Perkins v. State*, 67 Ind. 270, 33 Am. Rep. 89; *Miller v. State*, 79 Ind. 198.

2. **Where Defrauded Party Has Means of Detection at Hand, False Pretense Not Indictable.** — *Woodbury v. State*, 69 Ala. 242, 44 Am. Rep. 515; *Com. v. Grady*, 13 Bush (Ky.) 285, 26 Am. Rep. 192; *Com. v. M'Crossin*, 3 Pa. L. J. 224; *Com. v. Hutchinson*, 2 Pa. L. J. 250, 1 Clark (Pa.) 302, 2 Pars. Eq. Cas. (Pa.) 309; *Buckalew v. State*, 11 Tex. App. 352. Compare *Miller v. People*, 22 Colo. 530; *Com. v. Mulrey*, 170 Mass. 103. In this last case, where a city official was indicted for obtaining money by false pretenses consisting of representing that false returns of amounts due from the city were true, it was held to be no defense that the city having control of the agencies through which the returns were made up, and of the sources from which they were made, and having other agents by whom the accounts were to be approved, ought to have discovered the discrepancy.

Passing One-pound Banknote for Five-pound Note. — But where the defendant fraudulently offered a one-pound Irish banknote as a note for five pounds, and obtained change as for a five-pound note, the person from whom the change was obtained being able to read, and the note itself upon the face of it clearly

Equal Means of Knowledge. — Where the prosecutor has equal means of knowledge with the party defrauding, it has been held that the offense is not committed.¹

(9) *Pretense Must Be the Inducement to Parting with Property.* — The false pretense made use of for the purpose must have been believed and relied upon by the defrauded party, and the means of inducing the prosecutor to part with the property.² The same rule would seem to apply if the property be parted

affording the means of detecting the fraud, it was held that this was obtaining money by means of false pretenses, Lord Campbell, C. J., remarking: "In many cases a party giving change would not look at the note offered, but would rely on the representations made at the time." *Reg. v. Jessop, Dears. & B. C. C. 442*, 7 Cox C. C. 399, 27 L. J. M. C. 70, 4 Jur. N. S. 123. There is no other case that goes to this length.

1. **Pretense of Having Given a Bank Bill and Getting No Change.** — Where a person falsely pretended that the prosecutor had, on a previous day named, received of him a certain bank bill in payment for certain drinks furnished to him, and had given back no change, this was held not to be the offense of false pretense. It was the naked case of a wilfully false affirmation, made to a party who had like means of knowledge whether the affirmation was true or false as the party who made it. It was one of a demand of money as of right, the seller being personally connected with all the alleged facts, and voluntarily submitting to the demand thus made upon him. *Com. v. Norton*, 11 Allen (Mass.) 266. See also *Woodbury v. State*, 69 Ala. 245, 44 Am. Rep. 515.

2. **Pretense Must Be Means of Obtaining the Property** — *England.* — *Reg. v. Jones*, 50 L. T. N. S. 726, 48 J. P. 616, 15 Cox C. C. 475; *Reg. v. Hazzlewood*, 48 J. P. 151; *Reg. v. Burton*, 54 L. T. N. S. 765, 16 Cox C. C. 62; *The Queen v. King*, (1897) 1 Q. B. 214.

Canada. — *Reg. v. Durocher*, 12 Rev. Lég. 697.

Alabama. — *O'Connor v. State*, 30 Ala. 13; *Meek v. State*, (Ala. 1898) 23 So. Rep. 155.

Arkansas. — *Jamison v. State*, 37 Ark. 445, 40 Am. Rep. 103; *Morgan v. State*, 42 Ark. 138, 48 Am. Rep. 55.

California. — *People v. Jordan*, 66 Cal. 10, 56 Am. Rep. 73; *People v. Mauritzen*, 84 Cal. 37.

Colorado. — *Morris v. People*, 4 Colo. App. 136.

Florida. — *Ladd v. State*, 17 Fla. 219; *Pendry v. State*, 18 Fla. 191.

Illinois. — *Jackson v. People*, 18 Ill. App. 512.

Indiana. — *State v. Magee*, 11 Ind. 154; *Clifford v. State*, 56 Ind. 248; *Abbott v. State*, 59 Ind. 70; *Cooke v. State*, 83 Ind. 404; *State v. Conner*, 110 Ind. 471.

Iowa. — *State v. Dowc*, 27 Iowa 275, 1 Am. Rep. 271; *State v. Stone*, 75 Iowa 215; *State v. Nine*, (Iowa 1898) 74 N. W. Rep. 945.

Kansas. — *State v. Metsch*, 37 Kan. 222; *Matter of Snyder*, 17 Kan. 553.

Maine. — *State v. Dorr*, 33 Me. 498.

Massachusetts. — *Com. v. Drew*, 19 Pick. (Mass.) 182. See also *Com. v. O'Brien*, 172 Mass. 248.

Michigan. — *People v. McAllister*, 49 Mich. 12.

Mississippi. — *Bowler v. State*, 41 Miss. 578. *Missouri.* — *State v. Bonnell*, 46 Mo. 395; *State v. Dennis*, 80 Mo. 596.

New Jersey. — *State v. Tomlin*, 29 N. J. L. 13.

New York. — *Therasson v. People*, 82 N. Y. 239, *overruling* 20 Hun (N. Y.) 55; *Watson v. People*, 87 N. Y. 564, 41 Am. Rep. 397; *Clark v. People*, 2 Lans. (N. Y.) 329; *People v. Tompkins*, 1 Park. Cr. Rep. (N. Y. Supreme Ct.) 224.

North Carolina. — *State v. Moore*, 111 N. Car. 672.

Oregon. — *State v. Bloodsworth*, 25 Oregon 83, *citing* 7 AM. AND ENG. ENCYC. OF LAW (1st ed.) 771.

Pennsylvania. — *Com. v. Alsop*, 1 Brews. (Pa.) 336; *Com. v. Hutchinson*, 2 Pa. L. J. 250, 1 Clark (Pa.) 302, 2 Pars. Eq. Cas. (Pa.) 309; *Com. v. McCrossin*, 3 Pa. L. J. 224; *Com. v. Chambers*, 2 Chest. Co. Rep. (Pa.) 63; *Com. v. Philadelphia County Prison*, 6 Phila. (Pa.) 78, 22 Leg. Int. (Pa.) 189.

Texas. — *White v. State*, 3 Tex. App. 605; *Buckalew v. State*, 11 Tex. App. 352; *Ervin v. State*, 11 Tex. App. 536; *Mathena v. State*, 15 Tex. App. 474; *Blum v. State*, 20 Tex. App. 592, 54 Am. Rep. 530; *Hightower v. State*, 23 Tex. App. 451; *Thorpe v. State*, (Tex. Crim. App. 1899) 50 S. W. Rep. 383; *Epperson v. State*, 42 Tex. 80.

Virginia. — *Fay v. Com.*, 28 Gratt. (Va.) 918.

West Virginia. — *State v. Hurst*, 11 W. Va. 59.

Wisconsin. — *State v. Green*, 7 Wis. 676.

Wyoming. — *Haines v. Territory*, 3 Wyoming 168.

Influence of Representations. — The question whether the defrauded party was influenced by the representations is a distinct one, having no necessary connection with the falsity of the pretense or the fraudulent intent, and proof of these others reflects no light upon it. *Therasson v. People*, 82 N. Y. 239, *overruling* 20 Hun (N. Y.) 55.

Lawfully Receiving Money and Returning Change in Spurious Coin. — Where a person sold a pair of shoes for one dollar and forty cents, for which he received in payment one dollar and fifty cents, and paid the difference in two spurious half-dimes, knowing that they were spurious and worthless, the offense was not committed; for the money was not obtained by any fraudulent representation or practice by which the prosecutor was induced to part with it, nor did it appear that any intent to cheat or defraud entered the mind of the defendant before he received the money. *State v. Allred*, 84 N. Car. 749.

Money Paid for Services and Not in Consequence of Representation. — *Bowler v. State*, 41 Miss. 578.

Where There Was a Previous Confidence. — An employee having obtained more money than he should have obtained, by presenting a false

with by the use of a false token.¹ And if one necessary link in the chain of means be obtained by the fraudulent representations, the whole transaction is infected.²

No Inducement. — If there be no reliance placed upon the false representations,³ or if the prosecutor relies upon his own judgment,⁴ or knows that the pretenses are false,⁵ no offense is committed. Still, in such cases the defendant may be convicted of an attempt to commit.⁶ But if the prosecutor, for the purpose of ascertaining the truth of the pretenses, relies upon the judgment of another person who, unknown to the prosecutor, happens to be a con-

account of wages due to other employees, it was contended that no cases were within the statute but those where the original credit was obtained by means of the false pretenses, and that it did not extend to cases where there was a previous confidence. The judges finally agreed that if the false pretense created the credit, the case was within the statute. *Witchell's Case*, 2 East P. C. 830.

Engagement of Marriage Between Defendant and Party Defrauded. — In *People v. Weir*, (Cal. 1898) 52 Pac. Rep. 656, the defendant represented to a young woman to whom he was engaged to be married, that he had an opportunity to secure employment, and that as a condition precedent a cash deposit was necessary. She advanced the amount requested. His declarations both as to the employment and the need of the money were false. The court negatived the contention of the defense "that the woman loaned him the money because of the engagement existing between them, and not by reason of his representations," characterizing it as "so technical as to possess little merit."

Obtaining Food and Refreshment in Restaurant. — In *Reg. v. Jones*, (1898) 1 Q. B. 120, the facts were that the defendant went into a restaurant and ordered food and refreshment, which he consumed, but no question was put to him and no inquiry was made of him by the prosecutor as to his means, nor was any statement made by him as to whether he had means to pay. In reply to his inquiry as to what he was to pay, he was told it was four shillings, but he said he had no means of paying, that he had no money, and had only a halfpenny upon him. It was held that he had not committed the offense of obtaining goods by false pretenses.

Offer to Change a Bill. — In *Reg. v. Gemmell*, 26 U. C. Q. B. 312, the defendant having agreed to do a certain thing for seventy-five cents, the prosecutor took out a two-dollar bill to pay him, saying that he would get it changed. The prisoner said: "I'll change it," upon which the money being handed to him, he kept it and gave back no change. There being no proof as to what induced the prosecutor to part with the money, it was held that a conviction for obtaining money by false pretenses could not be sustained.

Where the Pretense Might Be the Means, Though Not the Direct Means. — A person having obtained money by the false statement that he was a captain in the Fifth Dragoon Guards, Lord Denman, C. J., said: "Here the means employed by the defendant are the statement that he was a captain in her Majesty's Dragoon Guards. We do not, perhaps, see how such a statement could directly

be the means of procuring from the prosecutor an order for five hundred pounds; but we can conceive it might do so. * * * For instance, if the prosecutor had been desired to part with it to a person of such a name and description, the fact of his being in the Fifth Dragoon Guards might be the only thing wanting to make him out to be that person." *Reg. v. Hamilton*, 10 Jur. 1029.

1. Confidence in Token. — 2 Bish. N. Cr. L., § 159.

2. Obtaining One Link by Which the Fraud Accomplished. — Where the false pretense was made to the secretary of the treasury, and the money placed in the hands of the navy agent, from whom it was obtained, it was contended that it did not appear by what deceitful practices the money had been obtained from the navy agent, in whose hands it was safe, and that therefore there was no fraud upon the United States; but the court said that the getting the money out of the treasury was a necessary link in the chain of means to accomplish the fraud, and if a single link was obtained by the deceptive practices of the defendant, those deceptive practices were as effectual in constituting the offense as if every other link in the chain had been forged by the like deception. *U. S. v. Watkins*, 3 Cranch (C. C.) 545.

3. When Prosecutor Not Induced to Part with Property — *England*. — *Reg. v. Mills*, 7 Cox C. C. 263, *Dears. & B. C. C.* 205, 26 L. J. M. C. 79, 3 Jur. N. S. 447; *Reg. v. Roebuck, Dears. & B. C. C.* 24, 7 Cox C. C. 126, 25 L. J. M. C. 101, 2 Jur. N. S. 597; *Rex v. Dale*, 7 C. & P. 352, 32 E. C. L. 539. See also *Reg. v. Keighley, Dears. & B. C. C.* 145, 7 Cox C. C. 217.

Indiana. — *Hess v. Young*, 59 Ind. 384.

Kansas. — *State v. Crane*, 54 Kan. 251.

New York. — *People v. Bough*, (Supreme Ct.) 1 N. Y. Supp. 298; *People v. Stetson*, 4 Barb. (N. Y.) 151.

Pennsylvania. — *Com. v. Philadelphia County*, 6 Phila. (Pa.) 80, 22 Leg. Int. (Pa.) 189.

4. Prosecutor Relying upon His Own Test. — On the trial of an indictment for false pretenses it was proved that the prisoner offered a chain in pledge to a pawnbroker, and required money to be advanced upon it, representing that it was gold. On being tested it turned out to be a compound of brass, silver, and gold, but the gold was very minute in quantity. There was held not to be a false pretense. *Reg. v. Lee*, 8 Cox C. C. 233. See also *Reg. v. Ball*, 1 C. & M. 249, 41 E. C. L. 140.

5. Prosecutor's Knowledge of Falsity of Pretense. — *Reg. v. Hensler*, 11 Cox C. C. 570, 22 L. T. N. S. 691, 19 W. R. 108.

6. See *supra*, this title, *Cheats at Common Law — Attempt to Cheat*.

federate of the defendant, and he is thereby deceived, the offense is committed.¹

Desire to Entrap. — And although the defrauded party is desirous of entrapping the defendant, yet if he relied upon the representations, the offense is committed, the test being the motive operating upon his mind.²

Pretense Made After Property Obtained. — If the pretense be not made until after the property is obtained, no offense is committed.³ But this rule would seem not to apply where there is a mere technical delivery.⁴

Need Not Be the Sole Inducement. — But it is not necessary that the false pretenses should have been the sole inducement to the obtaining of the thing. It is sufficient that they have a material or controlling influence in inducing the prosecutor to part with his property.⁵ In several cases the rule is stated to be that the false pretenses need not be the paramount cause of the delivery to the prisoner; it is sufficient if they are a part of the moving cause and without them the defrauded party would not have parted with the property.⁶ In still other cases it has been declared that the false pretenses must be the sole inducement to the parting with the property.⁷ The rule as first stated is, however, the one generally recognized at the present time.

1. *State v. Knowlton*, 11 Wash. 512.

Reliance — Meaning of. — When it is said that one relied upon a representation, the idea conveyed to the mind by the expression is not only that he believed the representations to be true, but that upon his belief or faith he had acted, or was willing to act. *Clifford v. State*, 56 Ind. 248.

2. **Conspiracy to Entrap.** — Where a person received a letter from the accused stating that on payment of twenty shillings he would give him information of something to his advantage to the value of two hundred and fifty pounds, and the money was paid in the belief of the truth of the statement of the accused, the latter was guilty of obtaining money under false pretenses, even though the prosecutor had conspired with another for the purpose of entrapping him. *Rex v. Ady*, 7 C. & P. 140, 32 E. C. L. 469. To the same effect is *Reg. v. Corey*, 22 New Bruns. 543. But in *Reg. v. Mills*, 7 Cox C. C. 263, where the money was paid with the prosecutor's knowledge of the falsity of the pretense, Cockburn, C. J., said "The question always is, what is the motive present to the mind of the prosecutor? If the motive which operates on his mind is not the false pretense, but a desire to entrap the defendant, that is not an obtaining money by false pretense. The question is, what is the immediate motive acting on the mind of the prosecutor?"

3. **Pretense Made After Property Obtained.** — *State v. Moore*, 111 N. Car. 672.

A carrier, having ordered a cask of ale, said, after he had possession of it: "This is for W." It was held that an indictment for obtaining it by falsely pretending that he had been sent by another person for it could not be sustained. *Reg. v. Brooks*, 1 F. & F. 502.

Pretense Made After Stoppage of Property in Transitu. — *People v. Haynes*, 14 Wend. (N. Y.) 546, 28 Am. Dec. 530, reversing 11 Wend. (N. Y.) 557.

Giving Bogus Check in Payment of Goods, After Delivery. — *State v. Willard*, 109 Mo. 242.

4. **Where the Delivery of the Property Is Merely a Technical One.** — Where sheep were sold for cash and were weighed, and the weights recorded, and the buyer afterwards by falsely

representing that he had funds in the bank, induced the seller to take a check which proved to be worthless, it was held that this was obtaining goods under false pretenses, even if technically the weighing and the recording of the weights constituted a delivery. *Com. v. Devlin*, 141 Mass. 430.

5. **The Pretense Must Have a Material or Controlling Influence in the Inducement** — *Alabama*. — *Woodbury v. State*, 69 Ala. 242, 44 Am. Rep. 515.

Arkansas. — *Donohoe v. State*, 59 Ark. 375. *Indiana*. — *State v. Conner*, 110 Ind. 471.

Iowa. — *State v. Fooks*, 65 Iowa 196.

Louisiana. — *State v. Tessier*, 32 La. Ann. 1227.

Massachusetts. — *Com. v. Hershell*, Thach. Cr. Cas. (Mass.) 70; *Com. v. Drew*, 19 Pick. (Mass.) 183; *Com. v. Davidson*, 1 Cush. (Mass.) 43.

Mississippi. — *Smith v. State*, 55 Miss. 522.

Nebraska. — *Wax v. State*, 43 Neb. 22.

New Jersey. — *State v. Thatcher*, 35 N. J. L. 445.

New York. — *People v. Herrick*, 13 Wend. (N. Y.) 91; *People v. Higbie*, 66 Barb. (N. Y.) 137; *People v. Oyer & T. Ct.*, 83 N. Y. 453; *People v. Miller*, 2 Park. Cr. Rep. (N. Y. Supreme Ct.) 199; *Scott v. People*, 62 Barb. (N. Y.) 71.

Pennsylvania. — *Com. v. Daniels*, 2 Pars. Eq. Cas. (Pa.) 339.

Virginia. — *Fay v. Com.*, 28 Gratt. (Va.) 912; *Trogdon v. Com.*, 31 Gratt. (Va.) 884.

Wyoming. — *Haines v. Territory*, 3 Wyoming 168.

6. *Matter of Snyder*, 17 Kan. 554; *State v. Cowdin*, 28 Kan. 270; *State v. Gordon*, 56 Kan. 67. See also *Cowen v. People*, 14 Ill. 352.

7. **Sole Inducement.** — See *Bryant v. Com.*, (Ky. 1898) 47 S. W. Rep. 578.

In *People v. Dalton*, 2 Wheel. Cr. Cas. (N. Y. Gen. Sess.) 180, it was held that the pretense must be the sole inducement to the parting with the goods, and that if it appears that any act or declaration of the defendant, forming part of the *res gestæ*, and not set out in the indictment, formed part of the inducement, the prisoner is entitled to an acquittal. See also *Blum v. State*, 20 Tex. App. 593, 54

Inducement Inferred. — The fact that the prosecutor was induced to part with his property by the representations made may be inferred¹ even though the prosecutor does not testify as to the effect of the representation in inducing him to part with his property.²

Effect of Representations. — The questions as to the reasonable effect of the representations in inducing the prosecutor to part with his property, and whether he was deceived by them, are for the jury.³

(10) *Pretense Need Not Be Personally Made.* — The pretense need not be personally made to the defrauded party, but may be made to his agent or clerk,⁴ or it may be made by advertisement.⁵

(11) *Pretense Need Not Be in Words — Acts Sufficient.* — It is laid down in many cases that acts as well as words may constitute a false pretense within the meaning of the law, and that where acts exist words are not needed.⁶

Am. Rep. 530, which appears inferentially also to require that the pretense be the sole inducement.

1. Inference that the Representation Was the Inducement May Be Made. — Reg. v. Burton, 54 L. T. N. S. 765, 16 Cox C. C. 62; Jones v. U. S., 5 Cranch (C. C.) 652; Matter of Snyder, 17 Kan. 553; Com. v. Coe, 115 Mass. 501; Therason v. People, 82 N. Y. 239, *overruling* 20 Hun (N. Y.) 55; People v. Herrick, 13 Wend. (N. Y.) 87.

In Com. v. Daniels, 2 Pars. Eq. Cas. (Pa.) 335, it was said: "When once the false representations are clearly proved and the intention to cheat and defraud fully established, the jury would infer that the credit was given on the representations thus made, in the absence of any other proof. It is a necessary inference from the facts thus established."

2. People v. Hong Quin Moon, 92 Cal. 42; State v. Thatcher, 35 N. J. L. 449.

3. Effect of Representations Is Question for Jury. — People v. Bryant, 119 Cal. 595; Meek v. State, (Ala. 1898) 23 So. Rep. 155; Jackson v. People, 18 Ill. App. 513; State v. Moats, (Iowa 1899) 77 N. W. Rep. 701; People v. Rice, (Supreme Ct.) 13 N. Y. Supp. 164, *affirmed* 128 N. Y. 649, 59 Hun (N. Y.) 616; People v. Cole, (Supreme Ct.) 20 N. Y. Supp. 505, 65 Hun (N. Y.) 624, *affirmed* 137 N. Y. 530; People v. Dimick, 107 N. Y. 13; People v. Oyer & T. Ct., 83 N. Y. 449; People v. Blanchard, 90 N. Y. 314; Thomas v. People, 34 N. Y. 351; People v. Sully, 5 Park. Cr. Rep. (N. Y. Super. Ct.) 167; People v. Dalton, 2 Wheel. Cr. Cas. (N. Y. Gen. Sess.) 179; State v. Knowlton, 11 Wash. 512.

4. The Pretense Need Not Be Made Personally to the Defrauded Party. — Reg. v. Godfrey, Dears. & B. C. C. 426, 7 Cox C. C. 392, 4 Jur. N. S. 146, 27 L. J. M. C. 151; Reg. v. Dent, 1 C. & K. 249, 47 E. C. L. 249; Com. v. Harley, 7 Met. (Mass.) 467; Com. v. Call, 21 Pick. (Mass.) 523, 32 Am. Dec. 284; People v. Wakely, 62 Mich. 297; Perry v. State, (Tex. Crim. App. 1898) 46 S. W. Rep. 816. See also Com. v. Alsop, 1 Brews. (Pa.) 329.

Agent of Corporation. — In State v. Turley, 142 Mo. 403, it was held that false pretenses made to the credit clerk and agent of a corporation must be considered as having been made to the corporation.

Pretense Made to One Partner. — The offense of obtaining goods by false pretenses from a mercantile firm may be committed by pre-

tenses made to one partner. Com. v. Moar, Thach. Cr. Cas. (Mass.) 410.

When Relation of Principal and Agent Does Not Exist. — The offense may be committed by a false pretense made to one person with the intent to defraud another, although the relation of principal and agent does not exist between the person to whom the representation is made and the person defrauded; as where the defendant, being entitled to a claim against a county for witness fees, assigned it to another person, whereby he obtained goods from such person, and subsequently stated to the register and clerk of the county that he had not assigned his claim, and was entitled to the county order, by means of which he obtained the order for the amount. It was held that he was guilty of false pretenses. State v. Hargrave, 103 N. Car. 328.

5. False Pretense May Be Made by Advertisement. — Reg. v. Cooper, 1 Q. B. Div. 19, 45 L. J. M. C. 15, 33 L. T. N. S. 754, 24 W. R. 279, 13 Cox C. C. 123; Reg. v. Randell, 57 L. T. N. S. 718, 52 J. P. 359, 16 Cox C. C. 335; Jackson v. People, 126 Ill. 139; State v. Sarony, 95 Mo. 349.

6. Pretense Need Not Be in Words — *England.* — Reg. v. Bull, 13 Cox C. C. 608, 36 L. T. N. S. 376; Reg. v. Giles, Leigh & C. 502, 10 Cox C. C. 44, 34 L. J. M. C. 50, 11 Jur. N. S. 119, 11 L. T. N. S. 643, 13 W. R. 327; Reg. v. Holloway, 1 Den. C. C. 370, T. & M. 40, 3 New Sess. Cas. 410, 2 C. & K. 942, 61 E. C. L. 942, 18 L. J. M. C. 60, 13 Jur. 86; Reg. v. Hunter, 10 Cox C. C. 642, 17 L. T. N. S. 321, 16 W. R. 342; Reg. v. Powell, 51 L. T. N. S. 713, 54 L. J. M. C. 26, 49 J. P. 183, 15 Cox C. C. 568; Reg. v. Butcher, 32 L. T. N. S. 110; Rex v. Barnard, 7 C. & P. 784, 32 E. C. L. 736; Reg. v. Hensler, 11 Cox C. C. 570.

Canada. — Reg. v. Lee, 23 U. C. Q. B. 340; Reg. v. Campbell, 18 U. C. Q. B. 413. See also Reg. v. Huppel, 21 U. C. Q. B. 281.

Indiana. — Musgrave v. State, 133 Ind. 297.

Iowa. — State v. Joaquin, 43 Iowa 132; State v. Dowe, 27 Iowa 273, 1 Am. Rep. 271; State v. Grant, 86 Iowa 222.

New York. — Fowler v. People, 18 How. Pr. (N. Y. Supreme Ct.) 500.

North Carolina. — State v. Phifer, 65 N. Car. 321.

Pennsylvania. — Com. v. Daniels, 2 Pars. Eq. Cas. (Pa.) 335; Com. v. Wallace, 114 Pa. St. 412, 60 Am. Rep. 353.

(12) *Writing Required in Case of Certain Pretenses.* — By statute in some of the *United States* certain acts of false pretense are required to be in writing in order to constitute the offense.¹

(13) *Defendant's Knowledge of Falsity of Pretense.* — It is essential to the commission of the offense that the defendant must have knowledge of the falsity of the pretense at the time when it is made.²

Texas. — *Blum v. State*, 20 Tex. App. 592, 54 Am. Rep. 530.

Assuming to Be Payee of a Money Order. — Where the prisoner obtained money from the keeper of a post office, by assuming to be the person mentioned in a money order, which he presented for payment, though he did not make any false declaration or assertion in order to obtain the money, it was held a false pretense. *Rex v. Story*, R. & R. C. C. 60.

Wearing Cap and Gown of Commoner of University. — If a person at Oxford who is not a member of the university goes to a shop, for the purpose of fraud wearing a commoner's cap and gown, and obtains goods, this appearing in a cap and gown is a sufficient false pretense to satisfy the statute, although nothing passes in words. *Rex v. Barnard*, 7 C. & P. 784, 32 E. C. L. 736.

Assumed Porter of an Inn Collecting Charges on a Parcel with Printed Ticket. — In a note to *Rex v. Barnard*, 7 C. & P. 784, 32 E. C. L. 736, the case of *Rex v. Douglass* is mentioned. The defendant, in the assumed character of a porter of an inn, delivered a parcel, as from the country, with a printed ticket, with writing charging carriage and portage, and received the money charged. The parcel turned out to be a mock parcel, worth nothing. Part of the false pretenses charged was the contents of what the porter's ticket contained. It was objected that the defendant had not uttered these words; but Lord Ellenborough said: "I take the defendant to have uttered every word contained on the ticket which he brought with the parcel." This case is reported, as to other points, in 1 Campb. 212, but the parcel does not appear from that report to have been a mock parcel.

Obtaining Goods by Sending Halves of Banknotes. — Where a person obtained goods by sending half banknotes requesting goods to the value of the entire notes to be sent to her, and at the time when she did so she had not the corresponding half notes in her custody, having previously sent them to other persons, it was held that this was obtaining goods by false pretenses. *Morris, C. J.*, remarking that the request for the goods along with sending the two half notes was evidence from which the jury might infer that there was a sort of silent statement by the defendant that she had the corresponding half notes ready for the satisfaction of the prosecutor. *Reg. v. Murphy*, 10 Ir. C. L. Rep. 508, 13 Cox C. C. 298, 15 Moak 333.

1. Means or Ability to Pay — New York. — Section 544 of the New York Penal Code provides that "a purchase of property by means of a false pretense is not criminal where the false pretense relates to the purchaser's means or ability to pay, unless the pretense is made in writing and signed by the party to be charged." *People v. Page*, 7 N. Y. Crim. Rep. 5.

Wyoming. — Comp. Laws 1876, c. 35, § 138, applies to obtaining money or goods on credit by the false representations in writing of the defendant as to his "responsibility, wealth, or mercantile correspondence or connection." *Haines v. Territory*, 3 Wyoming 168.

Illinois. — There is a statute in this state very similar to the one just mentioned. See *Lucas v. People*, 75 Ill. App. 662.

Under Massachusetts General Statutes, c. 151, § 54, requiring that certain representations should be in writing, in order to constitute the offense, a false representation that a certificate of stock is good, valid, and genuine is not required to be in writing. *Com. v. Coe*, 115 Mass. 481. Nor that a certain note was valid and secured by a real estate mortgage; and in such case evidence is admissible tending to show that the defendant represented to the person defrauded that the note was secured by mortgage. *Com. v. Parmenter*, 121 Mass. 354.

And in *Com. v. Stevenson*, 127 Mass. 446, it was held to be no objection to an indictment charging the accused with inducing by false pretenses another to sign a lease that such pretenses were not alleged to have been in writing, as "the statute does not require that, in cases like this, the false pretense should be in writing."

Obtaining Acquittance of Attachment — New Hampshire. — Under Gen. Laws N. H., c. 275, § 1 (Pub. Stat. 1891, c. 273, § 1), in order to constitute the obtaining by false pretenses of an acquittance of an attachment, the acquittance must be in writing. *State v. Falconer*, 59 N. H. 535.

2. Knowledge of Falsity of Pretense Essential — England. — *Reg. v. Henderson*, 1 C. & M. 328, 41 E. C. L. 183, 2 Moo. C. C. 192; *Reg. v. Bowen*, 4 New Sess. Cas. 62, 3 Cox C. C. 483, 13 Q. B. 790, 66 E. C. L. 790, 19 L. J. M. C. 65, 13 Jur. 1045; *Reg. v. Keighley, Dears. & B. C. C.* 145, 7 Cox C. C. 217; *Reg. v. Philpotts*, 1 C. & K. 112, 47 E. C. L. 112; *Reg. v. Hazleton*, L. R. 2 C. C. 139.

Indiana. — *State v. Smith*, 8 Blackf. (Ind.) 491; *State v. Snyder*, 66 Ind. 208; *Johnson v. State*, 75 Ind. 556.

Iowa. — *State v. Nine* (Iowa 1898) 74 N. W. Rep. 945.

Michigan. — *People v. Beebe*, 90 Mich. 356; *People v. Fitzgerald*, 92 Mich. 328.

Missouri. — *State v. Bradley*, 68 Mo. 142.

New Jersey. — *Sharp v. State*, 53 N. J. L. 511; *State v. Blauvelt*, 38 N. J. L. 307.

New York. — *Watson v. People*, 87 N. Y. 564, 41 Am. Rep. 397.

North Carolina. — *State v. Moore*, 111 N. Car. 672.

Pennsylvania. — *Com. v. Alsop*, 1 Brews. (Pa.) 328, 6 Phila. (Pa.) 371, 24 Leg. Int. (Pa.) 196; *Com. v. Pugh*, 1 Lanc. Bar (Pa.) 534. *Com. v. Usner*, 7 Lanc. L. Rev. (Pa.) 57.

Presumption of Guilty Knowledge. — But under certain circumstances it will be presumed that the defendant had knowledge of the falsity of the pretense.¹

Defendant's Belief in Truth of Pretense. — If the defendant believes in the truth of the representation made, although it may be false, the offense is not committed.²

5. The Intent — *a.* **IN GENERAL.** — In order to constitute the offense, there must be an intent to defraud at the time when the property or the signature to an instrument is obtained.³

South Carolina. — *State v. Haines*, 23 S. Car. 170.

Texas. — *Hirsch v. State*, 1 Tex. App. 393; *Mathena v. State*, 15 Tex. App. 474.

West Virginia. — *State v. Hurst*, 11 W. Va. 59.

1. Presumption as to Knowledge of Falsity of Pretense. — *Com. v. Usner*, 7 Lanc. L. Rev. (Pa.) 57; *State v. Haines*, 23 S. Car. 170. See also the cases cited in the note preceding.

Where a person publicly advertises a horse as having certain qualities, he will be presumed to speak from knowledge of the character and qualities of the horse. *Jackson v. People*, 126 Ill. 139.

Cashing Post-office Orders with Knowledge of Their Fraudulent Issue. — Where the postmaster at B. transferred to the defendant at T. post-office orders payable there, which the defendant presented and got cashed, but the moneys for which had never been received by the postmaster at B., the entries being false, it was held that if the defendant was aware of the frauds practiced by the postmaster at B., and was knowingly co-operating with him to enable him to carry his frauds into effect, he might be assumed to have known that the money for them had never been paid at B., and therefore that there was no honest right to draw it at T. in payment of such orders. *Reg. v. Dessauer*, 21 U. C. Q. B. 231.

Selling Bonds Known to Have Been Stolen. — Bonds which had been stolen in 1883 were found in 1890 in the possession of the prisoner, who under an assumed name was dealing with them and selling them to innocent purchasers. It was held that he must have known that the bonds had been stolen. *In re Pinter*, 66 L. T. N. S. 324.

2. If Defendant Believes the Representation Is True, No Offense Committed. — *State v. Alphin*, 84 N. Car. 745.

Where the defendant induced the prosecutor to indorse a draft on the defendant's father, and by means thereof obtained the money, but the evidence showed that the defendant acted in good faith and in the reasonable belief that the draft would be accepted and paid, it was held that the offense was not committed. *Ketchell v. State*, 36 Neb. 324.

3. Intent to Defraud Essential — *England.* — *Young v. Rex*, 3 T. R. 104; *Reg. v. James*, 12 Cox C. C. 127; *Reg. v. Gray*, 17 Cox C. C. 299; *Reg. v. Hazelton*, L. R. 2 C. C. 139.

Alabama. — *O'Connor v. State*, 30 Ala. 13; *Mack v. State*, 63 Ala. 140; *Dorsey v. State*, 111 Ala. 40.

California. — *People v. Jordan*, 66 Cal. 10, 56 Am. Rep. 73.

Indiana. — *Todd v. State*, 31 Ind. 514; *State v. Fields*, 118 Ind. 491.

Kansas. — *State v. Matthews*, 44 Kan. 602; *State v. Clark*, 46 Kan. 65.

Kentucky. — *Com. v. Van Tuyl*, 1 Metc. (Ky.) 1, 71 Am. Dec. 455.

Massachusetts. — *Com. v. Drew*, 19 Pick. (Mass.) 182; *Com. v. Dean*, 110 Mass. 65; *Com. v. Moear*, Thach. Cr. Cas. (Mass.) 470.

Michigan. — *People v. Winslow*, 39 Mich. 505; *People v. Wakely*, 62 Mich. 303.

Mississippi. — *Bowler v. State*, 41 Miss. 578.

Missouri. — *State v. Norton*, 76 Mo. 180; *State v. Jackson*, 112 Mo. 585.

New Jersey. — *Sharp v. State*, 53 N. J. L. 511.

New York. — *Therasson v. People*, 82 N. Y. 239, overruling 20 Hun (N. Y.) 55; *Watson v. People*, 87 N. Y. 564, 41 Am. Rep. 397; *People v. Baker*, 96 N. Y. 348; *People v. Johnson*, 12 Johns. (N. Y.) 292; *Brown v. People*, 16 Hun (N. Y.) 535; *People v. Fish*, 4 Park. Cr. Rep. (N. Y. Super. Ct.) 212; *Scott v. People*, 62 Barb. (N. Y.) 71. In *Henshaw v. Bryant*, 5 Ill. 107, Caton, J., said that the courts of New York have allowed less evidence of the fraudulent intent to prevail, in both civil and criminal cases, than the courts in any of the other states or England.

Pennsylvania. — *Com. v. Daniels*, 2 Pars. Eq. Cas. (Pa.) 340; *Com. v. Aisop*, 1 Brews. (Pa.) 336; *Com. v. M'Crossin*, 3 Pa. L. J. 224.

South Carolina. — *State v. Phifer*, 65 N. Car. 321; *State v. Munday*, 78 N. Car. 462; *State v. Oakley*, 103 N. Car. 408; *State v. Garriss*, 98 N. Car. 733.

Tennessee. — *McCorkle v. State*, 1 Coldw. (Tenn.) 336; *Rothschild v. State*, 13 Lea (Tenn.) 302.

Texas. — *Blum v. State*, 20 Tex. App. 592, 54 Am. Rep. 530; *Rosales v. State*, 22 Tex. App. 673.

Virginia. — *Fay v. Com.*, 28 Gratt. (Va.) 918.

Under the Penitentiary Act of the District of Columbia respecting false pretenses, a fraudulent intent is supposed to be a necessary ingredient in the offense of obtaining money, etc., by false pretenses, although the act does not, as does the English statute of 30 Geo. II., c. 24, expressly require it. *Jones v. U. S.*, 5 Cranch (C. C.) 654.

What Is Intent to Defraud. — The intent to defraud is the intent by the use of such false means to induce another to part with his possession and to confide it to the defendant when he would not otherwise have done so. *Com. v. Coe*, 115 Mass. 502; *People v. Oscar*, 105 Mich. 704.

Intention to Repay. — It has been held that if a person obtains a loan of money from another by a false pretense of an existing fact, he commits the offense, although he intended to repay the money. *Com. v. Schwartz*, 92 Ky. 510, citing 7 AM. AND ENG. ENCYC. OF LAW (1st ed.) 752, 753.

Intention Wholly to Deprive Owner of Property. — To constitute an obtaining by false pretenses it is essential, equally as in larceny, that there shall be an intention to deprive the owner wholly of the property obtained.¹

The Intent Is the Gist of the Offense, and ordinarily proof of its existence must depend upon the circumstances attending the transaction.²

b. INTENT TO DEFRAUD A PARTICULAR PERSON. — Under statutes in some jurisdictions it is not necessary to prove an intent to defraud any particular person; it is sufficient to prove that the party did the act with intent to defraud.³

c. WHEN INTENT NOT FRAUDULENT. — It has been held that where a false pretense is made for the purpose of cheating a person into the performance of a duty — as to collect or obtain satisfaction of a debt due — by which money or property is obtained, even though the pretense employed for the purpose is false, the offense is not committed, for in such case there is no intent to defraud.⁴

d. INTENT A QUESTION OF FACT. — The question of intent is not a pre-

Accomplishing Another Result than That Intended. — The statute of *Indiana* in force in 1869 (2 Gav. & H. 445, § 27; now Rev. Stat. 1896, § 2204) did not require as an element of the offense that the false representation should be made for the purpose of accomplishing the particular thing which does result. Accordingly it has been held that if there be an intent to accomplish a particular result by the false pretense, which fails, and another thing of value be obtained and accepted with like intent to defraud, the law imputes a design from the beginning to consummate the latter result. *Todd v. State*, 31 Ind. 514.

Pretense Made as Excuse for Not Working. — A pretense to a parish officer, as an excuse for not working, that the party had not clothes, when really he had, although it induced the officer to give him clothes, was held not to be obtaining goods by false pretenses, inasmuch as the pretense was made rather as an excuse for not working than for obtaining the clothes. *Rex v. Wakeling*, R. & R. C. C. 375.

1. Obtaining Use of a Chattel. — The obtaining by false pretenses the use of a chattel for a limited time only, without an intention to deprive the owner wholly of the chattel, is not obtaining it by false pretenses within the statute 24 & 25 Vict., c. 96, § 88. *Reg. v. Kilham*, L. R. 1 C. C. 261, 39 L. J. M. C. 109, 22 L. T. N. S. 625, 18 W. R. 957, 11 Cox C. C. 561. See also the title LARCENY.

2. Intent Gist of Offense. — *Weyman v. People*, 4 Hun (N. Y.) 516, affirmed 62 N. Y. 623; *People v. Getchell*, 6 Mich. 496; *Trogdon v. Com.*, 31 Gratt. (Va.) 362.

Fraudulent Agreement Between Agent and Sub-agent. — Where the accused as a subagent collected money from another person under a fraudulent agreement with the agent to divide the money, with the knowledge and belief that it was the intention of the agent to squander the money, and not to account for it and pay it over to his employers, this was held evidence of an intent to defraud. *Com. v. Call*, 21 Pick. (Mass.) 522, 32 Am. Dec. 284.

Knowledge of Falsity of Pretense as Proof of Intent. — Where an indictment charged that the defendant, with intent to defraud the state, procured an order from the state debt board for the exchange of coupons for state

certificates of indebtedness, by falsely pretending that the bonds from which the coupons were cut had been redeemed, it was held that the defendant's knowledge that such bonds had been redeemed was not proof of his intent to defraud, for he may have intended no fraud upon the state when he made the representation. *Woodruff v. State*, 61 Ark. 179. See also *supra*, this section, *Essentials of the Cheat or Pretense — Defendant's Knowledge of Falsity of Pretense*.

3. Under Stat. 24 & 25 Vict., c. 96, § 88, it is not necessary to prove an intent to defraud any particular person. An intent to defraud is sufficient. 2 Russ. on Cr. (9th Am. ed.) 618.

Colorado. — Under Gen. Stat. Colo., 1883, § 884 (Mills's Annot. Stat. 1891, § 1378), making it an offense for any person to report falsely of his honesty, wealth, or mercantile character, it is not necessary that an intention to defraud any particular person should exist. *Schayer v. People*, 5 Colo. App. 75.

4. Obtaining Satisfaction of a Debt Due. — *Rex v. Williams*, 7 C. & P. 354, 32 E. C. L. 540; *Jamison v. State*, 37 Ark. 445, 40 Am. Rep. 103; *Com. v. McDuffy*, 126 Mass. 467; *People v. Thomas*, 3 Hill (N. Y.) 169; *State v. Hurst*, 11 W. Va. 71. See also *People v. Griffin*, 2 Barb. (N. Y.) 429.

Contra. — *People v. Smith*, 5 Park. Cr. Rep. (N. Y. Supreme Ct.) 490. See also *Com. v. Leisy*, 1 Pa. Co. Ct. Rep. 50, where it was held that it was a false pretense to buy a horse and give a check in payment for it upon a bank in which the drawer had no funds, even though the check was given as a ruse in order to obtain the payment of a debt due by the prosecutor to the defendant.

Obtaining Possession of Property as Agent Without Fraudulent Intent. — Where the defendant, as agent for her daughter, obtained from C. possession of an organ which belonged to the daughter, who was entitled to its immediate possession by reason of the nonpayment of the price thereof, by falsely representing that she was the agent of the "Western Temple of Music," but it was her desire only to get possession of said organ without any intent to defraud, it was held that she was not guilty of obtaining property by false pretenses. *Matter of Cameron*, 44 Kan. 64.

sumption of law, but a question of fact which must be submitted by the court to the jury. Being a secret operation of the mind, it can be ascertained only by the acts and representations of the party.¹

6. The Obtaining of Property — *a. IN GENERAL.* — In order to constitute the offense the property must have been actually obtained. Using a false pretense whereby property could be obtained, without more, would not constitute the offense.²

Obtaining by Accused or for His Benefit. — In some cases it has been held that in order that the property may be obtained within the meaning of the statute, the obtaining must have been by the party himself, or in accordance with the wish or for the advantage of himself, or for the purpose of effecting some object of the party making the false pretense.³ But under the statutes of

1. Intention a Question of Fact for Jury. — *Reg. v. Cooper*, 2 Q. B. Div. 510, 46 L. J. M. C. 219, 36 L. T. N. S. 671, 25 W. R. 696; *Woodruff v. State*, 61 Ark. 179; *Com. v. Walker*, 108 Mass. 312; *State v. Norton*, 76 Mo. 181; *Brown v. People*, 16 Hun (N. Y.) 535; *Com. v. Daniels*, 2 Pars. Eq. Cas. (Pa.) 340; *Com. v. M'Crossin*, 3 Pa. L. J. 219; *Trogdon v. Com.*, 31 Gratt. (Va.) 862.

2. The Property Must Have Been Obtained. — *Reg. v. Hazelton*, L. R. 2 C. C. 139; *Rex v. Buttery*, 5 D. & R. 616, cited in *Pearson v. M'Gowran*, 3 B. & C. 700, 10 E. C. L. 215; *Rex v. Burdett*, 4 B. & Ald. 179, 6 E. C. L. 440; *Com. v. Smith*, Vaux (Pa.) 74; *Ex p. Parker*, 11 Neb. 313.

Under the *District of Columbia Penitentiary Act*, no person is guilty of the offense respecting false pretenses unless he has obtained something by his false pretense. *Jones v. U. S.*, 5 Cranch (C. C.) 650.

In *Arkansas* it has been held that where a party is charged with obtaining money by false pretenses, the money must have been actually and not merely impliedly or constructively obtained, and must have come into the defendant's possession. *Jamison v. State*, 37 Ark. 445, 40 Am. Rep. 103.

Under the *North Carolina Act of 1891*, c. 205, the goods must have been feloniously obtained. *State v. Wilson*, 116 N. Car. 979.

"Obtain" — **Meaning of.** — The primary definition of the word "obtain," as given by Webster, is, "to get hold of by effort." *Ex p. Parker*, 11 Neb. 309.

In *Reg. v. Garrett*, 17 Jur. 1060, Dears. C. 232, Maule, J., said: "The word 'obtain' means the same as the word 'get,' in its sense of 'acquiring.'" Parke, B., said: "The word 'obtain,' as used in the statute, seems to mean not so much a defrauding or depriving another of his property, as the obtaining some benefit to the party making the false pretense."

"The word 'obtain' does not mean obtain the loan of, but obtain the property in, any chattel, etc." *Reg. v. Kilham*, L. R. 1 C. C. 261.

To obtain means to "get hold of; to get possession of; to acquire." *State v. McGinnis*, 71 Iowa 685.

The word "obtained" is used in the *Illinois* statute, not in any antiquated and obsolete sense, but in its ordinary and popular signification as an active verb, meaning "acquired." *Watson v. People*, 27 Ill. App. 496.

Under the *Kansas* statute providing that "Every person who, with intent to cheat or defraud another, shall designedly, by means of any false token or writing, * * * obtain from any person any money, personal property," etc., an indictment alleged that upon certain false pretenses a party paid to the defendant a certain sum of money, and also paid certain liens and incumbrances to a certain amount. It was held that while it was not necessary to use the exact words of the statute, other words conveying the same meaning must be employed; but that the substitution of the word "paid" was not equivalent to the word "obtained;" that the crime defined was not that of making a false pretense, but that the statute was directed against one who obtains something, or in other words who gets possession of something, purposely, by effort, that is, by a false pretense. *Brewer, J.*, dissented, but concurred in a reversal on other grounds. *State v. Lewis*, 26 Kan. 123.

But in *Sandy v. State*, 60 Ala. 60, it was held that where the defendant procures money to be paid to another in extinguishment of his own debt, it is the same in fact and in law as if the money had been first paid to him, and by him to the creditor; that the gist of the offense — the practical wrong — lies in inducing another to part with something valuable by knowingly representing as true that which is false; such representation being made to the prisoner's advantage and with intent either to injure or defraud the person to whom the representation is made.

"Retained" is not synonymous with "obtained," and therefore where a person retained money by virtue of his position, although he remained in such position by false pretenses, it was held that the offense was not committed. *Watson v. People*, 27 Ill. App. 496.

3. The Obtaining Must Be by the Party Accused or for His Benefit. — *Reg. v. Garrett*, Dears. C. C. 232, 6 Cox C. C. 260, 2 C. L. R. 106, 23 L. J. M. C. 20, 17 Jur. 1060; *Bracey v. State*, 64 Miss. 26; *People v. Court of Gen. Sess.*, 13 Hun (N. Y.) 400.

Where the Property Was Obtained by a Third Party. — Where a person falsely represents to a vendee of land that the vendor holds and owns the title thereto, and the vendee accordingly, in consideration of the transfer of the land, gives to the vendor money and a note, the party thus falsely representing the vendor's title cannot be convicted of obtaining money or property by false pretenses, where he does

some of the *United States* it is not necessary that the property should be obtained for the benefit of the defendant.¹

Right of Property Must Be Parted With. — Even though the property be obtained by a false pretense, yet if the defrauded party did not intend to part with his right of property in the thing obtained, but merely with the possession of it, the offense is not committed.²

b. PROPERTY NOT IN EXISTENCE WHEN PRETENSE MADE. — The offense may be committed although the property be not in existence at the time the pretense is made, provided the subsequent delivery of the property is directly connected with the false pretense.³

c. DEFENDANT INTERESTED IN PROPERTY OBTAINED. — If the defendant be interested in the property obtained, either as a partner or a stockholder, the offense is not committed.⁴

d. DELIVERY OF PROPERTY. — Where the party committing the fraud has possession of the property at the time when the false pretense is made, there is a complete transfer of it without delivery.⁵ There is an obtaining from the prosecutor when his property is obtained from his wife⁶ or from his agent.⁷

e. OWNERSHIP OF PROPERTY. — The ownership of the property must be shown. This is necessary to exclude the fact of the defendant's having

not obtain or receive the note or money, or either. Proof simply that they were received by the vendee is not sufficient. *Willis v. People*, 19 Hun (N. Y.) 84.

1. Under the Indiana Statute since embodied in Rev. Stat. 1896, § 2204, providing that "whoever" shall obtain money or property by false pretenses shall be guilty of a felony, it has been held that it makes no difference that the direct and immediate object of the person making the false pretense is to obtain money for another, for the gravamen of the offense consists in the felonious purpose to defraud another out of money or property; that it is not an element of the offense that it shall be obtained for the person making the pretenses or that he shall intend to obtain it for himself. *Musgrave v. State*, 133 Ind. 297.

Massachusetts. — In *Com. v. Harley*, 7 Met. (Mass.) 462, where parties were jointly indicted, it was held that it was not necessary to a conviction that they, or either of them, obtained property on their own account, or derived or expected to derive personally any pecuniary benefit therefrom. And in *Com. v. Langley*, 169 Mass. 89, it was held to be no defense that the title to the property obtained by the defendant and which came into his hands as treasurer of a corporation, did not pass to him but to the corporation, and that evidence that he received no benefit from it was incompetent.

Under Rev. Stat. Ohio, § 7088, making it an offense for a person to write or print, either in whole or in part, any letter, telegram, or other instrument, "with intent to obtain from any person anything of value, and to wrong and defraud any person," it is not necessary that the person intend to obtain the money for himself. The statute says "whoever writes." It does not say for whom the property shall be obtained. *State v. Hofman*, 2 Ohio Dec. 206, 1 Ohio N. P. 209.

The Texas Penal Code, art. 793 (Pen. Code 1895, § 946), provides that "it is not necessary, in order to constitute the offense of swindling, that any benefit shall accrue to the person

guilty of the fraud or deceit." *May v. State*, 15 Tex. App. 436.

2. The Right of Property in the Thing Obtained Must Be Parted With. — Where a person obtained a machine by means of a false pretense, but the written contract contained a provision that the title, ownership, and possession of the machine should remain with the vendor until full payment of the note for the price thereof, and that the vendors could declare the note due and take possession of the machine at any time they deemed themselves insecure, even before the maturity of the note, it was held that this did not constitute a false pretense. *State v. Anderson*, 47 Iowa 142. Compare *Reg. v. Corey*, 22 New Bruns. 547. See also *supra*, this section, *Distinguished from Other Offenses — From Larceny*.

3. Property Not in Existence When Pretense Made. — *Reg. v. Martin*, L. R. 1 C. C. 56, 36 L. J. M. C. 20, 15 L. T. N. S. 54, 15 W. R. 358, 10 Cox C. C. 383.

4. Where Defendant Interested in Property Obtained. — *Reg. v. Watson, Dears. & B. C. C.* 348, 7 Cox C. C. 364, 4 Jur. N. S. 14; *Reg. v. Evans*, 9 Cox C. C. 238, Leigh & C. 252, 32 L. J. M. C. 38, 9 Jur. N. S. 184, 7 L. T. N. S. 507, 11 W. R. 125; *Reg. v. St. Louis*, 10 L. C. Rep. 34.

5. Obtaining Property Without Delivery. — Where a banker collects money for a customer and induces the customer, by false representations, while the money is still in his possession, to loan it to the bank, he is guilty of the offense, as there was a complete transfer of the property without the delivery. *Com. v. Schwartz*, 92 Ky. 510, 36 Am. St. Rep. 609, (Ky. 1892) 19 S. W. Rep. 189.

6. Obtaining Money from Prosecutor's Wife. — *Reg. v. Moseley, Leigh & C.* 92, 9 Cox C. C. 16, 31 L. J. M. C. 24, 7 Jur. N. S. 1108, 5 L. T. N. S. 328, 10 W. R. 61.

7. Obtaining Goods from Selling Agent. — The charge that goods were obtained from a person is sufficiently supported by proof that such a person was a selling agent and had the possession of them. *Com. v. Blanchette*, 157 Mass. 489.

obtained his own goods or money, in which case there can be no offense unless the prosecuting witness has some special interest in the property.¹

f. INJURY OR PREJUDICE TO DEFRAUDED PARTY. — The general rule is that the party from whom the property was obtained must have been cheated and defrauded by the false representation made,² and that although a false representation be made, and property thereby obtained, no crime is committed if the party from whom the property was obtained is not injured³ or

1. Ownership of Property Must Be Proved. — Reg. v. Marsh, 1 Den. C. C. 505, T. & M. 192, 3 New Sess. Cas. 699, 13 Jur. 1010; Ladd v. State, 17 Fla. 220.

Ownership or Possession. — The prosecutor being in possession of the property obtained *prima facie*, he is the owner. But if he has it in his possession as bailee or trustee, it is sufficient to sustain an indictment for obtaining the prosecutor's property. Britt v. State, 9 Humph. (Tenn.) 42.

Alabama Statute. — A person having possession of property belonging to the estate of a decedent was induced to part with it on the false pretense that he had been sent for it by the decedent's widow. It was held that if there was an intent to defraud either the widow or the bailee, either had a sufficient property or interest in the thing obtained to be the subject of such intent, and that it was not indispensably necessary that there should have been administration on the estate of the decedent; for the widow has, under the Alabama statute, a valuable and clearly defined interest in her husband's estate, and in its preservation. Mack v. State, 63 Ala. 138.

Under the Massachusetts General Statutes, c. 172, § 12, the actual or constructive possession of money fraudulently obtained, or the general or special property in the whole or any part of it, is sufficient to support a charge of obtaining it from the person named in the indictment. Com. v. McDuffy, 126 Mass. 467.

Special Property in Thing Obtained. — Possession gives a special property, which the law regards and will protect against any claimant except the rightful owner. Mack v. State, 63 Ala. 140. And where a person has a special property and the general owner obtains it from him by false pretenses, it is the property of the special owner. Reg. v. Martin, 2 Jur. 516.

2. Injury or Prejudice to Defrauded Party — California. — People v. Jordan, 66 Cal. 10, 56 Am. Rep. 73.

Georgia. — Berry v. State, 97 Ga. 202; Drought v. State, (Ga. 1897) 28 S. E. Rep. 1013.

Kansas. — Matter of Snyder, 17 Kan. 553; State v. Clark, 46 Kan. 65; State v. Palmer, 50 Kan. 324.

Michigan. — People v. Wakely, 62 Mich. 303.

North Carolina. — State v. Munday, 78 N. Car. 460.

But in Com. v. Wilgus, 4 Pick. (Mass.) 178, it was held not necessary to prove that the prosecutor was actually defrauded; that if he might have been defrauded, and there was an intent to defraud, it is sufficient.

"Injury" — "Defraud." — In the Alabama Code of 1876, § 4370 (Crim. Code 1896, § 4729), punishing the offense of obtaining money or property "with the intent to injure or de-

fraud," the word "injure" means nothing more or less than what is implied in the word "defraud." The only injury that can be inflicted is the deception which imposes on the confidence of the other. This is a fraud. Carlisle v. State, 76 Ala. 75.

To defraud means to cheat a person out of something. *Per* Pollock, C. B., in Reg. v. Ingham, Bell C. C. 181. In consequence of this, the word "cheat" has been omitted in the statute of 24 and 25 Vict., c. 96, § 88, the previous enactments having "cheat or defraud." 2 Russ. on Cr. (9th Am. ed.) 618, note.

Under Gen. Stat. Colorado 1883, § 884 (Mills's Annot. Stat. 1891, § 1378), providing that "if any person * * * shall obtain a credit thereby, defraud any person or persons of * * * any valuable thing," etc., the clause should be construed as if it read "shall obtain a credit, and thereby defraud." Morris v. People, 4 Colo. App. 136.

3. Other Notes Given Sufficient to Protect Prosecutor. — Where money was obtained under false pretenses as to the value of a note given as security for money borrowed, it was held that the offense was not committed where it appeared that other notes given at the same time were sufficient to protect the party defrauded from any loss through the defendant's false representation. State v. Palmer, 50 Kan. 324.

No Effort Made to Collect Note Which Could Have Been Collected. — A person obtained money on the execution of a mortgage on certain property and of a note indorsed by solvent parties. The prosecutor ascertained that the defendant did not own all the property mentioned in the mortgage, but made no effort to collect the amount of the note from the indorsers, which he could have collected. It was held that the defendant did not commit the offense, for the prosecutor was not injured. State v. Clark, 46 Kan. 65.

Grantee in a Deed Fraudulently Substituting His Own Name. — Where a deed to real estate, perfect in form with the exception that the grantee's name was omitted, was duly executed and acknowledged and left with a person to have the grantee's name afterwards filled in, and such person inserted his own name as grantee, instead of the name of the person to whom the deed was to be executed, whereby he procured money on a mortgage of the property described in the deed, it was held that he was not guilty of obtaining money under false pretenses from the mortgagee, because the latter was not cheated or defrauded, he having received a valid mortgage, by reason of being ignorant of the transaction between the parties to said deed, which as to the grantor was valid. State v. Matthews, 41 Kan. 602.

prejudiced thereby.¹

g. **CONVERSION OF PROPERTY.** — If the defendant has authority to obtain the property, he does not commit the offense although he converts it to his own use.²

h. **THE PROPERTY OR THING OBTAINED** — (1) *In General.* — The offense of false pretenses being statutory, the statutes of the particular state must be consulted as to whether or not the property or thing obtained is within their provisions. At common law the offense of cheating did not apply to a fraudulent transaction whereby the owner of land was deprived of it.³ And such a transaction has been held not to be the subject of a criminal charge under a statute providing against the obtaining of "money, goods, property, or other things of value."⁴ But the obtaining of such property is now punishable under the statutes generally in force in the *United States* against obtaining by

Where Prior Lien Waived by Acts and Conduct of First Mortgagee. — Where a mortgagor falsely represented to a second mortgagee that a second mortgage was a first mortgage, but he was urged to make such representation by the first mortgagee, it was held that the offense was not committed; for the first mortgagee by his conduct waived his prior lien and thus rendered the second mortgage the first mortgage, giving to the second mortgagee what he bargained for. *State v. Asher*, 50 Ark. 427.

Prior Mortgage Not Being Enforced. — It has been held that there is no injury where a person gives a second mortgage on property which he falsely pretends to be free from incumbrances, in the absence of evidence that the property has neither been sold nor appropriated to the extinguishment of the senior mortgage, and especially where the evidence shows that the mortgaged property exceeds in value the aggregate indebtedness represented in both the mortgages, and it does not appear that the senior mortgage is being either claimed against the mortgagor or enforced against the mortgaged property. *McGee v. State*, 97 Ga. 199.

Under the Texas Penal Code, art. 793 (Pen. Code 1895, § 496), it is not necessary to constitute the offense that any injury shall result to the person intended to be defrauded. It is sufficient that there was a wilful design to receive benefit or cause an injury. *May v. State*, 15 Tex. App. 436.

1. *People v. Cook*, 41 Hun (N. Y.) 69.

Obtaining Signature to Written Instrument. — Where a party is indicted for obtaining by false pretenses a signature to a written instrument, in order to bring a case within the statute the instrument must be of such a character as may work a prejudice to the party from whom it was obtained. *State v. Butler*, 47 Minn. 483.

To Constitute an Injury or Prejudice to the innocent party in obtaining his signature to a deed conveying real estate, the prosecutor must own or have some interest in the land described in the deed, or the deed itself must contain covenants rendering him liable to an action. *Dord v. People*, 9 Barb. (N. Y.) 675; *State v. Jamison*, 74 Iowa 613. See also *People v. Williams*, 4 Hill (N. Y.) 9, 40 Am. Dec. 258.

Unacknowledged Deed to Property of Married Woman. — Where a husband fraudulently obtained from his wife a deed conveying real

estate belonging to her in her own right in the state of New York, under the pretense that it was a deed of lands in Illinois belonging to him, but the deed was not acknowledged by the wife in the mode prescribed by law for passing the estate of a *feme covert* in New York, it was held that such deed was not such an instrument as was contemplated in the statute, as it could not prejudice the wife's rights in her property. *People v. Galloway*, 17 Wend. (N. Y.) 540.

A Warranty Deed means a deed with at least covenants of warranty, and shows sufficiently that it may prejudice the party signing it. *State v. Butler*, 47 Minn. 483.

Indorsement of Note in Renewal. — In *People v. Miller*, 2 Park. Cr. Rep. (N. Y. Supreme Ct.) 200, it was said that where a person is induced by false representations to indorse a note in renewal of a previous one, it is questionable whether such a case comes within the spirit and object of the statute to punish false pretenses; that the prosecutor's liability is not increased by the transaction.

The Renewal of a Bill of Exchange obtained under false pretenses or by means of fraud is incurring a debt or liability whereby credit is obtained within the meaning of subsection 1 of section 13 of the Debtors Act (England), 1869. *Reg. v. Pierce*, 56 L. J. M. C. 85, 56 L. T. N. S. 532, 51 J. P. 790, 16 Cox C. C. 213.

Under the Iowa Statute providing that if any person with intent to defraud "falsely * * * make any instrument in writing, * * * purporting to be the act of another, by which any pecuniary demand or obligation is created," he shall be punished, it has been held that an intent to defraud only is required; it is not necessary that a pecuniary loss should have been suffered. *State v. Jamison*, 74 Iowa 613.

2. Conversion of Property Obtained under Authority. — A surveyor of highways, having authority to order gravel for the roads, ordered gravel as usual, and applied it to his own use. This was held not to be a false pretense. *Reg. v. Richardson*, 1 F. & F. 488.

3. Land Not the Subject of a Cheat at Common Law. — *Com. v. Woodruff*, 7 Pa. L. J. 362; *State v. Burrows*, 11 Ired. L. (33 N. Car.) 477.

4. Changing the Quantity of Land Conveyed in a Plat and Survey. — *State v. Burrows*, 11 Ired. L. (33 N. Car.) 477. See also *State v. Layman* 8 Blackf. (Ind.) 330.

false representations a signature to a written instrument.¹

Statute 30 Geo. II. — The property included in the statute 30 Geo. II., c. 24, § 1, was limited to money, goods, wares, or merchandise.²

1. See *infra*, this section, *Signature to Written Instrument*.

2. **Money.** — Banknotes were not money, wares, or merchandise, within the statute 30 Geo. II., c. 24, § 1. *Rex v. Hill*, R. & R. C. C. 142.

Under the *Virginia* Act of Nov. 18, 1789, judgment was arrested where a prisoner was convicted of fraudulently obtaining from the Bank of Virginia one of its notes for one hundred dollars. *Com. v. Swinney*, 1 Va. Cas. 146, 5 Am. Dec. 512. But where the same party was indicted for fraudulently obtaining from the bank "fifty dollars in money current in the said commonwealth of Virginia," the indictment was held good. In the note to the report of this case it is said that the judgment was arrested in the first case on the ground, it is presumed, that the obtaining of the bank-note was not "money" in the sense in which that term was used in the act. *Com. v. Swinney*, 1 Va. Cas. 150.

But in *State v. Kube*, 20 Wis. 217, 91 Am. Dec. 390, where the indictment charged the obtaining of a package of money containing the sum of sixty dollars in bank bills, it was held that bank bills are money; that the word money is as frequently and generally applied to bank bills or notes which represent coin, or are a substitute for it, and pass current as a medium of exchange and commerce, as it is to coined metals, as gold, silver, or copper.

Although according to the English doctrine bank bills were not money under the statute 30 Geo. II., c. 24, the obtaining thereof would be punishable under the statute 7 & 8 Geo. IV., c. 29, § 53, which extended to the obtaining a "valuable security," and under the American statutes a bank bill or note would undoubtedly be a "thing of value." See *infra*, this section, *Valuable Thing*.

Selling Railway Passes. — Where it appeared that the defendant sold two railway passes good only to carry a particular person, and which the purchaser could not use except by committing a fraud on the railway company, and at the risk of being at any moment expelled from the train, it was held that there was evidence to go to the jury on an indictment against the defendant for obtaining money by false pretenses. *Reg. v. Abrahams*, 24 L. C. Jur. 325, 1 *Dorion* (Quebec) 126.

Obtaining Entry of Judgment Is Not Obtaining Money. — A person who by false and fraudulent representations obtains the consent of a city to the entry of a judgment in his favor against it in an action then pending for damages for an injury to him on a street of said city, and the payment of a sum of money by the city in satisfaction of that judgment, cannot be convicted of obtaining money by false pretenses. The money paid upon the judgment was not in a legal sense obtained by false pretenses, which were used only to procure the consent of the city that the judgment should be rendered. *Com. v. Harkins*, 128 Mass. 79.

Obtaining Credit on an account is not obtain-

ing money by false pretenses. *Reg. v. Eagleton*, 1 Jur. N. S. 944.

Obtaining credit on a promissory note is not obtaining money, goods, or other property. *State v. Moore*, 15 Iowa 412.

Obtaining credit in account from the party's own banker, by drawing a bill of exchange on a person on whom the party has no right to draw, and which has no chance of being paid, is not a false pretense, though the banker pays money for him in consequence to an extent that he would not otherwise have done. *Rex v. Wavell*, 1 Moo. C. C. 224.

Where a person who had an interest in the profits of a ship had repairs done to the ship, and in the settlement of accounts presented a receipt for a larger amount than he had paid, it was held that this was not obtaining money under false pretenses, but only a credit on account. *Reg. v. Crosby*, 1 Cox C. C. 10.

Obtaining Food and Refreshment in Restaurant. — A person obtained food and refreshment in a restaurant without payment; but no statement being made by him as to whether or not he had means to pay, nor any question put to him, or inquiry made from him, it was held that while he was not indictable under the Larceny Act of 1861, of obtaining goods by false pretenses, he was liable under section 13 of the Debtors' Act, 1869, for obtaining credit by fraud. *Reg. v. Jones*, (1898) 1 Q. B. 119.

Credit — Definition of. — In *People v. Wasservogel*, 77 Cal. 173, the court said: "Among the definitions of the word 'credit' are the following: 'Credit is confidence or trust reposed in one's ability to pay what he may promise,' *Abbott's Law Dict.* 'The ability to borrow, on the opinion conceived by the lender that he will be repaid,' *Bouvier's Law Dict.* 'Credit is the capacity of being trusted,' *Dry Dock Bank v. American L. Ins., etc., Co.*, 3 N. Y. 356."

Procuring Discharge of a Debt. — Where the defendant, being indebted to another, obtained satisfaction of his debt by false pretenses made to the defrauded party, to whom the defendant's creditor was indebted, said debt being satisfied by the discharge of the indebtedness due to the defrauded party by the defendant's creditor, it was held that the offense was not committed, for no money was obtained by the defendant. *Jamison v. State*, 37 Ark. 445, 40 Am. Rep. 103.

Property. — The note of a minor is not property within the *Massachusetts* statute of 1815, c. 136 (Rev. Stat., c. 126, § 32), and a person obtaining such note does not commit the offense. *Com. v. Lancaster*, Thach. Cr. Cas. (Mass.) 428.

Under the *Iowa* Code, § 45 subdiv. 9, 10, personal property includes evidences of debt, and under section 4073 a nonnegotiable draft drawn on an insurance company by its adjuster in settlement of a claim under an insurance policy for the value of horses destroyed, even though such draft was not approved by the board of directors of said company, is property. As between the defendant and the insurance

By the Statute 52 Geo. III., c. 64, § 1, the provisions of the statute 30 Geo. II. were extended so as also to include securities and choses in action.¹

Statute 7 & 8 Geo. IV. — But as these statutes, as well as the statute 33 Hen. VIII., were found insufficient to protect against the obtaining of other kinds of property, the statute 7 & 8 Geo. IV., c. 29, § 53, which repealed all the previous statutes referred to, was enacted. This statute punished the obtaining of "any chattel, money, or valuable security."² But in order to sustain a conviction under this statute the valuable security must have been such while in the hands of the prosecutor.³

company it is an evidence of debt, although never accepted or approved. *State v. Patty*, 97 Iowa 373.

Under the *California* Penal Code, § 7, a promissory note is personal property and may be the subject of the crime of obtaining property under false pretenses. *People v. Reed*, 70 Cal. 529, *People v. Skidmore*, (Cal. 1899) 55 Pac. Rep. 984.

Under the *Michigan* statute (2 How. Annot. Stat. 9432), a promissory note is "personal property" and "evidence of debt." *People v. Summers*, (Mich. 1898) 73 N. W. Rep. 818.

1. **Statute 52 Geo. III., c. 64, § 1**, provides that "all persons who knowingly and designedly, by false pretense or pretenses, shall obtain from any person or persons, or from any body politic or corporate, any money, goods, wares, or merchandise, or any bond, bill of exchange, banknote, promissory note, or other security for the payment of money, or any warrant or order for the payment of money or delivery or transfer of goods, or other valuable thing, with intent," etc., shall be punished. 3 Chitty's Cr. L. 998; *People v. Stone*, 9 Wend. (N. Y.) 182, *People v. Gates*, 13 Wend. (N. Y.) 311; 2 Bish. N. Cr. L., § 411 (2).

2. **Property Obtained under Stat. 7 & 8 Geo. IV.** — 2 Bish. N. Cr. L., § 412, 2 Russ. on Cr. (3d Eng. ed.) 287.

Dogs. — Dogs, not being subject to larceny at common law, are not chattels within the 7 & 8 Geo. IV., c. 29, § 53, and a person who, by means of false representations, obtained two pointer dogs from another does not commit the offense of obtaining property by false pretenses. *Reg. v. Robinson*, Bell C. C. 34, 28 L. J. M. C. 58, 5 Jur. N. S. 203, 7 W. R. 203.

Railway Ticket. — A ticket which enables a person to travel on a railway is a chattel within the statute of 7 & 8 Geo. IV., c. 29, § 53, and a person obtaining it by false pretense from a servant of the company commits the offense. The fact that the ticket was to be returned at the end of the journey does not prevent it, while of value to the holder as enabling him to travel gratis, from being a chattel. *Reg. v. Boulton*, 2 C. & K. 917, 61 E. C. L. 917, 1 Den. C. C. 508, 3 Cox C. C. 576, 13 Jur. 1034.

It was said by the court in *Reg. v. Kilham*, L. R. 1 C. C. 261, 39 L. J. M. C. 109, that the reasons for the above decision do not very clearly appear, but that it might be said that the prisoner, by using the ticket, entirely converted it to his own use, for the only purpose for which it was capable of being applied.

3. **One's Own Acceptance Not a Valuable Security.** — *Reg. v. Danger*, Dears. & B. C. C. 307, 7 Cox C. C. 303, 3 Jur. N. S. 1011. In

consequence of this decision the statute 24 & 25 Vict., c. 96, § 90, was enacted, covering such a case. *Reg. v. Gordon*, 23 Q. B. Div. 354.

Obtaining a Signature to a Mortgage from the prosecutor is not obtaining a valuable security, within the meaning of Consol. Stat. *Canada*, c. 92, § 72. To bring the offense within the statute it must be a valuable security to the person who parts with it. *Reg. v. Brady*, 26 U. C. Q. B. 13.

Order on Treasurer of a Burial Society. — Where a secretary to a burial society falsely pretended that a death had occurred, and so obtained from the president an order on the treasury, it was held that this was a valuable security under 7 & 8 Geo. IV., c. 29, § 53, as explained by section 5. *Reg. v. Greenhalgh*, 1 Dears. C. C. 267, 6 Cox C. C. 257.

Check on Banker on Unstamped Paper. — If a person by false pretenses obtains a check on a banker on unstamped paper, payable to D. F. J., and not payable to bearer, it is not an obtaining a valuable security by false pretenses. *Rex v. Yates*, Car. C. L. 333, 1 Moo. C. C. 170.

Valuable Security Procured Through the Medium of a Contract. — In *Reg. v. Rymal*, 17 Ont. Rep. 227, the defendant, by untrue representations, made with knowledge that they were untrue, induced the prosecutor to sign a contract to pay two hundred and forty dollars for seed wheat. He also represented that he was the agent of another person whose name appeared in the contract, and who afterwards called upon the prosecutor and procured him to sign and deliver to him a promissory note in such person's favor for two hundred and forty dollars. The contract did not provide for the giving of a note, and when the representations were made nothing about a note was mentioned. The prosecutor, however, swore that he gave the note because he had entered into the contract. It was held, upon a case reserved, that the charge of false pretenses can be sustained as well where the money is obtained or the note procured to be given through the medium of a contract as when obtained or procured without a contract; and the fact that the prosecutor gave a note instead of the money did not relieve the defendant from the consequences of his fraud; the giving of the note was the direct result of the fraud by which the contract had been procured. But the note before it was delivered was not a valuable security, but only a paper upon which the prosecutor had written his name, so that it might be afterwards used and dealt with as a valuable security. *Citing Reg. v. Danger*, Dears. & B. C. C. 307. See also *Reg. v. Hope*, 17 Ont. Rep. 463.

Statute 24 & 25 Vict. — The statute 24 & 25 Vict., c. 96, which repeals the statute 7 & 8 Geo. IV., c. 29, also punishes the obtaining any chattel, money, or valuable security; but in order to meet the deficiencies of that statute in regard to the construction placed by the courts upon what constituted a valuable security, section 90 also provides that any person who "shall by any false pretense fraudulently cause or induce any other person to execute, make, accept, indorse, or destroy the whole or any part of any valuable security, or to write, impress, or affix his name, or the name of any other person, or of any company, firm, or copartnership, or the seal of any body corporate, company, or society, upon any paper or parchment, in order that the same may be afterwards made or converted into or used or dealt with as a valuable security, shall be guilty of a misdemeanor." ¹

(2) *Valuable Thing.* — Under statutory enactments in several of the United States the character of property that may be obtained by a false pretense has been extended so as to embrace not only such as is mentioned in the several English statutes referred to, but any "valuable thing," which phrase is more comprehensive than "valuable security." ² But it has been held that if the person whose signature has been obtained could not, in a civil action, on proof that it was obtained by false pretenses, be affected, the signature obtained is not a "valuable thing," and the offense is not committed. ³ The soundness of this rule is, however, questionable, and its authority appears to have been shaken. ⁴ Under a statute making it an offense to obtain a valuable thing

1. Property Obtained under Statute 24 & 25 Vict. — 2 Russ. on Cr. (9th Am. ed.) 618. See Reg. v. Bowerman, (1891) 1 Q. B. 112, 60 L. J. M. C. 13, 63 L. T. N. S. 532, 39 W. R. 207, 17 Cox C. C. 151.

2. Valuable Thing. — A check representing funds in the bank is a "thing of value" the obtaining of which by false pretenses is indictable under Rev. Stat. Ohio, § 7076. Tarbox v. State, 38 Ohio St. 581.

Under the Washington statute, Penal Code, § 234, a woman's beaver shoulder cape is a thing of value. State v. Reiff, 14 Wash. 664.

A nonnegotiable promissory note is a valuable thing. State v. Porter, 75 Mo. 177. So also is a person's signature as surety on a promissory note. State v. Thatcher, 35 N. J. L. 445.

On a charge of obtaining an indorsement on a promissory note, the valuable thing is the indorsement, and not the amount of the note. State v. Blauvelt, 38 N. J. L. 307.

See State v. Barr, (N. J. 1898) 40 Atl. Rep. 777, for an indictment which, although held bad as a charge of conspiracy for want of an averment of some act done in execution of the agreement to effect the object thereof, was considered good as an indictment for obtaining a valuable thing by false pretenses.

Option on Real Estate and Power of Attorney. — Where a party procured in Missouri an option on real estate and a power of attorney from husband and wife, the real estate being situate in Kansas and held in right of the wife, it was held that the common law would be presumed to prevail in the sister state of Kansas in the absence of any showing to the contrary; that as by common law a married woman's contract to real estate would possess no validity, and could not be enforced, it could not, therefore, be regarded as a "valuable thing," even if those words could be held as the legal equivalent of the word "property;" that as at

common law a married woman could not, either with or without her husband, execute a power of attorney, it must be held that such instrument also possessed no validity; and that a party obtaining such instruments by false pretenses does not commit the offense of obtaining a "valuable thing." State v. Clay, 100 Mo. 571.

3. Signature to an Order for Articles to Be Paid For. — Under section 172 (Rev., p. 257) of the New Jersey Crimes Act, a person's signature to an order for certain articles for which he was to pay a certain price is not a "valuable thing," if it can be proved that it was obtained by false pretenses, even though it purported to be negotiable; for the signer could not, on such proof, under any circumstances, be affected. Robinson v. State, 53 N. J. L. 41.

Receipt in Discharge of Debt on Payment in Worthless Notes. — Where a person obtained a receipt in discharge of a debt which was paid with the worthless notes of a broken bank, such receipt is not property or a valuable thing under the Pennsylvania statute of July 12, 1842, § 21. A receipt is always open to explanation, and the receipt given was no bar to the party recovering his debt. It was a cheat neither at common law nor under the statute. Moore v. Com., 8 Pa. St. 260.

4. Obtaining Signature to a Note by Pretending that the Instrument Was a Contract. — Where the accused obtained a signature to a promissory note by representing themselves as agents of the Western Medical Works of Indianapolis, authorized to appoint agents to vend its medicines, and induced the prosecutor to accept the agency and sign what he supposed to be a contract by which he was to receive a certain amount of medicines to sell on commission, but which he afterwards discovered was a promissory note for seven hundred and fifty dollars, executed by, payable to, and indorsed by himself, and such signature was obtained

by false pretenses, it is not necessary, in order to constitute the offense, that the property obtained should be of any particular value.¹

(3) *Valuable Right*. — Under a statute punishing the obtaining by false pretenses an "instrument of writing conveying and securing a valuable right," the valuable right must be one which could be enforced at law.² And it has been held that a writing partaking of the nature of a promissory note is not such an instrument.³

(4) *Other Thing of Value — Other Property* — The course of legislation on this subject in the *United States* shows an intention to bring within the reach of the statute every kind of property; and accordingly the statutes, after particularizing the kinds of property against the fraudulent obtaining of which they are directed, add general words, such as "other thing of value," "other property," or the like.⁴

(5) *Board and Lodging*. — In several of the *United States* the obtaining of board and lodging in hotels or boarding houses by false representations or tricks is an offense.⁵

by pretending to read what the accused represented to be a copy of said contract, it was held that the note was a thing of value, and, while open to any defense the maker might have against it in the hands of any one holding it by indorsement or otherwise, contingencies might have occurred which might have enabled the holder, even the accused, to collect the amount; that if the maker had died leaving the note outstanding, it would have been impossible to prove the fraud by which it had been obtained. *State v. Porter*, 75 Mo. 171.

1. *Property Obtained Need Not Be of Any Particular Value*. — *People v. Stetson*, 4 Barb. (N. Y.) 151; *State v. Gillespie*, 80 N. Car. 397.

Value Implied. — It has been held that though there be no proof of the value, the value may be implied, as where an indictment charged the obtaining a package of money in bank bills, this clearly implies that the bank bills were of value, and passed current for money. *State v. Kube*, 20 Wis. 223, 91 Am. Dec. 390.

2. *Chance in a Raffle*. — Under Pen. Code *Texas*, art. 790 (Pen. Code 1895, art. 943), a chance in a raffle is not a "valuable right," and fraudulently obtaining such chance is not swindling. *Rosales v. State*, 22 Tex. App. 673.

3. *Note*. — *Hurst v. State*, (Tex. Crim. App. 1898) 45 S. W. Rep. 573.

4. *"Other Valuable Thing"*. — In *New Jersey* the statute intended to denounce as a crime the obtaining by deceit of every valuable thing of a personal nature. "Other valuable thing" includes everything of value. *State v. Thatcher*, 35 N. J. L. 445.

In *North Carolina* it has been held that the words "or other thing of value" were not used to qualify the words immediately preceding, "money, goods, or property," but only to enlarge the class of personal things which it was made penal to obtain by false pretenses. *State v. Gillespie*, 80 N. Car. 397.

But in *Wisconsin* it has been held that a person who obtains board and lodging upon false representations does not commit the offense of obtaining property; for the words "other property," in Rev. Stat., § 4423, must, under the familiar rule *non estur a sociis*, be limited to such tangible classes of property as are therein previously enumerated; that is to say,

"money, goods, wares, merchandise, or other property" of that description. *State v. Black*, 75 Wis. 490.

"Other Effects" — "Other Valuable Thing." — Under the *New York* statute, 1 Rev. Laws 410, § 13, punishing the obtaining by false pretenses of "any money, goods, or chattels, or other effects whatsoever," etc., fraudulently obtaining an indorsement to a promissory note by false pretenses, where the party obtaining it has actually used it for his own benefit, is within the spirit of the act; for the words "or other effects" in the statute are equivalent to the words "or other valuable thing" in the British act. The words "other effects" as used in this act were designed to be most comprehensive. They were probably intended to embrace everything of a personal character not appropriately and strictly falling under the description of money, or goods or chattels. But whether or not a note, where no use has been made of it, can be considered either money or goods or chattels or a valuable thing may be questionable. *People v. Stone*, 9 Wend. (N. Y.) 182.

Under the *Missouri* statute in force in 1822, punishing the obtaining by false pretenses of "moneys, goods, or merchandise, or effects whatever," etc., the word "effects" was held to embrace a bill of exchange. The court said: "By name, effects will embrace lands, tenements, etc. Effects in law must mean everything which is subject to the laws of property and ownership, whether real or personal, and of the personalty, whether of possession or in action. A bill of exchange is not money, but is a security for money, because it contains the proof that money is due, and a promise to pay it. It is also a species of merchandise, or rather answers the end of money, in passing like money. It is effects within the meaning of the statute." *State v. Newell*, 1 Mo. 248.

"Or Other Property." — A promissory note is property within the meaning of the words "or other property," as used in Rev. Laws *Vermont*, § 4154 (Stat. 1894, § 4960). *State v. Switzer*, 63 Vt. 604, 25 Am. St. Rep. 789.

5. *Obtaining Board and Lodging*. — *Ex p. Williams*, (Cal. 1898) 53 Pac. Rep. 706; *State v. Tull*, 42 Mo. App. 324; *State v. Kingsley*,

(6) *Signature to Written Instrument* — (a) *In General.* — Obtaining by false pretenses the signature of a person to a written instrument is now generally, under statutory enactment, an indictable offense.¹

Instrument Must Be of Value. — The mere obtaining a signature is not an offense. It is necessary that the signature be attached to some written instrument of value, and that the instrument itself, with the signature thereto, be obtained.²

(b) *Signature to Conveyance of Land.* — In some of the *United States* obtaining by false pretenses a signature to a conveyance of land is an indictable offense.³

(c) *Signature of Public Officer.* — The offense of obtaining the signature of a public officer to a warrant or order for the payment of money out of public funds may be committed although no pretense is made to the person whose signature is procured, if the manner and circumstances of the wrongful act in its inception were such as to deceive the officer, and he was so induced to sign,

108 Mo. 135. See generally the title INNS AND INNKEEPERS.

Under the *Indiana* statute a person obtaining board and lodging by false representations as to his property with intent to defraud comes within section 27 of the Felony Act, 2 Rev. Stat. 1876, p. 436, defining the crime of obtaining goods by false pretenses. *State v. Snyder*, 66 Ind. 203.

Under the *Missouri* statute of March 26, 1891, obtaining board and lodging in hotel or boarding house by false pretense is a misdemeanor. Laws Mo., 1891, p. 159. This act does not discriminate against the persons obtaining the board or lodging, nor deny them the right of trial by jury of any fact constituting an essential element of the crime denounced by it. Whether or not the board was obtained with intent to defraud is a question for the jury. *State v. Kingsley*, 108 Mo. 135.

1. Obtaining Signature to Written Instrument. — *Woodruff v. State*, 61 Ark. 164; *People v. Stone*, 9 Wend. (N. Y.) 182; *Baker v. State*, 14 Tex. App. 337.

An Indorsement to a Negotiable Promissory Note is a signature to a written instrument within the meaning of 2 Rev. Stat. *New York* 677, § 53, in force in 1858. *People v. Chapman*, 4 Park. Cr. Rep. (N. Y. Supreme Ct.) 56.

Where a Party Fraudulently Procures an Indorsement on a Draft for the purpose of obtaining money for his own accommodation by pretending that he was authorized by a corporation in whose employment he was to draw it, evidence of what was due him from the corporation is inadmissible, where the reliance was placed upon the responsibility of the corporation. *State v. Hanscom*, 28 Oregon 427.

Offense of Obtaining Signature Not Confounded with Forgery. — Under Comp. L. *Michigan* 1871, § 7590 (How. Annot. Stat. 1882, § 9161), providing that the instrument to which the signature has been obtained must be one upon which, if the instrument were forged, a charge of forgery could be maintained, it was held that such provision does not confound the crime of forgery with that of false pretenses; that the statute refers to forgery to distinguish the class of instruments in regard to which the offense in question may be committed, and that a promissory note belongs to that class. *People v. Mott*, 34 Mich. 80.

Sale of Instrument. — The sale of a note, the signature to which is known by the seller to have been obtained by false pretenses, was a

crime under Rev. Stat. *Indiana*, 1881, § 2204, though the pretenses made were verbal representations, and not of a nature which would have made the act of obtaining the signature a crime. *State v. Adams*, 92 Ind. 116.

2. Signature Must Be Attached to Written Instrument of Value. — *In re Payson*, 23 Kan. 760; *Fenton v. People*, 4 Hill (N. Y.) 126.

Obtaining Credit on a Promissory Note. — Where the defendant by false pretenses induced one P. to take from him several worthless promissory notes, whereby he obtained credit by indorsement upon certain promissory notes held by P. against him, it was held that he had not committed the offense of obtaining the signature to a written instrument, for credit is a mere intangible thing of no value. *State v. Moore*, 15 Iowa 412.

Under the Ohio Statute of Feb. 21, 1873 (70 Ohio L. 39), making it an offense to procure the signature of a person to a promissory note by false pretenses, it is not necessary that the value of the note be found by the verdict of the jury, the amount of the note and not its value being the basis upon which the grade of the offense and the punishment on conviction are to be determined; and hence to procure the signature of a person notoriously insolvent to a promissory note, as the maker, by false pretenses, would complete the offense, although the note might not be of any value. *Ellars v. State*, 25 Ohio St. 385.

3. Signature to Conveyance of Land. — *State v. Layman*, 8 Blackf. (Ind.) 330; *Cooke v. State*, 83 Ind. 404.

The Land Need Not Belong to the Defrauded Party. — Where a person was employed to negotiate a loan for three hundred dollars, and he procured the signature to a mortgage for four hundred dollars, falsely pretending that it was for three hundred dollars, it was held that the fact that the land did not belong to the mortgagor made no difference, for the reason that under the covenants of the mortgage a pecuniary liability was created against the mortgagor. *State v. Jamison*, 74 Iowa 613.

Obtaining Signature After a Prior Unacknowledged Deed Was Given. — The offense of obtaining a signature to a deed by false pretense is committed, even though a prior unacknowledged deed to the same land was given; and it is competent to introduce the prior deed to show the fraudulent intent which animated the defendant at the inception of the transaction. *State v. Alexander*, 119 Mo. 447.

even though the signature is procured through the intermediate agency of other public officers innocent of the fraud, but in the performance of the line of duty pertaining to their offices.¹

When the Signature Obtained Is But an Incident, and Not the End Sought. — But where a false pretense is made to a public officer for the purpose of obtaining money, by means of which pretense the officer is induced to give a check, the offense of obtaining a signature to an instrument is not committed.²

(d) **Delivery of Instrument.** — The mere signing of the instrument is not obtaining it, in the sense of the statute. There must be a delivery, for until delivery the intent to defraud is not consummated, and the instrument creates no liability.³ It has, however, been held that if the instrument becomes operative without delivery, the offense is complete.⁴

7. When Offense Complete. — The offense of obtaining property by false pretenses is complete when the property is obtained.⁵ So also where the signature to an instrument has been obtained. And in such case it is not necessary that an actual loss or injury should be sustained by the maker of the instrument.⁶

8. Who May Commit Offense. — A Married Woman cannot be convicted of obtaining goods by false pretenses, when she informed the prosecutor at

1. Obtaining Signature of Public Officer. — *People v. Oyer & T. Ct.*, 83 N. Y. 455.

Procuring Draft from County Judge for Appropriation for School Purposes — Texas. — On a charge of swindling by falsely representing that the signatures to a petition presented to a county judge were genuine, whereby the accused obtained from the county judge a draft for an appropriation for school purposes, it must appear that the signatures were on the instrument when it was delivered by the accused, and that he then falsely and fraudulently averred that they were genuine. *Scott v. State*, 27 Tex. App. 264.

2. Obtaining Check on Pretense Made to Procure Money Is Not Offense of Obtaining Signature. — Where a county auditor fraudulently issued an order on the county treasurer in favor of another person and falsely pretended that the order was properly issued on a valid claim, and that he was authorized to receive payment in cash, by means of which he received a check for the amount from the treasurer, when in fact the person in whose favor the order was drawn had no claim against the county, had never presented any such claim, and had never given authority to the county auditor to issue the order or to receive payment, it was held that this did not constitute the offense of obtaining a signature to an instrument. The signature to the check received was an incident, and not the end in fact sought, or to which the pretenses related. If the charge had been that by means of the pretense he obtained the check it would have been sufficient. Nor was it an offense under c. 6, § 13, c. 8, § 39, or c. 11, § 6 of the Crimes Act of 1877 (74 Ohio L. 240). *Kennedy v. State*, 34 Ohio St. 310.

3. Delivery of Instrument Essential. — *State v. Clark*, 72 Iowa 30; *State v. McGinnis*, 71 Iowa 685; *State v. Jamison*, 74 Iowa 613; *In re Payson*, 23 Kan. 760; *Fenton v. People*, 4 Hill (N. Y.) 126; *People v. Chapman*, 4 Park. Cr. Rep. (N. Y. Supreme Ct.) 58; *Baker v. State*, 14 Tex. App. 338.

4. When Offense Complete Without Delivery of Instrument. — Where a person with intent to defraud made false representations to another as to his pecuniary responsibility, in order to induce such other person to advance money to him for the pretended joint purchase of goods in which they were to be partners, and articles of copartnership were drawn, it was held that the offense was complete even though there was no delivery of the articles of partnership, because upon executing the agreement the defrauded party became subject, at least as to third persons, to all the obligations and liabilities of the partnership, and the instrument took effect and became equally operative whether it was in the possession of the defendant or of the defrauded party. *Com. v. Hutchison*, 114 Mass. 325.

5. Offense Complete When Property Obtained. — Under the statute 30 Geo. II., c. 24, the offense was not complete until the property was obtained. *Rex v. Buttery*, 5 D. & R. 616, cited in *Pearson v. McGowran*, 3 B. & C. 700, 10 E. C. L. 215; *People v. Higbie*, 66 Barb. (N. Y.) 134. See also 2 Bish. N. Cr. L., § 460. And see the cases generally throughout the article. See *Reg. v. Byrne*, 10 Cox C. C. 369. In that case a postman falsely pretended that the sum of two shillings was payable on a post letter intrusted to him for delivery, whereas one shilling only was payable. It was held that the offense was complete when he made the pretense, and therefore the absence of any evidence to show positively that he did not pay over the extra shilling to the superior officer was quite immaterial to his guilt or innocence.

6. Loss or Injury Not Essential to Offense of Obtaining Signature. — *State v. Jamison*, 74 Iowa 613; *State v. Pryor*, 30 Ind. 350; *People v. Genung*, 11 Wend. (N. Y.) 19, 25 Am. Dec. 594; *People v. Crissie*, 4 Den. (N. Y.) 525; *People v. Gates*, 13 Wend. (N. Y.) 324; *People v. Sully*, 5 Park. Cr. Rep. (N. Y. Super. Ct.) 170; *People v. Stone*, 9 Wend. (N. Y.) 190; *State v. Hanscom*, 28 Oregon 427.

the time of the fact that she was married.¹

A Minor has been held to be within a statute making it an offense to procure goods by false pretenses.²

Agent. — That the defendant in making false pretenses acted for another will not relieve him from responsibility.³

Aiders and Abettors. — If a person be within easy call, with intent to aid or assist others in their purpose of obtaining money by false pretenses, or in escaping, or in getting rid of or misleading the person from whom the money was obtained, that is a presence aiding and abetting, and the accused is as guilty as if he were personally present.⁴

9. Particular Instances of False Pretenses — a. MEANS AND RESOURCES — OWNERSHIP OF PROPERTY — (1) In General. — A false representation by the defendant of his means and resources, whether in his own hands or in the hands of another person for him, is a false pretense.⁵

Ownership of Property. — It is a false pretense for a person fraudulently to represent himself to be the owner of property which he does not own; for by so doing he misrepresents his ability to pay.⁶

1. When Married Woman Not Liable to Conviction. — *Com. v. Herman*, 15 Phila. (Pa.) 386, 38 Leg. Int. (Pa.) 260.

2. Minor Indictable for False Pretenses. — *People v. Kendall*, 25 Wend. (N. Y.) 399, 37 Am. Dec. 240.

3. Agent. — *State v. Chingreen*, (Iowa 1898) 74 N. W. Rep. 946.

4. What Is a Sufficient Presence Aiding and Abetting. — *Dull v. Com.*, 25 Gratt. (Va.) 976. See generally the title AIDER AND ABETTOR, vol. 2, p. 29.

Aiding and Abetting Postmasters. — Under 20 U. S. Stat. at L., c. 259, p. 140 (Supp. to Rev. Stat., vol. 1, p. 358), providing that "any postmaster who shall make a false return to the auditor for the purpose of fraudulently increasing his compensation," etc., aiders and abettors are punishable, notwithstanding the fact that only postmasters are named therein. The offense is a statutory misdemeanor. This is the rule whether the misdemeanor is created by statute or by the common law. *U. S. v. Snyder*, 14 Fed. Rep. 554.

Aiding or Abetting Ring Dropping. — In *Rex v. Moore*, 1 Leach C. C. 314, 2 East P. C. 679, it was held that to aid and assist a person, to the jurors unknown, to obtain money by the practice of ring dropping was felony, if the jury should find that the prisoner was confederating with the person unknown to obtain the money by means of this practice.

Depositing Money as a Stake. — If there is a plan to cheat a man of his property, under color of a bet, and he parts with the possession only to deposit it as a stake with one of the confederates, the taking by such confederate is felonious. *Rex v. Robson*, R. & R. C. C. 307.

5. Possessed of a Capital that Came Through His Wife. — *Com. v. Burdick*, 2 Pa. St. 163, 44 Am. Dec. 186.

Having Money in Others' Hands. — *Com. v. Hutchinson*, 1 Clark (Pa.) 302, 2 Pa. L. J. 250.

Having Money in a Bank. — *Com. v. Karpowski*, 167 Pa. St. 226.

Having Credit with a Firm that Would Honor His Draft. — *People v. Wasservogle*, 77 Cal. 173.

Money Due and Owning. — In *England* it has been held that a representation that a sum of

money, part of a larger sum, was "due and owing" to the accused for work he had performed is not a representation of an existing fact; for the allegation might be supported by evidence of a mere overcharge, or of a mere matter of opinion, either as regarded fact or law. *Reg. v. Oates*, Dears. C. C. 459, 1 Jur. N. S. 429, 3 C. L. R. 661. But the contrary has been held in *Georgia*. *Branham v. State*, 96 Ga. 307.

Obtaining Further Time for Payment of a Debt. — It is not an indictable offense to obtain further time for the payment of an existing debt by a false statement that the person indebted has moneys owing to him which he expects shortly to realize. *Com. v. Chambers*, 2 Chest. Co. Rep. (Pa.) 63.

6. Pretense as to Owning Property. — *Williams v. State*, (Ga. 1898) 31 S. E. Rep. 546; *State v. Hill*, 72 Me. 242; *Tuttle v. State*, (Tex. Crim. App. 1899) 49 S. W. Rep. 82. See also *People v. Bryant*, 119 Cal. 595.

In *State v. Penley*, 27 Conn. 587, the defendant falsely represented that he owned a farm in a certain town and was worth money enough to pay for twenty such yokes of oxen as the yoke he had obtained, and it was held that this representation, though a naked assertion, constituted a false pretense within the statute.

So also where the defendant falsely represented that he had purchased a farm in a certain place he was held to have committed the offense. *State v. Fooks*, 65 Iowa 453.

Joint Ownership of Property. — Where a person falsely pretended to be with his father a joint owner of cows and other stock, this was held to be a false pretense. *People v. Kendall*, 25 Wend. (N. Y.) 399, 37 Am. Dec. 240.

Owning a Check. — A false representation by a person that he owns a check on a bank of a certain specified value is a false pretense. *Casily v. State*, 32 Ind. 66.

Giving a Mortgage on property not owned by the mortgagor, whereby goods are obtained, is a false pretense. *Com. v. Lincoln*, 11 Allen (Mass.) 233; *Com. v. Lee*, 149 Mass. 184.

Good Faith of Representation. — In *People v. Griffith*, (Cal. 1898) 54 Pac. Rep. 725, it is held that no offense is committed where the defend-

Title to Land. — Where a person obtained property by falsely pretending to have a good title to land which he said he would give for the property obtained, this was held to be a false pretense, even though the defrauded party might, by an examination of the records, have discovered the fact to be otherwise.¹

Second Sale of Same Land. — While in some circumstances a second sale of the same property might not result injuriously to the second purchaser, it is nevertheless an indictable offense by statute in some jurisdictions to make a second sale of the same land.² In order to constitute the offense it is not necessary to show that the second purchaser has tested his title by action.³

Selling Mortgaged Property. — Under statute in some of the *United States* selling mortgaged property is an offense.⁴

That Certain Buildings Are Upon Land. — A misrepresentation by a person that certain buildings are upon land which he owns, by means of which he obtains a loan of money, is a false pretense.⁵

(2) *As to Incumbrances on Property.* — A false representation that property is free from incumbrances, whereby money or property or other thing of value is obtained, is a false pretense.⁶ So also where a person on a sale of a mort-

ant acts in good faith in representing himself to be the owner of certain property; and this is a question for the jury.

1. **Title to Land.** — *Thomas v. People*, 113 Ill. 537. See also *Miller v. People*, 22 Colo. 530, citing 7 AM. AND ENG. ENCYC. OF LAW (1st ed.) 708.

Examination of Title Before Sale. — Where false representations are made as to the title to land, and the person to whom they are made, instead of acting upon them, has his attorney examine the title to the said land before it is sold, the offense of obtaining property under false pretenses is not committed. *People v. Gibbs*, 98 Cal. 661. See *supra*, this section, *Essentials of the Cheat or Pretense — Pretense Must Be the Inducement to Parting with Property*.

Pretense of Title to Land Not in Existence. — A false pretense of title to land not in existence is within the statute, even though there be a warranty in the deed. *Com. v. Alsop*, 1 Brews. (Pa.) 341.

Pointing Out Other Property as the Land that Was Being Sold. — Where the defendant in a sale of land pointed out to the intended purchaser a certain lot as being the property which he was about to sell, but the property answering to the description in the deed was a worthless lot, the greater part of which was in the bed of a river, it was held that he had committed the offense; for the purchaser had a right to rely upon the representation that the lot pointed out was the one he was purchasing. *State v. McConkey*, 49 Iowa 499. See also *People v. Bryant*, 119 Cal. 595.

A Clause of a Deed by which the borrower of a sum of money falsely declares property well and truly to belong to him may constitute a false pretense. *Reg. v. Judah*, 8 Leg. N. (Quebec) 124.

2. **Second Sale of Land Indictable.** — *People v. Garnett*, 35 Cal. 471, 95 Am. Dec. 125.

In California, in order to justify a conviction for a second sale of the same land, it is necessary to charge in the indictment and prove at the trial, first, the first and second sales, barter or disposal of the land, as therein specified; and, second, that said second sale, barter,

or disposal of the land was for a valuable consideration, and was made with intent to defraud either the first or second purchaser. *People v. Garnett*, 35 Cal. 470, 95 Am. Dec. 125.

Second Sale Where Purchaser Has Knowledge of First. — Where a second sale of land was made to parties at their request, after they had been fully informed by the grantor of the fact of the first sale, and its tenor, it was held not fraudulent within the meaning of the *California* statute. *People v. Garnett*, 35 Cal. 471, 95 Am. Dec. 125.

3. **Second Purchaser Need Not Test Title.** — *State v. Dozier*, Dudley (Ga.) 155.

Sale of Land Where Title Subsequently Questioned. — The offense of obtaining property by false pretenses was committed where the defendant falsely represented that he had a good title to property, the title to which was subsequently brought in question before the appellate court, in a case to which the defendant was not a party, and declared good, where it appears that a rehearing in such case has been granted. *People v. Hamberg*, 84 Cal. 468.

4. **Under the Texas Penal Code**, art. 773, in force in 1868, swindling by selling mortgaged property with intent to defraud the mortgagee is a felony. *State v. Small*, 31 Tex. 184.

Under the Arkansas Statute, if a person is charged with selling mortgaged property, it must appear not only that the mortgage was recorded and filed with the clerk as a record, but also that it was acknowledged. *State v. Harberson*, 43 Ark. 378.

A cropper on shares has such an interest in the crop as he may mortgage, and if he sells the mortgaged crop he will be guilty of felony; and in order to constitute the offense it is not necessary that the crop be sold with a felonious intention to deprive the mortgagee of his debt. *Beard v. State*, 43 Ark. 284.

5. **Pretense that Buildings Are upon Land.** — *Reg. v. Burgon, Dears. & B. C. C.* 11, 7 Cox C. C. 131, 25 L. J. M. C. 105, 2 Jur. N. S. 596; *Reg. v. Huppel*, 21 U. C. Q. B. 281; *People v. Oscar*, 105 Mich. 704.

6. **Misrepresentation that Property Is Unencumbered.** — *Reg. v. Meakin*, 11 Cox C. C. 270, 20

gage pretends that said mortgage is the first lien on the mortgaged property.¹

(3) *Giving Check.* — Giving a check on a bank is a representation that the maker has money on deposit in the bank and that the check will be paid on presentation; and accordingly, if a person gives a check for the property obtained on a bank in which he has no account, or which he knows will not be paid, this is a false pretense.² But it has been held that if a person has an account and gives a check when he has no funds in the bank, that fact in itself will not be a false pretense, if he has reason to think that the check will be paid.³

Signing and Delivery of Check. — In order to constitute the giving of a check under the circumstances stated a false pretense, it is necessary that it be signed and delivered.⁴

(4) *Solvency and Ability to Pay.* — A false representation as to one's solv-

L. T. N. S. 544, 17 W. R. 683; *McGee v. State*, 97 Ga. 199; *State v. Pryor*, 30 Ind. 350; *State v. Butler*, 47 Minn. 483; *State v. Munday*, 78 N. Car. 460. See also *Miller v. People*, 22 Colo. 530, citing 7 AM. AND ENG. ENCYC. OF LAW (1st ed.) 708.

Where Mortgage Did Not Specify Land on Which Crop Was to Be Raised. — Where a person was charged with obtaining goods under the false representation that a certain crop to be raised was not subject to mortgage, and it appeared that a mortgage which it was alleged covered the crop in question did not specify the land on which it was to be raised, it was held that there was no false representation as to incumbrances, for there was no mortgage upon such crop; and the defect could not be cured by parol evidence. *State v. Garriss*, 98 N. Car. 733.

Mere Delivery Not a Pretense. — A mere delivery by a person of property represented to be free from incumbrances without claiming to be the owner of it, whereby money is obtained, is not a false pretense. *Jenkins v. State*, 97 Ala. 66.

1. **Pretense that a Mortgage Is a First Lien.** — *People v. Sully*, 5 Park. Cr. Rep. (N. Y. Super. Ct.) 165.

2. **Giving a Worthless Check Is a False Pretense** — *England.* — *Rex v. Jackson*, 3 Campb. 370; *Rex v. Parker*, 7 C. & P. 825, 32 E. C. L. 755, 2 Moo. C. C. 1; *Reg. v. Hazelton*, L. R. 2 C. C. 134, 44 L. J. M. C. 11, 31 L. T. N. S. 451, 23 W. R. 139.

California. — *People v. Donaldson*, 70 Cal. 116.

Illinois. — *Barton v. People*, 135 Ill. 405, 25 Am. St. Rep. 375.

Indiana. — *Maley v. State*, 31 Ind. 192.

Massachusetts. — *Com. v. Devlin* 141 Mass. 430.

New York. — *Lesser v. People*, 73 N. Y. 78, affirming 12 Hun (N. Y.) 668; *Smith v. People*, 47 N. Y. 303; *Foot v. People*, 17 Hun (N. Y.) 218.

Pennsylvania. — *Com. v. Wallace*, 114 Pa. St. 412, 60 Am. Rep. 353; *Com. v. Leisy*, 1 Pa. Co. Ct. Rep. 50; *Com. v. Collins*, 8 Phila. (Pa.) 609; *Com. v. Mullen*, 4 Pa. Dist. Rep. 656.

Contra. — But in *Martin v. State*, 36 Tex. Crim. Rep. 125, it was held, where a person bought cattle and gave in payment therefor a worthless check upon a bank, telling the seller that he would have no trouble in getting the money, that this was in the nature of a repre-

sentation or promise relating to a future event, and was not equivalent to representing that he then had money in said bank, or that he was authorized to draw against it.

Agreement to Delay Presentation of Check. — If a party receiving a check agrees to delay presenting it till a certain time when there would be a reasonable probability of its payment according to the circumstances of the case, the offense is not committed where the check is presented before such time, even though the party has no account at the bank. *Reg. v. Walne*, 11 Cox C. C. 647, 23 L. T. N. S. 748.

Giving an Acceptance to Be Paid Next Day. — Where the prisoner purchased goods and gave in payment for them a bill drawn on and accepted by himself on the day of the purchase, payable one month after date at the London and Westminster Bank, and stated when he gave the bill that it would be paid the next day at the bank in Taunton, and that he had made arrangements that it should be paid, which representations were untrue, this was held to be a false pretense. *Reg. v. Hughes*, 1 F. & F. 355.

Check in Fictitious Name. — If a person draws a check on a bank in which he has no account, in a fictitious name, in payment for goods purchased, this is a false pretense. *Reg. v. Martin*, 5 Q. B. Div. 34, 49 L. J. M. C. 11, 41 L. T. N. S. 531, 28 W. R. 232, 44 J. P. 74, 14 Cox C. C. 375.

3. **Overdrawing Account at Bank.** — The giving of a check does not necessarily imply that there are funds in the bank to the amount of the check. Not only may a banking account be kept under a guaranty upon the express terms that it may be overdrawn, but, without any such arrangement, a person of position may often overdraw an account in perfect good faith and with the tacit sanction of his bankers. *Reg. v. Hazelton* L. R. 2 C. C. 138, 44 L. J. M. C. 11, 31 L. T. N. S. 451, 23 W. R. 139.

4. **Signing and Delivery of Check Essential.** — *Tarbox v. State*, 38 Ohio St. 583.

Pretense of Having Drawn a Check. — Where a person is charged with inducing another to sign a lease to a third party, the false representation that he then and there has in his possession a check for the payment of money, drawn by him in favor of the defrauded party, from the proceeds of which he intends to pay certain of her bills, is not a false pretense. *Com. v. Stevenson*, 127 Mass. 449.

ency and ability to pay, by means of which something of value is obtained, is a false pretense.¹

False Reports. — Under statute in some of the *United States* a person procuring others to make false reports of his honesty, wealth, or mercantile character, whereby he obtains credit, is guilty of the offense.²

1. Misrepresentation as to Ability to Pay —

California. — *People v. Wieger*, 100 Cal. 357.

Georgia. — *Hathcock v. State*, 88 Ga. 96.

Indiana. — *State v. Pryor*, 30 Ind. 350.

New York. — *People v. Haynes*, 11 Wend. (N. Y.) 557, reversed on other grounds in 14 Wend. (N. Y.) 547, 28 Am. Dec. 530.

Tennessee. — *Rothschild v. State*, 13 Lea (Tenn.) 294.

But in *State v. De Hart*, 6 Baxt. (Tenn.) 222, decided previously to the *Rothschild* case, *supra*, it was held that where the defendant purchased goods by falsely representing that he had a package of goods in his office, together with much other property subject to be applied to the payment of said goods, thereby inducing the prosecutor to confide in the ability of the said defendant to pay for said purchases, he did not commit the offense of obtaining goods under false pretenses under the statute, the court saying that "common prudence and caution upon the part of the prosecutor should have required him to resort to other information as to these facts."

Owed But Little, and Was Not Owning Any Large Debt. — Where the representations by the defendant were that he had ample means to pay all his debts, that he owed but little, and was not owing any large debt, and that his note for two hundred and fifty dollars was good, the terms "little" and "large" were uncertain; and where such representations, in connection with the use of such words, were well calculated to inspire confidence in his ability to pay, and he induced the seller to give him credit, this was a false pretense. *State v. Call*, 48 N. H. 126.

Under the Georgia Statute punishing the obtaining by a person of a credit by false representations of his own respectability, wealth, or mercantile correspondence and connections, a false representation made by a person of his solvency and ability to pay is a representation to a certain extent of his wealth, and is within the statute. It is not necessary that he should represent that he is wealthy. *Hathcock v. State*, 88 Ga. 96.

In New York, 2 Rev. Stat. 677, § 53, providing for punishment for obtaining goods by means of false pretenses, made verbally, concerning the ability of the defendant to pay, was repealed by Laws 1886, c. 593; and such an act is not made an offense by the Penal Code enacted in 1882, although section 725 of such Code provides that it shall not affect any statute providing for the punishment of offenses not defined and made punishable by such Code. Section 544 of the Penal Code requires such pretense to be in writing. *People v. Page*, 7 N. Y. Crim. Rep. 5.

Illinois Statute. — Section 96 Ill. Cr. Code "was intended to include cases where the defrauded party parted with his money in some other sense than as a loan; and where the loan was procured by the false representation of the borrower as to his solvency, the case

falls within section 97, provided the representation was in writing, of course." *Lucas v. People*, 75 Ill. App. 662.

Pretense as to Insolvency of Another Person's Debtor. — Where a person falsely represented to another that a debtor of the latter was insolvent and largely indebted, and possessed of only small means, whereby he induced such person to part with a claim on said debtor at a sacrifice, this was held to be a false pretense. If the defendant had said that the debtor was unable to pay his debt and the creditor was thereby induced to part with his property at a great sacrifice, this would have been a naked assertion, which, if untrue, would have been a simple lie. But when the facts upon which the assertion was made were set forth, they were presented to the creditor's mind as motives for him to part with his evidence of indebtedness at an unconscionable sacrifice. *State v. Tomlin*, 29 N. J. L. 23.

Statement by Banker as to Solvency of Bank. — Where a banker makes a false statement as to the assets and liabilities of an insolvent bank, when he knows or has reason to believe that it is not solvent, whereby a person is induced to lend money to the bank, or to deposit money therein, to his injury, such representation is a false pretense. *Com. v. Schwartz*, 92 Ky. 510, (Ky. 1892) 19 S. W. Rep. 189; *Com. v. Wallace*, 114 Pa. St. 410, 60 Am. Rep. 353. And see generally the title OFFICERS AND AGENTS OF PRIVATE CORPORATIONS.

But where a banker obtains possession of a draft in the usual course of business, without disclosing the fact of the bank's insolvency, he does not commit the offense of obtaining property on false pretenses. *People v. Moore*, 37 Hun (N. Y.) 91.

2. False Reports as to Mercantile Character. etc. — *People v. Jordan*, 66 Cal. 10, 56 Am. Rep. 73.

Comp. Laws Wyoming, 1876, c. 35, § 138, applies to a person obtaining money or goods on credit by procuring "others to report falsely of his honesty, wealth, or mercantile character."

Section 139, as amended March 5, 1884, applies to all cases of obtaining property generally on credit by false pretenses. But section 138 limits the general act only so far as its words go, and leaves the commission of offenses not within its limits for punishment under the general act. *Haines v. Territory*, 3 Wyoming 168.

"Wealth" — **Meaning of.** — Under the *Georgia* statute providing that if any person, by falsely representing his wealth, obtains a credit, etc., Lumpkin, J., in delivering judgment in *Branham v. State*, 96 Ga. 307, said: "The word 'wealth,' as used in this section, does not import a great fortune or vast possessions, as is frequently implied from its ordinary use, but its real meaning is the possession or ownership of such means or property as would reasonably entitle one to expect and receive the credit he

(5) *Failure to Disclose Insolvency.*—Obtaining goods on credit by an insolvent person without disclosing his insolvency, where no false representations are made or any acts of intentional deception done, is not a false pretense.¹

b. AS TO INDEBTEDNESS DUE. — It is a false pretense to misrepresent the amount of indebtedness due by others² or by the defendant himself.³

c. AS TO VALIDITY OF CLAIMS FOR MONEY. — Where a false statement is made concerning the validity of a claim or of a right upon which to predicate a claim for money, it is a false pretense.⁴

seeks to obtain. Indeed, this word is at last a mere relative term. Among millionaires, a man worth only a hundred thousand dollars is poor indeed; while in some localities a man worth five thousand dollars over and above all his liabilities would be considered a very wealthy citizen. In principle, and very properly, this section applies to one who, by falsely pretending and representing that he owns or has earned and will receive something of value which he neither owns nor is entitled to, thus defrauds another of his property, whether the amount involved be large or small."

1. *Failure to Disclose Insolvency Not a False Pretense.* — Com. v. Eastman, 1 Cush. (Mass.) 219, 48 Am. Dec. 596; Tefft v. Windsor, 17 Mich. 425; People v. Moore, 37 Hun (N. Y.) 91.

2. *Pretense that Money Was Due by Member of Benefit Society.* — Where the secretary of an Odd Fellows' lodge pretended to a member of the lodge that the sum of thirteen shillings ninepence was due by him to the lodge for liabilities incurred by him as a member, whereas the sum of two shillings twopence only was due, by means of which pretense he fraudulently obtained from such member the larger sum of money, it was held to be a false pretense within the statute 7 & 8 Geo. IV., c. 29. Reg. v. Woolley, 1 Eng. L. & Eq. 537, 1 Den. C. C. 559, T. & M. 279, 4 New Sess. Cas. 341.

Larger Sum of Money Due. — A workman employed by clothiers was to keep an account of the number of shearmen employed and the amount of their earnings and wages, which he was to deliver weekly, in writing, to a clerk, who paid him the amount. He delivered in a false account, charging for more work, and of other men, than was actually done, by which he obtained a larger sum than was actually due. It was held an obtaining money under false pretenses, within the statute 30 Geo. II., c. 24, because without the false pretense he would not have obtained the credit, and it was not like a case of money paid generally on account. *Witchell's Case*, 2 East P. C. 830.

Issuing Process for Double the Amount Due. — A money lender having a claim for a small sum against a borrower for money lent and high interest caused an attorney to issue process for a sum double the amount, making up the difference by items charged on various pretenses, and after receiving payment from a third party of the sum lent, so that only a sum of five pounds remained due for interest, still prosecuted the suit for the whole amount indorsed on the process, and then tried to get from the debtor a charge on property of far greater value, and represented to the third party that the whole sum was really due. It was held that he was guilty of a false pretense. Reg. v. Taylor, 15 Cox C. C. 265.

3. *Substituting False Bill of Parcels.* — In Reg. v. Steels, 11 Cox C. C. 5, 17 L. T. N. S. 666, 16 W. R. 341, the prisoner's wife had selected for him, subject to its fitting him, a coat the price of which was fourteen shillings and sixpence, and had paid four shillings and sixpence on account, for which she received a bill of parcels giving credit for that amount. On trying on the coat it was found to be too small, and the prisoner was then measured for one to cost twenty-two shillings. When that was made it was tried on by the prosecutor, who was not privy to the former part of the transaction. The prisoner, when the coat was given to him, handed the bill of parcels for the four shillings and sixpence saying, "There is ten shillings to pay." The bill was receipted, and the prisoner took the twenty-two shilling coat away with him. This was held to be a false pretense.

4. *Sending a False Return of Fees* due to the defendant to the commissioners of the treasury, with an affidavit attached, upon which a minute was drawn up which operated as an authority to the paymaster-general to pay, and upon which the defendant received the amount claimed, was held to be a false pretense. Reg. v. Cooke, 1 F. & F. 64.

Representation by Member of Benefit Society of Death of Wife. — Where a member of a benefit society, having produced a fraudulent certificate of his wife's death, obtained money by falsely pretending that his wife was dead, in which event he would be entitled to a certain sum, it was held that the pretense consisted in the statement that his wife was dead, and also that the money was not obtained upon the certificate, which could be admitted only as evidence of the death of the wife. Reg. v. Dent, 1 C. & K. 249, 47 E. C. L. 249.

Insurance Agent Representing Validity of Claim for Insurance. — Where a person, as agent for several insurance companies, reinsured the cargo of a vessel, after being notified of the loss of the vessel, by means of which he obtained the amount of the reinsurance, it was held that it was sufficient that he represented that the insurance was valid, by means of which a loss had occurred which imposed a liability on the company; and the precise peril against which the company had insured, as he represented, was immaterial. *People v. Dimick*, 107 N. Y. 13. See also *State v. Patty*, 97 Iowa 373.

False Claim Against Insurance Company Not Credited with Salvage. — Where a person presented to an insurance company a false and fraudulent claim for more than he was entitled to claim, the fact that the false claim had not been credited for a possible salvage upon articles merely damaged, which might

d. AS TO BUSINESS — BUSINESS RELATIONSHIPS — OCCUPATION. — It is a false pretense within the meaning of the statute for a person to misrepresent the nature or extent of his business¹ or business connections,² or by whom or for what purpose he is employed.³ So also where he obtains money by pretending to want to employ a person.⁴ It is also an indictable false pretense for a person to misrepresent the business or profession in which he is engaged⁵ or in which a third person is engaged.⁶

e. AS TO QUALITY, QUANTITY, OR CONDITION OF THINGS. — A fraudulent representation by the seller as to the quality of the thing sold, not relating to a mere matter of opinion, but to a specific fact within his knowledge, is a false pretense.⁷

Stamp on Goods. — Where a person falsely represents that a stamp on goods is a well-known trade mark, as indicating the fineness or quality of the goods,

by the action of the insurer under the policy suffer a reduction by the amount of some value found to remain in the articles, was held not to affect the fraudulent character of the claim. *People v. Spiegel*, 143 N. Y. 107, *affirming* 75 Hun (N. Y.) 161.

Collecting Insurance Premium After Lapse of Policy. — See *Reg. v. Powell*, 54 L. J. M. C. 26, 51 L. T. N. S. 713, 49 J. P. 183, 15 Cox C. C. 568.

1. Doing Good Business on His Own Capital. — In *Com. v. Poulson*, 2 Pars. Eq. Cas. (Pa.) 326, the defendant falsely represented that he had been in partnership with another, which was dissolved, and when engaged in the concern the partnership had made money; that he had opened business by himself on a capital of two thousand dollars, which he had put in the store, and that he was doing a good business. This was held to be a false pretense within the *Pennsylvania Act of July 12, 1842*.

Sending Out False Business Letter Heads reciting that the sender is a dealer in groceries, etc., whereby a wholesale merchant is induced to sell goods to him, is a false pretense under *Gen. Stat. Kentucky*, c. 29, art. 13, § 2 (*Stat. 1894*, § 1208). *Taylor v. Com.*, 94 Ky. 281.

2. Connected with a Person of Opulence. — *Reg. v. Archer*, *Dears. C. C.* 449, 6 Cox C. C. 515, 3 C. L. R. 623, 1 Jur. N. S. 479.

Not Trading with Any Other Merchant. — *Smith v. State*, 55 Miss. 513.

3. Living with and Employed by a Certain Person. — *People v. Johnson*, 12 Johns. (N. Y.) 292. See also *Rex v. Villeneuve*, 2 East P. C. 839, *cited in* *Young v. Rex*, 3 T. R. 104.

4. Wanting to Employ a Clerk. — A false representation of wanting to employ a clerk, and obtaining money from an applicant for the situation by pretending it is to be deposited as a security for the honesty of such person, is a false pretense. *Reg. v. Crab*, 11 Cox C. C. 85, 18 L. T. N. S. 370, 16 W. R. 732. *Compare* *People v. Morse*, 99 N. Y. 662.

5. Misrepresentations as to Business or Profession. — *Bobbit v. State*, 87 Ala. 91; *Reg. v. Hamilton*, 10 Jur. 1029; *Reg. v. Moseley*, *Leigh & C.* 92, 9 Cox C. C. 16, 31 L. J. M. C. 24, 7 Jur. N. S. 1108, 5 L. T. N. S. 328, 10 W. R. 61; *Thomas v. People*, 34 N. Y. 351; *People v. Dalton*, 2 Wheel. Cr. Cas. (N. Y. Gen. Sess.) 179. See also *Higler v. People*, 44 Mich. 299, 38 Am. Rep. 267.

6. Pretense as to a Third Person's Occupation and Residence. — *Com. v. Stevenson*, 127 Mass. 440.

7. Cigar Supplies Containing Only Tobacco Stems and Rubbish. — *Hafner v. Com.*, (Ky. 1896) 36 S. W. Rep. 549.

Location of Land. — *People v. Cummings*, (Cal. 1899) 55 Pac. Rep. 898.

Quality of Land. — *People v. Bryant*, 119 Cal. 595.

Selling Chain of Six-carat Gold for Fifteen-carat Gold. — *Reg. v. Ardley*, L. R. 1 C. C. 301, 40 L. J. M. C. 85, 24 L. T. N. S. 193, 19 W. R. 478, 12 Cox C. C. 23. *Compare* *Reg. v. Bryan*, *Dears. & B. C.* 265, 7 Cox C. C. 312, 26 L. J. M. C. 84, 3 Jur. N. S. 620; *Reg. v. Levine*, 10 Cox C. C. 374.

Testing the Quality. — Where the prisoner was indicted for falsely pretending on one occasion to a pawnbroker that a certain material, which he produced, was "gold shruff," and on another occasion that an article he produced was "ribbon gold," and it appeared that the gold shruff and ribbon gold were worth three pounds eighteen shillings an ounce, but the thing which the prisoner said was gold shruff was worth only eighteen shillings an ounce, and what the prisoner said was ribbon gold was silver gilded over, and both the articles were tried by the pawnbroker with aquafortis and stood the test, *Adams, Serjt.*, was of the opinion that, as the prisoner had merely stated an untruth with reference to an article which he produced, and not about a fact which the person imposed upon could not detect at the time, the untrue statement did not amount to a false pretense, but was only an untrue assertion. *Reg. v. Tabram*, as stated by counsel *arguendo*, in *Reg. v. Ball*, 1 C. & M. 251, 41 E. C. L. 141. It is clear that the facts and the ground of this decision are at variance, for neither the inspection nor the testing did discover the fraud; and the case is *overruled* by *Reg. v. Ball*, 1 C. & M. 249, 41 E. C. L. 140. In that case the prisoner endeavored to obtain money from a pawnbroker by pretending that thimbles were silver, but on a test being applied they were found not to be silver; but as no property was obtained he was convicted only of an attempt.

Misrepresenting Milk Yield of Cow. — *Parks v. State*, 94 Ga. 601.

Value of Article Immaterial. — If one purchases an article upon faith of the representation that it is what it is not, the criminality of the false pretense is not relieved because the article sold was of value. *Bartlett v. State*, 28 Ohio St. 672.

the offense is committed.¹

Exhibition of False Samples—False Packing.—In some states there are statutes making criminal the fraudulent exhibition of false samples of cotton or other commodities by means whereof any person is injured,² and the false packing of articles of merchandise with intent to defraud.³

Selling by Sample.—A misrepresentation that goods sold are like the sample shown is a false pretense.⁴

Mere Tricks of Trade, bluster and empty boast, by which a person puffs his goods, are not a false pretense.⁵

Dealer's Talk.—But assertions of fact which might, under some circumstances, come under what is designated "dealer's talk," and be treated as the mere language of commendation, may constitute a false pretense, as where they are material to the negotiations for the sale, and made fraudulently with the intention that they should be accepted and acted upon by the seller, and the seller by such means is induced to pay a higher price than he otherwise would have paid.⁶

1. **Hallmark of Goldsmiths' Company.**—A false representation that a stamp on a watch was the hallmark of the Goldsmiths' Company, and that the number 18, part thereof, indicated that the watch was made of eighteen-carat gold, is an indictable offense, and is not the less so because accompanied by a representation that the watch was a gold one, and some gold was proved to have been contained in its composition. *Reg. v. Suter*, 10 Cox C. C. 577, 17 L. T. N. S. 177, 16 W. R. 141.

Selling Spurious Goods as the Goods of a Well-known Manufacturer.—*Reg. v. Dundas*, 6 Cox C. C. 380.

False Marks as to Quantity or Quality—Sale and Delivery of Goods—Iowa Statute.—Under section 2750 of the Iowa Code, punishing the "falsely marking any cask, package, box, or bale, as to quality or quantity, with intent to defraud," a person falsely marking a sack of flour with the brand "98 lbs. superfine," with intent to defraud, commits the offense without proof of the fact that the sack was sold and delivered as such. *State v. Burge*, 7 Iowa 255.

2. **Exhibition of False Samples.**—See *Cowles v. State*, 50 Ala. 454.

In a prosecution for exhibiting false samples of cotton, evidence that the bale from which the sample was taken "was mixed-packed being better on one side than on the other," is admissible. *McGhee v. State*, (Ala. 1898) 23 So. Rep. 797.

3. **False Packing.**—In order to sustain a conviction under section 470 of the *Texas Penal Code* (Code 1895, art. 568), it must appear that the accused knew that the articles (in this case cotton) were false-packed, or was in possession of such facts as imposed upon him the duty of making examination or inquiry as to that fact, and also that he sold the articles with intent to defraud. In default of evidence establishing these facts a conviction will be reversed. *Anderson v. State*, 30 Tex. App. 699.

Mixing Sand and Dirt with Cotton Before Ginning.—Where the defendant mixed sand and dirt with cotton while the cotton was in the seed, before it had been ginned, for the purpose of increasing its weight, it was held that he was guilty of swindling under article 470 of the *Texas Penal Code* in force in 1887 (Code

1895, art. 568); that it was not necessary to the commission of the offense that the defendant should have been present at the time of packing and baling the cotton, nor that at that very time he should have put the sand into the bale; that the sand, though partially removed by the process of ginning, went into the bale by his act as effectually as if he had put it into the bale when the cotton was packed; and that by putting the sand into the seed cotton, he had put it into the bale of cotton. *Jones v. State*, 22 Tex. App. 680.

4. **Selling by Sample.**—*Reg. v. Foster*, 2 Q. B. Div. 301, 46 L. J. M. C. 128, 36 L. T. N. S. 34, 13 Cox C. C. 393; *Reg. v. Goss*, 6 Jur. N. S. 178, Bell C. C. 208.

5. **Tricks of Trade Are Not a False Pretense.**—*State v. Phifer*, 65 N. Car. 321.

To say "this is an excellent piece of cloth," or "this is the best horse in the world," or that a horse is "first class," "all right," is not indictable, as no one is deceived. *State v. Hefner*, 84 N. Car. 752.

Pretense that Seller Could Sell Goods Twenty-five Per Cent. Cheaper than Others.—*People v. Morphy*, 100 Cal. 84.

6. **Condition or Qualities of Animals.**—Where the owner of a mule made false representations as to its soundness and that it worked well and did not kick, this was held to be a false pretense. *State v. Burke*, 108 N. Car. 750. So also where it was represented that a certain mare was sound in limb and body, and always had been sound in limb and body, whereas she was broken down in her loins. *State v. Sherrill*, 95 N. Car. 663.

Where a person falsely represented that there never had been anything the matter with the eyes of a certain mare, whereas the mare had been treated for the "hooks" and was also what is called a windsucker, this was held to be a false pretense. *State v. Hefner*, 84 N. Car. 751.

So also a representation that a horse is "sound, kind, and true," *Watson v. People*, 87 N. Y. 561, 41 Am. Rep. 397, 26 Hun (N. Y.) 79; *Com. v. Jackson*, 132 Mass. 16; see also *Jackson v. People*, 126 Ill. 139; or that a horse is sound, *State v. Stanley*, 64 Me. 157, if untrue, will constitute a false pretense.

But in *State v. Holmes*, 82 N. Car. 607, it

Visible or Discoverable Defects. — If the defect in the quality or condition of the thing sold be visible, or discoverable by ordinary observation, the representation made is not a false pretense. In such case the purchaser is not deceived, and the rule of *caveat emptor* applies.¹

Attention Called to Visible Defects. — But where visible defects are called to the seller's attention at the time of the sale, and he makes a false statement in reference to the character or cause of such defects, for the purpose of dissipating doubt or suspicion in the mind of the purchaser, which statement induces the purchase, there is a false pretense.²

Hidden Defects. — If the defect is not visible, or cannot be discovered by ordinary observation, the rule of *caveat emptor* does not apply.³

As to Weight. — Where a person sells an article by weight and falsely represents the weight to be greater than it is, and thereby obtains payment for a quantity greater than that delivered, he commits the offense of obtaining money by false pretenses.⁴

f. AS TO PRICE. — A false representation that goods are selling at a certain price is an indictable false pretense.⁵

g. AS TO GENUINENESS — Worthless Bills and Notes. — It is a false pretense to pass the notes of a broken bank that has stopped payment, and whose notes have become valueless,⁶ or the valueless promissory

was held not to be a false pretense, but only a falsehood or false affirmation, for a person to represent that a horse was sound and healthy, and that there was nothing the matter with him, when in fact the horse was not as it was represented, but was entirely unfit for use, which fact was known to the defendant.

1. Visible or Discoverable Defects. — *Rainey v. State*, 94 Ga. 599; *State v. Lambeth*, 80 N. Car. 396; *State v. Delyon*, 1 Bay (S. Car.) 353. See supra, this section, *Essentials of the Cheat or Pretense*.

A false representation that cotton is of the grade of "good middling" is not an indictable offense, for it is a matter of observation, and the defect is as patent to the prosecutor as to any one else. *State v. Young*, 76 N. Car. 258.

2. Attention Called to Visible Defects. — *State v. Wilkerson*, 103 N. Car. 337; *People v. Crissie*, 4 Den. (N. Y.) 525.

3. Selling Barrels of Turpentine Containing Chips and Dirt. — Where the defendant sold to the prosecutor four barrels of crude turpentine, representing that they were all just as good at the bottom as they were at the top, etc., and when examined the barrels contained only a small quantity of turpentine on the top of each, the rest of the contents being chips and dirt, it was held that the defendant was guilty of cheating by false tokens. *State v. Jones*, 70 N. Car. 75.

Selling Blind Horse with Eyes Apparently Good. — Where a person knowingly misrepresents a blind horse as sound (the horse's eyes being apparently good), and thereby cheats and defrauds the buyer, he is liable to conviction for being a common cheat and swindler under section 4595 of the *Georgia Code* in force in 1877 (Code 1895, § 670). *Tatum v. State*, 58 Ga. 408.

4. Misrepresenting Weight of Goods Sold Is a False Pretense. — *Reg. v. Ridgway*, 3 F. & F. 838; *Reg. v. Ragg*, Bell C. C. 215, 8 Cox C. C. 262, 29 L. J. M. C. 86, 6 Jur. N. S. 178, 1 L. T. N. S. 337, 8 W. R. 193.

Selling Coal at Less Weight than Contracted

For. — In *Reg. v. Sherwood, Dears. & B. C. C.* 251, 26 L. J. M. C. 81, 3 Jur. N. S. 547, the defendant agreed with the prosecutrix to sell and deliver to her a load of coal, at a certain price per hundredweight. He accordingly delivered a quantity of coal, to his knowledge weighing fourteen hundredweight. He, however, falsely represented that the quantity he had delivered weighed eighteen hundredweight, and thereby obtained the price of eighteen hundredweight. It was held that he had committed the offense of obtaining money by false pretenses. This case *overrules* *Rex v. Reed*, 7 C. & P. 848, 32 E. C. L. 766. In that case the prisoner was charged with falsely pretending that a quantity of coal which he delivered weighed sixteen hundredweight (meaning 1,792 pounds), whereas it weighed only 896 pounds; and it was held that this was a false affirmation only, and not a false pretense.

Selling Loads of Soot Containing Bags of Old Bricks. — *Reg. v. Lee, Leigh & C.* 418, 9 Cox C. C. 460, 33 L. J. M. C. 129, 10 L. T. N. S. 348, 12 W. R. 750.

5. Pretense that Goods Are Selling at a Certain Price. — *Com. v. Wood*, 142 Mass. 401.

6. Passing Worthless Banknotes a False Pretense. — *Reg. v. Dowey*, 11 Cox C. C. 115, 37 L. J. M. C. 52, 17 L. T. N. S. 481, 16 W. R. 344; *Reg. v. Smith*, 6 Cox C. C. 314; *Rex v. Flint, R. & R. C. C.* 342; *Reg. v. Philpotts*, 1 C. & K. 112, 47 E. C. L. 112; *Com. v. Hulbert*, 12 Met. (Mass.) 446.

Passing Worthless Note Without Verbal Representation. — The mere passing off of worthless notes, where the bank had stopped payment many years before, without any verbal representation, is tantamount to a representation that the note is a good and genuine note of an existing bank, and for the face value of it. *Reg. v. Jarman*, 14 Cox C. C. 111, 28 Moak 545.

But in *Com. v. Stone*, 4 Met. (Mass.) 47, it was held that where no words are said concerning the passing of a bill of a broken bank, the question whether it amounts to a representation that the bill is worth what it pur-

note of an individual.¹

Spurious Notes, Coin, and Bonds. — It is also an indictable false pretense to pass off a "flash note,"² or a stolen bond,³ or spurious metal representing coin,⁴ or counterfeit notes.⁵ But this last is now generally a distinct offense.⁶

h. AS TO LOCALITY. — It is a false pretense for a person falsely to represent that he resides at a particular locality where the question of locality is a material fact in inducing the prosecutor to part with the property.⁷

i. AS TO PERSONAL STATUS OR CONDITION — (1) *Being Unmarried.* — Where a person obtained money from a woman by falsely pretending that he was unmarried, and that he would furnish a house with the money, and would then marry her, it was held to be a false pretense.⁸

ports to be depends upon all the evidence of the attendant circumstances.

Passing Note of Some Value. — Where the defendant was charged with passing at its face value, a note of a broken bank whose notes had become practically worthless, it was held that he was guilty of false pretenses even though the note was of some value, *Com. v. Stone*, 4 Met. (Mass.) 45; or even though the bank afterwards declared a dividend, *Reg. v. Evans*, Bell C. C. 187, 8 Cox C. C. 257, 29 L. J. M. C. 20, 5 Jur. N. S. 1361, 1 L. T. N. S. 108. "Good" — "Genuine." — The term "good" rather imports "genuine" than as expressive of a note being available to insure payment. *Com. v. Stone*, 4 Met. (Mass.) 48.

1. Promissory Note. — Where a person tenders to another a promissory note of a third party, in exchange for goods, though he says nothing, yet he should be taken to affirm that the note has not to his knowledge been paid, either wholly or to such an extent as almost to destroy its value. *Reg. v. Davis*, 18 U. C. Q. B. 180.

Pretense that Promissory Note Is a Draft. — A charge of obtaining money by pretending that a promissory note is a draft is not a false pretense. If the instrument is a valid obligation against the maker, it is good for the amount called for, and it is not a material fact whether it be called a draft, a due bill, or a written obligation. *State v. Dyer*, 41 Tex. 521.

2. Flash Note. — Where the defendant passed a "flash note" as a Bank of England note, on a person unable to read, and obtained property and the difference in change, it was held that he was guilty of a false pretense. *Reg. v. Coulson*, T. & M. 332, 1 Den. C. C. 592, 4 Cox C. C. 227, 19 L. J. M. C. 182, 14 Jur. 557.

3. Selling Bonds Known to Have Been Stolen. — Bonds which had been stolen in 1883 were found in the prisoner's possession in 1890. Under an assumed name he was dealing with them and selling them to innocent purchasers. It was held that his conduct amounted to a false representation of the genuineness of the bonds which could not be cured by the fact that, the bonds passing freely from hand to hand, the innocent purchaser from whom the prisoner obtained the money would be able to get it back again. *In re Pinter*, 66 L. T. N. S. 324.

Bogus Bond. — The testimony of a police officer as to a bogus bond, arising from his experience in regard to such instruments, is admissible for the purpose of showing whether the bond is a genuine or a bogus instrument. *State v. Norton*, 76 Mo. 181.

4. Spurious Metal Representing Coin. — Where a person passes a piece of spurious metal representing a twenty-dollar gold piece on one side, but on the other side having an advertisement merely, and not purporting to be coin, this is a false pretense under the *Tennessee Code*, § 4701. It is not the offense of passing counterfeit coin, for in such case the spurious coin passed must be a representation of genuine coin on both sides. *Roberts v. State*, 2 Head (Tenn.) 501.

But in *State v. Allred*, 84 N. Car. 749, it was held that giving in change spurious money knowing it to be worthless and spurious was not a false pretense, but the offense of counterfeiting. It does not appear in what the spuriousness consisted.

Where a person is charged with passing spurious money, representing it to be good, the spuriousness of the money must be shown. *Brown v. State*, 29 Tex. 503. See generally the title COUNTERFEITING, vol. 7, p. 875.

5. Uttering Counterfeit Note. — In *Rex v. Freeth*, R. & R. C. C. 94, it was held that the fact of uttering a counterfeit note as a genuine one is a false pretense, notwithstanding the note upon its face would have been good for nothing in point of law.

6. See generally the title COUNTERFEITING, vol. 7, p. 875.

7. Pretense of Residing at a Particular Place. — *Woodbury v. State*, 69 Ala. 242, 44 Am. Rep. 515.

8. Pretense of Being Unmarried. — *Reg. v. Jennison*, 9 Cox C. C. 158, Leigh & C. 157, 31 L. J. M. C. 146, 8 Jur. N. S. 442, 6 L. T. N. S. 256, 10 W. R. 488. But see *State v. Renick*, (Oregon 1899) 56 Pac. Rep. 275. In this latter case it appeared that the defendant was married, but represented and pretended, under an assumed name, to an unmarried woman, that he was not married, and by this means, coupled with a promise of marriage, obtained a sum of money from her. The indictment charged that the money was obtained by false pretenses, through and by the use of a false token, and that the use by the defendant of himself as such false token was sufficient to constitute the offense. The court held that the false token was lacking and therefore the indictment did not charge a crime.

Threat of Action for Breach of Promise. — Where a married man, having obtained from a woman a promise of marriage which she refused to fulfil, threatened her with an action, whereby he obtained money, it was held that the fact that he paid his addresses to the woman was sufficient evidence of the pretense

(2) *Being Prepared to Do a Thing.* — A false representation of being prepared to do a thing is a misrepresentation of an existing fact, and is therefore an offense.¹

(3) *Being in a Necessitous Condition.* — A false representation made by a person as to his own or another's necessitous condition, by means of which gifts of money or property are obtained in charity, is a false pretense.²

j. AS TO IDENTITY. — A false representation as to the identity of persons or things is a false pretense.³

Assuming a Fictitious Name is a false pretense.⁴

Falsely Personating Another, by means of which something of value is obtained, is a false pretense.⁵

k. AS TO ANOTHER'S EXISTENCE. — A false representation as to another's existence is a false pretense.⁶

l. AS TO POSSESSING SUPERNATURAL POWER. — A false pretense of possessing supernatural power, made for the purpose of obtaining money or goods, is indictable.⁷

that he was a single man, and in a condition to marry; and the threat of an action for breach of promise was a pretense that he was entitled to maintain his action. *Reg. v. Cope-land*, 1 C. & M. 516, 41 E. C. L. 282.

Pretense of a Treaty of Marriage. — Fraudulently obtaining goods under a pretense of a treaty of marriage is an indictable offense. *Anonymous*, Lofft 146.

1. *False Representation of Being Prepared to Do a Thing.* — *Reg. v. Gordon*, 23 Q. B. Div. 354, 58 L. J. M. C. 117, 60 L. T. N. S. 872, 53 J. P. 807, 16 Cox C. C. 622; *Rex v. Crossley*, 2 M. & Rob. 17, 2 Lew. C. C. 164.

2. *When Obtaining Gifts in Charity Is a False Pretense.* — *Reg. v. Jones*, 14 Jur. 533, 1 Den. C. C. 551, 4 New Sess. Cas. 353, 4 Cox C. C. 198, 19 L. J. M. C. 162; *Reg. v. Hensler*, 11 Cox C. C. 570; *Com. v. Whitcomb*, 107 Mass. 436; *State v. Matthews*, 91 N. Car. 635.

Contra. — *People v. Clough*, 17 Wend. (N. Y.) 351, 31 Am. Dec. 303. The decision in this case is based chiefly upon the ground that the preamble to the statute of *New York*, which was copied from the English statute of Geo. II., referred to trade and credit.

3. *Identity of Person.* — A false representation that a note executed by a certain person is the note of a certain other person is a false pretense. *People v. Cook*, 41 Hun (N. Y.) 71.

Pointing Out Another Person as the One Meant. — On the charge of inducing another to sign a lease to a third party, pointing out another person as such third party would not seem to amount to the representation of a material fact which is calculated to deceive and induce the prosecutor to sign the lease. *Com. v. Steven-*
son, 127 Mass. 449.

Identity of a Horse. — *Com. v. Haughey*, 3 Metc. (Ky.) 225.

4. *Obtaining Money and Drawing Checks in Fictitious Name.* — In *Com. v. Drew*, 19 Pick. (Mass.) 179, the defendant from time to time deposited money in a bank and drew checks under a fictitious name. At length, for the purpose of defrauding the bank, he drew such a check when he had no money deposited, and presented it himself, and the bank paid the amount. It was held that the assumption of a fictitious name was a false pretense within the meaning of the statute; but inasmuch as

it had no influence in inducing the bank to pay the money, the offense of obtaining money under false pretenses was not committed.

Delivering Spurious Lottery Tickets for Sale under Fictitious Name. — Where a person assumed a false name and delivered spurious quarters of lottery tickets for sale on commission, with a declaration that he had in a bank the genuine corresponding whole tickets, this was held to be a false pretense within the *Massachusetts* statute of 1815, c. 106. *Com. v. Wilgus*, 4 Pick. (Mass.) 177.

5. *Pretense by Falsely Personating Another.* — 2 Bish. N. Cr. L., § 152.

For a full discussion of the principles governing the offense of falsely personating another, see the title FALSE PERSONATION, *ante*.

6. *Misrepresentation of Another's Existence.* — An advertisement was inserted by the prisoner in a newspaper in the name of Rev. A. Brient, Holt, Trowbridge, Wilts., as to a prize to be given to the successful competitor in a word competition. No such person as the Rev. A. Brient existed at the address given, and sums of money which certain persons were induced to send in the belief that a *bona fide* competition was indicated by the advertisement were received and appropriated by the prisoner. It was held that the advertisement was intended to convey the impression that there was a person named A. Brient, a minister of religion, living at the place indicated, who had instituted a *bona fide* competition. *Reg. v. Randell*, 57 L. T. N. S. 718, 52 J. P. 359, 16 Cox C. C. 335.

7. *Pretense of Supernatural Power.* — A woman went to one G. and asked her if she could tell her anything on the cards to fetch her husband back. G. said that she would bring him back, but that the stuff she used was expensive. She then obtained money and goods, and said she would bring him back over hedges and ditches, and named a day for doing so; that she was a cunning woman, and there was not such another near. It was held that the representation as to possession of the power was a false pretense. *Reg. v. Giles, Leigh & C.* 502, 10 Cox C. C. 44, 34 L. J. M. C. 50, 11 Jur. N. S. 119, 11 L. T. N. S. 643, 13 W. R. 327.

A false pretense of having power to communicate with the spirits of deceased and other

m. **PRETENSE THAT A THING HAS BEEN DONE.** — A person obtaining money by falsely pretending that a thing has been done commits the offense.¹

n. **PRETENSE OF ACTING UNDER AUTHORITY.** — It is a false pretense to obtain money or property by falsely pretending to act under authority, either as broker² or agent.³

Purchasing Goods upon Faith and Credit of Another. — And where a person purchases goods for himself upon the credit of another, by falsely pretending that the latter had authorized him to get the goods, the offense is committed.⁴

persons, although such other persons were not present in the place where the defendant then was; and of having power to produce and cause to be present such spirits as aforesaid in a materialized or other form; and also that musical instruments produced musical and other sounds, by means of the spirits so caused to be present, were held to be representations of existing facts. *Reg. v. Lawrence*, 36 L. T. N. S. 404. See also *Com. v. County Prison*, 15 W. N. C. (Pa.) 282, to the same effect.

Practicing Witchcraft, whereby money or other property is obtained, has also been held indictable. *Reg. v. Bunce*, 1 F. & F. 523.

1. Pretense of Having Done a Thing. — A carrier obtained the carriage money by pretending to have delivered the goods and lost the receipt for their delivery. This was held to be a false pretense. *Rex v. Airey*, 2 East P. C. 831, 2 East 30.

Pretense of Having Made a Bet. — In *Young v. Rex*, 3 T. R. 98, the defendants falsely pretended that one of them had made a bet with a colonel in the army that a certain person would on the next day run ten miles in length within one hour. This was held to be a false pretense.

Pretense that Persons Had Agreed to Pay Defendant's Debts. — Where a person procured signatures to a note, by falsely pretending that certain persons had made an arrangement to furnish money to pay all his debts, together with the note which the prosecutor might give, this was a pretense of an existing fact and not of something to take place in the future. *State v. Switzer*, 63 Vt. 606, 25 Am. St. Rep. 789.

2. Acting as Broker for an Undisclosed Principal. — *Com. v. Jeffries*, 7 Allen (Mass.) 572, 83 Am. Dec. 712.

3. Representation by Bank Clerk of Depositor Giving Notice of Withdrawal. — A clerk in a savings bank received a check from the manager of the bank, upon a false representation that one of the depositors had given notice of withdrawal, and for the purpose of handing it over to the depositor. According to the usual course of business, if a depositor could not attend at a proper time to receive the check, he allowed the clerk to receive such check and to get the cash for it, to be kept by him till called for. It was handed to the clerk as the agent of the depositor. It was held that this was a false pretense. *Reg. v. Essex, Dears. & B. C. C. 371*, 7 Cox C. C. 384, 27 L. J. M. C. 20, 4 Jur. N. S. 15.

Second Sale of Same Goods under Authority to Sell. — Under the *Indiana* statute defining felonies, approved June 10, 1852 (2 Rev. Stat. 1876, p. 436), punishing the obtaining, etc., by color of any false token or writing, or any

false pretense, a person selling corn under a letter of authority to sell it, and afterwards by means of said letter making a sale to a second purchaser, is guilty of a false pretense under said act if in force, as supposed, but not under section 2204 of the Act of 1881, which punishes the obtaining, etc., by color of any false token or writing, for the writing is genuine, but the representation false. But a false pretense by such person that an assignment of the letter would vest the title to the corn in the assignee is not an offense; for the assignee has no right to rely upon the representation, which simply consists in the misconstruction of an instrument too plain to be misunderstood and the misstatement of the fact of the transfer of it. If its character had been different and its meaning uncertain, it could have made no difference, because in reference to such matters every man must rely upon his own judgment or resort to his legal adviser to instruct him. *Shaffer v. State*, 82 Ind. 221.

Where the Fraud Is Accomplished by Means of an Innocent Agent. — In *Reg. v. Butcher*, Bell C. C. 6, 8 Cox C. C. 77, 28 L. J. M. C. 14, 4 Jur. N. S. 1155, 7 W. R. 38, the prisoner said to a little boy that he would give him a penny if he would go and get B.'s money. The boy innocently went to the pay table, and said to the treasurer that he was come for B.'s money; and B.'s wages were given to him. He took the money to the prisoner, who was waiting outside. It was held that the prisoner could not be convicted on the charge of obtaining the money from the treasurer by falsely pretending to the treasurer that he, the prisoner, had authority from B. to receive his money, or of obtaining it from the treasurer and the boy by falsely pretending to the boy that he had such authority, or of obtaining it from the boy by the like false pretense to the boy; but that he might have been convicted of obtaining the money by falsely pretending to the treasurer that the boy had authority from B. to receive the amount.

4. Purchasing Goods upon Faith and Credit of Another. — *Reg. v. Burnside*, Bell C. C. 282, 8 Cox C. C. 370, 30 L. J. M. C. 42, 6 Jur. N. S. 1310, 3 L. T. N. S. 311, 9 W. R. 37; *Com. v. Whitney*, (Ky. 1887) 3 S. W. Rep. 533; *State v. Mickle*, 94 N. Car. 843.

Order from Third Person. — Where a person falsely pretends to have an order from a third person for goods which are to be charged to the latter, it is immaterial whether the order is verbal or written. *State v. Mickle*, 94 N. Car. 843.

Married Woman Separated from Husband Pretending to Act under Husband's Authority. — A married woman living separately from her husband, and receiving an income from him for her separate maintenance under a deed of

As to Being Sent. — So also where a person obtains property by falsely pretending to have been sent for it, he is guilty of the offense.¹

As to Having a Warrant of Arrest. — A false representation of having a warrant issued for the arrest of the prosecutor is a false pretense.²

Pretense of Authority to Compromise a Crime. — In *Indiana* it has been held that a representation by a person pretending to be an officer with a warrant of arrest that he has authority to compromise a crime is one which the defrauded party is bound to know is false, and therefore it cannot deceive.³ But there is authority supporting the contrary view.⁴

10. Jurisdiction of Offense — *a. IN GENERAL.* — It is not material where the pretenses are made, as they of themselves do not constitute a crime. They are simply the means by which the crime is accomplished. The place where the property is obtained by means of such pretense with intent to cheat and defraud is the place where the offense is committed.⁵ Accordingly, where a false pretense is made in one state and the property is obtained in another, the party defrauding is not amenable to the jurisdiction of the former state.⁶

Place Where Property Obtained — **Property Delivered to Common Carrier.** — Although the representations be made in one county or state, and the property obtained in another, yet if the accused procured the owner of the property to deliver it to a common carrier, consigned to the accused in the latter place, the title to the property being thereby parted with, the offense is committed in the

separation, which stipulated that he should not be liable for her debts, falsely pretended that she was living with him and was authorized by him to get goods on credit, for which he would pay; that she wanted goods to furnish a house in his occupation, and, being asked for a deposit, said it was a cash transaction; that her husband would give a check as soon as the goods were delivered. This was held to be a false pretense. *Reg. v. Davis*, 11 Cox C. C. 181, 19 L. T. N. S. 325, 17 W. R. 127.

Under the Texas Statute against swindling, *Pasc. Dig.*, art. 2427, is included "the purchase of property upon the faith and credit of some other person, upon the false pretense that such other person has given the accused the right to use his name or credit in making the acquisition." But a person so obtaining goods from another may show that the goods were for the family of the person whose credit was used, for the question of authority in such case is the essence of the controversy. *Bozier v. State*, 5 Tex. App. 220.

1. Pretense of Being Sent by Another. — *Coleman's Case*, 2 East P. C. 672; *Reg. v. Woolley*, 1 Den. C. C. 559, *per* Anderson, B.; *Thorne v. Turck*, 10 Daly (N. Y.) 329, *affirmed* 94 N. Y. 94, 46 Am. Rep. 126; *State v. Dixon*, 101 N. Car. 741.

2. Pretense of Having a Warrant of Arrest. — *Perkins v. State*, 67 Ind. 270, 33 Am. Rep. 89; *Com. v. Henry*, 22 Pa. St. 255.

3. Perkins v. State, 67 Ind. 276, 33 Am. Rep. 89.

4. Ryan v. State, (Ga. 1898) 30 So. Rep. 378. See also *People v. Stetson*, 4 Barb. (N. Y.) 151.

5. Offense Committed in Place Where Property Obtained. — *State v. House*, 55 Iowa 473; *Com. v. Van Tuyl*, 1 Metc. (Ky.) 1, 71 Am. Dec. 455; *State v. Dennis*, 80 Mo. 596; *State v. Shaeffer*, 89 Mo. 278; *Adams v. People*, 1 N. Y. 173, 3 Den. (N. Y.) 190, 610; *People v. Sully*, 5 Park. Cr. Rep. (N. Y. Super. Ct.) 169.

But in *U. S. v. Plympton*, 4 Cranch (C. C.) 309, it was held that where the false pretenses were made in Maryland the offense was committed there, even though the bills and acceptances on which the money was obtained were discounted in Washington, D. C., and that an indictment could not be sustained in the latter place.

Goods Obtained in One County Brought into Another. — One who obtains goods by false pretenses in one county, and afterwards brings them into another county, where he is apprehended with them, cannot be indicted for the offense in the latter county, but must be indicted in the former. *Reg. v. Stanbury*, 9 Cox C. C. 94, *Leigh & C.* 128, 31 L. J. M. C. 88, 8 Jur. N. S. 84, 5 L. T. N. S. 686, 10 W. R. 236.

Where Pretense Made and Property Obtained in One County, but Note Given in Payment Made in Another. — Where it appeared that the false pretenses were made, and the property obtained by them delivered, in the county of Washington, that was held to be the proper county for the trial of the offense, though it appeared that by agreement of the parties the note given for the property was not made and delivered until a subsequent time and in a different county. *Skiff v. People*, 2 Park. Cr. Rep. (N. Y. Supreme Ct.) 147.

6. Pretense Made in One State and Property Obtained in Another. — *Stewart v. Jessup*, 51 Ind. 413, 19 Am. Rep. 739.

Pretense Made Through Agent in Another State. — Although the defendant resides in one state, the pretense may be made by him in another state through an agent there, in which case he will be deemed to be a principal; and if he comes within the limits of such state, the courts thereof have jurisdiction of his person, and it is no defense that the offender owes allegiance to another state or sovereignty. *Adams v. People*, 1 N. Y. 173, *affirming* 3 Den. (N. Y.) 190.

former place, and must be prosecuted therein; for delivery to the carrier is a delivery to the consignee.¹

Money or Drafts Sent by Post. — Where the false pretense is made by letter sent to the prosecutor in another place, and the latter sends from that place a draft to the defendant which is cashed by him, the money is obtained where the draft is cashed.²

Pretense Made by Letter. — Where a false pretense is made by letter, the pretense is made when the letter is posted.³

1. Delivery of Property to Common Carrier Is Delivery to Defendant. — *Norris v. State*, 25 Ohio St. 225, 18 Am. Rep. 291; *State v. Lichliter*, 95 Mo. 408.

And it would appear that the mere fact of delivery to the common carrier at the place where the pretenses are made, without the procurement or direction of the defendant, will be a sufficient delivery to the defendant. *Com. v. Karpowski*, 167 Pa. St. 225, *affirming* 15 Pa. Co. Ct. Rep. 280.

Property Consigned to Fictitious Persons. — A person represented to the owners of machines that he was authorized by several persons named by him to give orders in their behalf for the purchase of machines to be sent to them severally by railroad at different places in Vermont. The machines were accordingly sent, but there were no such persons, and he received the goods himself, as he had intended to do. It was held that the offense was committed in the county where he made the representations. If there had been any such persons as he named, and the machines had been sent to them, there might have been good reason to hold that the goods were not delivered to him in the county where the representations were made. But as the names were fictitious, representing only himself, and as the goods were really sent to him and received by him, he was the real consignee. The well-established doctrine that delivery to the carrier is delivery to the consignee applies. *Com. v. Taylor*, 105 Mass. 172.

When Delivery to Common Carrier Is Not Delivery to Defendant. — Where parties bought goods from a traveling salesman of merchants in another county, but there was no written contract as required by the statute of frauds, and the evidence showed delivery of the goods to a railroad for conveyance to the buyers, but did not show that they were accepted or received by them, it was held that, as the contract was void under the statute of frauds, the delivery of the goods to the railroad company was not a delivery to them. But it would be otherwise if the contract had been such as to vest the legal title in the purchasers. *Exp. Parker*, 11 Neb. 313.

2. Cashing a Draft. — *Reg. v. Holmes*, 12 Q. B. Div. 23, 53 L. J. M. C. 37, 49 L. T. N. S. 540, 15 Cox C. C. 343.

But in *Com. v. Wood*, 142 Mass. 459, it was held that where the pretenses were made in Massachusetts, but the defrauded party, at the request of the defendant, sent a cashier's draft to the defendant at New York instead of paying over the money in Massachusetts, the offense was complete in the latter state. The decision was based on the ground that the postmaster in Massachusetts, where the letter inclosing the draft was mailed, was the agent

of the defendant to receive it. See also *Reg. v. Jones*, 1 Den. C. C. 551, 4 New Sess. Cas. 353, 4 Cox C. C. 198, 14 Jur. 533.

An information at common law for a conspiracy between the captain and purser of a man of war for planning and fabricating false vouchers to cheat the crown (which planning and fabricating were done upon the high seas) is well triable in Middlesex, upon proof there of the receipt by the commissioners of the navy of the false vouchers transmitted thither by one of the conspirators through the medium of the post, and the application there by a third person, a holder of one of such vouchers (a bill of exchange) for payment, which he there received. *Rex v. Brisac*, 4 East 164.

Draft Discounted Where Drawn. — If a person in Washington, D. C., by deceitful practices causes money of the United States to be placed to his credit in New York, and subject to his draft, and he draws, accordingly, in Washington, and there gets the draft discounted by a broker, and there receives the proceeds of the draft, the fraud is consummated in Washington, if the drawee honors and pays the draft, and thereby ratifies the act of the broker in advancing the money; but until the draft is paid the offense is not complete. *U. S. v. Watkins*, 3 Cranch (C. C.) 442.

3. Pretense Made by Letter. — *Reg. v. Holmes*, 12 Q. B. Div. 23, 53 L. J. M. C. 37, 49 L. T. N. S. 540, 15 Cox C. C. 343. In this case the false pretense was made by letter posted in England to the prosecutor in France.

But in a previous case it would seem to be held that the pretense is not made till the letter is delivered. In *Reg. v. Leech, Dears*, C. C. 642, 7 Cox C. C. 100, 25 L. J. M. C. 77, 2 Jur. N. S. 428, 36 Eng. L. & Eq. 589, the prisoner wrote and posted in a county a letter containing a false pretense to the prosecutor, who received it in a borough. The prosecutor in the borough posted to the prisoner in the county a letter containing the money obtained by the false pretense, and which the prisoner received in the county; it was held that under the statute 7 Geo. IV., c. 64, § 12, which authorizes the trial in any jurisdiction where the offense is begun or completed, the prisoner might be tried for the offense of obtaining the money by false pretenses at the borough quarter sessions; part of the offense being the making the false pretense, and the false pretense being made to the prosecutor in the borough, where the letter containing the false pretense was delivered to him by the post-office authorities, whom the prisoner made his agents for that purpose.

Inference as to Where Letter Was Posted. — On an indictment for obtaining money by a false pretense which was alleged to have been made by sending a certain false return of fees to the

Jurisdiction in Either County. — Under statute in some jurisdictions the defendant may be tried in any county where the offense is begun or completed.¹

Indians. — If an Indian commits the crime in question outside of the Indian country, whether upon one of his own race or another, he is amenable to the law of the place where the crime is committed.²

b. WHERE OFFENSE PUNISHABLE UNDER FEDERAL STATUTE. — Where the offense is punishable under a statute of the United States, the statute does not have the effect of nullifying or superseding the law of the state where the offense was committed.³

c. WHERE ATTEMPT TO COMMIT IS MADE. — An attempt to commit the crime is cognizable where the attempt is made.⁴

11. Grade of Offense and Punishment. — Under the English statutes the offense is a misdemeanor.⁵ In some of the *United States* the offense is a misdemeanor, in others a felony.⁶ In *Mississippi* the obtaining of property over a certain value is a felony, and under it a misdemeanor.⁷

Punishment. — In some states the punishment is the same as that for larceny; ⁸ in others it is punished by fine or imprisonment or both.⁹

commissioners of the treasury, it appearing that the return was received by them in Westminster, with a letter dated Northampton, and an affidavit sworn there, it was held that the jury might infer from these facts that the letter was posted at Northampton. *Reg. v. Cooke*, 1 F. & F. 64, cited approvingly in *Reg. v. Holmes*, 12 Q. B. Div. 23.

1. Defendant May, by Statute Be Tried Where Offense Begun or Completed — England. — The statute 7 Geo. IV., c. 64, § 12, authorizes the trial in any jurisdiction where the offense is begun or completed. *Reg. v. Leech*, Dears. C. C. 642, 36 Eng. L. & Eq. 589, *Reg. v. Jones*, 1 Den. C. C. 551, 4 New Sess. Cas. 353, 4 Cox C. C. 198, 19 L. J. M. C. 162, 14 Jur. 533.

New York. — The Code of Criminal Procedure, § 134, provides that "when a crime is committed partly in one county and partly in another, or the acts or effects thereof constituting or requisite to the consummation of the offense occur in two or more counties, the jurisdiction is in either county;" and therefore, where a crime is partly committed in one place and the fruits of the crime are finally received in another, the accused may be tried in the former place. *People v. Dimick*, 107 N. Y. 33.

2. In re Wolf, 27 Fed. Rep. 606, holding that the Supreme Court of the District of Columbia had jurisdiction in the case. See generally the title **INDIANS**.

3. Where Offense Punishable under a Statute of the United States. — *Abbott v. People*, 75 N. Y. 602, affirming 15 Hun (N. Y.) 437. See also *Com. v. Walker*, 108 Mass. 313.

4. Attempt to Commit Cognizable Where Made. — *State v. Terry*, 109 Mo. 622. The statute under which the indictment in this case was drawn was declared unconstitutional.

5. Reg. v. Prince, L. R. 1 C. C. 155.

6. Under the Indiana Statute the offense is a felony. *Musgrave v. State*, 133 Ind. 297.

In *North Carolina* the offense is a misdemeanor. *State v. Crumpler*, 90 N. Car. 701.

In *Tennessee* it is a felony. *Rafferty v. State*, 91 Tenn. 655.

7. Mississippi. — By the third section of the article creating County Courts, the obtaining of goods, money, or other property, by false pretenses, under the value of one hundred dol-

lars, was made a misdemeanor; and obtaining goods of the amount or value of one hundred dollars or over, was a felony under Rev. Code 630, art. 348, in force in 1867. *Bowler v. State*, 41 Miss. 570.

8. State v. Hurst, 11 W. Va. 71; *Dull v. Com.*, 25 Gratt. (Va.) 965.

9. Fine and Imprisonment — California. — Where a person is sentenced to imprisonment for one year and to pay a fine twice the value of the property which he is found guilty of obtaining by false pretenses, he cannot be imprisoned for nonpayment of the fine. *People v. Hamberg*, 84 Cal. 475.

In *Massachusetts* a person convicted under the statute of 1815, c. 136, § 1, of cheating by false pretenses, may by force of the statute of 1788, c. 53, § 1, be sentenced to pay a fine and costs within ten days, and, if not paid, to suffer an imprisonment not exceeding three months. *Wilde v. Com.*, 2 Met. (Mass.) 408. And under said statute of 1815, taken in connection with the statute providing for the discharge of persons imprisoned for the nonpayment of fine and costs, one may be sentenced to pay costs as well as a fine. *Wilde v. Com.*, 2 Met. (Mass.) 408.

Solitary Imprisonment — Massachusetts. — Neither the statute of 1815, c. 136, nor that of 1812, c. 134, authorized solitary imprisonment as part of the sentence for cheating by false pretenses. A sentence, therefore, of one day's solitary imprisonment and one year's hard labor for this offense was held to be erroneous, and reversed, though by the former statute it might have been punished with confinement at hard labor for a term not exceeding seven years. *Wilde v. Com.*, 2 Met. (Mass.) 408.

Punishment for Procuring Signature to and Delivery of a Note — Missouri. — Under Rev. Stat. Missouri, 1879, § 1561, providing that "every person who, with intent," etc., obtains "from any other person or persons any money, property, or valuable thing whatever, by means or by use of any trick or deception," etc., shall be punishable by imprisonment in the penitentiary, it was held that the offense was punishable under said section, and that the state was not obliged to prosecute under section 1335, providing for punishment against the ob-

12. Attempt to Commit. — Under statute in some jurisdictions a person may be convicted of an attempt to obtain property by false pretenses, although charged with the substantive offense.¹

Acts Considered Attempts. — Acts remotely leading towards the commission of the offense are not to be considered as attempts to commit it; but acts immediately connected with it are.²

taining the signature of a person to a written instrument by false pretenses, which imposes only the same punishment as for larceny; for the larceny of a note at common law is considered as the larceny of only so much paper. *State v. Porter*, 75 Mo. 171.

Statute Prescribing Different Penalties for Similar Offenses—Missouri. — A person indicted for swindling under Rev. Stat. Mo., 1879, § 1561, may be punished under said section without regard to section 1564, relating to similar offenses, but prescribing different penalties. *State v. Beaulsleigh*, 92 Mo. 490.

North Carolina. — The offense of obtaining goods by false pretenses is punishable by fine of not less than one hundred dollars nor more than one thousand dollars, or by imprisonment in the penitentiary for not less than one nor more than five years, or both, at the discretion of the court. *State v. Crumpler*, 90 N. Car. 701.

Sentence in the Alternative—Georgia. — Where the accused is sentenced to pay a fine of one thousand dollars and the costs of the prosecution, or to be confined in the common jail for twelve months, the sentence is in the alternative. When in the alternative, the imprisonment is a part of the punishment, and the limit is six months (Code, § 4705). If, however, the judge simply puts a fine upon the criminal, it seems that he can enforce the payment of that fine by an unlimited imprisonment in jail; and in that event the imprisonment does not discharge the fine, although the judge or other competent authority may afterwards release the prisoner from jail. *Hathcock v. State*, 88 Ga. 91.

Power to Release Penalty—Tennessee. — The power to release the penalty imposed by the Tennessee Act of 1842, c. 48, for obtaining goods under false pretenses, on the recommendation of the jury, where the goods do not exceed ten dollars, is vested in the circuit judge alone, and cannot be exercised by the Supreme Court. *Chapman v. State*, 2 Head (Tenn.) 36.

Cruel and Unusual Punishment. — See for a free discussion of this phase of the subject, the title CRUEL AND UNUSUAL PUNISHMENT, vol. 8, p. 441.

1. Canada. — Under the statute 18 Vict., c. 92, § 13 (Con. Stat. Canada, c. 98, § 68), a person indicted for obtaining money, etc., may be found guilty of an attempt to commit the offense, which is a misdemeanor, the obtaining being a felony. *Reg. v. Goff*, 9 U. C. C. P. 438.

In Tennessee an attempt to commit the offense of false pretenses is a felony punishable by imprisonment in the penitentiary. *Rafferty v. State*, 91 Tenn. 655.

Obtaining Money Where the Prosecutor Knew that the Pretenses Were False. — In *Reg. v. Hensler*, 11 Cox C. C. 570, 22 L. T. N. S. 691, 19 W. R. 108, the prisoner wrote a begging

letter to the prosecutor, in which, by certain false statements, he attempted to obtain money. The prosecutor sent the prisoner five shillings, but stated at the trial that he knew the pretenses were false. It was held that defendant might be convicted of an attempt to obtain money by false pretenses. See also *Reg. v. Keighley, Dears. & B. C. C. 145*, 7 Cox C. C. 217.

Obtaining Money—No Reliance on the Pretense. — A party falsely pretended to a pawnbroker that a chain was silver. The pawnbroker, without relying on the prisoner's statement, but upon his own examination and test, lent him ten shillings on the chain, which was made of a composition worth about a farthing an ounce. It was held that while not guilty of the substantive offense, he committed the offense of attempting to obtain money by false pretenses, for the statement was a false pretense within the meaning of the statute 7 & 8 Geo. IV., c. 29, § 53. *Reg. v. Roebuck, Dears. & B. C. C. 24*, 7 Cox C. C. 126, 25 L. J. M. C. 101, 2 Jur. N. S. 597.

Where Pretense Unsuccessful. — A man went into a pawnbroker's shop in the middle of the day, and laid down eleven thimbles on the counter, saying: "I want five shillings on them." The pawnbroker's assistant asked the man if they were silver, and he said they were. The assistant tested them, and found that they were not silver, and in consequence did not give any money, but sent for a policeman, and gave the man into custody. It was held that this was an attempt to commit the offense of obtaining money under false pretenses, and by consequence that if the money had been obtained the offense would have been complete. *Reg. v. Ball*, 1 C. & M. 249, 41 E. C. L. 140. Compare *State v. Fraker*, (Mo. 1899) 49 S. W. Rep. 1017.

See generally the title ATTEMPTS TO COMMIT CRIME, vol. 3, p. 250.

2. Acts Connected with False Pretense—Obtaining Credit. — One E. had contracted with the guardians of a poor-law union to deliver loaves of a specified weight to any poor persons bringing a ticket from the relieving officer. The tickets were to be returned by E. at the end of each week, together with a statement of the number of tickets sent back, whereupon he would be credited for the amount and the money would be paid at the time stipulated in the contract. E. delivered to certain poor people who brought tickets loaves of less than the specified weight, returned the tickets with a note of the number sent, and obtained credit in account for the loaves so delivered. It was held that although he had obtained credit in account, and could not, therefore, have been convicted of the offense of actually obtaining money by false pretenses, yet he had done all that was depending on himself towards the payment of the money, and was therefore guilty of the

When Attempt Complete. — When the attempt to commit the principal or ultimate offense is made, the offense of attempting to commit is complete.¹

13. Conspiracy to Commit — *a.* IN GENERAL. — Where two or more persons conspire to cheat and defraud, the false representations of one of them, made designedly for the purpose, are chargeable against all.² But in order to make one conspirator amenable for the acts or declarations of a co-conspirator, there must be proof of complicity between them;³ and the combination or agreement must be to cheat and defraud in some one of the modes made

attempt. *Reg. v. Eagleton*, 1 Jur. N. S. 940, Dears. C. C. 515, 33 Eng. L. & Eq. 540.

Attempt — Question on Whose Behalf Goods Ordered. — A person employed at a hospital wrote as manager, when in fact he was not manager, to the prosecutor, for a small quantity of linen, not saying that it was for the hospital. The goods were really ordered for himself, but were not sent. Being charged with an attempt to obtain them, the question was whether he ordered the goods on behalf of the hospital or in his own name, there being evidence of the absence of an intention to pay cash. *Reg. v. Franklin*, 4 F. & F. 94.

1. Attempt Complete When Attempt Made. — *State v. Decker*, 36 Kan. 720. See generally the title ATTEMPTS TO COMMIT CRIME, vol. 3, p. 250.

Vexatious Indictments Act Not Applicable to Attempts. — A person being charged with attempting to obtain money by false pretenses without the leave required by the Vexatious Indictments Act (22 & 23 Vict., c. 17), and objection that the indictment having been preferred for an offense upon which he had not been committed for trial, it should be quashed, being taken and overruled, it was held that the Vexatious Indictments Act, § 1, was inapplicable, as that applied only to the offense of obtaining money or other property by false pretenses, and not to the offense of attempting to obtain. *Reg. v. Burton*, 32 L. T. N. S. 539.

2. False Representations of One Conspirator Chargeable Against All. — *State v. Rowley*, 12 Conn. 112; *Cowen v. People*, 14 Ill. 352; *Com. v. Harley*, 7 Met. (Mass.) 462; *State v. Tomlin*, 29 N. J. L. 24; *Blum v. State*, 20 Tex. App. 593, 54 Am. Rep. 530. See generally the title CONSPIRACY, vol. 6, p. 830.

Where Several Acts Are Committed. — Where several acts, although consummated at different times, and against different individuals, are committed in pursuance of an agreement entered into between the conspirators, they are part and parcel of a single scheme, and constitute but one offense. Thus the agreement of the conspirators may contemplate dealings with one man or many, at the same or at different times, in relation to the same or different matters, and these several acts would be a part of a system or scheme of conspiracy. *State v. Grant*, 86 Iowa 223.

3. Proof of Complicity Must Be Shown. — *Marvisky v. State*, 9 Tex. App. 377. See the title CONSPIRACY, vol. 6, p. 830.

Where a city official made false returns of sums of money due from the city to a contractor, and the latter afterwards drew the sums, the court said that "the jury were warranted in finding that it was by pre-established harmony rather than by fortuitous concurrence." *Com. v. Mulrey*, 170 Mass. 103.

How Complicity and Co-operation May Be Shown.

— If A procures B to go to C and with a false pretense, of which A is conscious, to obtain the goods of C, A is guilty in the matter of obtaining these goods by false pretenses. And whether A be outside or within the door of the shop of C is immaterial; all that is necessary to be proved is that he is at the time acting in concert with B, and aiding in putting forth the false pretenses, and that the precise false pretenses and representations charged in the indictment be made with his knowledge, concurrence, and direction. *Com. v. Harley*, 7 Met. (Mass.) 465.

Connection with Transaction Showing Complicity. — Where a person falsely represented that a note in his confederate's possession was given by him for property bought, and the confederate, on the following day, with the aid of a letter from such person written to the party defrauded, wherein he agreed to pay the note as promised the day before, was enabled to obtain certain property from the prosecutor on said note, such person was sufficiently connected with the transaction of the confederate of the second day to make him liable for obtaining money under false pretenses. *State v. Davis*, 56 Kan. 54.

Presence of One Defendant Without Knowledge of Other's Design. — If a person be present when money is received by another under false pretenses, and take part of it, although he had full knowledge of the representations made to obtain it, he does not commit the offense of obtaining money under false pretenses, when he had no knowledge of such a design, and was not present when the representations were made, or had any knowledge of them. *People v. Cline*, 44 Mich. 290.

Where the Success of the Conspiracy Depended in Part upon a Person Having No Knowledge of the Fraud. — In *Musgrave v. State*, 133 Ind. 297, the defendant conspired to obtain money from an insurance company by insuring his life for his mother's benefit, without her knowledge; and, in order that it might appear that he had died, the conspirators procured a skeleton and placed it so that it would appear that he had been burned to death, the co-conspirator having stated that it was the skeleton of the defendant. It was held that though the mother was not a party to the fraud, the defendant's purpose might well be done without her doing any wrong; and it would not avail him as a defense that she knew nothing of the existence of the policy, or of the guilty purpose or acts of the conspirators.

Conspiracy to Remove Goods Insured and Burn House. — Where parties conspired with the owner of goods, who had effected insurance upon them, to remove the goods from the house in which they were stored, and to burn

criminal by statute.¹ But it would seem that in order to a conviction there need not be, in a technical sense, a representation of an existing fact.²

May Be Committed Against United States. — The crime of false pretenses being punishable in the District of Columbia, a conspiracy to commit the crime there is a conspiracy to commit an offense against the United States.³

Success or Failure Immaterial. — The fact that the means used did not prove successful is immaterial; the defendant is guilty whether he fails or succeeds.⁴

The Obtaining of the Property. — If property be obtained by one, another may be convicted, even though he received no share of the property.⁵ But under a statute which punishes only those who receive the fruits of the fraud, if one only receives the property the others are not guilty.⁶

b. EVIDENCE. — On a joint charge of swindling, evidence is admissible tending to prove a conspiracy between the parties to swindle the public generally, or any individual.⁷

down the house so that the owner could fraudulently and falsely pretend that the goods were burned, it was held that the defendants other than the owner must have known that he was the owner of the goods; that they were insured, and that he intended to commit the felony, or that they believed he had such intention. *Com. v. Barnes*, 132 Mass. 242.

1. *Com. v. Eastman*, 1 Cush. (Mass.) 227, 48 Am. Dec. 596.

Obtaining Goods for Purpose of Resale. — A person conspiring to obtain goods by representing that he wants them for purposes of resale in the regular course of trade as a retail dealer, is indictable for a conspiracy under Gen. Stat. *Massachusetts*, c. 161, § 54, and Stat. 1863, c. 248, § 2. *Com. v. Walker*, 108 Mass. 309.

False Bookkeeping and False Reports by employees, by which was concealed from their employer knowledge of the fact of embezzlement, do not constitute a conspiracy to obtain money by false pretenses. *Watson v. People*, 27 Ill. App. 496.

When Charge of Conspiracy Too Vague and Uncertain. — An indictment charging in substance that N. W. and others did conspire by false pretenses to defraud of large sums of money all such persons as should apply to or negotiate with them for a loan of money is too vague and uncertain to sustain a conviction. *White v. Reg.* 10 Ir. C. L. Rep. 523, 13 Cox C. C. 318, 15 Moak 353.

2. **Conspiracy Committed, though No False Pretense in the Technical Sense Be Made.** — Three persons were in a room of a public house with the prosecutor. One of them pulled out a pen case and left the room, leaving the pen case on the table; while he was absent, the other two took the pen out of the pen case and proposed to the prosecutor that he should wager with the other person on his return that there was no pen in the pen case. The prosecutor accordingly wagered fifty shillings. The pen case was then opened, another pen tumbled out, and the prisoners took the money. It was held that this was a conspiracy to cheat; that it was not necessary that a false pretense should be used, in the technical sense that it was a representation of an existing fact. *Reg. v. Hudson*, 6 Jur. N. S. 566, 8 Cox C. C. 305, 29 L. J. M. C. 145, 8 W. R. 421, 2 L. T. N. S. 263.

3. **Conspiracy by False Pretenses May Be Committed Against United States.** — *In re Wolf*, 27 Fed. Rep. 611.

4. **Success or Failure of Conspiracy.** — *Watson v. State*, 16 Lea (Tenn.) 608. See generally the title CONSPIRACY, vol. 6, p. 830.

5. **Accused May Be Convicted, though He Receive No Share of Property Obtained.** — *State v. Davis*, 56 Kan. 54.

Check Obtained by One but Proceeds Participated in by Others. — Where several persons are jointly indicted for obtaining a check by false pretenses, and it appears that the check was delivered to one in the absence of the others, who afterwards participated in the proceeds thereof, they are all equally guilty. *Jones v. U. S.*, 5 Cranch (C. C.) 652.

6. *Jones v. U. S.*, 5 Cranch (C. C.) 647.

7. **Conspiracy to Swindle the Public Generally May Be Shown.** — *State v. Beauchleigh*, 92 Mo. 490. See also *Reg. v. Stenson*, 12 Cox C. C. 111, 25 L. T. N. S. 666.

Evidence of Bank Deposits. — Where a city official and another person were charged with a conspiracy to swindle the city out of certain moneys, evidence of deposits in bank by the official at the time, much too large to be accounted for by his salary, was held admissible in connection with independent evidence tending to show a successful fraudulent conspiracy. *Com. v. Mulrey*, 170 Mass. 103.

Declarations of Co-conspirator When Charged with Conspiracy and with False Pretenses. — Two were jointly indicted for obtaining money by conspiracy and by false pretenses. On being arraigned, one pleaded guilty, and the other not guilty. On the trial of the indictment, the one who had pleaded guilty was admitted as a witness against the other, although it was objected that the evidence of a co-conspirator could not be received under the count for conspiracy. The jury found him not guilty on the count for conspiracy, but guilty on the counts for false pretenses. It was held that the co-conspirator was admissible as a witness, and that the conviction was right. *Reg. v. Gallagher*, 32 L. T. 406. See also *Reg. v. Stenson*, 12 Cox C. C. 111, 25 L. T. N. S. 666.

Detective Permitting Swindle in His Presence. — A detective who permits a swindle to be committed in his presence is not such a co-conspirator as to be incompetent to testify against the swindler. *State v. Beauchleigh*, 92 Mo. 490.

c. PUNISHMENT. — A conspiracy cannot be more severely punished than would be the perpetration of the offense.¹

14. **Compounding the Offense.** — In *Pennsylvania* it has been held that the offense may lawfully be settled by the parties after the institution of criminal proceedings; hence, a promissory note given to the prosecutor in settlement of such an offense and in consideration of the abandonment of a criminal prosecution begun thereon is founded upon a valid consideration.²

III. **OFFENSES OF KINDRED NATURE** — 1. **Presenting False Claims to Public Officers** — a. **IN GENERAL.** — In the *United States*, federal and state statutes have been enacted against presenting false claims to public officers for allowance out of public funds.³ Under the federal statutes it is not necessary that

1. **Punishment for Conspiracy.** — Hartmann v. Com., 5 Pa. St. 67.

In *Maine*, a conspiracy to cheat by false pretenses, and actually cheating by false pretenses, are offenses of like legal turpitude, and punishable in like manner. Both are felonies. *State v. Mayberry*, 48 Me. 238.

In *Michigan*, a party convicted of conspiring to obtain the money of another by means of false pretenses may be sentenced under How. Stat., § 9434, which provides a punishment for the commission of offenses indictable at the common law for the punishment of which no provision is expressly made by any statute of this state. *People v. Watson*, 75 Mich. 582.

2. In *Pennsylvania* the offense is a misdemeanor, and under section 9 of the Act of March 31, 1860 (Purd. Dig. 377), the magistrate or the court to which misdemeanors of an inferior class have been returned may permit the settlement of such offenses. *Geier v. Shade*, 109 Pa. St. 180.

A Note Given in Settlement of the Offense of false pretenses being for a valid consideration, the fact that the principal debtor therein procured the signatures of certain persons thereto by means of false pretenses will not invalidate the note, without evidence that the payee had notice of the fraud. *Rothermal v. Hughes*, 134 Pa. St. 510.

Contra. — But in *Bowen v. Buck*, 28 Vt. 308, it was held that the suppression of a prosecution for obtaining goods by false pretenses is not a legal consideration for the giving of a note; for the offense is of the nature of the *crimen falsi*; and, furthermore, that it will make no difference in this respect, as to the validity of the note, that it was given only for the value of the goods obtained, and only for the amount of the debt justly due therefor from the person who obtained them.

See generally the titles **COMPOUNDING OFFENSES**, vol. 6, p. 399; **CONSIDERATION**, vol. 6, p. 667.

3. **False Claim Against United States by Custodian of Court House.** — Where a custodian in the United States court house and post office at Lincoln, Nebraska, presented to an officer of the treasury department a false and fictitious claim against the United States for payment and approval for matting alleged to have been purchased for the use of said building, and for the purpose of aiding to obtain payment of the claim made a false voucher therefor, this was held to be an offense under Rev. Stat. U. S., § 5438. *U. S. v. Hull*, 14 Fed. Rep. 324.

Preparation and Use of Fraudulent Claim Against a Municipality. — Where a person prepares a false claim and files it with a public officer for the purpose of fraudulently passing it through the known and understood route to payment, knowing the natural and necessary consequence of his acts, the bare presence of the claim or bill is a direct statement on his part, to each person whose duty renders it necessary for him to examine and act upon it, that its contents are true, and is therefore a false pretense; for however indirect or circuitous the channel by which it reaches its destination, when there the person who gave it its direction and aim is also there, by the instrument used to effect his purpose. *People v. Oyer & T. Ct.*, 83 N. Y. 453; *People v. Genet*, 19 Hun (N. Y.) 96.

Presenting False Claim to a County. — Where a county assessor presented to a board of county commissioners a false claim purporting to be an account for money paid for clerical assistance in his office, and received an order from said board on the county treasurer for payment of the amount, it was held that as the county can act only by its officers and agents, and the board is the financial agent of the county, the presentation of such claim to the board is practically a presentation to the county. *Roberts v. People*, 9 Colo. 458.

Under the California Penal Code, § 72, in a prosecution for presenting to a board of supervisors a fraudulent claim for traveling expenses, it is immaterial whether or not the warrant upon which the claim was based was regularly issued, or that the claim as presented contained several items, or items not alleged to be false or fraudulent. *People v. Carolan*, 71 Cal. 195.

False Claim Not Itemized — **Colorado Statute.** — Where a county assessor received an order for the amount of a duly certified account purporting to be an account for money paid for clerical assistance in his office, the objection that the account was not itemized as required by statute will not avail where the county commissioners had been allowing the accounts of department clerks for several years. It could not be said that the items given in the account did not inform them of the nature of the services claimed. Nor will it avail that the county was not divided into districts for which deputies should have been appointed as required by law, nor that the account had been certified before a deputy clerk. *Roberts v. People*, 9 Colo. 458.

Under the North Carolina Statute, in a prosecution

the claim should have been presented by a person on his own behalf.¹

b. WHO IS AN OFFICER. — An officer within the meaning of such statutes may be a court or a collective body.²

2. Confidence Game. — In many states there are statutes directed against what are popularly known as "confidence games." As the devices by which this method of swindling may be perpetrated are as various as the human mind is suggestive, it would be clearly impossible to specify and define them all in a statute, and the legislatures have not attempted to do so. Hence general words have been used, to which the courts are disposed to give such scope and effect as their natural meaning fairly imports and the effectuation of the legislative intent requires.³

cution for inducing a county treasurer to cash an order by falsely representing it to be genuine, the fact that the order was for a bill of stationery for a county officer is no defense, where the bill had not been authorized by the county treasurer to be paid; for the county treasurer had no authority to pay the bill except upon an order of the county commissioners. *State v. Walton*, 114 N. Car. 783.

Presumption as to Person Who Presents Warrant to Treasurer. — Where a county assessor fraudulently procured the allowance of a claim of a board of county commissioners, for which he received a warrant on the treasurer, which was paid, the treasurer not knowing to whom he paid it, it was held that, as the warrant was negotiable, it was a presumption of fact that the assessor presented it, or caused it to be presented, and obtained the money thereon, notwithstanding the possibility that it might have been lost by him, or that it might have been stolen, and presented by some one else, since, when the nature of the case admits of explanation or contradiction, and none is offered, and enough has been proven to warrant a reasonable conclusion against the defendant, the law warrants the adoption of the conclusion to which the proof tends. *Roberts v. People*, 9 Colo. 458.

False Statement as to Killing of Sheep — Compensation from the Sheep Fund. — Under the *Pennsylvania* Act of Feb. 27, 1869, and its supplements, a party making a false statement before a justice of the peace as to the killing by dogs of sheep belonging to him, for the purpose of procuring a certificate of damage for compensation from the "sheep fund," to be paid by a county treasurer, may be convicted for a false pretense. *Com. v. Sweet*, 4 Pa. Dist. Rep. 136.

Consummation of Offense. — Under *Rev. Stat. Ohio*, § 7075, providing that whoever, knowing the same to be false or fraudulent, makes out or presents for payment any claim, account, or other evidence of indebtedness, false or fraudulent in whole or in part, for the purpose of procuring the allowance of the same, shall be punished, etc., the presentation of a false and fraudulent claim to a board of infirmity directors for the purpose of procuring its allowance is the consummation of the offense. *Hauck v. State*, 45 Ohio St. 439.

1. Claim Need Not Be Presented by Person on His Own Behalf. — Section 5438, *Rev. Stat. U. S.*, concerning the presentation of false and fictitious claims, is not limited in its operation to false claims presented by a person on his own behalf. It is intended to apply to an

attorney, agent, officer, or other person who undertakes to get a claim which is false and fraudulent allowed in his own behalf or in behalf of any other. "It is a matter of history that this legislation was intended mainly to put a stop to the practice which was said to prevail at the city of Washington and elsewhere, where claim agents and lobbyists, acting on behalf of others, were in the habit of manufacturing false and fictitious testimony — pension agents and other agents of that character." *U. S. v. Huli*, 14 Fed. Rep. 324.

2. Presentation of False Claim to District Court. — The presentation for approval to a District Court of the United States of a claim by a deputy marshal is a presentation to an officer in the civil service of the United States, within the meaning of *Rev. Stat. U. S.*, § 5438. *U. S. v. Strobach*, 4 Woods (U. S.) 600.

Deputy Marshal Presenting Claim to Late Marshal. — Where a deputy marshal presented a claim for services to the late marshal, for approval, which claim was in favor of the said late marshal against the United States, such marshal is, within the meaning of *Rev. Stat. U. S.*, § 5438, an officer to whom it is an offense punishable by that section for a deputy marshal to present a false claim for fees. *U. S. v. Strobach*, 4 Woods (U. S.) 592.

Board of Infirmity Directors — Ohio Statute. — The board of infirmity directors of a municipal corporation is an accounting officer in the sense in which that term is employed in section 7075 of the *Ohio Revised Statutes*, which provides that whoever knowingly presents a false and fraudulent claim to the auditor "or other accounting officer" of any municipal corporation, for the purpose of procuring the allowance thereof, is guilty of a crime. *Hauck v. State*, 45 Ohio St. 439.

3. Confidence Game. — *Morton v. People*, 47 Ill. 475; *Pierce v. People*, 81 Ill. 98; *Maxwell v. People*, 158 Ill. 248; *Van Eyck v. People*, (Ill. 1899) 52 N. E. Rep. 852; *State v. Quinn*, 47 Iowa 368; *State v. Wilson*, (Minn. 1898) 75 N. W. Rep. 7115.

A "confidence game" is "any swindling operation in which advantage is taken of the confidence reposed by the victim in the swindler." *Maxwell v. People*, 158 Ill. 256, quoting *Webster's International Dictionary*.

In *Maxwell v. People*, 158 Ill. 248, it was urged by counsel that the statute, by employing the words "by means or by use of any false or bogus checks, or by any other means, instrument or device," had reference exclusively to the obtaining of money or property

3. Fraudulent Practices in Sports or Games. — In *England*, fraudulently obtaining money by means of unlawful device and ill practice in playing at sports or games is punishable.¹

IV. DEFENSES — Eventual Recovery. — The fact that the defrauded party might eventually have recovered the property, or for the injury, is no defense.²

Payment or Restoration. — When money or property has been obtained by false pretenses with intent to defraud, it will not avail the defendant as a defense that he had an honest intention to repay the money or pay for the property,³ or that he is able and willing to do so,⁴ or that he has offered to refund,⁵ or that a subsequent restoration or repayment has been made.⁶

by the use of false or bogus checks, or by the use of other false or bogus commercial paper, or paper of the same specific class as checks; but the court negated this contention, saying: "It being the evident intention of the statute to punish the obtaining, or attempting to obtain, money or property by any means, instrument, or device commonly called the confidence game, it would be a very narrow construction of the statute to restrict its meaning to such devices as consist only in the use of false or bogus checks, or other commercial paper of like character. The generic or family characteristic, by which other means, instruments, or devices are included within the same genus as the device specifically mentioned, is not so much indicated by the word 'checks' as by the words 'false or bogus.' The obtaining of money by means or use of what is false or bogus is the offense aimed at. This is further apparent from the designation, in section 99, of the victim as 'the person defrauded or attempted to be defrauded.'"

Sleight-of-hand Performance — Strap Game. — Under the *Iowa* statute, Laws of 1876, c. 102, a sleight-of-hand performance with a strap, and known as the "strap game," is an offense. Sleight-of-hand performances, whether done by means of three-card monte, or the use of cards, or other devices, are embraced within the statute. *State v. Quinn*, 47 Iowa 368.

Swindling at Cards — California. — In *People v. Frigerio*, 107 Cal. 151, the defendant and his confederate pretended to play at a game of cards wherein the defendant, as an inducement to the prosecutor to part with his money, was permitted to win repeatedly, but the moment the prosecutor's money was put up it was apparently lost by the defendant to his confederate. This was held sufficient evidence for a conviction under section 332 of the Penal Code, directed against persons who obtain money fraudulently by the game of "three-card monte, so called, or any other game, device, * * * or other means whatever," although the circumstances disclosed were such as to render the defendant guilty of larceny.

Obtaining Credit by False Representations of Solvency. — When the defendant exhibited letter heads and business cards of a firm with which he was connected, a draft, or copy of one, and made a note payable at a particular bank, also drew orders on various firms, the court held that these were but false representations designedly made, of his solvency, for the purpose of obtaining credit, and did not constitute a "confidence game" within the statute. *Pierce v. People*, 81 Ill. 98.

Note or Order Signed by Defendant. — In *Pierce v. People*, 81 Ill. 98, it was held that a note or

order given by the accused, signed by himself, but containing no indorsement whatever, was not within the phrase "false or bogus checks" as used in the 98th section of the *Illinois* Criminal Code (Rev. Stat. 1874, p. 366).

Constitutionality of Statute. — The *Illinois* Act of Feb. 27, 1867, defining and punishing the confidence game, has been adjudged constitutional. *Morton v. People*, 47 Ill. 468.

1. Wagering by Tossing with Coins. — Where the prosecutor was induced to go a public house and drink and toss for wagers with one of the prisoners, and the event was that the prosecutor lost and the prisoners took away his property, it was held that this was a sport, pastime, or exercise, if not a game, within the meaning of 8 & 9 Vict., c. 109, § 17. *Reg. v. O'Connor*, 15 Cox C. C. 3, 45 L. T. N. S. 512, 46 J. P. 214, 31 Moak 742.

2. Eventual Recovery of Property. — *People v. Bryant*, 119 Cal. 595.

That There Might Be Recovery for Injury Sustained Is No Defense. — *Territory v. Ely*, 6 Dakota 128.

3. An Intention to Pay Is No Defense — England. — *Reg. v. Naylor*, L. R. 1 C. C. 4, 35 L. J. M. C. 61, 11 Jur. N. S. 910, 13 L. T. N. S. 381, 14 W. R. 58, 10 Cox C. C. 149.

California. — *People v. Wiegner*, 100 Cal. 354.

Iowa. — *State v. Neimeier*, 66 Iowa 636.

Kentucky. — *Com. v. Schwartz*, 92 Ky. 510, 36 Am. St. Rep. 609, (Ky. 1892) 19 S. W. Rep. 189, citing 7 AM. AND ENG. ENCYC. OF LAW (1st ed.) 752, 753.

Maine. — *State v. Hill*, 72 Me. 242.

Massachusetts. — *Com. v. Coe*, 115 Mass. 501; *Spaulding v. Knight*, 116 Mass. 154.

Pennsylvania. — *Com. v. Schuyler*, 1 Pa. Co. Ct. Rep. 403.

Texas. — *Buntain v. State*, 15 Tex. App. 515.

It is no defense to an indictment for fraudulently obtaining property under a promise to pay cash for it, under *Missouri* Rev. Stat. 1889, § 3564, that the defendant had made arrangements with others to furnish him money but that they had failed to do so; nor that he intended to tender a check which he in fact never tendered, and which would have been worthless if tendered and accepted. *State v. Wilson*, (Mo. 1898) 44 S. W. Rep. 722.

4. The Fact that the Defendant Is Able and Willing to Restore the Property or pay the money fraudulently obtained is no defense; for the possession of the means of payment is entirely consistent with the fraud charged. *People v. Oscar*, 105 Mich. 704; *State v. Thatcher*, 35 N. J. L. 445.

5. An Offer to Refund Is No Defense. — *Carlisle v. State*, 77 Ala. 71.

6. Subsequent Restoration or Repayment. — The

Offense Committed for Meritorious Object. — The fact that the defrauded party committed the offense for a meritorious object is equally unavailing.¹

Intent to Violate the Law. — Where the defendant knew that his representations were false, and where they were made with intent to deceive the prosecutor and obtain the latter's property, it is immaterial whether his intent "was consciously directed to law breaking."²

Defrauded Party in the Wrong. — Although the defrauded party was himself guilty of an unlawful act in the transaction, the defendant cannot rely upon this fact to defeat the prosecution.³

Motive of Prosecution. — In one instance it was held that the fact that a prosecution for false pretenses was instituted for the purpose of collecting a debt should not prevent a conviction.⁴ In several cases, however, such a practice has been the subject of judicial condemnation.⁵

V. EVIDENCE — 1. **As to the Pretenses** — *a.* **IN GENERAL.** — In the absence of statutory regulation the false pretense is provable like any other fact; but some states provide for the mode of proof.⁶

Onus of Proof. — The onus of proving the falsity of the pretense devolves upon the state; it is not incumbent upon the defendant to prove its truth.⁷

offense being complete when the money or property is obtained by false pretenses, it is not purged by a subsequent restoration or repayment. *Donohoe v. State*, 59 Ark. 378; *Com. v. Coe*, 115 Mass. 502; *People v. Oscar*, 105 Mich. 704. See also *Com. v. Howe*, 132 Mass. 258.

That the accused was forced to make restitution after being arrested, constitutes no bar to a conviction upon an indictment subsequently returned. *Williams v. State*, (Ga. 1898) 31 S. E. Rep. 546.

1. **That Offense Committed for Meritorious Object No Defense.** — *People v. Lennox*, 106 Mich. 625; *Musgrave v. State*, 133 Ind. 297.

2. **Intent to Violate the Law.** — *Com. v. O'Brien*, 172 Mass. 284.

3. **That Defrauded Party Also in the Wrong No Defense** — *England*. — *Reg. v. Hudson*, 6 Jur. N. S. 566, 8 Cox C. C. 305, 29 L. J. M. C. 145, 2 L. T. N. S. 263, 8 W. R. 421.

Canada. — *Reg. v. Ewing*, 21 U. C. Q. B. 533.

California. — *People v. Martin*, 102 Cal. 558. *Colorado*. — *In re Cummins*, 16 Colo. 451, 25 Am. St. Rep. 291.

Indiana. — *Casily v. State*, 32 Ind. 66.

Massachusetts. — *Com. v. Morrill*, 8 Cush. (Mass.) 571.

Michigan. — *People v. Watson*, 75 Mich. 582.

New Jersey. — *Cunningham v. State*, (N. J. 1897) 38 Atl. Rep. 847.

In *Com. v. O'Brien*, (Mass. 1898) 52 N. E. Rep. 77, it was said to be no defense that the party defrauded entered into an agreement in which there was an element of technical illegality.

Contra. — *McCord v. People*, 46 N. Y. 470 (Peckham, J., dissenting); *People v. Stetson*, 4 Barb. (N. Y.) 151; *State v. Crowley*, 41 Wis. 271, 22 Am. Rep. 719. See also *People v. Clough*, 17 Wend. (N. Y.) 351, 31 Am. Dec. 303.

4. *Com. v. Singer*, 2 Del. Co. Rep. (Pa.) 182.

5. See *Drought v. State*, (Ga. 1897) 28 S. E. Rep. 1013; *State v. Rivers*, 58 Iowa 110, 43 Am. Rep. 112; *Com. v. Hickey*, 3 Pa. L. J. 86. See also *Morris v. People*, 4 Colo. App. 136; *Bowen v. Buck*, 28 Vt. 315.

Other Matters Pertaining to the Question of Defense have been treated in the preceding parts of this article, in connection with the special subject.

6. **Proof of Oral Pretense** — *California*. — Section 1110 of the Penal Code provides that where the false pretense is oral, it must be proven by the testimony of two witnesses, or of one witness and corroborating circumstances. *People v. Martin*, 102 Cal. 558.

7. **State Must Prove Falsity of Pretense.** — *Morris v. People*, 4 Colo. App. 136; *Bowler v. State*, 41 Miss. 576; *Babcock v. People*, 15 Hun (N. Y.) 347; *Brown v. State*, 29 Tex. 503.

When Onus upon Defendant to Prove Leave to Sell Stock. — A tenant of a farm gave a bill of sale upon the stock therein, and about two months thereafter sold all the stock without anything being said as to the ownership thereof, or as to the existence of the bill of sale. No evidence was given by him, when tried for false pretenses, to prove that he had obtained the leave of the holder of the bill of sale to the selling of the stock. It was held that the onus of proving that he had leave to sell the stock lay upon him, and not upon the prosecution, and that he had, by the act of selling, represented himself as being the absolute owner. *Reg. v. Sampson*, 52 L. T. N. S. 772, 49 J. P. 807.

Evidence Held Sufficient to Negative the Pretense. — A person was charged with obtaining twenty yards of carpet by falsely pretending that a certain person who lived in a large house down the street, and had had a daughter married some time back, had been to him about some carpet, and had asked him to procure a piece of carpet. He afterwards sold the carpet so obtained to two different persons. The only evidence to disprove the truth of the statement was that of a woman who lived in the village, whose daughter was married about a year previously, and who stated that she had not sent the defendant to the prosecutor's shop for the carpet. It was held that this evidence was sufficient to negative the pretense. *Reg. v. Burnside*, Bell C. C. 282, 8 Cox C. C. 370, 30 L. J. M. C. 42, 6 Jur. N. S. 1310, 3 L. T. N. S. 311, 9 W. R. 37.

Must Be Proved as Laid. — The matter alleged to be false being material, the prosecution must be confined to the pretense as laid in the indictment.¹

Need Not Be Proved in Precise Words Laid. — The precise words as laid in the indictment need not be proved. It is sufficient if the pretense be proved in substance and effect.²

Proof Need Not Be Direct. — It is not necessary, in order to establish the falsity of the representations, that the proof should be direct; but such evidence must be given, or such facts established, as tend legitimately and necessarily to show it.³

Proof of One False Pretense Sufficient. — Although other representations not false constituted a part of the inducement on which property or the signature to an instrument was obtained, proof of one of the false pretenses made, having a material influence in inducing the prosecutor to part with the thing obtained, is sufficient.⁴

Defendant May Prove Truth of Representations. — The accused is entitled to produce any testimony which may show that his representations were true. *Rainforth v. People*, 61 Ill. 365.

1. The Pretense Must Be Proved as Laid — *England*. — *Rex v. Plestow*, 1 Campb. 494; *Reg. v. Bulwer, Leigh & C.* 476, 9 Cox C. C. 492, 33 L. J. M. C. 171, 10 Jur. N. S. 684, 10 L. T. N. S. 580.

Florida. — *Ladd v. State*, 17 Fla. 221.

Kansas. — *Matter of Eberle*, 44 Kan. 472.

New Jersey. — *Sharp v. State*, 53 N. J. L. 511.

Pennsylvania. — *Com. v. Daniels*, 2 Pars. Eq. Cas. (Pa.) 338.

Texas. — *Moore v. State*, 20 Tex. App. 239; *Peckham v. State*, (Tex. Crim. App. 1894) 23 S. W. Rep. 532.

Wisconsin. — *State v. Green*, 7 Wis. 686.

Evidence of Facts Not Averred Inadmissible. — Upon a charge for obtaining goods under false pretenses, evidence of specific sums owed by the accused is inadmissible when not described or set forth in the indictment. *Barber v. People*, 17 Hun (N. Y.) 366.

Representations in Indictment Not Negatived. — In *State v. Long*, 103 Ind. 481, the defendant was charged with obtaining money by falsely representing that he was the owner of a certain amount of stock in a manufacturing company, and that he was solvent and able to pay all his debts, but as the indictment did not negative the representations of insolvency, nor charge that the stock was unpledged, it was held that evidence offered by the state that the stock was pledged to secure an indebtedness due and unpaid, exceeding its value, was not admissible.

Where Indictment Avers a Greater Indebtedness than That Specified. — But the testimony of one not named in the indictment that the defendant owed him a certain sum at the time when he represented himself to be solvent is admissible under the general averment of a greater indebtedness than that specifically set out in the indictment. *State v. Long*, 103 Ind. 484.

Instrument Purporting on Its Face to Be a Draft. — Where the defendant was charged with obtaining money upon certain worthless drafts, which he represented were worth the sum of one hundred dollars each, an instrument which upon its face was called a draft, but which in fact was not, was held not admissible for the purpose of proving the alleged false pretense. *Prehm v. State*, 22 Neb. 673.

2. Pretense Need Not Be Proved in Precise Words Laid in Indictment. — *Com. v. Howe*, 132 Mass. 251; *Com. v. Hershell*, Thach. Cr. Cas. (Mass.) 70; *People v. Sully*, 5 Park. Cr. Rep. (N. Y. Super. Ct.) 169; *Com. v. Daniels*, 2 Pars. Eq. Cas. (Pa.) 338.

3. Direct Proof Not Required. — Where a person represented that a fraudulent check was good, and that the drawer was responsible, it appeared that after the check had been protested and returned by the bank on which it was drawn, the party defrauded said to the defendant: "The bank writes that this party is a myth; that you have been drawing fraudulently upon the bank," to which the defendant replied that he would make it good, but made no denial. This was held sufficient. *People v. Pinckney*, 67 Hun (N. Y.) 428.

Where the defendant falsely pretended to be indebted to the prosecutor and one other person only, his itemized account to a person not referred to as his creditor may be proved by such person, as tending to show that the representation was false and fraudulent. *Smith v. State*, 55 Miss. 521.

On a charge of obtaining goods under pretense of sending them to Charleston, S. C., the evidence of a person usually employed to cart goods for the defendant to the effect that no goods had been carried by him for the defendant to any ship bound for that port was held admissible. *Com. v. Hershell*, Thach. Cr. Cas. (Mass.) 70.

The pretense may be proved by the acts and conduct of the defendant in connection with his statements. *People v. Sully*, 5 Park. Cr. Rep. (N. Y. Super. Ct.) 169.

4. Proof of One False Pretense Sufficient — *England*. — *Reg. v. Hewgill*, Dears. C. C. 315, 2 C. L. R. 630, 18 Jur. 158; *Rex v. Dale*, 7 C. & P. 352, 32 E. C. L. 539; *Rex v. Hill, R. & R.* C. C. 142.

Alabama. — *Beasley v. State*, 59 Ala. 20.

Arkansas. — *State v. Vandimark*, 35 Ark. 306; *Woodruff v. State*, 61 Ark. 159.

Georgia. — *Hathcock v. State*, 88 Ga. 98.

Iowa. — *State v. Chingren*, (Iowa 1898) 74 N. W. Rep. 946.

Kentucky. — *Com. v. Haughey*, 3 Metc. (Ky.) 225.

Maine. — *State v. Dunlap*, 24 Me. 77.

Massachusetts. — *Com. v. Davidson*, 1 Cush. (Mass.) 43; *Com. v. O'Brien*, 172 Mass. 248.

Missouri. — *State v. Vorback*, 66 Mo. 172.

b. **SECONDARY EVIDENCE.** — The false pretense may be proved by secondary evidence after notice to the defendant to produce the primary evidence thereof.¹

Pretense that Property Is Unencumbered. — Where a person is charged with obtaining a loan of money on property which he represented to be free from incumbrances, the record of the mortgage cannot be offered as primary evidence without first laying a foundation for such evidence.² If the false pretense is contained in a letter which is lost, parol evidence of the contents of the letter may be given.³ And the fact that an instrument which apparently embodies the terms of the transaction between the parties has been subsequently signed will not exclude parol evidence of the false representations that have been made which are not contained therein; for the proceeding being a criminal one, the state cannot be precluded from showing the true facts of the case.⁴

c. **DOCUMENTARY EVIDENCE.** — In general, any writings or documents used by the defendant for the purpose of effecting the fraud, tending to show the commission of the offense, are admissible in evidence.⁵ But letters written by the defendant subsequently to the commission of the offense are not admissible in his behalf, for this would be allowing him the advantage of evidence which he had made for himself.⁶

d. **ADMISSIONS.** — The falsity of the pretense may be shown by the admissions of the defendant, if such admissions were voluntarily made.⁷

New Jersey. — *Cunningham v. State*, (N. J. 1898) 40 Atl. Rep. 606.

New York. — *Webster v. People*, 92 N. Y. 427; *People v. Stone*, 9 Wend. (N. Y.) 191; *Fowler v. People*, 18 How. Pr. (N. Y. Supreme Ct.) 493; *People v. Haynes*, 14 Wend. (N. Y.) 555, 28 Am. Dec. 530.

Pennsylvania. — *Com. v. Alsop*, 1 Brews. (Pa.) 336; *Com. v. Daniels*, 2 Pars. Eq. Cas. (Pa.) 338; *Com. v. Lundberg*, 18 Phila. (Pa.) 482, 43 Leg. Int. (Pa.) 260.

Tennessee. — *Britt v. State*, 9 Humph. (Tenn.) 42.

1. **Letter-press Copies.** — *Com. v. Jeffries*, 7 Allen (Mass.) 561, 83 Am. Dec. 712.

2. **Proof of Mortgage by Producing the Record.** — *State v. Penny*, 70 Iowa 191. Here it was held further that a foundation for the admission of the record of a mortgage is not laid by the state when it shows by the county recorder that the original mortgage is not in his possession, when the state and not the prosecuting witness is the party offering the evidence.

Certificate of Existence of Mortgage. — A certificate of the clerk tending to show the existence of a mortgage is not admissible, when it does not contain a copy of the whole mortgage. *Sherman v. People*, 13 Hun (N. Y.) 577.

3. **Parol Evidence of Pretense Contained in Letter.** — *Rex v. Chadwick*, 6 C. & P. 181, 25 E. C. L. 344.

4. **Parol Evidence of Representations Not Excluded by Written Instrument.** — *Reg. v. Adamson*, 1 C. & K. 192, 47 E. C. L. 192, 2 Moo. C. C. 286; *Jackson v. People*, 126 Ill. 139; *Com. v. Sebring*, 1 Pa. Dist. Rep. 163.

See Generally the title **SECONDARY EVIDENCE.**

5. **Proofs of Loss on Claim for Insurance.** — *Rafferty v. State*, 91 Tenn. 655.

Letters Addressed to Defendant but Not Delivered. — *Reg. v. Cooper*, 1 Q. B. Div. 19, 45 L. J. M. C. 15, 33 L. T. N. S. 754, 24 W. R. 279, 13 Cox C. C. 123.

Mortgage Represented to Be Genuine. — *Territory v. Ely*, 6 Dakota 128.

Proof of De Facto Existence of Bank. — Where the defendant obtained money from a bank by false pretenses, for which he gave a note and a chattel mortgage on property, evidence of the note and the chattel mortgage is, so far as the accused is concerned, proof of the *de facto* existence of the bank from which the money was obtained. *Cowan v. State*, 22 Neb. 524.

Documents Also Tending to Prove Other Crimes. — Letters written by the defendant tending to show that he committed the crime are admissible against him although they also tend to show that he committed other crimes. *Com. v. Blood*, 141 Mass. 575.

Proof of Advertisment. — Where a person, in answer to an advertisement, finds the defendant at the place indicated, and he makes substantially the same representations as in the advertisement, this is a sufficient foundation to admit the advertisement in evidence without further proof that the defendant authorized its publication. *Jackson v. People*, 126 Ill. 139.

Presumption as to Letter Signed in Name of a Firm. — Upon a charge of obtaining goods, a letter containing statements which induced the defrauded party to part with the goods, signed in the name of the firm, would be presumed to have been written by the accused, who was a member of the firm and the only one of the firm who resided at the place where the letter was written, and who had the exclusive management and control of the business. *Trogdon v. Com.*, 31 Gratt. (Va.) 869.

6. *Jones v. State*, 8 Tex. App. 652.

See Generally the title **DOCUMENTARY EVIDENCE**, vol. 9, p. 877.

7. **Voluntary Admissions of Defendant.** — *State v. Lewis*, 45 Iowa 20; *Maddox v. State*, 41 Tex. 208. See the title **CONFESSIONS**, vol. 6, p. 520.

c. AS TO PARTICULAR INSTANCES OF THE PRETENSE — (1) *As to Means and Resources — Ownership of Property.* — Where the defendant is charged with pretending to own real estate that he did not own, the jury, in ascertaining the pretense of ownership, is not confined to the deeds, but may take into consideration oral declarations of the defendant.¹

(2) *As to Solvency and Ability to Pay.* — For the purpose of proving the falsity of the pretense of solvency and ability to pay, the defendant's financial condition at the time of the representation may be shown.² If the defendant

Slave Confessing to Be Free. — Where parties fraudulently pretended that a free negress was a slave, in which fraud she herself participated, and by means of which the defendants obtained money by selling her to the prosecutor, her confession that she was free was competent evidence against her of that fact. *Jones v. U. S.*, 5 Cranch (C. C.) 655.

Declaration as to Gold Brick. — Where a party was charged with obtaining money jointly with another by falsely pretending that a certain brick was a gold brick, and when taken into custody replied to a demand of the officer for the gold brick by saying that he knew nothing about a gold brick, the court said: "As he was familiar with the character of the brick which they had with them, his positive assertion that he knew nothing of a gold brick is sufficient under the circumstances to sustain the finding that it was not made of gold." *State v. Gordon*, 56 Kan. 64.

Telegraphic Messages in Defendant's Handwriting. — Telegraphic messages, proved to be in the handwriting of the defendant, and to have been received at the telegraph office and sent over the wires properly directed to the person who was then living at the place of their destination, are admissible against the defendant as evidence of his declarations, and as tending to show communications to the person to whom they were addressed. This ruling comes within the principle on which it is held that proof that letters were deposited in the post office, duly directed, is evidence tending to show that they reached their destination and were received by the persons to whom they were addressed. *Com. v. Jeffries*, 7 Allen (Mass.) 563, 83 Am. Dec. 712.

Confession Must Be Corroborated — Iowa. — Where a person is charged with obtaining money under false pretenses by representing that property upon which he obtained a loan was not encumbered, but the only evidence offered to show that it was encumbered was an admission by the defendant, it was held that such evidence was not sufficient unless corroborated, it being in the nature of a confession under the Code, § 4427 (Code 1897, § 5491), and the inherent improbability and weakness attach to it which attach to confessions in general sought to be proved by evidence. *State v. Penny*, 70 Iowa 190.

Statements of Third Party to Whom Accused Refers Defrauded Party. — Where the false representations were made in January and the accused referred the defrauded party to another person for information as to the ownership and character of the property of which he represented himself to be the owner, the evidence of the declaration of such person made in the following November that the defendant

did not own the said property is not admissible in evidence. *Todd v. State*, 31 Ind. 520.

Admissions as to Matters Resting in Records. — The admission by the defendant that his house and lot were mortgaged is not admissible against him, when it is sought to affect him by such evidence. The mortgage itself, the record, or a certified copy should be produced. In the absence of these, secondary evidence is not admissible. *Sherman v. People*, 13 Hun (N. Y.) 577. See also *State v. Penny*, 70 Iowa 191.

1. Pretense of Ownership of Land — Oral Declarations Admissible. — *Com. v. Alsop*, 1 Brews. (Pa.) 331.

Record of Suit in Which Property Recovered. — Where the pretense was the ownership of certain property, the record of a suit between the prosecutor and the defendant's wife in which the latter recovered the property is admissible. *Com. v. Lundberg*, 18 Phila. (Pa.) 482, 43 Leg. Int. (Pa.) 260.

Ownership of Other Property than That Represented. — Where the accused falsely represented that he owned a certain plantation of a given value, evidence offered by him that he owned other property, which was less valuable, is not admissible. *Culver v. State*, 86 Ga. 197.

2. Solvency and Ability to Pay. — Evidence of promissory notes executed after the misrepresentation, in renewal of previous debts, is admissible to show the defendant's financial condition at the time of the representation. *Hathcock v. State*, 88 Ga. 92.

So also evidence of the nonpayment of promissory notes given for the property obtained is admissible. *Skiff v. People*, 2 Park. Cr. Rep. (N. Y. Supreme Ct.) 146.

Judgments recovered against the defendant after the representation are admissible to prove his financial condition at the time of the representation. *Hersey v. Benedict*, 15 Hun (N. Y.) 284.

So also petitions and schedules of his creditors filed by the accused in bankruptcy proceedings. *Abbott v. People*, 15 Hun (N. Y.) 437, affirmed 75 N. Y. 602; *Com. v. Drew*, 153 Mass. 595; *Trogdon v. Com.*, 31 Gratt. (Va.) 879.

But the schedules and statements filed by the defendant's partners are not evidence against him. *Trogdon v. Com.*, 31 Gratt. (Va.) 879.

So also a deposition voluntarily given in an insolvency proceeding is admissible for this purpose. And a statement in a deposition is voluntary if the defendant might have objected to answering on the ground that it would criminate him, but failed to do so. *People v. Wieger*, 100 Cal. 357.

offers evidence of his ability to pay, the proof must be limited to the time when the representation was made.¹

Solvency of Mercantile Firm. — Where a person makes false representations in regard to the solvency of a firm of which he is a member, evidence of the individual indebtedness of his partners is not admissible to prove the falsity of the representations.²

(3) *As to Genuineness — Of Written Instruments.* — On a charge of falsely representing written instruments to be genuine, evidence on behalf of the defendant that the signatures thereto were written by him upon authority of the makers is admissible.³

Testimony on Examination Supplementary to Execution — New York. — Upon a charge of obtaining goods under false pretenses, testimony given by the accused on his examination in proceedings supplementary to execution pursuant to section 292 of the *New York Code of Procedure* (now *Code Civ. Pro.*, § 2460) is inadmissible to prove debts due from the accused; for the section provides that his answer in such proceeding shall not be used as evidence against him in any criminal proceeding or transaction. His testimony given on such examination may be shown, not as proof of the facts stated by him, but as evidence of his sworn statement. *Barber v. People*, 17 Hun (N. Y.) 366.

Bank Books — Funds in Bank. — The books of the bank where the defendant deposited his money are admissible, if supported by the oath of the bookkeeper, to show the amount he had on deposit at the time when he made the representations. *Jordan v. Osgood*, 109 Mass. 464, 12 Am. Rep. 731. This was a civil action, but the principle would, doubtless, be equally applicable to a criminal proceeding.

Where the defendant was charged with passing a worthless check, the production of the books of the bank having been waived, it was held that the testimony of the bookkeeper of the bank that the name of the prisoner did not appear upon the books, and that there was no credit to that name, was competent and sufficient to show, if true, that there were no funds in the bank to pay the check, and that it was worthless. *Smith v. People*, 47 N. Y. 303.

But in *Moore v. State*, 20 Tex. App. 241, it was held, where a person was charged with having made false pretenses by representing that he had a certain amount on deposit in a bank, and that the bank would honor and pay any draft or check drawn by him, that *prima facie* evidence by the books of the bank of the fact that he had no such money on deposit in said bank was not sufficient to overthrow the presumption of innocence.

Notarial Protest. — In *State v. Reidel*, 26 Iowa 436, it was held that a notarial certificate of protest on a draft by a notary public of another state is not admissible for the purpose of showing that the defendant had no funds in the bank upon which the draft was drawn, on the ground that a notary cannot know or certify to the fact that the defendant had no funds in the bank; that the officers of the bank may tell him so, but this is their declaration simply, and that such a declaration is not, in a criminal sense, clothed with the character of evidence by merely being certified to by a notary public.

Defendant Having No Means to Employ Counsel. — Where the defendant, when arraigned upon an indictment for borrowing money upon the false pretense that he was a man of means, stated to the court that he had no means to employ counsel to defend him, and thereby obtained counsel at the expense of the state, his statements so made were admissible in evidence upon the trial to prove the falsity of the pretense made to his victim. *State v. Fooks*, 65 Iowa 196.

1. When Defendant Offers Evidence of His Ability to Pay. — *People v. Herrick*, 13 Wend. (N. Y.) 91.

Defendant's Pecuniary Credit and Standing. — In *State v. Penley*, 27 Conn. 592, it was held that evidence offered by the defendant that he was in good pecuniary credit and standing at the time when the false representations were made is inadmissible for the purpose of proving his pecuniary ability.

But in *Com. v. Eastman*, 1 Cush. (Mass.) 189, 48 Am. Dec. 596, which was a charge for conspiracy to cheat and defraud and to get goods under color and pretense of buying them upon credit, and then to remove them out of the commonwealth, it was held that evidence as to the standing and credit of the defendants was admissible for the purpose of showing whether they could have bought goods on credit.

Evidence by the defendant that he had unlimited credit with another person at said time is also inadmissible. *Hathcock v. State*, 88 Ga. 93.

2. Pretense of Solvency of Mercantile Firm. — The solvency and pecuniary ability of a mercantile firm may well exist although the members of the firm may individually be insolvent as respects their private creditors, and evidence of individual indebtedness is therefore not admissible. *Com. v. Davidson*, 1 Cush. (Mass.) 41.

3. Proof of Authority to Sign Instrument Represented as Genuine. — *State v. Lurch*, 12 Oregon 95. But in *Com. v. Goddard*, 2 Allen (Mass.) 148, it was held that where the defendant falsely pretended that the signature to a note was genuine, he cannot be allowed to prove that the person whose name appeared upon it as maker had said that the defendant had authority to sign it, this being merely hearsay.

Comparison of Handwriting. — In a prosecution for obtaining property by the assignment of a fabricated mortgage and accompanying note, proof by comparison of handwritings that the signature to the assignment and the indorsements on the note were in the same handwriting as the body of the mortgage, and

Of Worthless Notes. — Where the defendant is charged with passing a worthless banknote, proof that the note was bad and of no value must be made.¹

(4) *As to Identity.* — Identity of common names and of residence in cities or long-settled localities is not enough to establish identity of persons.²

(5) *As to Being of Lawful Age.* — On a charge of obtaining goods by falsely pretending to be of full age, a plea of infancy in a civil action brought against the defendant is not admissible for the purpose of proving that he was a minor.³

f. AS TO KNOWLEDGE OF FALSITY OF PRETENSE. — The defendant's knowledge of the falsity of the pretense may be shown by his declaration or admissions made before or after the offense.⁴

that the signatures were forged, is not sufficient to connect the defendant with the offense, if it is not also shown, as a basis for the comparison, that the handwriting in any paper is actually his. *People v. Cline*, 44 Mich. 290. See generally the title **HANDWRITING**.

Press Copies of Letters are inadmissible for the purpose of proving the falsity of the pretense, as a standard of comparison by which to determine whether another paper, the handwriting of which is in controversy, was written by the same person. Nothing but original signatures can be used as a standard of comparison by which to prove the genuineness of signatures to papers produced on the part of the prosecution. *Com. v. Eastman*, 1 Cush. (Mass.) 217, 48 Am. Dec. 596.

Validity of Due Bills Given as Collateral Security May Be Shown. — In an action to recover damages for the conspiracy of the defendant and A. in inducing the plaintiff to take a forged note as collateral security for a loan to A., who had also given certain due bills as security, evidence is admissible, for the purpose of proving the validity of the due bills, that a third person had lent money to A., had received the same due bills as security, and still retained similar due bills therefor. *Spaulding v. Knight*, 176 Mass. 153.

1. Proof of Worthless Banknote. — *Rex v. Flint*, R. & R. C. C. 342.

Where the bank stopped payment by reason of bankruptcy, it is not necessary to prove the proceedings in bankruptcy. It is sufficient to prove the time when the bank stopped payment, and that cash could not be obtained for the note on its being presented for payment at the place where it was made payable. *Reg. v. Smith*, 6 Cox C. C. 314; *Reg. v. Dowey*, 11 Cox C. C. 115, 37 L. J. M. C. 52, 17 L. T. N. S. 481, 16 W. R. 344.

But in *Rex v. Spencer*, 3 C. & P. 420, 14 E. C. L. 376, it was held that although the prisoner knew that the bank had stopped payment, but it appeared that two only of the partners of the bank had become bankrupt, and that the third had not, the offense was not committed, because there was not sufficient evidence of the insolvency of the bank.

Nominal Value of Note. — Evidence of the depreciation of the bills of the bank in the market, connected with the evidence that the bank has refused to pay its bills, is competent to prove that the bill is not worth its nominal value. *Com. v. Stone*, 4 Met. (Mass.) 45.

Proof as to Note Being of No Value. — Where the prisoner was indicted for passing a five-

pound note which it was alleged was of no value, and the proof was that the bank had, some years previously, stopped payment, and paid a small dividend, and had ceased to exist, it was held that a conviction could not be sustained, as there was no evidence that the note was not of some value. *Reg. v. Evans*, Bell C. C. 187, 8 Cox C. C. 257, 29 L. J. M. C. 20, 5 Jur. N. S. 1361, 1 L. T. N. S. 108.

Opinion as to Value of Banknote. — It appeared that certain bills purporting to have been issued by a foreign bank had been transferred under certain representations alleged to be false, and the material questions to be decided were whether there was any such bank in existence, and whether it was solvent. It was held not to be competent to prove by a broker that, in his opinion, bills of that description never had any value, the broker not having shown any knowledge on the subject as to the facts, except that he had been for twelve years a money broker, had bought and sold bank bills, and in April or May previous had been offered and had refused to take bills of the description in question. *People v. Chandler*, 4 Park. Cr. Rep. (N. Y. Super. Ct.) 231. See the title **EXPERT AND OPINION EVIDENCE**, *ante*, p. 414.

2. Misrepresentation as to Identity. — An information for obtaining property by using a fabricated mortgage alleged the false representation that the pretended mortgagor lived somewhere in a particular quarter of the state. It was held that evidence that a person of that name had lived in another part of the state, and was dead, was not enough to establish the fabrication of the mortgage, especially if it was not shown that the pretended mortgagor had not signed it, or that a person of that name had been represented as owner and as the person who had signed. *People v. Cline*, 44 Mich. 291.

3. Proof of Infancy. — *Reg. v. Simmonds*, 4 Cox C. C. 277.

4. How Knowledge of Falsity of Pretense Shown. — *Fowler v. People*, 18 How. Pr. (N. Y. Supreme Ct.) 499.

Knowledge of Falsity of Pretense of Title to Land. — Where a person falsely pretended that he had title to certain property which he was giving in exchange, the judgment roll in a prior civil action against the defendant in which the worthlessness of his title was adjudged is admissible as tending to show that he knew he was selling property to which he had no title. *People v. Hamberg*, 84 Cal. 473.

But if an appeal from a judgment against the defendant was pending at the time of the

Evidence of Similar Transactions. — The general rule is that evidence of transactions similar in their nature committed at or about the time of the offense charged is admissible as showing the defendant's guilty intent or motive in the particular act charged in the indictment, provided they are not too remotely connected with the offense charged.¹

2. As to Intent. — The fraudulent intent must be proved by the state.²

representation, the judgment roll is not admissible. *People v. Gibbs*, 98 Cal. 661.

Competency of Witness to Prove Knowledge of Falsity. — A prosecuting attorney who is in a situation to know the facts tending to show knowledge of the falsity of the pretense on the part of the defendant is a competent witness. *People v. Hamberg*, 84 Cal. 473.

1. Evidence of Similar Transactions Admissible to Prove Guilty Knowledge or Intent — England. — *Reg. v. Francis*, 12 Cox C. C. 612, 30 L. T. 503.

Canada. — *Reg. v. Hope*, 17 Ont. Rep. 463.

United States. — *U. S. v. Snyder*, 14 Fed. Rep. 554.

California. — *People v. Wasservogle*, 77 Cal. 173.

Georgia. — *Farmer v. State*, (Ga. 1896) 28 S. E. Rep. 26.

Indiana. — See *State v. Long*, 103 Ind. 485.

Iowa. — *State v. Jamison*, 74 Iowa 613; *State v. Chingren*, (Iowa 1898) 74 N. W. Rep. 946.

Massachusetts. — *Com. v. Eastman*, 1 Cush. (Mass.) 189, 48 Am. Dec. 596; *Com. v. Stone*, 4 Met. (Mass.) 47; *Rowley v. Bigelow*, 12 Pick. (Mass.) 307, 23 Am. Dec. 607; *Com. v. Blood*, 141 Mass. 575; *Com. v. Jeffries*, 7 Allen (Mass.) 566, 83 Am. Dec. 712; *Com. v. Coe*, 115 Mass. 501.

Michigan. — *People v. Wakely*, 62 Mich. 303; *Cook v. Perry*, 43 Mich. 626; *People v. Summers*, (Mich. 1898) 73 N. W. Rep. 818.

Minnesota. — *State v. Wilson*, (Minn. 1898) 75 N. W. Rep. 715.

Missouri. — *State v. Turley*, 142 Mo. 403; *State v. Bayne*, 88 Mo. 609; *State v. Jackson*, 112 Mo. 585; *State v. Wilson*, (Mo. 1898) 44 S. W. Rep. 722.

New York. — *Bielschowsky v. People*, 3 Hun (N. Y.) 42, affirmed 60 N. Y. 616; *Weyman v. People*, 4 Hun (N. Y.) 516, affirmed 62 N. Y. 623; *Hall v. Naylor*, 18 N. Y. 588, 75 Am. Dec. 269; *Mayer v. People*, 80 N. Y. 364; *Cary v. Hotailing*, 1 Hill (N. Y.) 311, 37 Am. Dec. 323; *Hennequin v. Naylor*, 24 N. Y. 139; *Miller v. Barber*, 66 N. Y. 558; *People v. Dimick*, 107 N. Y. 13; *Rankin v. Blackwell*, 2 Johns. Cas. (N. Y.) 198; *Allison v. Matthieu*, 3 Johns. (N. Y.) 235; *Hersey v. Benedict*, 15 Hun (N. Y.) 287; *State v. Peckens*, 153 N. Y. 576.

North Carolina. — *State v. Walton*, 114 N. Car. 783.

Ohio. — *Tarbox v. State*, 38 Ohio St. 581.

Tennessee. — *Defrese v. State*, 3 Heisk. (Tenn.) 62; *Rafferty v. State*, 91 Tenn. 655.

Texas. — *Martin v. State*, 36 Tex. Crim. Rep. 125.

Virginia. — *Trogdon v. Com.*, 31 Gratt. (Va.) 862.

Compare Reg. v. Holt, 8 Cox C. C. 411, Bell C. C. 280, 30 L. J. M. C. 11, 6 Jur. N. S. 1121, 3 L. T. N. S. 310, 9 W. R. 74; *Jackson v. People*, 18 Ill. App. 514; *Todd v. State*, 31 Ind. 519; *Strong v. State*, 86 Ind. 208, 44 Am. Rep.

292; *Com. v. Jackson*, 132 Mass. 17; *Morgan v. State*, (Neb. 1898) 77 N. W. Rep. 64; *Cowan v. State*, 22 Neb. 525; *Com. v. Daniels*, 2 Pars. Eq. Cas. (Pa.) 336.

In *State v. Church*, 43 Conn. 471, it was held that false statements made by the accused with regard to the transaction, six months after its occurrence, are not admissible as proof of an intent to cheat and defraud.

Codefendant's Testimony as to Acts Previous to Commission of Crime. — Where it is shown that the defendant's colleagues got off the train where the crime was committed after the commission of the crime, but he remained with their victim, the evidence of one of such colleagues as to the gang's operations for ten days previous to and up to the day of the crime described, and their procedure in their prior operations, is admissible against the defendant. *State v. Beauleigh*, 92 Mo. 490.

Time Within Which Similar Transactions Must Have Taken Place. — In *People v. Shulman*, partly reported in *Mayer v. People*, 80 N. Y. 376, note, Earl, J., said: "It is generally said in the cases that they [similar transactions] must have occurred about the same time as the commission of the alleged crime; but that is quite indefinite, and in some of the reported cases proof of them has been received, although they occurred months before and after the time of the crime. Each case, as to the application of this rule, must depend largely upon its own circumstances, and not unfrequently the limit of them must rest entirely in the discretion of the judge presiding at the trial. * * * But there is one general rule which must apply to all such cases: there must be, in the transactions thus sought to be proved some relation to or connection with the main transaction. That is, they must show a common motive or intent running through all the transactions, or they must be such as in their nature to show guilty knowledge at the time of the main transaction, and if they possess these characteristics, then it matters not whether they were before or after or near to or remote from the main transaction."

This case is reported as *Shulman v. People*, 14 Hun (N. Y.) 516, affirmed *sub nom.* *People v. Shulman*, 76 N. Y. 624. It is reported as *People v. Spielman* in 20 Alb. L. J. 96.

Evidence of Previous Attempt to Commit Similar Act. — It seems that evidence of an attempt to commit similar acts is admissible, whether the attempt is successful or not. *Hersey v. Benedict*, 15 Hun (N. Y.) 287.

2. Fraudulent Intent Must Be Proved by State. — *Mack v. State*, 63 Ala. 140; *Dorsey v. State*, 111 Ala. 10; *Carlisle v. State*, 76 Ala. 77; *People v. Baker*, 96 N. Y. 343; *State v. Garriss*, 98 N. Car. 733.

Proof of Intent. — The circumstances and condition of the accused and his motives for doing the act charged have to be considered as bear-

Evidence of Similar Transactions. — The rule as to the admissibility of evidence of similar transactions for the purpose of showing guilty knowledge or intent has already been stated.¹

Intent Inferred. — The intent need not, however, be shown by independent testimony; it may be inferred from the character of the representation or pretense, its known falsity, and the attendant circumstances.² For the purpose of enabling the jury to draw a proper inference as to whether or not there existed in the mind of the defendant an intent to deceive, the state may show the steps preliminary to the crime, and the acts and conduct of the defendant with reference thereto;³ also his acts and conduct subsequent to the commission of the crime and at the time when it was committed.⁴

ing upon the question of his intent in doing it. *People v. Baker*, 96 N. Y. 348.

Where the defendant is charged with obtaining the signature of a person as indorser on a note, evidence that he procured the same person to indorse notes from time to time in large amounts, which finally resulted in the latter's ruin, is competent as bearing upon the motives of the defendant; and evidence of an assignment made by the person so defrauded, for the benefit of creditors, is competent as part of the history of the case. *People v. Cole*, (Supreme Ct.) 20 N. Y. Supp. 505, 65 Hun (N. Y.) 624, affirmed 137 N. Y. 530.

Recovery of Judgments for the Goods Purchased. — Judgments recovered against the person for goods purchased by false pretenses are admissible as tending to prove the preconceived intention not to pay for them. *Hersey v. Benedict*, 15 Hun (N. Y.) 284.

Insolvency at Time Goods Purchased. — Evidence that the defendant was deeply insolvent at the time of making the false representations relied upon is competent against him for the purpose of showing the intent. *Com. v. Jeffries*, 7 Allen (Mass.) 568, 83 Am. Dec. 712.

Evidence of Intent in Passing Worthless Bank Bill. — Where the defendant is charged with passing a worthless bank bill, evidence in such case of the depreciation of the bills of such bank in the market, connected with evidence that the bank refused to pay its bills, and that they are not passable as current bills, is competent to prove his fraudulent intent in passing it. *Com. v. Stone*, 4 Met. (Mass.) 45.

Financial Responsibility of Real and Pretended Maker of Note May Be Shown. — Where a person obtained money by falsely pretending that a certain promissory note made by Albert Pike was made by a person of the same name who lived in a certain stone house in the town of Concord, and that it was not made by a certain other man of that name residing in such town, the prosecution may give evidence as to the financial responsibility of the person so represented to be the maker of the note, and that of the person who did make it, as it tends to characterize the purpose and intent with which the defendant made the false pretense. *People v. Cook*, 41 Hun (N. Y.) 71.

1. See *supra*, this section, *As to Knowledge of Falsity of Pretense*.

2. **Intent May Be Inferred.** — *Mack v. State*, 63 Ala. 140; *State v. Neimeier*, 66 Iowa 636; *People v. Getchell*, 6 Mich. 496; *People v. Herrick*, 13 Wend. (N. Y.) 87; *State v. Garriss*, 98 N. Car. 733; *Com. v. M'Crossin*, 3 Pa. L. J. 224; *State v. Haines*, 23 S. Car. 173.

3. **Acts and Conduct of Accused Before the Crime Admissible on Question of Intent.** — *People v. Winslow*, 39 Mich. 507; *State v. Sarony*, 95 Mo. 349; *People v. Sully*, 5 Park. Cr. Rep. (N. Y. Super. Ct.) 164; *Com. v. M'Crossin*, 3 Pa. L. J. 219; *Trogdon v. Com.*, 31 Gratt. (Va.) 862.

4. **Acts and Conduct of Accused at and After Commission of Crime Admissible.** — *Com. v. M'Crossin*, 3 Pa. L. J. 224.

Accused Drawing Draft on a Bank for Amount Obtained After Threat of Prosecution. — Where a person was threatened with prosecution for swindling, evidence that he drew a draft for the amount which he was charged with obtaining on a bank with which he falsely stated that he had an account, thus endeavoring to postpone investigation into his conduct, is admissible as bearing upon his intent. *Newberry v. State*, (Tex. Crim. App. 1893) 22 S. W. Rep. 1041.

Executing Mortgage Three Days After Goods Obtained. — Where a person obtained goods by representing that he had ample means to pay all his debts, that he owed but little, and was not owing any large debt, and that his note for two hundred and fifty dollars was good, the state may, as bearing upon his intent, prove that in three days afterwards he mortgaged the greater part of his property to another. *State v. Call*, 48 N. H. 132.

Disposition of Goods. — The disposition of the goods made by the accused — as by depositing quantities of them in different places; retaining the money collected on sales, leaving little or nothing for creditors; running off with the proceeds of the sale of the property obtained — is admissible in evidence for the purpose of showing the intent of the defendant at the time of the purchase. *State v. Dennis*, 80 Mo. 589; *State v. Lichliter*, 95 Mo. 409. See also *Mack v. State*, 63 Ala. 141.

Depositing Goods under an Assumed Name. — Where the defendant was charged with attempting to obtain money from an insurance company by pretending that the goods which she had insured had been destroyed by fire, evidence that they had been found at a pawnbroker's shop, where the defendant had deposited them under an assumed name, is admissible. *Rafferty v. State*, 91 Tenn. 655.

Executing General Assignment. — In an action of replevin against a sheriff who had levied on goods of a debtor who by false and fraudulent representations had purchased goods, evidence that such debtor had made a general assignment is admissible to show the intent with which he made the purchase, as against creditors who have recovered judgments after such

Defendant May Repel Intent. — But the defendant may repel the imputation of an intent to defraud, whether the effect is to defeat the cause of action or to lessen the punishment which may be inflicted. And if he be a competent witness, he may testify as to whether in making the representations he stated anything that he believed or knew to be false.¹

Parol Evidence Admissible to Disprove Written Instrument. — The accused, in repelling the imputation of an intent to commit the crime, may disprove by parol evidence the written evidence of an apparent false pretense, when the effect would not vary or modify the instrument.²

3. As to Obtaining the Property — Some Definite Portion of the Goods Obtained. — It is sufficient to prove that some definite portion of the goods was obtained by means of the alleged false pretense.³

Res Gestæ. — The statement of the accused made at the time of obtaining the property is admissible as part of the *res gestæ*.⁴

Signature to Written Instrument. — On a charge of obtaining a signature to an instrument by false pretenses, previous conversations of the defendant with a third party as to procuring the signature are admissible in evidence against him.⁵

Signature of Public Officer. — Where a public officer is unable to state what transpired at the time of signing an instrument, the signature to which was fraudulently procured, he may testify as to the routine of his office in such matters.⁶

purchases and before the assignment. *Hersey v. Benedict*, 15 Hun (N. Y.) 286.

Retaining Money, Altering Coupons, etc. — Where a person was employed to negotiate a loan for three hundred dollars, and he procured the signature to a mortgage for four hundred dollars, falsely pretending that it was for three hundred dollars, evidence that he received and retained the excess, paid the interest on the mortgage as it fell due, and altered the coupons before giving them to the mortgagor, was admissible on the question of intent, and the fact that the land did not belong to the mortgagor made no difference, for the reason that under the covenants of the mortgage a pecuniary liability was created against the mortgagor. *State v. Jamison*, 74 Iowa 613.

Telegrams Sent by the Defendant After the Money Was Obtained, for the purpose of misleading the defrauded party, are admissible to show the intent of the defendant in procuring the money. *State v. Lewis*, 45 Iowa 21.

1. Defendant May Disprove Intent. — *Babcock v. People*, 15 Hun (N. Y.) 355.

Facts Tending to Disprove Intent. — Where the accused was charged with procuring the indorsement of the prosecutor to a promissory note by the false pretense that a former note for the same amount, indorsed in like manner, was destroyed, it was held that he might show that he was a partner with the prosecutor; that the latter was bound by agreement between them to indorse with him to an amount considerably larger than the two notes, but had refused to perform the agreement; and that the money obtained on the notes was used in their business for their joint benefit; for such evidence tends to disprove the presumption of an intent to defraud. *People v. Getchell*, 6 Mich. 496.

Defendant May Show Course of Dealing Between Himself and Prosecutor. — *State v. Rivers*, 58 Iowa 108, 43 Am. Rep. 112; *Lutton v. State*, 14 Tex. App. 518.

2. Prior Mortgage Executed under Misapprehension. — *State v. Garriss*, 98 N. Car. 733.

3. Proof that Some Definite Portion of Goods Obtained Sufficient. — *Com. v. Lee*, 149 Mass. 184.

Appropriating Part of Proceeds of Check. — *Reg. v. Leonard*, 2 C. & K. 514, 61 E. C. L. 514, 1 Den. C. C. 304, 3 Cox C. C. 284.

4. Evidence Admissible as Part of Res Gestæ. — *Maddox v. State*, 41 Tex. 208. See generally the title *RES GESTÆ*.

Facts Forming Part of Res Gestæ. — In *Britt v. State*, 9 Humph. (Tenn.) 38, the defendant falsely pretended that he had a warrant against the prosecutor for passing counterfeit money, and by means of threats and promises in regard thereto extracted banknotes from the prosecutor, and on the next day pursued the prosecutor into an adjoining county, falsely pretended that the latter had stolen his (the defendant's) overcoat, and by means thereof extracted from the prosecutor articles of clothing. The indictment charged the defendant with obtaining the banknotes by falsely pretending that the defendant had passed counterfeit money. It was held that evidence of the transaction in the adjoining county was admissible as part of the *res gestæ*.

5. Evidence as to Obtaining Signature to Written Instrument. — *Com. v. Castles*, 9 Gray (Mass.) 121, 69 Am. Dec. 278.

Defendant's Books of Account. — The party charged with having obtained the signature of a person to a note by false pretenses is not at liberty to introduce his own books of account to show the state of accounts between him and the prosecutor, unless accompanied by proof *abundant* of the real state of account. *People v. Genung*, 11 Wend. (N. Y.) 19, 25 Am. Dec. 594.

Want of Confidence in Defendant's Responsibility. — It is competent for a party whose signature has been fraudulently obtained to state why he did not confide in the personal responsibility of the accused, in order to show that the signature was fraudulently obtained. *People v. Herrick*, 13 Wend. (N. Y.) 90.

6. Where Signature of Public Officer Obtained, He May Testify as to Routine of Office. — *People v. Oyer & T. Ct.*, 83 N. Y. 447.

As to Inducement to Parting with Property. — For the purpose of proving the prosecutor's reliance upon the representations of the defendant, it is competent to prove by the prosecutor, when called as a witness in behalf of the people, that in the transaction in question he relied upon such representations and parted with the property by reason thereof.¹

FALSE REPRESENTATION. (See also the titles *FALSE PRETENSES, ante; FRAUD AND DECEIT.*) — A false representation in law is one known to be false or not known to be true by the party making it, and must have been to the gain of the one making it or to the loss of another.²

FALSE SWEARING. (See also the title *INSURANCE.*) — The offense of false swearing has been said to consist in falsifying, under an oath administered by a competent officer, in a proceeding which is not judicial but where the oath is taken to effect a judicial right.³ Another authority says that "false swearing is the name given in the statutes of some of the states to false declarations on oath, which, while not within any common-law or statutory designation of perjury, are by such statutes rendered otherwise indictable."⁴

FALSE TOKENS. — See the title *FALSE PRETENSES, ante, p. 792.*

FALSE WEIGHTS AND MEASURES. — See the title *WEIGHTS AND MEASURES.*

FALSI. — See *CRIMEN FALSI*, vol. 8, p. 259; and the title *INFAMY AND INFAMOUS CRIMES.*

FALSIFYING. — See generally the title *FORGERY.* As to surcharging and falsifying accounts, see *SURCHARGE*, and the title *ACCOUNTS*, vol. 1, p. 463; and see such titles as *EXECUTORS AND ADMINISTRATORS*, vol. 11, p. 720; *GUARDIAN AND WARD*; *TRUSTS AND TRUSTEES*, etc. As to falsifying records, see *ALTERATION OF RECORDS*, vol. 2, p. 284; and the titles *RECORDS*; *RECORDING ACTS*; and see 8 *ENCYC. OF PL. AND PR.* 917.

FALSIFYING JUDGMENT. (See also the title *JUDGMENTS AND DECREES.*) — Reversing a judgment is sometimes called falsifying it.

FALSUS IN UNO, FALSUS IN OMNIBUS. (See also the titles *EMBEZZLEMENT*, vol. 10, p. 1034; *WITNESSES*; and see *FALSE — FALSELY, ante.*) — False in one thing, false in everything.⁵

1. **Prosecutor May Testify that He Relied upon Defendant's Representations.** — *People v. Hong Quin Moon*, 92 Cal. 42; *Matter of Snyder*, 17 Kan. 553; *Com. v. Drew*, 153 Mass. 595; *State v. Thatcher*, 35 N. J. L. 449; *People v. Miller*, 2 Park. Cr. Rep. (N. Y. Supreme Ct.) 199; *People v. Sully*, 5 Park. Cr. Rep. (N. Y. Super. Ct.) 164; *Com. v. Boyer*, 2 Pa. Dist. Rep. 843. But compare *Com. v. Daniels*, 2 Pars. Eq. Cas. (Pa.) 332; *Rex v. Dale*, 7 C. & P. 352, 32 E. C. L. 539.

Opinion upon Letter Sent to Prosecutor by Defendant. — Where the false pretense alleged consists of an untrue statement of the prisoner with reference to his position and occupation, the opinion of the person defrauded as to the position and occupation of the prisoner, formed upon a letter received by him from the prisoner, is admissible as evidence of the belief of the person defrauded in the truth of the false pretense, although not necessarily conclusive. *Reg. v. King*, 66 L. J. Q. B. 87, 75 L. T. N. S. 392.

Evidence of Defendant's Financial Condition. — Where false representations were made as to the value of a mortgage security given, evidence by the defendant, who was an indorser of the note, as to his financial condition at the time of the maturity of the note is inadmissible for the purpose of proving that the vendor did not rely on the mortgage security. *Van*

Buren v. People, 7 Colo. App. 136.

Broker Charged with Goods Sold to His Principal. — Where a person obtained goods by falsely pretending that he was acting as a broker for an undisclosed principal, the seller may testify that he gave credit to such principal, although in his books of account he entered the transactions as a sale to the defendant, and made out the bill of parcels in that form; and it is proper to admit as a question of fact for the jury to determine, to whom the credit was in fact given. The entry in the vendor's books does not constitute a written contract; it is not even legal evidence of the sale. Both the bills and the order for delivery might well have been made out to the broker in order to enable him to forward the goods to the supposed principal, and they are wholly distinct from and independent of the contract of sale in pursuance of which they are made. *Com. v. Jeffries*, 7 Allen (Mass.) 564, 83 Am. Dec. 712.

2. Appendix, 3 Mo. App. 593.

3. 1 Wharton's Crim. Law (9th ed.), § 1244.

4. Bishop's New Crim. Law, § 1014. The distinction between this crime and perjury, and the cases arising under the statutes referred to in the text, will be found fully set out in the title *PERJURY*.

5. *The Schooner Boston*, 1 Sumn. (U. S.) 356; *Duncan v. State*, 97 Ga. 180.

FAMILY.

- I. THE HOUSEHOLD, 866.
- II. RELATIONSHIP, 869.
- III. HUSBAND AND WIFE, 873.
- IV. SEPARATION, 874.

CROSS-REFERENCES.

See the titles *ALLOWANCES*, vol. 2, p. 157; *BENEFICIARIES (IN INSURANCE)*, vol. 3, p. 963; *ELECTIONS*, vol. 10, p. 600; *FIRE INSURANCE*; *HOMESTEAD*; *HUSBAND AND WIFE*; *ISSUE*; *NEXT OF KIN*; *PARENT AND CHILD*; *PEDIGREE*; *SEPARATE PROPERTY (OF MARRIED WOMEN)*; *SUCCESSION*; *TRUSTS AND TRUSTEES*; *WILLS*. See also *ENCYCLOPEDIA OF PLEADING AND PRACTICE*, title *SERVICE OF PROCESS*; and in every instance the titles *EXEMPTIONS (FROM EXECUTION)*, ante, p. 59, and *HOMESTEAD* should be consulted, as there are innumerable cases construing the term "family" as used in the exemption and homestead laws.

I. THE HOUSEHOLD. — A family is defined as a collective body of persons who form one household, under one head and one domestic government, including parents, children, and servants, and, as sometimes used, even lodgers or boarders.¹

1. Century Dict., quoted in *Matter of Shed*, 1, 60 Hun (N. Y.) 369, affirmed 133 N. Y. 601.

As to the effect of breaking up the household see *infra*, this title, *Separation*.

Other Definitions. — A family is defined to be a collective body of persons who live in one house and under one manager. Webster's Dict., approved in *Poor v. Hudson Ins. Co.*, 2 Fed. Rep. 432; *Chicago, etc., R. Co. v. Chisholm*, 79 Ill. 587; *Race v. Oldridge*, 90 Ill. 252, 32 Am. Rep. 27; *Parsons v. Livingston*, 11 Iowa 106, 77 Am. Dec. 135; *Tyson v. Reynolds*, 52 Iowa 431; *Arnold v. Waltz*, 53 Iowa 706, 36 Am. Rep. 248; *Linton v. Crosby*, 56 Iowa 386, 41 Am. Rep. 107; *Emerson v. Leonard*, 96 Iowa 313; *Menefee v. Chesley*, 98 Iowa 55; *Duncan v. Frank*, 8 Mo. App. 289; *Barney v. Leeds*, 51 N. H. 265; *Dorrington v. Myers*, 11 Neb. 390; *Regan v. Zeeb*, 28 Ohio St. 485; *Garaty v. Du Bose*, 5 S. Car. 500; *Rollings v. Evans*, 23 S. Car. 326; *Moyer v. Drummond*, 32 S. Car. 165, 17 Am. St. Rep. 850; *Homestead Cases*, 31 Tex. 680, 98 Am. Dec. 553; *Goode v. State*, 16 Tex. App. 415.

In a broad sense the word "family" may include all the person's children, whether living with him or not, and even other relatives, but in a more limited sense it includes only those who are living together as one household. *Hart v. Goldsmith*, 51 Conn. 479.

"In its limited sense, the word 'family' signifies the father, mother, and children; in its ordinary acceptation, it means all the relatives who descend from a common root; in its most extensive scope, it comprehends all the

individuals who live under the authority of another, including even servants." *Galligar v. Payne*, 34 La. Ann. 1057.

"Family" is defined, as "1. Persons who collectively live together in a house, or under one head; a household. 2. Those who are of the same lineage, or who are descended from one common progenitor; a race or tribe; a house." *Peeler v. Peeler*, 68 Miss. 141.

In *Norwegian Old People's Home Soc. v. Wilson*, 176 Ill. 94, it was said: "The word 'family' is used in various significations, some more restricted, others more extended; the general scope and purview of the statute or of the will having to be considered in each case. It is used to indicate, first, the whole body of persons who form one household, thus including also servants; second, the parents with their children, whether they dwell together or not; and third, the whole group of persons closely related by blood. Cent. Dict. It 'may mean a man's household, consisting of himself, his wife, children, and servants; it may mean his wife and children, or his children excluding his wife; or, in the absence of wife and children, it may mean his brothers and sisters or next of kin; or it may mean the genealogical stock from which he may have sprung.'"

In *Homestead Cases*, 31 Tex. 677, 98 Am. Dec. 553, it was said that the word "family" "was most certainly used in its generic sense [in the *Texas Constitution*], embracing a household composed of parents and children, or other relatives, or domestics and servants;

One Person. — In this sense of the word a family must consist of two or more persons residing together; one person can never be said to constitute a family.¹

in short, every collective body of persons living together within the same curtilage, subsisting in common, directing their attention to a common object, the promotion of their mutual interests and social happiness." See also *Whitehead v. Nickelson*, 48 Tex. 525.

Married Women. — In construing the *Delaware* Act for the protection of women, *Comegys, C. J.*, said: "Regarding the word 'family,' then, in the 'Act for the protection of women' (Rev. Code, p. 479, § 3), in this latter sense, for it has no technical meaning, we say to you that it means the household, or collection of persons, including husband, wife, children, lodgers, servants, residing together and receiving diet, lodging, etc., from a common supply or source, and subject to rules for their government, as members of such household, with respect to such membership." *Hogg v. Lobb*, 7 Houst. (Del.) 399.

Estray Law. — It was held that the term "family," in the *Texas* statute regulating the sale of estrays and forbidding the sale unless there should be present at the sale at least three bidders besides the members of the family of the taker up, meant the collective body of persons living in one house under one head or manager. *Goode v. State*, 16 Tex. App. 414. See also the titles *ANIMALS*, vol. 2, p. 379; *IMPOUNDING*.

Widow's Allowance. — In a statute regulating a widow's allowance it was held that the term "family" did not include alone the widow and minor children of the deceased, but also included such persons as constituted the family of the deceased at the time of his death, whether servants, or children who had attained their majority. *Strawn v. Strawn*, 53 Ill. 263. Compare *Matter of Noah*, 73 Cal. 590.

Widower — Bachelor. — In *Blythe v. Ayres*, 96 Cal. 592, it was said by *McFarland, J.*: "Either a widower or a bachelor, as we all know, may have a family, viz., 'a collective body of persons living together under one head or manager.'"

A Guardian and Minor Child have been held to be a family. *Rountree v. Dennard*, 59 Ga. 629, 27 Am. Rep. 401.

Inmates of Workhouse — English Waterworks Clauses Act. — In *Liskeard Union v. Liskeard Waterworks Co.*, 7 Q. B. Div. 595, the inmates of a workhouse were held to constitute one family for the purposes of the *Waterworks Clauses Act* of 1847, which regulated water companies and authorized them to charge an increased rate where a house was occupied by more than one family.

1. One Person. — *Race v. Oldridge*, 90 Ill. 250, 32 Am. Rep. 27; *Berry v. Hanks*, 28 Ill. App. 55; *Rock v. Haas*, 110 Ill. 528; *Emerson v. Leonard*, 96 Iowa 313; *Zimmerman v. Franke*, 34 Kan. 650; *McCanna v. Anderson*, 6 N. Dak. 482; *Homestead Cases*, 31 Tex. 677, 98 Am. Dec. 553; *Bahn v. Starcke*, 89 Tex. 203.

So in *Calhoun v. McLendon*, 42 Ga. 406, and *Garaty v. Du Bose*, 5 S. Car. 499, a single man was held not to constitute a family. These cases were under exemption laws and in each case the claimant had servants and employees.

But within the meaning of the homestead law it has been held that the only survivor of a family may constitute the family. *Matter of Lamb*, 95 Cal. 397. See also the title *HOMESTEAD*.

So in *Hesnard v. Plunkett*, 6 S. Dak. 73, it was held that under a statute that defined a family as one or more persons actually occupying a homestead, a single person was entitled to a homestead exemption.

Widow Alone. — A statute provided that certain property of a testator might be "set apart for the use of the family of the deceased." It was held that a childless widow was embraced in the term "family of the deceased." *Walley's Estate*, 11 Nev. 260.

A widow remained upon her husband's farm, and carried it on for eleven years after his death as her only means of support. Her children were of full age and married, and had left her. She rented the farm and stock, reserving and occupying one room in the house. It was held that she was entitled to the benefit of the exemption law as the head of a family engaged in agriculture. *Collier v. Latimer*, 8 Baxt. (Tenn.) 420, 35 Am. Rep. 711.

So in *Bradley v. Rodelsperger*, 3 S. Car. 226, it was held that a widow without children may occupy the position of head of a family within article 2, § 32, of the *South Carolina Constitution*. But see *Emerson v. Leonard*, 96 Iowa 311; *Tyson v. Reynolds*, 52 Iowa 431; *Linton v. Crosby*, 56 Iowa 386.

Deserted Wife. — In *Berry v. Hanks*, 28 Ill. App. 55, it was held that a deserted wife without children was a family within the meaning of the *Illinois* statute exempting property of the head of a family from execution and attachment.

Disturbing a Neighborhood or Family in the Night-time. — A statute provided that it should be a punishable offense to disturb a neighborhood or family in the night-time. It was held that the statute was intended to protect all persons from unlawful annoyance in their abodes in the night, and that a woman occupying her dwelling alone was as much under such protection as if surrounded by children or friends. *Noe v. People*, 39 Ill. 96.

Abusive Language. — The *Code of Alabama* prohibited, under penalties, the usage of insulting language near the dwelling house of another and in the hearing of the family of the occupant or any member of his family. It was held that in order to constitute the offense it was not necessary that the entire family be present. The court said: "A family, *ex vi terminis*, must be more than one person; hence the provision of the statute for the protection of any member of the family. Without such provision it would be no offense to use the insulting language in the presence of one member of the family. But it by no means follows that, to fill the other provision of the statute, all the members of the occupant's family should be present. There is no room for saying, we think, that the occupant, his wife, and several children did not constitute a family in the sense of the statute, merely be-

Two or More Families may reside in the same house, each retaining its distinct character as a separate family.¹

Members of the Household but Not Relatives.—Within the definition as given above, members of the same household, though not relatives, are said to constitute a family.² But the term is frequently used in a narrower sense, requiring relationship also between the members of the household.³

Servants.—As used in this broad sense of a collective body of persons living

cause two of his children were not present. To so hold would be a technicality of construction which the words of the statute do not require, and which is essentially repugnant to the manifest purposes of the enactment. In ordinary acceptance, husband, wife, and several children at the time present constitute a family, and, as such, are as much under the protection of the statute as if every member of the family was present." *Bones v. State*, (Ala. 1898) 23 So. Rep. 485.

1. Two Families in One House.—A widow who, with her children, resides in the house and on the land of her aged father, being permitted to cultivate such portion of the land as she chooses, is the head of a family, though her father lives in the same house and claims control over the house and farm. *Bachman v. Crawford*, 3 Humph. (Tenn.) 213, 39 Am. Dec. 163. See also *Brown v. Brown*, 68 Mo. 388.

2. Members of the Household but Not Relatives.—In *Carmichael v. The Northwestern Mut. Ben. Assoc.*, 51 Mich. 494, it was held that the term "family," as used in a statute providing for the organization of benevolent associations to secure "to the families or heirs of any member, upon his death," a certain sum of money, would cover a case where the insured and the beneficiary were an old man and a young woman who were not related, but had lived for many years in the same household, and had treated each other as father and daughter. The court said: "Now this word 'family,' contained in the statute, is an expression of great flexibility. It is applied in many ways. It may mean the husband and wife having no children and living alone together, or it may mean children, or wife and children, or blood relatives, or any group constituting a distinct domestic or social body. It is often used to denote a small select corps attached to an army chief, and has even been extended to whole sects, as in the case of the Shakers."

A widow keeping a boarding house, with a female friend residing with her, and female servants besides the boarders, is said to be the head of a family. *Race v. Oldridge*, 90 Ill. 250, 32 Am. Rep. 27. See also *Weed v. Dayton*, 40 Conn. 293. Compare *Supreme Lodge, etc. v. Nairn*, 60 Mich. 44.

3. Tyson v. Reynolds, 52 Iowa 431. And see the cases given in the succeeding sections of this article.

Persons Entitled to Support.—Where a statute provided that the Probate Court should make such reasonable allowance out of the estate of a decedent as should be necessary for the maintenance of his family, it was held that the word "family" embraced those who were the immediate family of the deceased, and were

by law entitled to look to him for both support and protection. *Matter of Noah*, 73 Cal. 590. See also *Byrne's Estate*, Myr. Prob. (Cal.) 1. Compare *Strawn v. Strawn*, 53 Ill. 263.

Homestead Law.—In *Harbison v. Vaughan*, 42 Ark. 539, the court said: "But to constitute a family, within the meaning of such statutes, something more is required than a mere aggregation of individuals residing in the same house. The cases seem to unite upon this test—that there must be an obligation upon the head of the house to support the others, or some of them, and a corresponding state of dependence on the part of the members so supported." See also *Bosquett v. Hall*, 90 Ky. 567, 29 Am. St. Rep. 404; *Bell v. Keach*, 80 Ky. 42; *Carter v. Adams*, (Ky. 1887) 4 S. W. Rep. 36; and see the title **HOMESTEAD**.

Poor Law.—As used in a poor law, it has been held that the word "family" should be confined to those for whose support the law obliges a person, whether male or female, to provide. *Landgrove v. Pawlet*, 20 Vt. 312. See also the article **POOR AND POOR LAWS**.

In *Cheshire v. Burlington*, 31 Conn. 326, it was held that the word "family" in the poor law embraced all the persons whom it was the right of the head of the family to control and his duty to support.

In *Manchester v. Rupert*, 6 Vt. 291, it was held that the wife of a minor son was not of the family of the father within a statute relating to settlements. The court said: "The term 'family' as here used includes those only whom the pauper is under legal obligation to support."

Widow's Allowance.—Boarders are not included within the meaning of a statute providing an allowance for a widow and her family. *Strawn v. Strawn*, 53 Ill. 263.

Service of Process.—So in *Fowler v. Mosher*, 85 Va. 421, it was said that where a statute required service of process to be upon a member of the family of the person notified, delivery to a mere boarder and stranger to his blood was not sufficient. See generally **ENCYC. OF PL. AND PR.**, article **SERVICE OF PROCESS**.

As against arrest on civil process, the children, domestic servants, and permanent boarders of a householder have been deemed to be of his family, but not visitors. *Oystead v. Shed*, 13 Mass. 520, 7 Am. Dec. 172.

Inmates of a House.—In *Supreme Lodge, etc., v. Nairn*, 60 Mich. 44, it was held that an intimate friend and comrade of a member of a benevolent association, who, being physically disabled and dependent on others for support, had lived in such friend's house for several years, did not come within the phrase "family relations." Compare *Race v. Oldridge*, 90 Ill. 250, 32 Am. Rep. 27; *Weed v. Dayton*, 40 Conn. 293.

in one house and under one head, the term will, of course, include servants.¹ But in its narrower sense of relationship, the term does not include servants.²

II. RELATIONSHIP. — A family is defined as parents with their children, whether they dwell together or not; in a more general sense, any group of persons closely related by blood, as parent and children, uncles, aunts, and cousins; often used in a restricted sense only of a group of parents and children, founded upon the principle of monogamy.³

1. Servants. — *Strawn v. Strawn*, 53 Ill. 263; *Race v. Oldridge*, 90 Ill. 250, 32 Am. Rep. 27; *Weed v. Dayton*, 40 Conn. 293.

"Lexicographers, from whom, in our literary education, we derive all our knowledge of the correct import of words, tell us that the word 'family,' in its origin, meant servants; that this was the signification of the primitive word. It now, however, has a more comprehensive meaning, and embraces a collective body of persons living together in one house, or within the curtilage, in legal phrase." *Homestead Cases*, 31 Tex. 677, 98 Am. Dec. 553.

The term "family" includes parents, children, and servants domiciled in the same house, and under the one head. *Cheshire v. Burlington*, 31 Conn. 326.

So in *Huckabee v. Swoope*, 20 Ala. 498, it was held that the word "family" in a will comprehended not only the wife and children of the testator, but his servants also.

Eating in the House — Fire Insurance. — A policy of insurance upon a summer hotel provided that a family should live in it during the whole year. It was held that two employees of the insured, living at the hotel and working on the grounds around it, but taking their meals at an adjoining hotel, constituted a family within the meaning of this provision. *Poor v. Hudson Ins. Co.*, 2 Fed. Rep. 438. See also the title FIRE INSURANCE.

But in an action on a policy of insurance by which there was "warranted a family to live in said house throughout the year," evidence that, at the time of the fire and for some time previous thereto, the only occupancy of the insured premises was by two workmen, who took their meals and were employed elsewhere during the day, but kept their trunks and clothing and slept at night in one of the rooms on the insured premises, was held not to justify the jury in finding that the warranty had been complied with. *Poor v. Humboldt Ins. Co.*, 125 Mass. 274, 28 Am. Rep. 228.

Service of Process — Workman in Shop. — Within a statute providing that process might be served upon a member of the defendant's family, it was held that a workman in the defendant's shop was not a member of his family. *Mayer v. Griffin*, 7 Wis. 82.

2. Servants Not Included. — The word "family," as used in a statute concerning the absolute property of the widow in cases of administration, includes children or those persons who have a legal or moral right to expect to be fed and clothed by the widow, and does not include assistants who may be necessary to keep the house and manage a farm. *Whaley v. Whaley*, 50 Mo. 577.

It has been held that a single man, who has no other persons living with him than servants and employees, is not the head of a family

within the meaning of statutes creating homestead exemptions. *Calhoun v. Williams*, 32 Gratt. (Va.) 18, 34 Am. Rep. 759; *Calhoun v. McLendon*, 42 Ga. 405; *Garaty v. Du Bose*, 5 S. Car. 493. And the rule is said to be the same although the servants are old and confidential, and have long managed the domestic affairs of the master, and were formerly his slaves. *Howard v. Marshall*, 48 Tex. 471. So of a widow residing in her own house, but having no other persons living with her than servants. *Murdock v. Dalby*, 13 Mo. App. 41.

Housekeeper. — In *Ellis v. Davis*, 90 Ky. 185, it was held that one whose family consisted only of himself and housekeeper was not a *bona fide* housekeeper with a family within the meaning of the Homestead Law.

3. Relationship. — *Century Dict.*, quoted in *Matter of Shedd*, 60 Hun (N. Y.) 369, affirmed 133 N. Y. 601.

As to the necessity of a common dwelling see the preceding section, and see *infra*, this title, *Separation*.

In *Brooks v. Collins*, 11 Bush (Ky.) 622, it was said: "The word 'family,' as defined by Bouvier, is 'father, mother, and children;' and again it is defined, 'All the relatives who descend from a common ancestor or who spring from a common root.'" See also *Fowler v. Mosher*, 85 Va. 425.

The word "family" includes sons and daughters so long as they live together and form a portion of the same household. *Bradlee v. Andrews*, 137 Mass. 50; *Phelps v. Phelps*, 143 Mass. 570.

Kindred. — In *Cruwys v. Colman*, 9 Ves. Jr. 319, the master of the rolls said: "I retain my first impression upon this case, that there is a sufficiently definite object of the trust pointed out, as the words 'of her own family' are equivalent to 'of her own kindred,' or 'her own relations.' The word 'family' may, according to the context, have different significations in different wills. It may be restrained to mean only the children. On the other hand, in *MacLeroth v. Bacon*, 5 Ves. Jr. 159, Lord Alvanley thought it might be extended to mean the husband, so as to include him as one of the family. But in this will it is clear that by 'those of her own family' the testatrix means 'her own kindred.' We perfectly understand the question of what family a man is. That is, from whom is he descended? to whom, consequently, is he related? Those of the same family are related to each other." See also *Matter of Jessup*, 81 Cal. 408.

Descendants Generally. — A codicil in the form of a letter to the testator's wife, saying: "I should be unhappy if I thought it possible that any one not of your family should be the better" for what he left her, was construed to include descendants of every degree in the

Children — Grandchildren. — In a bequest or a devise for the benefit of one and his family, it has been held that the word "family" *prima facie* means chil-

word "family." *Williams v. Williams*, 1 Sim. N. S. 358.

Graveyard. — A grantor reserved in his deed the old family graveyard, together with the right of way thereto. It was held that the word "family" was intended to embrace not merely those of the grantor's children who were at the time members of his household, but also his lineal descendants generally. *Brown v. Anderson*, 88 Ky. 578.

Family in the Sense of Relations. — In *In re MacLeay*, L. R. 20 Eq. 186, it was held that a devise "to my brother J., * * * on the condition that he never sells it [the land] out of the family," was valid, and that J. could not give a marketable title to a purchaser who was a stranger to the family.

Relations and Family. — In *Huling v. Fenner*, 9 R. I. 410, it is said: "It is objected that the person to whom the appointment is made is not one of the relations of the donor, Ray G. Huling, 'of the Huling family,' within the meaning of the power. The word 'relations,' in its widest extent, embraces persons of every degree of consanguinity. When not restricted in its meaning by other words, it extends to all persons who are descended from the same common ancestors. It is synonymous with 'kindred,' and is expressed also by the word 'family,' in its largest sense." See also the title RELATIVES.

A power to an unmarried woman to appoint a fund among "her own family or next of kin" was held to be capable of extension to any relative. *Snow v. Teed*, L. R. 9 Eq. 622.

Benefit Society. — The certificate of incorporation of a benefit society declared that the object of the society was the payment of a benefit fund on his decease to the member's family, orphans or dependents, as he might direct. It was held that the word "family" was flexible enough to include other relatives than the widow and children of the deceased. The court said: "The word 'family,' which is not found in the statute, would have included as such then only the widow and orphans, who are there named. When the words 'other relatives of deceased members' are introduced after these by the later statute, the word is sufficiently flexible to include them. One of its well-known meanings in common use includes as such relatives who are descendants of a common ancestor. See Worcester's Dict. and Webster's Dict., 'Family.'" *Marsh v. Supreme Council American Legion of Honor*, 149 Mass. 517. See also the title BENEFICIARIES (IN INSURANCE), vol. 3, pp. 963, 973.

Succession. — In *Den v. De Hart*, 3 N. J. L. 73, the court said: "The word 'family,' too, used in the section, must be taken in that sense in which the law uses it when speaking of descents, and in that restriction it will comprehend only the descendants of such ancestor; those who have his blood running in their veins; and in that sense is nearly if not quite of the same import as the word 'issue.'" This was upon the construction of a statute which had for an object the prevention of real estate going out of the family of the ancestor.

See also *Den v. Urison*, 2 N. J. L. 197; and see the titles ISSUE; SUCCESSION.

Heir at Law. — When applied to realty, the term has been construed in *England*, generally, to mean heirs at law. *White v. Briggs*, 2 Phil. 583; *Wright v. Atkins*, 17 Ves. Jr. 255, 19 Ves. Jr. 299; *Griffiths v. Evan*, 5 Beav. 241; *Doe v. Smith*, 5 M. & S. 126; *Williams v. Williams*, 20 L. J. Ch. N. S. 280; *Pyot v. Pyot*, 1 Ves. 335; *Lucas v. Goldsmid*, 29 Beav. 660; *Counden v. Clerke*, Hob. 29; *Chapman's Case*, 3 Dyer 333b.

In *Wright v. Atkins*, 1 T. & R. 143, however, Lord Eldon, when speaking of the English rule of construction just noticed, whereby "heir at law" and "my family" were held convertible terms, said: "The court, in its anxiety to find out the meaning of the testator, has found out that what he has said has the same meaning as if he had said nothing at all."

Father's Family. — In *M'Cullough's Heirs v. Gilmore*, 11 Pa. St. 370, it was said: "Whom did the testator mean by the heirs of his 'father's family'? A man's family may be considered as his household at a particular period, or as his race or generation. There is nothing in the will to designate or describe what the testator meant by his father's family. A family, in its collective or aggregate capacity, can have no heirs. We are, therefore, all in the dark as to whom the testator intended to designate by the use of the words 'heirs of his father's family.' We may, perhaps, indulge a reasonable conjecture that he intended to describe the heirs of his father."

Next of Kin. — When applied to personality, "family" generally means "next of kin." *White v. Briggs*, 2 Phil. 583; *Grant v. Lyman*, 4 Russ. 292; *Cruwys v. Colman*, 9 Ves. Jr. 320; *Williams v. Williams*, 20 L. J. Ch. N. S. 280; *Smith v. Greeley*, (N. H. 1893) 30 Atl. Rep. 413.

Where a testator, dying without children, left his fortune "to the good of my family, whoever survives longest," subject to a life estate in the wife, it was held that "family" meant next of kin. *In re Maxton*, 4 Jur. N. S. 407.

Father and Wife and Child — Beneficial Association. — The charter and laws of a fraternal association provided that death benefits should be paid to such person or persons, belonging to the immediate family of the deceased, as he might designate, and in default of any designations should go to his heirs at law. An unmarried man living with his father designated his father as his beneficiary. He afterwards married and lived with his wife and infant apart from his father's family. He died without having changed his designation of his father as his beneficiary. It was held that his wife and child took the benefits of the policy. *Knights of Columbus v. Rowe*, 70 Conn. 545. See also the title BENEVOLENT OR BENEFICIAL ASSOCIATIONS, vol. 3, p. 1041.

Service of Process — Mother and Son. — In *Ellington v. Moore*, 17 Mo. 424, it was held that the term "family," as used in the statute regulating service of process, was not confined

dren, and that a gift to A. and his family should be read as a gift to A. and his children.¹ But in some cases a declaration of trust in favor of "the family"

to persons under the control or in the employ of the person to be notified, and that if a son took his widowed mother to reside with him she was a member of his family within the meaning of the statute.

Married Women — Daughter and Mother. — Under a statute which renders a married woman liable for "necessaries" for the support and maintenance of her family, it was held that a married woman whose husband was without means was liable upon her contract for the funeral expenses of her mother, who lived and died in the household. *Bair v. Robinson*, 108 Pa. St. 247, 56 Am. Rep. 198.

Brothers and Sisters living together may constitute a family. *Duncan v. Frank*, 8 Mo. App. 289; *Moyer v. Drummond*, 32 S. Car. 165, 17 Am. St. Rep. 850, citing 7 AM. AND ENG. ENCYC. OF LAW (1st ed.) 804, note 2.

An Unmarried Woman Who Had Taken Charge of the Children of Her Sister upon the latter's death, and at her request, and with whom they lived in her own house, has been held to be the head of a family within the Iowa homestead exemption law. *Arnold v. Waltz*, 53 Iowa 706, 36 Am. Rep. 248.

Concubine. — The term "family" does not include a concubine or mistress. *Keener v. Grand Lodge, etc.*, 38 Mo. App. 543.

1. **Children** — *England*. — *MacLeroth v. Bacon*, 5 Ves. Jr. 159; *Barnes v. Patch*, 8 Ves. Jr. 604; *White v. Briggs*, 2 Phil. 583; *Gregory v. Smith*, 9 Hare 708, 15 Eng. L. & Eq. 202; *Pigg v. Clarke*, 3 Ch. Div. 672; *Burt v. Hell-yar*, L. R. 14 Eq. 160; *Woods v. Woods*, 1 Myl. & C. 409; *Blackwell v. Bull*, 1 Keen 176; *James v. Wynford*, 2 Sm. & G. 350; *Matter of Trustees' Relief Act*, 1 Sim. N. S. 242; *Beales v. Crisford*, 13 Sim. 592; *In re Terry*, 19 Beav. 581; *Wood v. Wood*, 3 Hare 65. See also *In re Muffett*, 56 L. J. Ch. 600.

United States. — *Raynolds v. Hanna*, 55 Fed. Rep. 783.

Kentucky. — *Flournoy v. Johnson*, 7 B. Mon. (Ky.) 693.

Maryland. — *Taylor v. Watson*, 35 Md. 519.

Pennsylvania. — *Heck v. Clippenger*, 5 Pa. St. 385.

Vermont. — *White v. White*, 30 Vt. 338.

Virginia. — *Hill v. Bowman*, 7 Leigh (Va.) 650; *Phillips v. Ferguson*, (Va. 1888) 1 L. R. A. 897.

West Virginia. — *Whelan v. Reilly*, 3 W. Va. 610.

But see *infra*, this title, *Husband and Wife*.

Examples. — A bequest to A. in trust for his family does not include A. *Wallace v. McMicken*, 2 Disney (Ohio) 564. See also *Barnes v. Patch*, 8 Ves. Jr. 604; *In re Hutchinson*, 8 Ch. Div. 540. Compare *infra*, this title, *Husband and Wife*.

And under a disposition by will to A.'s family the children are entitled to the exclusion of A. *Barnes v. Patch*, 8 Ves. Jr. 604.

A testator recited in a codicil that he believed he had made further provisions in a memorandum referred to, for the family of A.; if not, he bequeathed to each of her children, by name, five thousand dollars. In his previous will he had bequeathed to A. a legacy for

life, and the remainder to her daughter. It was held that by the family of A. the testator meant her children. *Alsop's Appeal*, 9 Pa. St. 374.

Under a power to give to any of the family of the testator, "family" has been held to mean children. *Dominick v. Sayre*, 3 Sandf. (N. Y.) 555.

In *MacLeroth v. Bacon*, 5 Ves. Jr. 159, it was held that a bequest to trustees for a married woman and her family would, without other circumstances, be confined to her and her children.

A bequest to one's wife, "towards her support and her family," has been held to give her children such an interest in the estate as to enable them to maintain a bill in their own names to protect such interest. *Woods v. Woods*, 1 Myl. & C. 401; *Beales v. Crisford*, 13 Sim. 592.

A testator devised certain property to his children upon condition that they should not marry into the family of one P. It was held that by the family of P., as used in this connection, was meant the children of P. *Phillips v. Ferguson*, 85 Va. 509.

The expression "if he shall get married and have a family," in its ordinary sense, in a will or settlement, means to get married and have issue of such marriage, and not merely to get married and have a family by becoming a housekeeper. *Spencer v. Spencer*, 11 Paige (N. Y.) 159.

Order of Removal. — So in an order for the removal of a pauper widow and her family it was held that the word "family" *prima facie* meant her children. *Chillisquaque v. Lewisburg*, 2 Penny. (Pa.) 487.

The Word "Family," in a Decree for the Investment of a Sum of Money for the petitioner "and her family," was declared to mean "children." *Mercier v. West Kansas City Land Co.*, 72 Mo. 473.

Adult Children. — In *Wood v. Wood*, 63 Conn. 324, the testator made the following provision: "In relation to my property at W., a house and several acres of land, and now occupied by my son S. and family, I reserve the same for the joint or several use of my wife and daughter (therewith) as can be agreed upon with said son. * * * The said premises to be kept in good repair by my said son, and the taxes duly paid, and when to be no longer occupied by any member of my family, or desired, then to be sold at the best terms, and the avails to be legally divided among my heirs." It was held that the term "family" did not include adult children living separate from and not forming a part of the same household, and that, as used in this provision, the testator's own family was intended. The court said: "The contention turns upon the construction to be put upon the term 'my family' as used in the clause just above quoted. If by that term the testator intended to exclude his son Samuel, then the claim of the executor is sustained. But if he intended to include Samuel in that term, then the claim of Samuel is sustained. In construing a will or any other writing words are to be given their primary

of a certain person has been held too indefinite to be sustained.¹

Stepchildren. — It has been generally held that the term "family" will not embrace a person's stepchildren.² On the other hand, the context or other

and common meaning unless there is something in the context to show that they are used in some other meaning. The word "family" in its common and primary meaning is "that collective body of persons who form one household, under one head and one domestic government, including children and servants." Century Dictionary. "That collective body of persons who live in one house and under one head or manager; a household, including parents and children and servants." Webster's Dictionary. This is also the meaning given to this word by the law decisions in this state and in the state of New York and in other states. *Cheshire v. Burlington*, 31 Conn. 326; *Hart v. Goldsmith*, 51 Conn. 479; *Spencer v. Spencer*, 11 Paige (N. Y.) 159; *Kain v. Fisher*, 6 N. Y. 597; *Bowne v. Witt*, 19 Wend. (N. Y.) 475; *Poor v. Hudson Ins. Co.*, 2 Fed. Rep. 432; *Bradlee v. Andrews*, 137 Mass. 50; *Bates v. Dewson*, 128 Mass. 334. And it does not include adult children living separate and not forming a part of the same household." To the same effect see *Smith v. Wildman*, 37 Conn. 384; *Phelps v. Phelps*, 143 Mass. 570; *Andrews v. Andrews*, 7 Heisk. (Tenn.) 234.

A testator placed his entire property in the possession of his widow with power to sell it "for the family and for the education and support of" his daughter and in trust for his son. The son was thirty years old and capable of supporting himself. The daughter was thirteen years old. It was held that the word "family" included the widow and minor daughter, but not the son. *In re Simon*, 55 Conn. 239.

So in the homestead and exemption statutes the term "family" has been held not to include adult children. *Hoffman v. Neuhaus*, 30 Tex. 633, 98 Am. Dec. 492; *Allen v. Manasse*, 4 Ala. 554. See also the titles EXEMPTIONS (FROM EXECUTION), p. 59, *ante*; HOMESTEAD.

But in *Chicago, etc., R. Co. v. Chisholm*, 79 Ill. 584, it was held that a son or daughter residing with the parent does not cease to be a member of the family when they respectively arrive at the age of twenty-one or eighteen, from that fact alone. In this case a family commutation ticket, which on its face purported to be for the exclusive use of a man and family, was held to authorize a son who was residing with the father as a member of his family to travel thereon, notwithstanding he might have attained his majority. But it was held further that if, at the time of purchase, the purchaser was informed that a son over twenty-one years of age would not, under the regulations of the company, be allowed to ride on it, such regulations would constitute a part of the contract of purchase, and would be obligatory upon the holder attempting to travel on the ticket. See also *Stilson v. Gibbs*, 53 Mich. 280.

Grandchildren. — A bequest of certain slaves and their families was restricted to such slaves and their wives and children residing in the same house with them, and not extended to their grandchildren. *Pringle v. M'Pherson*, 2 Desaus. (S. Car.) 524.

In *Dodge v. Boston, etc., R. Corp.*, 154 Mass. 299, it was held that the grandchild of the grantor of a right of way to a railroad was not a member of the grantor's family after ceasing to be a member of his household, within a provision in the grant that the grantor and his family should have free passage.

So in a devise the word "family" was held not to include grandchildren. *Pigg v. Clarke*, 3 Ch. Div. 672; *Burt v. Hellyar*, L. R. 14 Eq. 160.

But in *Ladiga v. Roland*, 2 How. (U. S.) 581, it was held that a grandmother and grandchildren might constitute a family.

1. Trust. — *Warner v. Rice*, 66 Md. 442; *Tolson v. Tolson*, 10 Gill & J. (Md.) 159, 8 Gill (Md.) 388; *Yeap Cheah Neo v. Ong Cheng Neo*, L. R. 6 P. C. 381; *Lambe v. Eames*, L. R. 10 Eq. 267, *affirmed* L. R. 6 Ch. 597. See also the titles CHARITIES, vol. 5, p. 932; TRUSTS AND TRUSTEES; WILLS.

Formerly, bequests to the family were frequently held void in *England* for uncertainty. *Harland v. Trigg*, 1 Bro. C. C. 142; *Doe v. Joinville*, 3 East 172; *Robinson v. Waddelow*, 8 Sim. 134. Compare Matter of Trustees' Relief Act, 1 Sim. N. S. 242. But now the subject-matter and the context of the will are to be taken into account, and the bequest upheld if it can be made out what the testator intended by the word "family." 2 Redf. on Wills (2d ed.) 71; 2 Story's Eq. Jur. (13th ed.), § 1071; *Hill v. Bowman*, 7 Leigh (Va.) 650.

Family—Perpetuities. — In *St. John v. Dann*, 66 Conn. 401, it was held that the term "family" in a bequest in trust for one and his family would be confined to persons in being at the death of the testator, and the children of such persons, so as not to conflict with the statute against perpetuities. See also the title PERPETUITIES.

2. Stepchildren. — *Lathrop v. Soldiers' Loan, etc., Assoc.*, 45 Ga. 483; *Kidd v. Lester*, 46 Ga. 231; *Freto v. Brown*, 4 Mass. 675. See also *Gay v. Ballou*, 4 Wend. (N. Y.) 403, 21 Am. Dec. 158.

In *Bates v. Dewson*, 128 Mass. 334, it was held that the word "family," as used in a provision by a testator that certain property should revert to his family, did not include his stepson.

In *Menefee v. Chesley*, 98 Iowa 55, it was held that a husband who had separated from his wife was not liable for the support of his stepchildren. The court said: "Were the children of a former husband a part of the defendant's family after he ceased to live with them, and can he be held liable for their support? Clearly not, as we think. While he may have been liable for the expenses of such a family so long as he continued to live in and be a part of it, yet when he threw off these obligations toward his stepchildren, as he had the right to do, his liability for their support ceased. They were no longer a part of his family, and he should not be held liable for the support of persons to whom he owed no duty. Our conclusion finds support in the case of *Schlesinger v. Keifer*, 131 Ill. 104."

circumstances will often show that the term "family" was intended to include stepchildren.¹

III. HUSBAND AND WIFE. — In law a husband and wife living together and having no children are sometimes deemed within the benefit of a statute as to families.² And so the term in a will has been held to include the wife as well as the children.³ But it has been held that the husband is not of the

An adult residing with his stepmother and transacting her business is not a member of her family. *Bowne v. Witt*, 19 Wend. (N. Y.) 475.

1. Stepchildren Included. — Under a statute providing for the allowance of an adequate sum for the support of a widow and her family from the estate of her deceased husband until the expiration of one year after the husband's death, it was held that the term "family" included her children by a former husband if they are under age and reside with her. *Sanderlin v. Sanderlin*, 1 Swan (Tenn.) 441. See generally the title ALLOWANCES, vol. 2, p. 156.

A testator directed his trustee to maintain his son "or his family." It was held that the term "family" would include the son's widow and her children, and also a child of the son by a former marriage, who did not live with his stepmother. *Smith v. Greeley*, (N. H. 1893) 30 Atl. Rep. 413. The court said: "In wills the word 'family' ordinarily means 'next of kin,' and there is nothing indicating that it was used in a different sense by the testator."

Duty to Support. — Though a husband is not bound to provide for the children of his wife by a former husband, yet if he takes them into his house they become members of his family, and he shall be deemed to stand *in loco parentis*, and be liable on a contract made by his wife for their education or other necessities. *Stone v. Carr*, 3 Esp. N. P. 1; *Gay v. Ballou*, 4 Wend. (N. Y.) 403, 21 Am. Dec. 158. Compare *Hardy v. Atherton*, 7 Q. B. Div. 264. See also the title PARENT AND CHILD.

Bastard. — A power by will to the testator's widow to dispose of property for the benefit of herself and family was held to authorize a gift by her will to an illegitimate son of one of the testator's sons. *Lambe v. Eames*, L. R. 6 Ch. 597.

2. Matter of Shedd, 60 Hun (N. Y.) 369, affirmed 133 N. Y. 601; *Regan v. Zeeb*, 28 Ohio St. 485; *McPhee v. O'Rourke*, 10 Colo. 301, 3 Am. St. Rep. 579.

A husband and wife constitute a family. *Kitchell v. Burgwin*, 21 Ill. 40; *Miller v. Finegan*, 26 Fla. 31. And this although the wife may have deserted him and may be residing in another state, and he may be living in independent relations with another woman. *Whitehead v. Tapp*, 69 Mo. 415; *Brown v. Brown*, 68 Mo. 388; *Gates v. Steele*, 48 Ark. 539.

In *Cheshire v. Burlington*, 31 Conn. 326, a wife was held to be a member of a family within the poor law.

A man who, at the time of his death, kept a house and servant, and left a widow, has been held to have left a family. *Kain v. Fisher*, 6 N. Y. 597.

Widow's Allowance. — A statute provided that upon the death of a man having a family, and

leaving a widow or minor child, certain property should not be deemed assets, but should be set apart for the widow. It was held that one who had not lived with his wife nor supported her for a number of years, and who at the time of his death was not keeping house and had neither servants nor minor children, but had a daughter living with her mother, had a family within the meaning of the statute. *Matter of Shedd*, 60 Hun (N. Y.) 367, affirmed 133 N. Y. 601.

3. Family Held to Include Wife. — *Hall v. Stephens*, 5 Cent. L. J. 530, 65 Mo. 670; *Bowditch v. Andrew*, 8 Allen (Mass.) 339; *Addison v. Bowie*, 2 Bland (Md.) 627; *Gafney v. Kenison*, 64 N. H. 354. Compare *Smith v. Smith*, 71 Mich. 633, 38 Alb. L. J. 434, and also the cases cited under the heading *Children — Grandchildren*, in the preceding section.

Where a testator directed that his business should be carried on by his wife and son for the mutual benefit of his family, it was held that "family" included his wife. *Blackwell v. Bull*, 1 Keen 176.

In *Crosgrove v. Crosgrove*, 69 Conn. 416, it was held that a bequest to a relative and family was to be equally divided between the relative named and his wife and children living at the testator's decease.

Wife and Children. — In construing the phrase in a will, "maintenance of my family," the court said: "The word 'family' may, undoubtedly, sometimes be so used as to include a wife as well as children. Indeed, it would usually be so understood if there were nothing to show that the contrary were intended. And we think the whole language of the will shows that it was meant to include the wife and children, while they should live together and thus constitute a family." *Bowditch v. Andrew*, 8 Allen (Mass.) 339.

So in *Bradlee v. Andrews*, 137 Mass. 50, where the testator devised property in trust, and directed his trustees to apply the income to support his children and their families, the court said that "the word 'family,' as used by the testator, would include his son and daughters, together with their respective children so long as they should live together and form a portion of the same household, or from their tender years be entitled to be treated as its members. It would also include the wife of the son, if she continued to reside with or be entitled to support from him."

Where a testator gave to one and his family jointly a certain sum, it was held that the sum should be divided equally between the beneficiary and his wife and daughter, who constituted his family at the death of the testator, to the exclusion of a child subsequently born. *Langmaid v. Hurd*, 64 N. H. 526.

In a will providing that certain property should revert to the testator's family it was held that by the word "family" was meant

wife's "family."¹

IV. SEPARATION. — In general, when the members of a family marry or leave the home permanently, the relation ceases as to them.² But when the term is used to designate the beneficiaries in a will this is not the case.³

his widow and child. *Bates v. Dewson*, 128 Mass. 334.

In *Smith v. Wildman*, 37 Conn. 384, it was held that the words "family of A." meant the wife and such children of A. as lived with him as part of his household and were legally dependent upon him for support.

A testator gave certain property in trust for his son and his family. In construing this provision in *Rugely v. Robinson*, 10 Ala. 722, the court said: "The term 'family,' it has been already shown, is a word of more or less extensive import, according as the context of the will may indicate. Here it is not to be understood in its more enlarged sense, as synonymous with 'kindred' or 'relations;' nor can it comprehend brothers and sisters, for these are all provided for by the will. It must then be taken to mean, in this instance, the wife and children of the testator's son Eli; for it is shown by the proof that he is both a husband and father."

Bequest for Support of One and His Family, and "for No Other Purpose" — Trust Fund. — A testator gave his son a sum of money "for the support of himself and family, and for no other purpose." In construing this provision the court said: "The word 'family' is a noun of multitude, and is capable of various significations, according to the context, and in the present case it would no doubt include the wife and children of the testator's son. The will should be carried out according to the intent of the testator. And we can have no possible doubt that it was his object to create the one thousand five hundred dollars in the hands of his son a trust fund, for the use specified in the will. The testator not only used affirmative words, appropriate to create a trust fund, but he saw fit at the same time to add a negative. The words are: 'for the support of himself and family, and for no other purpose.' To hold that under this will the son took the one thousand five hundred dollars absolutely as his own, and not as a trust fund, would be to pervert the use of language and the obvious intent of the testator." *White v. White*, 30 Vt. 338.

1. Husband. — It has been held, where a power was given by a will to appoint for the benefit of a married woman and her family, that unless controlled or influenced by some

other clause or expression the husband would be excluded. *MacLeroth v. Bacon*, 5 Ves. Jr. 159.

2. Separation. — *Roco v. Green*, 50 Tex. 483; *Zimmerman v. Franke*, 34 Kan. 650. And see *supra*, this title, *Husband and Wife*.

A family consisting of a widower, his daughter, and a distant female relative is dissolved by the marriage of the daughter. *Whitehead v. Nickelson*, 48 Tex. 517.

In *Rock v. Haas*, 110 Ill. 528, it was held that a person and his or her children permanently separated could not constitute a family. So in *Hart v. Goldsmith*, 51 Conn. 479, it was held, under a statute which provided that a married woman should be liable upon any contract made by her upon her personal credit for the benefit of herself or her family, that the term "family" included only those who were living with the married woman as part of her household, and that her contract for groceries to be furnished her son and his family, who were living by themselves, did not fall within the statute. See also the titles *HUSBAND AND WIFE*; *SEPARATE PROPERTY OF MARRIED WOMEN*. And see *FAMILY EXPENSES*, *post*.

"In common parlance, the family consists of those who live under the same roof with the *paterfamilias*; those who form * * * his fireside. But when they branch out and become the heads of new establishments, they cease to be part of the father's family." *Rex v. Darlington*, 4 T. R. 797. And in that case the term was held not to extend to grandchildren.

3. See *Townsend v. Townsend*, 156 Mass. 454. And see *supra*, this title, *Husband and Wife*; *Relationship — Children*; and see the title *WILLS*. For other cases where separation has been held not to destroy the family, see *supra*, this title, *Relationship*; *The Household — One Person*.

Parent and Child. — In *Putman v. Southern Pac. Co.*, 21 Oregon 243, it was said: "While the word 'family' usually imports a household, including parents, children, and servants, it is not always necessary, to sustain the family relation between parents and children, that they should have a residence together. It is the assumption of the duties that belong to the relation of parent and child that determines such family relation as existing in fact, and fixes their social status after maturity."

FAMILY AGREEMENTS OR SETTLEMENTS.

BY A. S. H. BRISTOW.

I. DEFINITION, 875.

II. WHEN EQUITY WILL UPHOLD, 875.

1. *In General*, 875.
2. *Settlement Founded on Mistake*, 875.
3. *Effect of Minority of Party*, 876.
4. *Effect of Exercise of Parental Authority*, 876
5. *Effect of Drunkenness of Party*, 877.
6. *Adequacy of Consideration*, 877.
7. *Validity of Deeds Making Settlements*, 877.
8. *Parol Agreements as to Land*, 878.

I. DEFINITION. — A family agreement or settlement is an agreement made between a father and his son or children, or between brothers, to dispose of property in a different manner from that which would otherwise take place.¹

II. WHEN EQUITY WILL UPHOLD — 1. **In General.** — Family agreements and settlements are treated with especial favor by the courts of equity, and equities are administered in regard to them which are not applied to agreements generally, and this on the ground that the honor and peace of families make it just and proper to do so.² Accordingly, it has been laid down as a general rule that a family agreement entered into upon the supposition of a right, or of a doubtful right, though it afterwards turns out that the right was on the other side, shall be binding, and the right shall not prevail against the agreement of the parties.³

A Court of Law, it has been held, will also, for like reasons, affirm such a settlement, unless the plaintiff is entitled to have it broken on clear evidence and on strictly legal ground.⁴

2. **Settlement Founded on Mistake.** — Family settlements are to be upheld only when good faith is observed, and if a party thereto knows a material fact and conceals it from another, who is misled by the concealment, the courts will not sustain the settlement.⁵ And it has been held that a family resettle-

1. **Family Settlement or Agreement Defined.** — Bouv. Law Dict.

2. **Family Settlements Favored in Equity** — *England*. — *Stockley v. Stockley*, 1 Ves. & B. 29; *Westby v. Westby*, 2 Dr. & War. 502; *Stapilton v. Stapilton*, 1 Atk. 5.

Georgia. — *Smith v. Smith*, 36 Ga. 191.

Pennsylvania. — *Jourdan v. Jourdan*, 9 S. & R. (Pa.) 276; *Lies v. Stub*, 6 Watts (Pa.) 48; *Barton v. Wells*, 5 Whart. (Pa.) 226; *Worrall's Accounts*, 5 W. & S. (Pa.) 111; *Ackla v. Ackla*, 6 Pa. St. 228; *Walworth v. Abel*, 52 Pa. St. 370; *Burkholder's Appeal*, 105 Pa. St. 31; *Wilen's Appeal*, 105 Pa. St. 121. See also *Ralston's Estate*, 172 Pa. St. 104.

Rhode Island. — *Supreme Assembly, etc.*, v. *Campbell*, 17 R. I. 406.

South Carolina. — *Smith v. Tanner*, 32 S. Car. 262, citing 7 AM. AND ENG. ENCYC OF LAW (1st ed.) 807.

Tennessee. — *Trigg v. Read*, 5 Humph. (Tenn.) 545; *Williams v. Sneed*, 3 Coldw.

(Tenn.) 533; *Owen v. Hancock*, 1 Head (Tenn.) 573; *Andrews v. Andrews*, 7 Heisk. (Tenn.) 235; *Darden v. Harrill*, 10 Lea (Tenn.) 421.

3. **General Rule as to Support of Family Agreements by Courts of Equity.** — *Stapilton v. Stapilton*, 1 Atk. 10; *Smith v. Smith*, 36 Ga. 191. See also *Cann v. Cann*, 1 P. Wms. 727. As to the necessity of the existence of a doubtful right for the support of family agreements, see *infra*, this section, *Adequacy of Consideration*.

4. **Family Agreement Supported by Court of Law.** — *De Hatre v. De Hatre*, 50 Mo. App. 1.

5. **Effect of Concealment of Material Fact by Party to Settlement.** — *Gordon v. Gordon*, 3 Swanst. 468; *Smith v. Pincombe*, 3 Macn. & G. 653; *Greenwood v. Greenwood*, 2 De G. J. & S. 28; *Tennent v. Tennents*, L. R. 2 H. L. Sc. 6.

Family Settlement Induced by Forged Paper. — A family settlement will not be upheld when

ment will not be supported if one party has made an innocent representation to another which is false, and the latter has been influenced thereby to enter into the resettlement.¹ But it has been held in *Pennsylvania* that nothing short of gross fraud will justify the setting aside of a family settlement, particularly where it has continued uninterruptedly for several years.² The principle seems to be fully established, however, that where family agreements have been fairly entered into without concealment or imposition on either side, with no suppression of what is true or suggestion of what is false, then, although the parties may have greatly misunderstood their situation and mistaken their rights, a court of equity will not disturb the quiet which is the consequence of that agreement.³

3. Effect of Minority of Party. — It has been maintained that whenever a court of chancery is called upon to sanction and enforce a family agreement which involves the rights and interests of minors, it is bound, in the exercise of its general superintendence and protective jurisdiction over the persons and property of infants, to see that their rights and interests are not injuriously affected by such contract. Such parties must have their day in court, they must be represented by guardians *ad litem*, and the proof must satisfy the conscience of the chancellor that their rights and interests are promoted and secured by the agreement; but when these requisites are complied with, it is the duty of the chancellor to uphold and support the agreement.⁴

4. Effect of Exercise of Parental Authority. — It has been held that if a son, tenant in tail, and a father, tenant for life, agree on something for the benefit of the younger children, and afterwards the son complains of paternal authority being exerted, though there might be something of that sort, yet, if the agreement be reasonable, the court will not set it aside.⁵ But where it appeared that, as a result of a resettlement, the father took direct benefits proceeding from the son, that the property had not been settled in a reasonable manner if the interest of the family alone was to be regarded, that the son had no professional assistance in the preparation of the deed, and that the contents were not properly made known to him, the arrangement was set aside.⁶

it is induced by a forged paper being presented by a party to it as genuine, such party knowing it to be forged. *Du Pont v. Du Bos*, 52 S. Car. 244.

1. Effect of Innocent Misrepresentation by Party. — *Fane v. Fane*, L. R. 20 Eq. 698; *Gordon v. Gordon*, 3 Swanst. 461.

In *Fane v. Fane*, L. R. 20 Eq. 698, a positive statement which was false was made by one party to another, though it was innocently made, and the court said: "If there is a mistake — if there is a representation made to the person about to effect a settlement, which is untrue although honestly and innocently made — still, that representation being made, the person who effects the resettlement is entitled under those circumstances to come to this court and to have the resettlement set aside upon the ground of mistake."

In *Gordon v. Gordon*, 3 Swanst. 467, Lord Eldon said: "My opinion is that if James Gordon, prior to the agreement, knew that there had been a private ceremony of marriage, and, conscientiously believing that it was not a legal marriage, omitted to communicate the fact to his brother, the plaintiff would be entitled to relief on the principle that, though family agreements are to be supported where there is no fraud or mistake on either side, or none to which the other party is accessory, yet where there is mistake, though

innocent, and the other party is accessory to it, this court will interpose."

2. Palethorp's Estate, 168 Pa. St. 98.

3. Where All Parties Act under Mistake of Fact or Law. — *Gordon v. Gordon*, 3 Swanst. 463; *Pullen v. Ready*, 2 Atk. 591; *Naylor v. Winch*, 1 Sim. & S. 555; *Neale v. Neale*, 1 Keen 672; *Stewart v. Stewart*, 6 Cl. & F. 911; *Brunson v. Henry*, 140 Ind. 466, *citing* 7 AM. AND ENG. ENCYC. OF LAW (1st ed.) 808.

4. Effect of Minority of Party. — *Reynolds v. Brandon*, 3 Heisk. (Tenn.) 606.

In *Boyd v. Robinson*, 93 Tenn. 26, the court said: "Family settlements are always sustained in courts of equity, unless it clearly appear that there is manifest error; and even in case of persons under disability, will not be disturbed after a long lapse of time and the accrual of other rights thereon."

5. Effect of Exercise of Parental Authority. — *Cory v. Cory*, 1 Ves. 19. To the same effect see *Bellamy v. Sabine*, 2 Phil. 435; *Dimsdale v. Dimsdale*, 3 Drew. 556; *Jenner v. Jenner*, 2 Giff. 232, 2 De G. F. & J. 359.

6. Circumstances Justifying Setting Aside Settlement — Direct Benefit to Parent. — *Hoghton v. Hoghton*, 15 Beav. 278. To the same effect see *Baker v. Bradley*, 7 De G. M. & G. 597.

But it has been held that in an arrangement settling the interests of all the branches of the family, the children may contract with each

5. Effect of Drunkenness of Party. — It has been held not to be sufficient to set aside a family agreement that one of the parties was drunk at the time, unless it appears that some unfair advantage was taken.¹

6. Adequacy of Consideration. — As a general rule, the court will not inquire into the adequacy or inadequacy of the consideration, and it is enough to support the agreement that there was a doubtful question and a compromise fairly and deliberately made.² And it has been held that a family agreement will not be considered as without consideration, independently of its being a compromise of doubtful rights; the settlement of a family dispute is itself a sufficient consideration to support the agreement or compromise.³ And the principle has been held to extend not merely to cases in which arrangements are made between members of a family for the preservation of its peace, but to cases in which arrangements are made between them for the preservation of its property.⁴

7. Validity of Deeds Making Settlements. — Deeds making family settlements, if fairly made, are always binding in equity upon the grantor, unless there be clear and decisive proof that he never parted or intended to part with the possession of the deed; and even if he retains it, the weight of authority is decided in favor of its validity, unless there be other circumstances beside the mere fact of his retaining it to show that it was not intended to be absolute.⁵

other to give to a parent who had a power to distribute property among them some advantage which the parent, without their contract with each other, could not have. *Davis v. Uphill*, 1 Swanst. 136.

Amendment of Settlement. — In *Hoblyn v. Hoblyn*, 41 Ch. Div. 200, it was held that where the father obtains a benefit from a resettlement, the jealousy of the court is necessarily aroused, but such a transaction is not necessarily unfair, nor, if unfair, is it fatal to the validity of the entire arrangement, and the objectionable provisions may be expunged without affecting the rest of the deed. See also *Turner v. Collins*, L. R. 7 Ch. 329.

1. Effect of Drunkenness of a Party. — *Cory v. Cory*, 1 Ves. 19.

2. Adequacy of Consideration Not to Be Questioned. — *Naylor v. Winch*, 1 Sim. & S. 555; *Persse v. Persse*, 7 Cl. & F. 318; *Smith v. Smith*, 36 Ga. 191; *Owen v. Hancock*, 1 Head (Tenn.) 573; *Bellows v. Sowles*, 55 Vt. 391. See also the title *CONSIDERATION*, vol. 6, p. 712; and for a discussion of this question as applied to the compromise of doubtful claims generally, see the same title, vol. 6, p. 711.

3. Settlement of Family Dispute a Sufficient Consideration. — *Wycherley v. Wycherley*, 2 Eden 175; *Watkins v. Watkins*, 24 Ga. 402; *Bailey v. Wilson*, 1 Dev. & B. Eq. (21 N. Car.) 182; *Burkholder's Appeal*, 105 Pa. St. 31; *Wilen's Appeal*, 105 Pa. St. 121; *Supreme Assembly, etc. v. Campbell*, 17 R. I. 406; *Farnsworth v. Dinsmore*, 2 Swan (Tenn.) 42. *Compare Bellows v. Sowles*, 55 Vt. 391; *Baldwin v. Kingstone*, 18 Ont. App. 63.

In *Stockley v. Stockley*, 1 Ves. & B. 23, the court said: "I had a doubt whether what is in *Stapilton v. Stapilton*, 1 Atk. 2, represented as falling from Lord Macclesfield in *Cann v. Cann*, 1 P. Wms. 723, could have been his language. If a doubt is raised between parties as to their rights, and, adverting to that doubt, they come to an agreement, and that is a reasonable agreement, in family matters the court goes a long way to carry it into execu-

tion; but my difficulty was that there might be a supposition of right without a doubt upon it; that it would be too much to execute an agreement entered into upon such supposition, if unfounded; and the words of Lord Macclesfield, instead of 'a supposition of right,' might have been 'a doubtful right.' But I observe in a manuscript note that I have, the same words are represented as those of Lord Macclesfield."

In *Supreme Assembly, etc. v. Campbell*, 17 R. I. 402, the court said: "But there is a class of cases of family arrangements relating to the settlement of property in which there is no question of doubtful or disputed rights, and in regard to which a peculiar equity has been administered, in that they have been supported upon grounds which would hardly have been regarded as sufficient if the transaction had occurred between strangers. In these cases the motive of the agreements was to preserve the honor or peace of families or the family property. When such a motive has appeared, the courts have not closely scrutinized the consideration."

4. The Preservation of Family Property a Sufficient Consideration. — *Williams v. Williams*, L. R. 2 Ch. 304; *Supreme Assembly, etc. v. Campbell*, 17 R. I. 406. See also *Hoghton v. Hoghton*, 15 Beav. 300.

5. Validity of Deeds Making Settlement. — *Souveryby v. Arden*, 1 Johns. Ch. (N. Y.) 240; *Bunn v. Winthrop*, 1 Johns. Ch. (N. Y.) 336; *Scrugham v. Wood*, 15 Wend. (N. Y.) 545; *Tarbox v. Grant*, 56 N. J. Eq. 199. See also *Thomas v. Crosby*, 171 Mass. 510.

In *Tarbox v. Grant*, 56 N. J. Eq. 199, it was held that where the evidence relating to the circumstances of the preparation, execution, and acknowledgment of a deed by a father of his equitable interest in his wife's personal estate to a trustee, for the benefit of his heirs, in the presence of his children, showed that the deed was intended to operate as a voluntary family settlement from the time of its execution and family acknowledgment, the

FAMILY AGREEMENTS, ETC. — FAMILY EXPENSES.

8. Parol Agreements as to Land. — It has been held that an agreement involving rights to real estate, though by parol, if it is in the nature of a family arrangement, and followed by the uninterrupted and several enjoyment of the portions allotted to two brothers respectively, will be enforced by a court of equity.¹

FAMILY BIBLE. — See the titles ANCIENT DOCUMENTS, vol. 2, p. 323; PEDIGREE.

FAMILY EXPENSES. (See also the titles FAMILY, *ante*, p. 866; HUSBAND AND WIFE; SEPARATE PROPERTY (OF MARRIED WOMEN).) — In several of the *United States* statutes have been passed making the wife's separate property liable for debts incurred for the expenses of the family. It has been held that the words "expenses of the family" mean such expenses as were incurred on account of and to be used in the family, and that what is included in the term must be determined by the circumstances of each case.² Under these statutes it has been held that the wife was personally liable.³ In the notes will be found many cases deciding what are and what are not family expenses, as the term is used in this connection.⁴ Other cases arising under the

subsequent retention of the deed by the grantor, if in fact he did retain it, did not prevent its operation as a deed executed and delivered.

1. Parol Family Agreements as to Land. — *Neale v. Neale*, 1 Keen 672.

2. Von Platen v. Krueger, 11 Ill. App. 627; *Dodd v. St. John*, 22 Oregon 250.

The plaintiff must show that such expenses related to the maintenance of the family. *Rodemeyer v. Rodman*, 5 Iowa 426.

Attorney's Fee. — *Family expenses* embrace merely legitimate *expenses* of the *family*, incurred as such for articles to be used in the family and actually used or kept for use therein. *Fitzgerald v. McCarty*, 55 Iowa 705. In this case an attorney's fees and interest were held not to be *family expenses*.

Necessaries. (See also NECESSARIES.) — In *Hyman v. Harding*, 162 Ill. 357, the court said: "The term '*expenses of the family*' is not synonymous with '*necessaries*,' which may be personal and individual as well as for the family. It does not include business expenses, which are incurred merely to secure the means to maintain the family; nor private or individual expenses, which do not affect the collective body of persons under one head constituting a household or family. But it does include *expenses* for many articles used by individual members of the *family*, if they mutually affect the members generally. It is apparent that, even though an article is purchased for and used by only one member of the family, yet it is a *family expense* if it conduces in any substantial manner to the welfare of the family generally."

Statutes. — The Oregon statute is worded as follows: "The *expenses* of the *family* and the education of the children are chargeable upon the property of both husband and wife, or either of them, and in relation thereto they may be sued jointly or separately." *Hill's Oregon Code*, § 2874. The *Illinois* and *Iowa* statutes are substantially the same.

Family. (See also the title FAMILY, *ante*.) — In *Neasham v. McNair*, 103 Iowa 696, it is said: "'Family' is defined as a collective body of persons who live in one home, under

one head or manager. *Menefee v. Chesley*, 98 Iowa 55, and authorities cited. That husband and wife, when living together, as they are presumed to do, are both members of the family, and included in this definition, will not be questioned. Necessaries for which the husband was liable will certainly now be conceded to be a part of the *family expense*." See also *Cole v. Bentley*, 26 Ill. App. 262.

Same. — Children of Wife by Former Husband. — The children of a wife by a former husband are not a part of the family of the second husband, from whom she is separated, so as to render him liable for their support, under the *Iowa Code*, making the *expenses* of the *family* chargeable on the property of either the husband or wife. *Menefee v. Chesley*, 98 Iowa 55.

3. Suit Against Wife Separately. — In *Watkins v. Mason*, 11 Oregon 72, and *Phipps v. Kelly*, 12 Oregon 213, it was held that for liabilities incurred as *family expenses* the wife might be sued at law jointly with her husband or separately and a personal judgment might be rendered against her. See also *Smedley v. Felt*, 41 Iowa 588; *Holmes v. Page*, 19 Oregon 233.

4. Jewelry. — A diamond shirt stud procured for personal use and actually used and worn by a husband was held *family expense*, in *Neasham v. McNair*, 103 Iowa 695.

In *Marquardt v. Flaughter*, 60 Iowa 148, it was held that a lady's gold watch and chain, a ring, and other small articles of jewelry purchased by the husband and used by members of his family were articles of *family expense* for which the wife was liable with the husband.

In *Hyman v. Harding*, 162 Ill. 357, it was held that a ring purchased by a husband or wife for his or her own use was not a *family expense*. The court distinguished the case of "*Marquardt v. Flaughter*, 60 Iowa 148, cited by plaintiffs in error. But in that case, which involved a watch and chain, a ring, and some other jewelry, neither the lower court nor the supreme court held that the ring was a *family expense*. The judgment in the lower court was of such an amount that it is a warrantable inference that it did not include the ring, while the supreme court impliedly, if not di-

statutes will be found in note 1.

FAMILY LIBRARY. (See also the title EXEMPTIONS (FROM EXECUTION),

rectly, stated that the ring was not a *family expense*. As to the watch and chain, it may be said that a watch is primarily at least for use, and in the family as much as elsewhere; it is usually beneficial to the family as such, though worn only by one; while a chain may be, in prudence, a proper adjunct to a watch."

Piano. — In *Smedley v. Felt*, 41 Iowa 588, a piano was held to be a *family expense* within the contemplation of the statute.

Organ. — In *Frost v. Parker*, 65 Iowa 178, an organ, though purchased by the husband for resale, but never actually sold by him, but used in the family for about seven years as organs are ordinarily used, was held to be a *family expense*.

Provisions, clothing, etc., are properly included in the term "*expenses of the family*." *Hawke v. Urban*, 18 Iowa 83.

Cook Stove. — In *Finn v. Rose*, 12 Iowa 565, a cook stove and fixtures, when purchased for and used in the family, was held to be a *family expense*.

Butcher's Bill. — In *Watkins v. Mason*, 11 Oregon 72, the wife was held liable for a butcher's bill. In that case there was nothing to charge the wife except that she was the wife of the purchaser and that the meats were used in their household. After referring to some of the Iowa cases, the court said: "If, by the law of these cases, the meat sold by the appellant to O. P. Mason for family use was used in the family, then Mary Mason, the wife, is liable."

Rent of House. — In *Illingworth v. Burley*, 33 Ill. App. 394, the rent of a house occupied as a residence was held a *family expense* within the meaning of a statute.

Sewing Machine. — In *Farrar v. Emery*, 52 Iowa 725, it was held that a sewing machine was a *family expense* and that the wife was personally liable for a debt incurred for such a machine.

Breaking-plow. — In *Russell v. Long*, 52 Iowa 250, a breaking-plow was held not a *family expense* within the statute.

Reaping Machine. — In *McCormick v. Muth*, 49 Iowa 536, a reaping machine was held not a *family expense*. The court said: "The expenses of a family are something quite different from whatever may contribute, either remotely or directly, to the support of the family. The merchant purchases goods on credit, and by selling them at a profit supports his family; or a farmer purchases cattle on credit, and by selling them at a profit contributes materially to the comfort and support of his family. But the indebtedness so contracted does not, we think, become a *family expense*."

Buggy. — In *Dodd v. St. John*, 22 Oregon 250, it was held that a buggy purchased by the husband for the use of the family was a *family expense* within the Oregon statute making the expenses of the family chargeable upon the property of both husband and wife.

Physician's Bill. — In *Schrader v. Hoover*, 80 Iowa 245, a physician's bill was held to be a *family expense* within the statute, and to en-

able the doctor to recover against the wife it was not necessary for him to allege and prove that such services were needful and proper for her.

So in *Cole v. Bentley*, 26 Ill. App. 260, physician's services rendered at the request of the husband to himself in his last illness were held to be a *family expense* for which an action would lie against the widow to charge her separate property. See also *Walcott v. Hoffman*, 30 Ill. App. 77.

And in *Younkin v. Essick*, 29 Ill. App. 575, medical expenses rendered to a husband and a minor child were held *family expenses* and chargeable upon the property of husband and wife, or either of them.

That medical services are included in *family expenses*, see *West Chicago St. R. Co. v. Carr*, 67 Ill. App. 530, 170 Ill. 478; *Mueller v. Kuhn*, 59 Ill. App. 353.

Adult Daughter. — But in *Blachley v. Laba*, 63 Iowa 22, it was held that a father was not liable for physician's services furnished to his adult daughter in her last illness, though the daughter was still living with her father as a member of his family.

Hospital Expense. — In *Delaware County v. McDonald*, 46 Iowa 170, it was held that expense incurred in the treatment of an insane wife in a hospital for the insane was not a *family expense* within the meaning of the statute.

Borrowed Money. — In *Davis v. Ritchey*, 55 Iowa 719, it was held that a wife was not liable for money borrowed by her husband, on the ground that it was borrowed for the purpose of paying *family expenses* and was actually so used.

Money Advanced. — In *Sherman v. King*, 51 Iowa 182, it was held that one who advances money to the husband, which is used for the payment of *family expenses*, cannot claim a lien upon the separate property of the wife therefor, where such advances were not made at her request.

1. Sale to Husband on His Individual Credit — Note. — In *Black v. Sippy*, 15 Oregon 574, it was held that the wife was liable for goods for family use, although sold to the husband on his individual credit, and this though the husband had given a note for the account.

And that the wife is liable on a note given by the husband for *family expenses*, see *Lawrence v. Sinnamon*, 24 Iowa 80.

Supplies Sold to Wife Against Husband's Directions. — In *Devendorf v. Emerson*, 66 Iowa 698, where the defendant, in writing, forbade the plaintiffs to sell goods to his wife on his account, and the plaintiffs thereafter sold to the defendant's wife family supplies, and the same were used as such, but there was no evidence that there was a necessity for such purchases, it was held that the defendant was not liable for the goods sold.

Discharge of Husband in Bankruptcy. — In *Jones v. Glass*, 48 Iowa 345, it was held that the wife was personally liable with her husband for expenses of the family, and a personal judgment might be rendered against her

ante, p. 59.) — See note 1.

FAMILY MEETINGS. — See the title GUARDIAN AND WARD.

FAMILY PHYSICIAN. (See also the title LIFE INSURANCE.) — The phrase "family physician" has no technical signification. It may be defined as signifying the physician who usually attends and is consulted by the members of a family in his capacity of physician.²

FAMILY USE. (See also the title FAMILY, *ante*, p. 866.) — See note 3.

FANCY. — See note 4.

FANCY WORD. — See the title TRADE MARKS.

FAR. — See note 5.

FARCE. — A farce is a short dramatic entertainment in which ludicrous qualities are greatly exaggerated for the purpose of exciting laughter; a short play of a low comic character.⁶

therefor in a joint action against her and her husband, notwithstanding the husband might have been discharged in bankruptcy.

Statute of Limitations. — In *Polly v. Walker*, 60 Iowa 86, the obtaining of a judgment against the husband alone, though with his consent, upon a demand for family supplies for which the property of both husband and wife was originally liable, was held not to extend the time of enforcing the claim against the property of the wife until the judgment was itself barred by the statute of limitations. The court distinguished the case of *Lawrence v. Sinnamon*, 24 Iowa 80.

Fraudulent Conveyance. — In *Davis v. Davis*, 20 Oregon 78, it was held that, as the *expenses* of the *family* are chargeable upon the property of both husband and wife, where the wife took a voluntary conveyance from her husband and paid a sum which had accrued as *family expense* before the conveyance to her, she was entitled to have the same, as well as the sum which she paid to her husband's vendor as purchase money before the land was conveyed to her, paid to her before her husband's creditors were satisfied. See generally the title FRAUDULENT SALES AND CONVEYANCES.

1. Family Library. — In *Robinson's Case*, 3 Abb. Pr. (N. Y. C. Pl.) 466, it was held that the professional books necessary to a professional man, who supported a family, for the practice of his profession were part of his *family library*.

2. Family Physician. — *Price v. Phoenix Mut. L. Ins. Co.*, 17 Minn. 497, 10 Am. Rep. 166. In that case it was held that the term as used in a life insurance policy meant the physician who was usually consulted by the members of the family, whether he usually attended the insured or not.

In *Reid v. Piedmont, etc.*, L. Ins. Co., 58 Mo. 421, it is said that the phrase *family physician* is one that is in common or ordinary use, and has no particular, definite, or technical signification. It signifies one who usually attends and is consulted by the members of a family in the capacity of a physician; it means one who is accustomed to attend, and not one who has occasionally attended.

3. Water Companies. (See also the title WATER COMPANIES.) — A statute providing for the organization of water companies designated as a primary purpose of such companies to furnish water for *family use*, and for supplying water for such use they were authorized to charge tolls and rates. It was held

that such a company was authorized to charge the county for water furnished for such *family use* to inhabitants whom it was the duty of the county to provide for, such as prisoners and occupants of charitable and educational institutions. The court said: "The *family uses* are such as are appropriate to the individual needs of the members of a household, and to the needs of the household in its collective capacity; it is the inhabitants, the men, women, and children, who are to be supplied with water for *family uses* — domestic uses, drinking, lavation, etc. The occupants of the jail, keepers and prisoners, have such *family uses*, as well as the best ordered family of parents, children, and servants. The fact that the city and county, as an incident to its power and duty to establish a jail, has the right and obligation to furnish necessary water for keepers and prisoners, does not change the nature of the uses for which such water is supplied, which are still *family uses*. These remarks will apply to the hospitals, poorhouses, schools, and other institutions to which water is supplied to the occupants or inhabitants for *family uses*." *Spring Valley Water Works v. San Francisco*, 52 Cal. 120.

Exemptions. — A statute exempted provisions found on hand for *family use*. It was held that this did not include groceries kept in a store as part of the stock in trade. *State v. Conner*, 73 Mo. 572. See the title EXEMPTIONS (FROM EXECUTION), *ante*, p. 59.

4. Fancy Bread. — Where an act requiring that bread should be sold by weight made an exception in the case of French or *fancy* bread, these terms were held to apply to bread which was sold as such at the time of the passage of the act, which was bread made of a finer quality of flour. Bread made of the same materials as ordinary bread, but baked in loaves of a different shape, was not within the meaning of the exception, although called and sold as *fancy* bread. *Aerated Bread Co. v. Gregg*, L. R. 8 Q. B. 355. Bread usually sold as *fancy* bread at the time of the passage of the act, but which subsequently became that most in use, is no longer *fancy* bread within the meaning of the act. *Reg. v. Wood*, 10 B. & S. 534, L. R. 4 Q. B. 559.

Fancy Goods and Yankee Notion Store. — As to the meaning of this term in an insurance policy, see *Barnum v. Merchants F. Ins. Co.*, 97 N. Y. 192.

5. As Far as Possible. — See POSSIBLE.

6. Farce. — *Society, etc.*, v. *Diers*, 60 Barb.

FARCY. (See also the title HORSES.)—See note 1.

FARE. (See also the title TICKETS AND FARES and the references there given.)—The price of passage, or the sum paid or to be paid for carrying a passenger.²

FARINA.—See note 3.

FARM—FARMING. (See also the titles HOMESTEAD; WILLS.)—The word “farm” is one of large import both in England and America, though perhaps somewhat different in the two countries. In the former it commonly implies estate leased; but as to the term, it is said to be a collective word, consisting of diverse things gathered into one, as a message, land, meadow, pasture, wood, common, etc. In America a man is generally the owner of his farm, and it is a parcel of land cultivated, used, occupied, managed, and controlled by one proprietor.⁴ As a verb, “to farm” means to let or lease at a certain

(N. Y.) 156. This case arose upon the construction of a statute requiring a license to be obtained for theatrical or dramatic performances. See also the titles OCCUPATION, BUSINESS, AND PRIVILEGE TAXES; THEATRES.

1. *Farcy* is a disease in the nature of scabies (itch) or mangy eruptions of the skin. Wirth v. State, 63 Wis. 55.

2. *Chase v. New York Cent. R. Co.*, 26 N. Y. 526.

Rate of Fare.—Under a statute of *New York*, which provided that any railroad company that should ask and receive “a greater rate of fare than that allowed by law” should forfeit fifty dollars, it was held that the penalty was incurred where a conductor required five cents in addition to the legal fare because the passenger had no ticket. “The statute means,” said the court, “that any railroad company which shall ask and receive a greater price for the carriage of a passenger than that allowed by law shall forfeit fifty dollars.” *Chase v. New York Cent. R. Co.*, 26 N. Y. 526.

3. *Farina*, as used in the customs law, applies to a food preparation made from that portion of the wheat kernel which contains the largest percentage of gluten. *Union Nat. Bank v. Seeberger*, 30 Fed. Rep. 429. See generally the title REVENUE LAWS.

4. *Aldrich v. Gaskill*, 10 Cush. (Mass.) 158. See also *Kendall v. Miller*, 47 How. Pr. (N. Y. Supreme Ct.) 446.

In England.—In *Homes v. Milward*, 38 L. T. N. S. 381, 47 L. J. Ch. 522, it was held that the word *farm* primarily meant land which was not held by the owner, but granted out and occupied by another person, and might relate either to the interest of the lessor or lessee.

Farm meant the rent of land held under lease, anciently reserved and paid in provision. Burr. L. Dict.; 2 Black. Com. 318.

Also rent reserved on a lease of land, payable in money, called *blanche ferme*, or white rent, to distinguish it from rent paid in provision. Burr. L. Dict.; 2 Black. Com. 42; *Wrotesley v. Adams*, Plowd. 195.

A *farm* is a term in lands, a lease of lands, or leasehold interest in lands. This is the proper technical signification of the word, especially in the description in a declaration in ejectment. *Lane v. Stanhope*, 6 T. R. 345; *Wrotesley v. Adams*, Plowd. 195, 2 Chit. Bl. Com. 318; 1 Chit. Gen. Prac. 160.

So a lease of other things than land; as, of

imposts. Burr. L. Dict. And a *farm* is land taken upon lease under a rent, generally annual, payable by the tenant. As thus used, it is a collective word, consisting of many things; as, a message, land, meadow, pasture, wood, common, etc. Whart. L. Lex.; 2 Black. Com. 318. This is its meaning in common acceptance, and for the purpose of description in a deed. 1 Chit. Gen. Prac. 160; *Wrotesley v. Adams*, Plowd. 195.

Products of a Farm. (See also PRODUCTS; and see the title INTOXICATING LIQUORS.)—A statute excepted the products of a *farm* from a liquor tax. In construing this provision the court said: “The words of the statute to be interpreted are ‘the products of his own farm.’ Now, a *farm*, the *farm*, his *farm*, in the ordinary sense, implies the land cultivated—used in some way—for the purposes of production by the owner thereof, or some other person having a temporary estate or interest therein, and land, whether covered by forest or not, adjoining or near and made subservient thereto, and used in aid thereof, for the purposes of producing grain—such as wheat, Indian corn, rye, barley, cotton, fruits, hay, vegetables, and the like, and perhaps live stock, such as cattle, sheep, horses, swine, and the like, by transmutation, directly or indirectly, brought about by the cultivation of the soil. Burr. Law Dict., *Farm*.” *State v. Kennerly*, 98 N. Car. 659.

Detached Lots of Land.—In *Bell v. Woodward*, 46 N. H. 333, it is said: “There is nothing in the legal definition of the word *farm*, as understood in the common and popular sense of the word, which countenances the idea that the parts or parcels of which it is composed must by necessity adjoin or be adjacent to each other, or that a separation of one part of the *farm* from the rest by fifty-one rods, or even a greater distance, should form an insurmountable or even a serious objection to its being considered one entire *farm*. The English definition of the word *farm* imports all such premises as have been let together. *Roberts on Wills*, vol. 1, p. 396. In its more general acceptance a *farm* means that which is held by a tenant. 1 Jarman on Wills 627. Coke gives the derivation of this Saxon term. 1 Coke’s Inst. 5 A. The word *farm* comprehends many things; for, by the conveyance of a *farm*, will pass a message, arable land, meadow, woodland, etc., thereto belonging or therewith used. Because the

word properly signifies a message, with a quantity of demesnes thereto belonging. Cruise Digest, title Deed, c. 20, § 41; Bouv. Law Dict., art. Farm." See also Black v. Hill, 32 Ohio St. 313; Locke v. Rowell, 47 N. H. 51; Gafney v. Kenison, 64 N. H. 354; Taylor v. Mixer, 11 Pick. (Mass.) 347.

Unless a contrary intention on the part of the grantor or testator clearly appears, the word *farm* in a deed or will will carry all parts of a tract used and occupied together. Kendall v. Miller, 47 How. Pr. (N. Y. Supreme Ct.) 446; Wheeler v. Randall, 6 Met. (Mass.) 520.

But in a deed the general description of the premises conveyed as "my homestead *farm*" may be restricted by the particular description. A grantor, having four parcels of land acquired by different conveyances, but which he occupied together, and on a portion of which he resided, executed a deed in which the premises were described as "my homestead *farm* in S., and is the same land which was conveyed to me," etc. He here specified the names of the grantors of three of the parcels, together with the date of their deeds, place of record, the number of acres in each parcel, and the number of the town lot in which the three parcels were situated. The description closed as follows: "For a more particular description reference may be had to said deeds; and the same is my homestead *farm*." The grantor's residence was on one of the three parcels specially described. It was held that the fourth parcel did not pass by this deed. Said the court: "The term 'homestead' by no means necessarily implies the four parcels of land which the grantor owned, although they lay and were occupied together." Woodman v. Lane, 7 N. H. 241.

In Gafney v. Kenison, 64 N. H. 354, it was held that the devise of a *farm* included an outlying field which was generally known as a part of the *farm* when the will was sealed and executed.

Same — Turnpike. — In Com. v. Carmalt, 2 Binn. (Pa.) 235, it was held that two detached pieces of land occupied as one *farm* were within a statute prohibiting turnpike companies from taking tolls from any person when passing from one part of his *farm* to another. See generally the title TURNPIKE.

Same — Adverse Possession. (See also the title ADVERSE POSSESSION, vol. 1, p. 861.) — A statute provided that adverse possession of a part of a single lot or of a known *farm* should not operate as constructive adverse possession beyond the limits of such lot or *farm*. It was held that the term *farm* meant land held for cultivation and cultivated in whole or in part, of whatever size, shape, or boundary, and whether comprising several lots or parts of lots. Pepper v. O'Dowd, 39 Wis. 538.

Same — Fires. — A statute provided that whoever wilfully set on fire a prairie, marsh, or woods, and caused damage to another, should forfeit a specified penalty. It was also provided that the penalty should not be exacted where a person was burning up anything on his own *farm* and the fire accidentally escaped to an adjoining prairie or woods. It was held that the term *farm* was not confined to inclosures. The court said: "We do not

wish it to be inferred that we would confine the word *farm*, as used in the statute, exclusively to inclosures. Cases might, no doubt, be put where a farmer would not be responsible for unintentionally firing the woods or prairie, by setting out fire outside of his inclosures. In clearing timber land, fires are set out to burn up the brush and roots and log heaps before the fence is built, and it would be readily admitted that if this was the sole design of the fire, the farmer would not be answerable if it accidentally escaped into an adjoining prairie or woods." Finley v. Langston, 12 Mo. 124. See generally the title FIRES.

Political Divisions. — A *farm* may be situated in two political divisions. Thus in Rogers v. Caldwell, 142 Ill. 434, the court said: "A *farm* is, both by the standards and in common acceptance, defined to be a body of land, usually under one ownership, devoted to agriculture, either to the raising of crops, or pasture, or both. It is not understood to have any necessary relation to, or to be circumscribed by, political or congressional subdivisions. A *farm* may consist of any number of acres; of one quarter section or less, or many quarter sections; of one field or many fields; may lie in one township and county, or in more than one." See also Worley v. Naylor, 6 Minn. 192.

Where a person occupies one entire *farm*, and a division line between two adjoining towns passes through the same, such *farm* can be assessed for taxes only in the town where the owner or occupant resides, although the *farm* comprises portions of distinct lots, and such lots lie in different towns. The words *farm* and "lot," as used in the New York Act of 1823, in this particular are synonymous. Saunders v. Springsteen, 4 Wend. (N. Y.) 429.

What Passes under the Word Farm. — By the grant of a *farm*, will pass a message and such land, meadow, pasture, wood, etc., thereunto belonging or therewith used; for this word doth properly signify a capital, or principal message, and a great quantity of demesnes thereunto appertaining. Also by the grant of all *farms*, or all farms, it seems leases for years do pass. Pres. Shep. Touch. 93; 4 Cruise Dig. 264; Co. Litt. 59.

Same — Leaseholds and Copyholds. — Under the word *farm* in a will, where the testator's estate included a *farm* composed of copyhold and freehold, which he had let to a tenant as one entire subject, such appearing from the will to have been the testator's intention, it was held that both copyhold and freehold passed. Doe v. Lucan, 9 East 448. Under similar circumstances, but where the *farm* was composed of leasehold and freehold, it was held that the leasehold passed as well as the freehold. Lane v. Stanhope, 6 T. R. 345. See also Thompson v. Lawley, 2 B. & P. 317.

In *In re Bright-Smith*, 31 Ch. Div. 314, where a testator devised a *farm* by the description of "my freehold *farm* and lands situate at Edgware, * * * and now in the occupation of James Bray," it was held that the copyhold parts of the *farm* passed as well as the freehold.

But in O'Connor v. O'Connor, 4 Ir. Eq. Rep. 483, it was held that a gift of real estate upon limitation which merged the fee carried

rent; to cultivate land.¹ "Farming" is defined as the business of cultivating

the interest in the real estate only and not the leasehold interest in a *farm*.

And under a devise of a *farm* with limitations inapplicable to leaseholds, leaseholds will not pass. *Hall v. Fisher*, 1 Colly. 47. See also *Stone v. Greening*, 13 Sim. 390; *Holmes v. Milward*, 47 L. J. Ch. 522. Compare *Hardwick v. Hardwick*, L. R. 16 Eq. 168.

Fee Simple. — The words "all my *farm*" in a will are not equivalent to "all my estate," and will not, of themselves, pass a fee without words of limitation. *Den v. Sayre*, 3 N. J. L. 183; *Lambert v. Paine*, 3 Cranch (U. S.) 131.

Parol Evidence. (See also the title PAROL EVIDENCE.) — It has been held that the term *farm* is ambiguous and that it might be explained by parol evidence. *Goodtitle v. Southern*, 1 M. & S. 299; *Down v. Down*, 1 Moo. 80; *Doolittle v. Blakesley*, 4 Day (Conn.) 265; *Taylor v. Mixer*, 11 Pick. (Mass.) 347; *Allen v. Richards*, 5 Pick. (Mass.) 514; *Bell v. Woodward*, 46 N. H. 333; *Gafney v. Kenison*, 64 N. H. 354; *Locke v. Rowell*, 47 N. H. 51; *Black v. Hill*, 32 Ohio St. 313.

Same — Leased Lands. — A testator devised as follows: "I give, devise, and bequeath unto my beloved wife, for and during her widowhood, the *farm* which I now occupy." It was held that parol evidence was admissible to show that the testator intended to devise the whole of his real estate at Dublin, which included a *farm* of ninety acres in the tenure of one B. under a lease from the testator for seven years, and that he gave such instructions to the attorney who drew the will. *Jackson v. Sill*, 11 Johns. (N. Y.) 215.

Devise of Entire Farm. — A devise to H. of an entire *farm* in the occupation of B., which included a small portion of marsh land, was held not to be dismembered by a subsequent devise in the same will of all the testatrix's marsh lands to M., she having a large estate in marsh lands besides those included in the *farm* previously devised. *Holdfast v. Pardoe*, 2 W. Bl. 975. See also *In re Bright-Smith*, 31 Ch. Div. 314.

The term *farm*, however, does not always relate to an entire subject. Thus in *Evens v. Griscom*, 42 N. J. L. 593, the court said: "Perhaps the only word that leads to this conclusion is the word *farm*, which, as it relates to an entire subject, may be said to require the whole property, besides that which lies in Sutton Wick, to compose it, and therefore the devise must be carried beyond Sutton Wick. But the word is of such indefinite meaning that I cannot be positive that the testator, by using it, meant to pass the whole." Quoting from *Doe v. Lylford*, 4 M. & S. 550.

Conflicting Description. — A bequest of a certain *farm* "in the tenure of S.," as "my *farm* of Whiteacre," or "my *farm* at A.," will pass the whole *farm*, notwithstanding that S. is not the tenant of all the farm. Thus in *Goodtitle v. Paul*, 2 Burr. 1094, Lord Mansfield said: "It is manifestly intended that the whole *farm* should pass by this will; and the testator never thought of any restriction of his devise, but meant these words, 'in the tenure of J. S.,' only as an additional and fuller description of a thing sufficiently ascertained

before." See to the same effect *Goodtitle v. Southern*, 1 M. & S. 299; *Down v. Down*, 7 Taunt. 343, 2 E. C. L. 343; *Wheeler v. Randall*, 6 Met. (Mass.) 529.

Defect in Description. — So in *Winn v. Cabot*, 18 Pick. (Mass.) 553, it was held that where a grantor conveyed all his *farm* in S., bounded, etc., and also six acres of woodland described by bounds, being the same farm whereof M. died seized, it was held that the woodland passed to the grantee, although it was never owned by M.

A deed by its description conveyed lot numbered three, "being the same *farm* that P. W. now lives on." In fact, the *farm* occupied by P. W. was on lot number one. It was held that the description "lot numbered three" was less certain than the word *farm*, and that the *farm*, and not lot number three, passed by the deed. *Abbott v. Pike*, 33 Me. 204.

But in *Slingsby v. Grainger*, 7 H. L. Cas. 283, it was held that a devise "of all my lands at Whiteacre *farm* in the occupation of A." would pass only that part of Whiteacre *farm* actually occupied by A.

See also *Whitfield v. Langdale*, 1 Ch. Div. 61, where an entire *farm* was held to pass under a certain description, although it contained many more acres than estimated by the testator.

Fee Farms. — A fee *farm* rent is a rent-charge issuing out of an estate in fee; a grant of lands in fee reserving rent is only letting lands to *farm* in fee simple, instead of the usual methods for life or years. Fee *farm* rent is a perpetual rent reserved on a conveyance in fee simple. *De Peyster v. Michael*, 6 N. Y. 497. See also the titles GROUND RENTS; LEASES.

1. To Farm in the Sense of to Mine. — A landowner assigned all the minerals on certain land to another, to *farm*. In construing this in *Shenandoah Land, etc., Co. v. Hise*, 92 Va. 238, the court said: "In the case at bar, the language used in the agreement provides that the minerals, etc., are assigned to Nicholas 'to *farm*.' * * * which term 'to *farm*,' in the sense used, is synonymous with the term 'to mine,' and can have no other meaning or import than that Nicholas was to mine the minerals to be found upon Sheffer's lands."

Farm Out. — To let for a term, at a certain rent; usually applied to the farming of revenues. *Burr. L. Dict.* By its charter, a railroad company was authorized to *farm* out the right of transportation over its road. It was held that the plain and obvious meaning of the words "to *farm* out," in this connection, was to lease. *State v. Richmond, etc., R. Co.*, 72 N. Car. 637. See generally the title LEASE.

Farm Let. (See also the title LEASE.) — The words "*farm* let" are the usual words of operation in a lease. 2 Bl. Com. 317.

In *Magee v. Fisher*, 8 Ala. 322, it is said: "The terms 'indenture' and 'covenant,' though usually found in deeds, have not a technical meaning. An instrument may be indented, whether under seal or not, and the practice has in fact become obsolete. A covenant is a contract, and is a writing obligatory, or parol promise, according as it is sealed or

the land.¹

FARM CROSSINGS. — See the title CROSSINGS, vol. 8, p. 427.

FARMER. (See also FARM, *ante*.) — A farmer is defined to be one who is devoted to the tillage of the soil; an agriculturist; a husbandman.²

not. The same remarks apply to the terms 'demise' and 'to farm let.' They are generally found in leases, but may be expressed by other terms, and are therefore not technical. Nor does it add anything to the obligation of a contract of lease, that it is under seal."

1. **Farming.** (See also BUSINESS, vol. 5, pp. 75, 76.) — *In re Slade*, 122 Cal. 434. This case was upon an exemption statute.

Trade. — A statute providing that any minor who should serve an apprenticeship to any lawful trade, for the space of four years in any town, and actually set up the same trade therein within one year after the expiration of said term, should thereby gain his settlement. In *Leeds v. Freeport*, 10 Me. 356, the court doubted whether *farming* was a trade, saying: "The case finds that the pauper was bound as an apprentice, in New Gloucester, to learn the trade of a farmer. We much doubt whether the business of *farming* comes under the appellation of a trade, within the true meaning of the statute." See also the title POOR AND POOR LAWS.

Land Used Exclusively for Farming Purposes. — A new charter granted to the city of Hartford, by which the city limits were extended, provided that land within the territory annexed that was "used exclusively for *farming* purposes, or was vacant and unoccupied land," should not be taxed for city purposes beyond a certain rate. It was held that a tract of land lying within the territory annexed, which was actually used for *farming*, but was held for building purposes, and was worth very much more for such purposes than for *farming*, was to be considered as land "used exclusively for *farming* purposes" within the statute. "The intention or expectation with which a man holds lands," said the court, "is something invisible, an idea or contemplation of the mind, and cannot qualify the holding so as to constitute it in any sense a use." *Gillette v. Hartford*, 31 Conn. 351.

Farming Neighborhood — Irrigation. (See also the title IRRIGATION.) — The property of a riparian proprietor in the water of a stream may, on payment of due compensation, be taken to supply *farming* neighborhoods with water. In *Lux v. Haggin*, 69 Cal. 305, the court said: "The words '*farming* neighborhoods' are somewhat indefinite; the idea sought to be conveyed by them is more readily conceived than put into accurate language. Of course, '*farming* neighborhood' implies more than one *farm*; but it would be difficult to say that any certain number is essential to constitute such a neighborhood. The vicinage may be nearer or more distant, reference being had to the populousness or sparseness of population of the surrounding country; but the farmers must be so near to each other, relatively to the surrounding settlers, as to make what in popular parlance is known as a '*farming* neighborhood.'" See also *Aliso Water Co. v. Baker*, 95 Cal. 268. And in *Lindsay Irrigation Co. v. Mehrtens*, 97 Cal. 680, the

court says: "A *farming* neighborhood may be defined as a region in which there are several tracts of *farming* land with a proximity of location, and which can be regarded as a whole with reference to some common interests, although they are distinct in boundaries, and held in individual proprietorship. Its extent need not be characterized by fixed boundaries, nor is its existence determined by any definite number of proprietors, and while a tract of land, though large in extent, might, if held in different proprietorships, constitute a neighborhood, yet it would not if it were held in a single ownership." See also NEIGHBORHOOD.

Farming Tools. — The defendant sold to the plaintiff a *farm*, together with all the *farming* tools now owned by the defendant and on said *farm*. It was held that parol evidence was admissible for the purpose of ascertaining to what specific property these words applied. *Rugg v. Hale*, 40 Vt. 138.

Farming Stock. — It has been held in a devise that the term *farming* stock will include the unsold produce upon the *farm*. *Harvey v. Harvey*, 32 Beav. 441; *Burbidge v. Burbidge*, 37 L. J. Ch. 47. And in some instances the term has been held to include growing crops. *Burbidge v. Burbidge*, 37 L. J. Ch. 47, 17 L. T. N. S. 138, *Vaisey v. Reynolds*, 6 L. J. Ch. 172; *In re Roose*, 17 Ch. Div. 696. This last case disapproved *Vaisey v. Reynolds*, 5 Russ. 12, where a gift of all *farming* stock was held not to pass crops on the ground unless there should be a plain intention that the legatee should take all personal estate.

In *Brooksbank v. Wentworth*, 3 Atk. 64, the words "stock on *farm*" were held to include a malt-house and a stock of malt.

Farm Building — Incubator. — In *O'Neill v. Pleasant Prairie Mut. F. Ins. Co.*, 71 Wis. 621, it was held that an incubator built and erected on an acre of ground leased for that purpose, and used in carrying on the business of hatching chickens by artificial means, was not a *farm* building.

2. **Farmer.** — *In re Slade*, 122 Cal. 434. This case was upon the consideration of exemption of farming utensils. See also the title EXEMPTIONS (FROM EXECUTION), *ante*, p. 59.

A statute gave herders and *farmers* a lien for their services on cattle intrusted to them, but it was held that this statute did not apply to one merely hired to take care of sheep. In *Hooker v. McAllister*, 12 Wash. 46, the court said: "The connection of the word 'herder' here with the other lienors provided for in the statute strengthens this idea. It would not be reasonable to conclude that the word *farmer*, used in the statute, would have reference to a person who left his farm and went to work for wages in herding or feeding or keeping cattle; but it evidently means that, where this character of stock is intrusted to a *farmer*, who takes the same to his farm and keeps it there, he shall have the lien provided for in the statute." See generally the title AGISTMENT, vol. 2, p. 3.

FARMING LANDS.—See the titles **BOROUGHs**, vol. 4, p. 724; **HOME-STEAD**; **TAXATION**.

FARMING ON SHARES.—See the title **CROPS**, vol. 8, pp. 302, 324.

FARO.—See note 1.

FARTHER.—See note 2.

FAST.—See note 3.

Extent of Land.—In *O'Neill v. Pleasant Prairie Mut. F. Ins. Co.*, 71 Wis. 624, the court said: "Whether it is necessary that he should till practically, I am not quite certain; but at least a man is not called a *farmer*, and his place is not called a farm, unless he has some considerable tract of land, and cultivates it, or uses it in some one of the usually recognized ways of farming."

Sunday Law. (See also the title **SUNDAY**.)—A *farmer* is not within Stat. 29 Car. II., c. 7, § 1, which enacts that "no tradesman, artificer, workman, laborer, or other person whatsoever shall do or exercise any worldly labor, business, or work of their ordinary callings, upon the Lord's Day," etc., and inflicts a penalty recoverable before justices of the peace. Said Blackburn, J.: "Certainly he [a *farmer*] is not within the persons enumerated in the act, and the only question is, Is he within the expression 'other person whatsoever'?" * * * It is impossible to suppose that so numerous and extensive a class as *farmers* would be referred to under general words if it was meant to be included. "Other person" here must mean some person not quite a tradesman, laborer, etc." Reg. v. Cleworth, 4 B. & S. 927, 116 E. C. L. 927.

Licenses.—Where the ordinance of a municipal corporation, forbidding the sale of fresh meat within certain limits except by persons licensed to sell, contained a proviso in favor of *farmers*, authorizing them to sell meat, the produce of their farms, it was held that a person following the business of a butcher, who sold meat without being licensed, could not claim the protection of the proviso, although the meat sold came of sheep fattened on his farm, if the farm were used only as an appendage to his business as a butcher. *Rochester v. Pettinger*, 17 Wend. (N. Y.) 265. See also the title **OCCUPATION, BUSINESS, AND PRIVILEGE TAXES**.

Supervising Farmer.—In *National Acc. Soc. v. Taylor*, 42 Ill. App. 97, it was held that the term "supervising farmer," in the classification of risks of an insurance company, covers a person who employs farm laborers and does but little work himself. See generally the title **ACCIDENT INSURANCE**, vol. 1, p. 302.

Farmer-like.—A lease stipulated that the tenants "should cultivate and farm said land in a workmanlike manner." In construing this the court, by Thompson, J., said: "This expression was undoubtedly intended to mean in a 'farmer-like manner,' or as good *farmers* usually do, and so we construe it." *Aughinbaugh v. Coppenheffer*, 55 Pa. St. 349.

1. **Faro Bank.** (See also the title **GAMBLING**.)—In *Ward v. State*, 22 Ala. 19, it was held that a count charging the defendant with betting at a certain game of cards called *faro* was sufficiently certain. The court said: "The court, therefore, is bound to know the

meaning of the term '*faro* bank' as it is used by the statute; and indeed the exhibition of and betting at these gaming tables have become, of late years, so much the object of legislative animadversion and legal penalty, that there is no difficulty upon that score. Its meaning is defined by our law writers (Bouv. Law Dict., tit. *Faro*); and according to the same authority, the terms 'betting at *faro*' are equivalent to 'betting at the game or table known as the *faro* bank.' The expression 'betting at *faro*' may not, perhaps, be understood by every one; but when understood, it has a certain and definite meaning, and conveys precisely the same idea as if the word 'bank' was added. The word *faro*, therefore, in the connection in which it is used in the fourth count of the indictment, is of equivalent import to the term '*faro* bank' as employed in the statute; and that being the case, it is sufficiently certain. *Worrell v. State*, 12 Ala. 732; *State v. Bullock*, 13 Ala. 413." See also *Brown v. State*, 10 Ark. 607. See generally *State v. Bates*, 10 Mo. 166; *State v. Ames*, 1 Mo. 524; Reg. v. Matheson, 4 Ont. Rep. 559.

Faro a Lottery. (See also the title **LOTTERIES**.)—In *State v. Smith*, 2 Verg. (Tenn.) 281, the court said: "*Faro* is as simple a lottery as those before us. The dealer and his antagonist stake equal sums of money, each upon a certain card; another pack is dealt off alternately, one to the dealer, one to the player, until the card bet upon comes out; the side to which it falls wins the money staked."

2. **Farther—Wills.**—Upon the construction of a codicil in a will, Lord Kingsdown, in *Hopwood v. Hopwood*, 7 H. L. Cas. 749, said: "I confess I find it difficult to put any other interpretation on his words 'whereas I have given £5,000 by my will, I give a *farther* sum of £7,000 by this codicil.' It seems to me to be the same thing as 'I give £7,000 by my codicil in addition to the £5,000 given by my will.'"

3. **Very Fast.**—An ordinance of a town provided that railroad trains should not be run through the town at a greater rate of speed than eight miles per hour. In an action against a railroad company to recover for the killing of a cow by a train of cars, it was proved that the train was running "very fast." It was held that this substantially proved that it was running at a greater rate of speed than eight miles per hour. *Indianapolis, etc., R. Co. v. Peyton*, 76 Ill. 340. See also the title **STREET RAILROADS**.

Fast Estate is a term sometimes used in wills to signify real property. See *Jackson v. Merrill*, 6 Johns. (N. Y.) 185; *Lewis v. Smith*, 9 N. Y. 502.

In *Lewis v. Smith*, 9 N. Y. 502, it was held that the power given to executors to sell the testator's *fast* estate, did not embrace lands which the decedent had entered into an executory contract to sell during his lifetime.

FAST FREIGHT LINES.—See the title **COMMON CARRIERS**, vol. 6, p. 236, and the references there given.

FATHER. (See also the titles **PARENT AND CHILD**; **SUCCESSION**; **SUPPORT AND MAINTENANCE**.)—The term “father” may mean the male parent; a male who has begotten a child. It may also mean an adopted father or a male ancestor more remote than a parent.¹

FATHOM.—A nautical measure of six feet in length.²

FAUCES TERRÆ.—*Fauces terræ* are headlands or promontories incasing a branch or arm of the sea.³

FAULT.—A fault is an error or defect of judgment or conduct; any deviation from prudence, rectitude, or duty; any shortcoming or neglect of care or performance, resulting from inattention, incapacity, or perversity; a wrong tendency, course, or act.⁴

Fast Fish.—By the usage of the whale fishery, a whale is to be considered as a *fast fish* if it is attached by any means, such as the entanglement of the line around it, etc., to the boat of the party first striking it, though the harpoon does not continue in the body; and when it is so attached, it cannot be taken by any other party. *Hogarth v. Jackson*, 2 C. & P. 595, 12 E. C. L. 279.

Fast Bill of Exceptions.—A *fast bill* of exceptions in *Georgia* is a bill of exceptions by which the proceedings in an injunction case, or other case in equity of an extraordinary nature, may be reviewed by the Supreme Court without the delay incident to ordinary cases. *Anderson's Law Dict.*; *Sewell v. Edmondston*, 66 Ga. 353.

As Fast as That.—Upon the words “as fast as that,” as used in a contract of sale of goods to be delivered in Boston, twenty-five barrels to be shipped by each steamer from Philadelphia, or as *fast as that*, the court in *Peck v. Waters*, 104 Mass. 350, said: “The qualification ‘or as fast as that’ imports an option on the part of the defendants. But whether it is an option to deliver the whole at once, or any quantity not less than twenty-five barrels by each steamer, or an option to deliver in such quantities as the defendants should choose, not faster than the rate named, cannot be decisively ascertained from the report.”

Charter-party.—A charter-party provided that a ship should discharge as *fast* as she could deliver in ordinary working hours. In construing this provision the court said: “This language is perfectly plain and unambiguous. It contemplates a delivery by every ordinary means at her disposal. That she was to run all her cargo winches at one and the same time was also, manifestly, within the contemplation of the parties, for it is expressly stipulated that she shall provide sufficient steam to so run them all. We are therefore of the opinion that she was entitled to insist on discharge as *fast* as she could from all of them. We do not agree with the district judge that by such a construction there is read into the contract more than its language imports. On the contrary, to qualify the provision by restricting it to one or two or three of her hatches would be to read into the charter a clause which the parties did not insert, and which we have no reason to suppose they intended to insert. In fact, the provisions about lighters and the supplying of steam for all the winches are persuasive to the conclusion that the parties meant precisely what they said.” *Hine v. Perkins*, 55 Fed.

Rep. 998. See also *The Glenfinlas*, 48 Fed. Rep. 758.

1. *Lind v. Burke*, (Neb. 1898) 77 N. W. Rep. 445.

Father, as used in the statute 26 Geo. II., c. 33, § 11, which provides for the consent of the *father*, in certain cases, to the marriage of a minor, solemnized by license, means legitimate *father*. *Priestly v. Hughes*, 11 East 1. See also the title **LEGITIMACY**; **MARRIAGE**.

2. **Weights and Measures.** (See also the title **WEIGHTS AND MEASURES**.)—In *Nahaolelua v. Kaaahu*, 9 Hawaiian 600, the court said: “We are of the opinion that the land conveyed was not the whole *apana*, but a portion of it only equal in area to two hundred and sixty-six square *fathoms* and seven square feet. There are many points in the case which support this conclusion. First, a *fathom*, when used in the measurement of land, is to be understood as meaning a square *fathom*, for in its common usage it is an integral part of a unit of land measure, and that it was so used in this case is clearly shown by the deed itself. For, had it been lineal measure that was meant, the result stated would have been two hundred and sixty-seven *fathoms* and one foot, as a *fathom* of lineal measure is six feet, while a square *fathom* contains thirty-six square feet. Consequently the expression ‘seven feet’ must be considered as representing a fractional part of a square *fathom*.”

3. *The Schooner Harriet*, 1 Story (U. S.) 259. See also the title **NAVIGABLE WATERS**.

4. **Century Dict.**

Fault and Negligence. (See also the titles **CONTRIBUTORY NEGLIGENCE**, vol. 7, p. 368; **NEGLIGENCE**.)—In *Louisville, etc., R. Co. v. Berry*, 2 Ind. App. 427, it was said: “It is insisted also that the averment that the plaintiff was free from *fault* contributing to the disaster was not sufficient because the word ‘negligence’ was not used in that connection. The argument is that the word *fault* imputes a moral delinquency, and is not the equivalent of ‘negligence’ in legal literature. Modern lexicography authorizes the use of this word in the same sense as ‘negligence.’ The *Century Dictionary* gives it the following, among other meanings,” quoting the definition given in the text.

In *School Dist. v. Boston, etc., R. Co.*, 102 Mass. 554, the declaration alleged the receipt by the defendants, as common carriers, of goods for transportation to the plaintiff, and the injury of the goods through the *fault* of the

FAVOR. (As to challenge for favor, see the title JURY AND JURY TRIAL.)
— See note 1.

defendants while in their care and custody. It was held that in substance it alleged that the defendants as common carriers received the plaintiff's property and that it was injured and destroyed through their negligence. The court added that the form of declaration was not to be commended.

Same — Landlord and Tenant — Fire. (See also the title LANDLORD AND TENANT.) — A statute relieved a tenant from his obligation to his landlord in case of a fire occurring without his *fault*. It was held that the tenant was still liable where the fire which occasioned the injury arose through his negligence, the court saying: "Such negligence is therefore a wrong and constitutes a *fault*." *Dorr v. Harkness*, 49 N. J. L. 571, 36 Alb. L. J. 255.

Same — Contributory Negligence. — In an action for wrongful death a complaint contained a general averment that the decedent was without *fault* or negligence. This was held sufficient, unless facts specially pleaded clearly showed that he was guilty of contributory negligence. *Louisville, etc., Consol. R. Co. v. Summers*, 131 Ind. 241. See also *Ohio, etc., R. Co. v. Walker*, 113 Ind. 196; *Pennsylvania Co. v. McCormack*, 131 Ind. 250. And see title CONTRIBUTORY NEGLIGENCE, 5 ENCYC. OF PL. AND PR. 1.

Where, in a complaint for negligence, it is necessary to negative contributory negligence on the part of the plaintiff, an averment that "the injury occurred without any *fault* on his part" is sufficient. The court said: "It is contended that the complaint is bad because it does not aver that the appellee's negligence did not contribute to the injury. This contention rests upon the assumption that the word *fault* is not equivalent to the word 'negligence.' We regard the words as having substantially the same meaning, and think that one who avers that he is without *fault* sufficiently shows that he was free from contributory negligence. The word *fault* is generally used by the courts and text writers in the sense in which it is here employed by the pleader." *Rogers v. Overton*, 87 Ind. 411. See also *Mount Vernon v. Dusouchett*, 2 Ind. 586; *Evansville, etc., R. Co. v. Hiatt*, 17 Ind. 102; *Riest v. Goshen*, 42 Ind. 339; *Louisville, etc., R. Co. v. Boland*, 53 Ind. 398; *Ft. Wayne v. DeWitt*, 47 Ind. 391.

Same — Ordinary Care. — In an action against a railroad company to recover for injury received through alleged negligence on the part of the servants of the company, the court instructed the jury that if the accident happened "without *fault*" on the plaintiff's part, the verdict should be in his favor. The jury having found in favor of the plaintiff, on appeal it was urged by the appellant that the instruction should have been that if the accident happened with the exercise of "ordinary care" on the part of the plaintiff, etc.; but the court held that the two forms of expression were equivalent. *Chicago, etc., R. Co. v. Ryan*, 70 Ill. 212.

Same — Without Fault. (See also the titles FOLLOW SERVANTS, *pass*; MASTER AND SERVANT.) — A statute authorized an employee to recover from a railroad company for injuries sustained by reason of the negligence of other employees when he himself was without *fault*

or negligence. In *Central R., etc., Co. v. Lanier*, 83 Ga. 591, the court said: "'Without *fault*' means that the party suing must not have done anything to contribute to his injury, or must have done everything to prevent the consequences of the company's negligence. In other words, he must show that he did nothing he ought not to have done, and neglected to do nothing he ought to have done. Under this clause of the code, we think this is the clear meaning of 'without *fault* or negligence.'" See also *Savannah, etc., R. Co. v. Austin*, 104 Ga. 614.

Fault or Neglect. — The Act of Congress of May 9, 1866, authorizes the Court of Claims to decree to a disbursing officer "relief from responsibility on account of losses by capture or otherwise, while in the line of his duty, * * * whenever said court shall have ascertained the facts of any such loss to have been without *fault* or neglect on the part of any such officer." It was held that "*fault* or neglect" are "not technical words, and must be taken in their common and popular signification. The former imports 'error or mistake,' and the latter, 'omission, forbearance to do anything that can be done or that requires to be done.'" The degree of care and diligence which the act requires is that which "a careful, prudent man would require of his agent in a matter of private interest, or exercise in his own affairs." *Malone's Case*, 5 Ct. of Cl. 486. See generally the title UNITED STATES OFFICERS.

Fault — Self-defense. (See also the title SELF-DEFENSE.) — In instructing upon the law of self-defense the trial judge said: "Hence a real or apparent necessity brought about by the design, contrivance, or *fault* of the defendant, cannot be availed of as a defense for the commission of a crime." The appellate court said: "As to the word *fault* as here used the law is unsound." *People v. Kennett*, 114 Cal. 18.

Gross Fault. (See also the title NEGLIGENCE.) — The *Louisiana Code* defines gross *fault* as that which proceeds from inexcusable negligence or ignorance. See *Thompson v. Yazoo, etc., R. Co.*, 47 La. Ann. 1107; *State v. Lazarus*, 39 La. Ann. 142.

Legal Default. (See DEFAULT, vol. 9, p. 167.) — *Fault* may be used in the sense of bad faith or mismanagement, and, on the other hand, it has a broader sense, as meaning not only mismanagement but also any legal default. *State v. Brown*, 73 Md. 509.

Sales with All Faults. — See the titles IMPLIED WARRANTY; SALES; WARRANTY.

1. Favor — United States Courts. (See also the title UNITED STATES COURTS.) — Where a statute of a state creates a contract, and a subsequent statute is alleged to impair the obligation of that contract, and the highest court of law or equity in the state construes the first statute in such a manner that the second statute does not impair it, whereby the second statute remains valid under the Constitution of the United States, the validity of the second statute is "drawn in question," and the decision is "in *favor*" of its validity, within the meaning of section 25 of the Judiciary Act of 1789. *Bridge Proprietors v. Hoboken Co.*, 1 Wall. (U. S.) 116.

FAVORABLE.—See note 1.

FEAR. (See also the title **DURESS**, vol. 10, p. 320; and as to putting in fear see the titles **ROBBERY**; **SELF-DEFENSE**.)—See note 2.

FEAT.—See note 3.

FEATHER BED.—See note 4.

FED.—See note.⁵

FEDERAL.—See the titles **CONSTITUTIONAL LAW**, vol. 6, p. 888; **UNITED STATES**, and references there given.

FEDERAL COURTS.—See the title **UNITED STATES COURTS**, and the references there given.

FEDERAL MONEY.—See note 6.

FEDERAL OFFICERS.—See the titles **PUBLIC OFFICERS**; **UNITED STATES**, and the references there given; and see such titles as **PRESIDENT**; **UNITED STATES MARSHALS**, etc.

FEDERAL QUESTIONS.—See the title **UNITED STATES COURTS**, and the references there given.

1. **Rates as Favorable** means no more than prices as low, and that simply, irrespective of any circumstances or conditions. *Decatur Gas-Light, etc., Co. v. Decatur*, 120 Ill. 67. This case arose upon the construction of a city ordinance providing that a gas company should furnish gas at rates as *favorable* as those of a company in a neighboring city. See generally the title **GAS COMPANIES**.

2. **Fear—Change of Venue.**—Upon application for a change of venue, the affidavit stated that the appellant had reason to *fear*, and did *fear*, that he could not have a fair trial, instead of using the statutory words "has reason to believe, and does believe." This was held bad. The court said: "The right to such peremptory change of the place of trial can only be acquired by the applicant filing an affidavit to the effect 'that he has good reason to believe, and does believe, that he cannot have a fair trial of such action on account of the prejudice of the judge, naming him.' * * * Here the affidavit merely states that the applicant 'has reason to *fear*, and does *fear*, that he cannot have a fair and impartial trial, * * * on account of the prejudice of' the judge, naming him. We are not aware of any decision of this court holding the two expressions to be equivalent. To our minds they are substantially unlike. To hold them to be equivalent by refining upon the words of each, would be to establish a rule which would call for another departure whenever some new form of expression should be presented. The statutory requirement is jurisdictional. In such a case, the substitution of equivalents to be ascertained by such finical reasoning would be dangerous." *Smith v. Clarke*, 70 Wis. 137.

3. **Feats of Horsemanship.**—A corporation that maintains a driving track for public horse racing is not liable to a tax on its gross receipts, under section 108 of the Act of Congress of June 30, 1864, as a corporation conducting a public exhibition of "*feats of horsemanship*." The court said that an exhibition of horse racing "is an exhibition of *feats* of horses, and not of their riders, and, therefore, not within the statute." *U. S. v. Buffalo Park*, 16 Blatchf. (U. S.) 189. See generally the titles **OCCUPATION, BUSINESS, AND PRIVILEGE TAXES**; **THEATRES**.

4. **Feather Bed.**—In *State v. Parker*, 47 Vt. 19, it was held that an indictment for larceny of "one *feather bed*" was sufficient. The court said: "The only question raised by the motion in arrest is whether the property stolen is described with sufficient definiteness in the indictment. We think the description is sufficiently definite. Persons of common apprehension of the meaning and use of language understand that by 'a *feather bed*' is meant a single article, composed of a quantity of feathers inclosed in a bedtick. It is as much a single article as very many things which are composed of different materials, but which have a definite use. To ordinary people, no more definite idea of the property stolen would have been conveyed if the pleader had been to the trouble of stating the exact number, color, and kind of feathers, and the exact number, length, size, and material of the threads in the tick. We do not think the description is open to the charge of being a 'lumping description' of the property stolen; nor that the respondent labored under any inconvenience in preparing his defense from an inability to understand from the description the precise thing the stealing of which he was charged with." See generally the title **LARCENY**, 12 ENCYC. OF PL. AND PR. 946.

5. **Fed—Cattle.**—In *Brockway v. Rowley*, 66 Ill. 102, it was said: "The term *fed* has a well-understood meaning when applied to cattle or hogs, and it is, to be made fit for market by feeding."

6. **Federal Money.**—In *Cocke v. Kendall*, 5 Fed. Cas. No. 2,929, Hempst. (U. S.) 236, a judgment was rendered for *federal money*. It was claimed that judgment should have been rendered for lawful money of Virginia, according to the expression used in the writing upon which the suit was brought. It was held no error. The court said: "It is insisted that it should have been rendered for lawful money of Virginia, according to the expression used in the writing. This, we think, in substance has been done, as lawful money of the United States would be lawful money of Virginia, or any other state or territory. At all events, the attitude in which the question is now presented would preclude us from reversing the judgment for that cause." See generally the titles **MONEY**; **PAYMENT**.

FEE. (See also the title EXTORTION, *ante*, p. 576; and see the title COSTS, 5 ENCYC. OF PL. AND PR. 100.)—I. Fees are a reward or wages given to one as a compensation for his labor and trouble, for the execution of his office or profession, as those of an attorney or a physician.¹

1. Callaway County v. Henderson, 119 Mo. 32, citing 7 AM. AND ENG. ENCYC. OF LAW (1st ed.) 819. In that case it was held that where one section of the Revised Statutes spoke of the compensation of the county clerk, while another spoke of his *fees*, the term *fees* included the compensation mentioned.

The meaning of the word *fee* is "a recompense allowed by law to officers for their labor and trouble." Harbor Master, etc., v. Southerland, 47 Ala. 517. See also Henderson v. State, 96 Ind. 437.

A *fee* is a sum of money paid by a person for a service done him by another. Bloor v. Huston, 28 Eng. L. & Eq. 360.

Fees are compensation allowed by law for specific service by an officer. Williams v. State, 2 Sneed (Tenn.) 162.

Distinguished from Costs.—Costs and *fees* are essentially different. The former are an allowance to a party for the expenses incurred in prosecuting or defending a suit. They are incident to the judgment, while the latter are compensations to public officers for services rendered to individuals in the progress of the cause, or (in another aspect) not in the course of litigation. Tillman v. Wood, 58 Ala. 578; Musser v. Good, 11 S. & R. (Pa.) 247.

In Howard Bldg., etc., Assoc. v. Philadelphia, etc., R. Co., 102 Pa. St. 222, it was said:

"Costs of the party must not be confounded with *fees* of the officer. They are, for many purposes, essentially different. Ramsey v. Alexander, 5 S. & R. (Pa.) 344. Costs are an allowance to a party for expenses incurred in conducting his suit; *fees* are compensation to an officer for services rendered in the progress of the cause. Musser v. Good, 11 S. & R. (Pa.) 247."

A federal statute allows a citizen, upon an affidavit of poverty, to prosecute any suit in the federal courts without prepaying *fees* or costs. In construing this provision the court said: "The statute is obscure in many particulars, and with the rest a question arises as to the meaning of the words '*fees* or costs,' found in it. We think, however, that this arises from the combination of two subject-matters in one sentence, and that it is to be construed distributively. 'Costs' mean 'taxable costs,' to be recovered by the adverse party, and the statute intends that no security or deposit shall be required for these. *Fees* means, for the case at bar, the *fees* of the clerk in the strict sense of the word, and does not relate to his disbursements; and the courts have no power, under the act, to require him to make disbursements at the hazard of recovering them at some future time from a person who confesses himself pecuniarily irresponsible." Columb v. Webster Mfg. Co., 76 Fed. Rep. 200.

A statute formerly authorized the imposition of hard labor in criminal cases for the payment of costs and officers' *fees*, but as amended the statute omitted the words "officers' *fees*," and employed only the word "costs." It was

held that this made no change in the statute, although the court admitted that costs and *fees* are generally different in their meaning, the one being an allowance to a party for the expenses incurred in a successful prosecution or defense of a suit; the other, compensation to officers for services rendered in the progress of the cause. Bradley v. State, 69 Ala. 321.

In Alexander v. Harrison, 2 Ind. App. 48, it was said: "The terms *fees* and 'costs' are often used interchangeably, as having the same application; but, accurately speaking, the term *fees* is applicable to the items chargeable by law as between the officer or witness and the party whom he serves, while the term 'costs' has reference to the expenses of the litigation as between litigants. Musser v. Good, 11 S. & R. (Pa.) 247. This distinction, however, has little, if any, practical value."

Fees and Salary Distinguished. (See also SALARY.)—A statute provided that the sheriff of a certain county should receive the same *fees* as were then allowed by law to the sheriff of another county. Another statute enacted two days later provided that the salary of the sheriff of the latter county should be two thousand dollars. It was held that the first law was not affected by the subsequent enactment. The court said: "By the ordinary acceptance of the term *fees*, as heretofore and now used in the statute, we understand it to signify compensation or remuneration for particular acts or services rendered by public officers in the line of their duties, to be paid by the parties, whether persons or municipalities, obtaining the benefit of the acts, or receiving the services, or at whose instance they were performed (Musser v. Good, 11 S. & R. (Pa.) 247; Tillman v. Wood, 58 Ala. 578); while the term 'salary' denotes a recompense or consideration to be paid a public officer for continuous, as contradistinguished from particular, services, and may be denominated 'annual or periodical wages or pay.' Cowdin v. Huff, 10 Ind. 83; Black's Law Dict. Lexicographers and some authorities class 'salary' and 'wages' as synonymous (see Webster, and Rapalje & Lawrence's Law Dictionary, and Com. v. Butler, 99 Pa. St. 535); but not so with the terms 'salary' and *fees*, as they appear generally to be distinguished very much as is indicated above." Landis v. Lincoln County, 31 Oregon 426.

Fees, Salaries, and Wages.—"Fees are compensation for particular acts or services, as the *fees* of clerks, sheriffs, lawyers, physicians, etc. 'Wages' are the compensation paid, or to be paid, for services by the day, week, etc., as of laborers, commissioners, etc. 'Salaries' are the *per annum* compensation to men in official and some other situations." Cowdin v. Huff, 10 Ind. 85. See also Board of School Com'rs v. Wasson, 74 Ind. 141. See also WAGES.

Fees and Commissions.—An ordinance provided that the city attorney should receive ten per cent. upon all sums of money collected

II. As applied in modern estates the terms "fee," "fee simple," and "fee

for the city. It was further provided that he should have stated *fees* for actions brought by him. It was held that he might have the ten per cent. as well as *fees*, for representing the city, on all sums collected. The court said: "It is argued, however, that this power granted to the council, to allow him *fees*, does not authorize them to grant him commissions on money collected. There is no force in this objection. The word *fees*, as defined by Burrill (see Burrill's Law Dict., vol. 1, p. 474, *verb. Fee*; see also Bouvier's Dict., vol. 1, p. 577, *verb. Fee*), is said to be the reward or compensation or wages allowed by law to an officer for services performed by him in the discharge of his official duties. The latter author cites cases showing the difference between *fees* of an attorney, counselor, and physician, and the costs of a suit. Webster, in his Unabridged Dictionary, p. 444, word *Fee*, following the elementary law writers, also gives in substance and quite fully the same definition of this word. Under this, the well-known and correct legal definition of the word *fee*, as used in the charter, we have no doubt that the city council has authority to allow the appellee, as city attorney, by way of compensation and remuneration for his official services, commissions on all sums of money collected for the city where he has rendered professional services in that behalf, and through his official instrumentality such sums of money have been in fact collected and paid into the city treasury." *Austin v. Johns*, 62 Tex. 182.

Commissions Estimated by Percentage.—A statute provided that "all salaried officers of the several counties of this state shall charge and collect, for the use of their respective counties, and pay into the county treasury on the first Monday in each month, the *fees* now or hereafter allowed by law in all cases except the percentage heretofore allowed such officers, and excepting also such *fees* as are a charge against the county." In construing this provision the court said: "Now it is argued that inasmuch as percentages are not required in so many words to be paid into the county treasury, but *fees* are, that percentages and *fees* refer to different things, and that the officers have no right to retain and pay such percentages into the treasury. We cannot concur in this view. The word *fees*, in its popular and common acceptance, includes the commissions, estimated by a percentage allowed by law, on sums of money received or collected. We think the word *fees* is used with such signification in the section cited from the County Government Act." *Smith v. Dunn*, 68 Cal. 54.

But in *Philadelphia v. Martin*, 125 Pa. St. 591, it was said: "Indeed, the meaning of 'commissions' or 'percentage,' as established by immemorial legal usage, is so wholly different from the meaning of the word *fees*, when used to designate compensation for legal services performed by an officer, that it is impossible to mistake the one as meaning that which is signified by the other." See also *Wesson v. Collins*, 72 Miss. 844.

Mileage and Per Diem Allowance.—The term *fees* has been held to include mileage and *per*

diem allowances to witnesses and jurors. *Phillips v. Eureka County*, 19 Nev. 352.

But in *Jefferson County v. Johnson*, 64 Ill. 149, and *Knox County v. Christianer*, 68 Ill. 455, it was held that a *per diem* allowance to county superintendents was to be regarded as compensation and not as *fees*.

Expenses.—A statute provided that a certain percentage of a public officer's *fees* should be paid into the treasury. It was held that the sum paid to the clerk of sessions in liquor-license cases was to be regarded as *fees* within the meaning of the *Pennsylvania* act taxing *fees*. The court said: "While the Acts of 1887 and 1891 both designate the payment as being made for expenses, it is a payment to the clerk which he is at liberty to keep, taking credit against it for actual expenses paid; and the balance is therefore an emolument of the office, and, under the taxing laws, must be regarded as a part of the income of the office. Any other construction would produce the absurd result that a large part of the purely official income of the clerk would be held free of all taxation, which cannot be endured consistently with the obvious purpose of the legislature. It would be a very narrow and constrained construction to hold that because the taxing acts use the word *fees* in describing the official income subject to taxation, they thereby intended to include all sorts and kinds of income which did not come within the technical designation of *fees*. We are clearly of opinion that receipts from this source are a part of the official receipts of the office, and are subject to taxation as such." *Com. v. Fry*, 183 Pa. St. 32.

Same—Traveling Expenses.—The *United States Revised Statutes* provided for a semi-annual written return, by every marshal, of "all the *fees* and emoluments of his office." It has been held that allowances for traveling expenses are *fees* within the meaning of this section. 18 Op. Atty.-Gen. 123. See generally the title UNITED STATES MARSHALS.

Same—Levying Execution.—A statute provided that whenever execution should be levied on real estate in all other respects according to law, except that the officer levying such execution should, by mistake or otherwise, have indorsed on said execution and have embraced in his levy other and greater *fees* than he should be entitled to, the levy should be valid. It was held that the term *fees* in this statute embraced all the expense attending the levy and was not confined to the charges of the officer for his personal expense. The court said: "The expression used is 'other and greater *fees*.' If the word *fees* includes, as the defendant supposes, no other than the *fees* of the officer, it is not easy to discover why the word 'other' was used at all in the statute. The expression 'greater *fees*' would have embraced all upon which the act was designed to operate. It is not a correct use of language to say 'other *fees*' if nothing but *fees* is intended. In such a case, another *fee* than the law allows is not a *fee* but a charge; but if the word is understood in its more popular sense, as including all expenses, the propriety of the expression 'other

simple absolute" are substantially synonymous.¹

FEED. — A certain amount of food or provender given to horses, cattle, etc., at a time.²

and greater *fees* appears very obvious. That, however, which seems to us quite decisive on this point is that the word *fees* is used in two senses; in one, to denote the charges of the officer for his personal services; in the other — which is the more general and popular use — all the expenses attending the levy and included in it. In the latter sense it was doubtless used by the legislature which enacted this law." *Camp v. Bates*, 13 Conn. 8.

Support of Debtor in Jail — Charges. — A statute prescribed that a debtor, besides other *fees*, should pay the jailer's *fees* before he could be discharged. It was held that *fees* included compensation for the support of the prisoner while he was in the custody of the jailer. The court said that "the word *fees* in these sections is used as synonymous with and signifies the same as 'charges.'" *McPheters v. Morrill*, 66 Me. 123.

Revenue Law. (See also the title REVENUE LAWS.) — Charges for gauging and weighing merchandise are *fees*. *U. S. v. Jahn*, 65 Fed. Rep. 794. In this case it was said: "But in the meantime, by subsequent legislation, the sections fixing the salary of weighers and gaugers had become inapplicable, and they were therefore omitted in the revision, and the word *fees* dropped out of the statutes. We agree with Judge Wheeler, who decided the case in the Circuit Court, that the omission in the Revised Statutes to denominate these charges as *fees* is of no significance. Inasmuch as the charges were in their inception treated and denominated by statute as *fees*, and as they were *fees* in the ordinary definition of the word, being a recompense prescribed by law for official services, we cannot doubt that they were intended to be included in the category of fees which were abolished by Congress by the Customs Administrative Act."

Receipt in Full — Rent. — As against a claim for rent of a law library and for attorney's *fees*, it has been held that a receipt for *fees* was not a full defense. *Kepler v. Jessup*, 11 Ind. App. 241.

Clerk's Fees. — A statute provided that certain officers should keep a *fee* book in which they should enter all *fees* received by them. It was held that the word *fees* included the recompense of a clerk for services rendered to a board of county commissioners, or for making out tax lists for the county. The court said: "One of the definitions of the word *fee* as given in Webster's International Dictionary is: 'Reward or compensation for services rendered or to be rendered; especially payment for professional services, of optional amount, or fixed by custom or law; charge; pay; perquisite; as, the *fees* of lawyers and physicians, the *fees* of office, clerk's *fees*, sheriff's *fees*, marriage *fees*, etc.'" *State v. Russell*, 51 Neb. 778.

Fee Bill. — A statute provided that writs and processes should run in the name of the state. It was held that a *fee* bill fell under the terms "process" and "writ" and should run in the name of the state. *Reddick v. Cloud*, 7 Ill. 670. See also *Newkirk v. Chapron*, 17 Ill. 344.

Attorney. — See ATTORNEY, vol. 3, p. 277; and the title ATTORNEY AND CLIENT, vol. 3, p. 414.

1. Fee and Fee Simple. — *Jecko v. Taussig*, 45 Mo. 169. In this case the court said: "Much stress is laid upon the distinction which is supposed to exist between an estate in *fee* and an estate in '*fee* simple absolute.' It is urged that a right to convey in *fee* does not necessarily give the right to convey in '*fee* simple absolute.' The distinction in question may have once existed and had practical force and importance in England. In this country, however, it is apprehended that such distinction has become dim and shadowy, at least in the general mind. The term *fee* implies an inheritable estate, and the addition of the word 'simple,' forming the compound word '*fee* simple,' as used in modern estates and conveyancing, adds nothing to the force and comprehensiveness of the original term. 1 Washb. on Real Prop. 65, 66. And Mr. Washburn says that 'a *fee* simple is the largest possible estate which a man can have in lands, being an absolute estate in perpetuity;' and further, that 'an estate in *fee* simple conveys at once the idea of an interest of unlimited duration.' *Id.* 59, 66. Nor does the addition of the term 'absolute,' as '*fee* simple absolute,' add anything to the force and meaning of the term *fee* or '*fee* simple.' *Id.* In modern estates these several terms, *fee*, '*fee* simple,' and '*fee* simple absolute,' are substantially synonymous."

The word *fee*, without any adjunct or limitation, describes the same quantity of estate as *fee* simple. *Jordan v. Record*, 70 Me. 529.

As to Fee Simple Estates see the title ESTATES, vol. 11, pp. 364-366, and the references there given.

Personal Property. — In *Hetfield v. Fowler*, 60 Ill. 47, it was said that the word *fee* is a term applicable only to real estate, and it was held that a limitation over, after the death of certain persons, to their children, in equal parts in *fee*, evinced that only the real property was to go to the children.

Fee Farm. (See also the title GROUND RENTS.) — A *fee* farm rent is a perpetual rent reserved on a conveyance in *fee* simple. *Fee* farms are lands held in *fee*, to render for them annually the true value, or more or less, and are called *fee* farms because a farm rent is reserved upon the land in *fee*. *De Peyster v. Michael*, 6 N. Y. 497, 57 Am. Dec. 470.

Tenant in Fee. — A tenant in *fee* simple is "he who hath lands or tenements to hold to him and his heirs forever." *Overbagh v. Patrie*, 8 Barb. (N. Y.) 37, quoting Litt. on Ten. 1.

2. Feed Stable. — On an indictment for keeping a livery, *feed* or sale stable in a town of less than two thousand inhabitants, without paying the tax of ten dollars required by Code Mississippi, 1880, § 585, the defendant contended that he did not keep such a stable as was within the meaning of the act. The court held otherwise, *Cooper, C. J.*, saying: "The appellant also contends that the evidence does

FEEL — FEELINGS. — Feelings are that element in the moral constitution of man which is possessed of sensibility or sensitiveness.¹

FEIGNED ISSUE. — See the title *ISSUES TO THE JURY*, II ENCYC. OF PL. AND PR. 605.

not show that he kept either a livery, sale, or *feed* stable. The evidence is that he had a stable at which he exposed a sign that he let stalls at ten cents per day to those desiring to have their use, and that a person renting a stall could either supply the food for the stock or the defendant would furnish it from his store, charging only its market value; that the stable was locked at night by the defendant, and that no stock was permitted to be taken out until both the stall rent and the account for food furnished was paid. This, we think, was sufficient to show that the stable was a *feed* stable within the meaning of the statute. It is immaterial that food was not kept at the stable, or that it was not furnished unless ordered by the owner of the stock. In truth, the defendant supplied both the stabling and the food for all who applied, and this he could not do without obtaining the privilege license required by law." *Morgan v. State*, 64 Miss. 511.

1. **Feelings.** — *Bovee v. Danville*, 53 Vt. 183. See also the title *DAMAGES*, vol. 8, p. 658.

Feel Unsafe and Insecure — Mortgages. See also the title *FORECLOSURE OF MORTGAGES*. — A clause in a chattel mortgage providing that the mortgagee might at any time he should feel insecure, treat the debt as due and sell the property, was held not to authorize the seizure and sale of the property, unless the mortgagor was about to do or had done some act which tended to impair the security. *Newlean v. Olson*, 22 Neb. 717; *J. I. Case Plow-Works v. Marr*, 33 Neb. 215.

So in *Humpfner v. Osborne*, 2 S. Dak. 318, it was said: "Again, appellants insist that, as the mortgage provided that if the mortgagee 'shall at any time deem itself insecure, then, thereupon, and thereafter it shall be lawful for

said mortgagee * * * to take said property, * * * and hold or sell and dispose of the same,' the jury should have been required to find the fact only as to whether or not D. M. Osborne & Co. did deem itself insecure, and that it was error in the court to submit questions two to six inclusive to the jury. We cannot agree with counsel in their construction of the clause in the mortgage above stated. This clause does not, we think, confer upon the mortgagee the absolute and arbitrary power of declaring for itself, without sufficient cause, that it does deem itself insecure, and authorize it to proceed and take and sell the property before the debt becomes due, but that it only authorizes the mortgagee to deem itself insecure, and to take such possession and sell, when the mortgagor has done or is about to do some one or more of the acts specified in the mortgage as grounds upon which the mortgagee may proceed to take such possession and sell. To hold that the right to take possession and sell before the debt becomes due depends upon the mortgagee's election and pleasure, and not upon the facts as they actually exist, would be clearly in conflict with other express and implied contracts contained in the note and mortgage, which are to be construed together. These clearly contemplate time for payment as specified in the note or mortgage, and possession by the mortgagor until the maturity of the debt, unless he does or is about to do some act detrimental to or which will impair the security. Therefore, until the debt matures, or some act is done or threatened, specified in the mortgage, which authorizes the mortgagee to take possession and sell, the mortgagor's possession cannot be legally disturbed by the mortgagee." See to the same effect *Newlean v. Olson*, 22 Neb. 717; *Lichtenberger v. Johnson*, 32 Neb. 185.

FELLOW SERVANTS.

BY THEODOR MEGAARDEN.

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CROSS-REFERENCES.

For matters of *PROCEDURE* see the title *MASTER AND SERVANT*, *ENCYCLOPEDIA OF PLEADING AND PRACTICE*, vol. 13, p. 891.

For other matters of *SUBSTANTIVE LAW* and *EVIDENCE* related to this subject, see the following titles in this work: *CONTRIBUTORY NEGLIGENCE*, vol. 7, p. 368; *MASTER AND SERVANT*; *NEGLIGENCE*; *PRIVATE INTERNATIONAL LAW*; *QUESTIONS OF LAW AND FACT*.

I. INTRODUCTORY — 1. General Rule of Liability for Torts. — The common law imposes upon every person the obligation of regulating and governing his own actions and business in such a manner as not to cause injury to others — *sic utere tuo ut alienum non ledas*. And where one commits a breach of this duty he becomes liable for the resulting consequences.¹

Rule Applicable to Employers. — This rule is applicable to employers, so that an employer is responsible for his personal negligence occasioning injury to his employee.²

1. See the title *TORTS*.

2. See the title *MASTER AND SERVANT*.

2. Liability Limited to One's Own Acts — *a*. GENERAL RULE. — But, while a man is responsible for the consequences of his own wrongful acts, it is a familiar and primary rule of law that he is not responsible for the acts of others. Generally speaking, a man is no more liable for the wrongs done by another than he is for another person's debts.¹

***b*. EXCEPTION IN CASE OF SERVANTS' TORTS — RESPONDEAT SUPERIOR.** — To this rule there is, however, an exception, now so thoroughly established that it is scarcely considered as an exception but rather as a fundamental rule itself, to the effect that a master is liable for the wrongful acts and negligence of his servant, performed while engaged in the pursuit of his master's business, within the scope of his employment.²

3. Restriction of the Exception — Fellow Servants. — This exception to the general rule that liability for torts is limited to one's own wrongs, while holding an employer responsible to third persons for the wrongful acts of his servants, has no application in certain cases where a servant seeks to hold his employer responsible for an injury resulting from the tortious acts of another servant. This restriction is incorporated in what is known as the "fellow-servant rule" or "doctrine of common employment."³

II. STATEMENT OF FELLOW-SERVANT RULE. — This rule, which, with its statutory modifications, it is the purpose of this article to discuss, may be stated as follows: Where a master uses due diligence in the selection of competent and trusty servants, and furnishes them with suitable means to perform the service in which he employs them, he is not answerable, where there is no countervailing statute, to one of them for an injury received by him in consequence of the carelessness of another, while both are engaged in the same service.⁴

III. ORIGIN AND PREVALENCE OF THE RULE. — The first application of this rule in *England* has sometimes, but with doubtful propriety, been referred to a case decided in 1837.⁵ The first case to be decided on the subject in the *United States*, if, indeed, it is not the first "fellow-servant" or "common-employment"

1. McKinney on Fellow Servants, § 1.

2. See the title MASTER AND SERVANT.

3. **Status of the Fellow-Servant Rule.** — The nonliability of the master to his servant for the wrongful or negligent act of a fellow servant is sometimes erroneously treated as an exception to the principle of the law of agency by which a master is held liable for acts of his servant. In reality the doctrine of *respondere superior* is an exception to the fundamental rule that a man is responsible only for his own wrongs, and the fellow-servant rule simply imposes a limitation on this exception. By the force of this rule the wrongful act of a fellow servant is excluded from the operation of the doctrine of *respondere superior*, and brought within the general rule that a man is responsible only for his own torts. See *Flike v. Boston*, etc., R. Co., 53 N. Y. 552, 13 Am. Rep. 545.

4. **Cases in Which the Rule Is Stated.** — For cases containing a statement of the fellow-servant rule, see the following: *Tunney v. Midland R. Co.*, L. R. 1 C. P. 296; *Lovell v. Howell*, 1 C. P. Div. 167; *Charles v. Taylor*, 3 C. P. Div. 492; *Warburton v. Great Western R. Co.*, L. R. 2 Exch. 30; *McInnis v. Malaga Min. Co.*, 25 Nova Scotia 345; *Grimsley v. Hankins*, 46 Fed. Rep. 400; *Acme Coal Min. Co. v. McIver*, 5 Colo. App. 267; *Blondin v. Oolitic Quarry Co.*, 11 Ind. App. 395; *Schaub v. Hannibal*, etc., R. Co., 106 Mo. 74; *Dallas v. Gulf*, etc., R. Co., 61 Tex. 196; *Norfolk*,

etc., R. Co. *v. Donnelly*, 88 Va. 853, quoting 7 AM. AND ENG. ENCYC. OF LAW (1st ed.) 821.

In the *Illinois* case of *Chicago*, etc., R. Co. *v. Kneirim*, 152 Ill. 458, 43 Am. St. Rep. 259, Mr. Justice Phillips, in delivering the opinion of the court, said: "The rule in this state is that where one servant is injured by the negligence of another servant, where they are directly co-operating with each other in a particular business in the same line of employment, or their duties being such as to bring them into habitual association, so that they may exercise a mutual influence upon each other promotive of proper caution, and the master is guilty of no negligence in employing the servant causing the injury, the master is not liable."

5. **Case of Priestley v. Fowler.** — The case of *Priestley v. Fowler*, 3 M. & W. 1, sometimes referred to as the earliest case on the subject, was decided by Lord Abinger in the year 1837. The plaintiff in this case was a servant of the defendant in his trade of butcher, and the defendant desired him to go with certain goods of the defendant, in a van belonging to the defendant and conducted by another servant. The plaintiff accordingly went, but the van, being overloaded, broke down, and the plaintiff, who was riding on it, was thrown off and his thigh broken. Under these circumstances the defendant was held not liable. While it has sometimes been stated that the history of the fellow-servant rule begins with this case,

case to be found in the English or American reports, came to trial at nisi prius in 1838 and was decided on appeal in 1841.¹ The next application of the rule was by an American court in 1842, in a case which has been declared to be the basis of the existing common law of England and America on the subject.² The English courts in 1850 applied the rule to railway companies,³ in a case which has been regarded as the leading English case, properly speaking, upon the subject. Since these cases were decided there have been a multitude of decisions in England, Canada, and the United States which recognize and apply the rule.⁴

an examination of the facts of the case will show that it is not strictly "a fellow-servant case at all." See the article by John F. Dillon, entitled "American Law Concerning Employer's Liability," in 24 Am. L. Rev. 175.

1. Case of Murray v. South Carolina Railroad Company.—This was the case of *Murray v. South Carolina R. Co.*, 1 McMull. L. (S. Car.) 385, 36 Am. Dec. 268, where it was held that a railroad company is not liable to one of its firemen for an injury arising from the negligence of a competent engineer. The judges neither at nisi prius nor at the hearing on appeal knew anything of the previous English case. "This," says Judge Dillon, "is really the first 'fellow-servant case,' or 'common-employment case,' so called, to be found in the English or American reports." 24 Am. L. Rev. 180. See *Parrish v. Pensacola*, etc., R. Co., 28 Fla. 251.

2. Case of Farwell v. Boston, etc., Railroad Corporation.—In 1842 the question came up in Massachusetts in the case of *Farwell v. Boston*, etc., R. Corp., 4 Met. (Mass.) 49, 38 Am. Dec. 339, Chief Justice Shaw writing the opinion. The two preceding cases were before the court. But Chief Justice Shaw began by stating that, while the court had had the benefit of those decisions, it would treat the case as one of new impression. This case decided that where a railway company employed a switch tender who was careful and trusty in his general character, and, after he had been long in the service of the company, employed an engineer who knew the character of the switch tender, the company was not answerable to the engineer for an injury received by him in consequence of the carelessness of the switch tender in the management of the switches. This case has been declared to be "the fountain head of the common law of England and America on this subject, except so far as it rests on antecedent and immemorial usage." Article entitled "American Law Concerning Employer's Liability," by John F. Dillon, in 24 Am. L. Rev. 175.

In *Anderson v. Bennett*, 16 Oregon 515, 8 Am. St. Rep. 311, Lord, J., in delivering the opinion of the court, said "Although *Murray v. South Carolina R. Co.*, 1 McMull. L. (S. Car.) 385, 36 Am. Dec. 268, was decided prior to *Farwell v. Boston*, etc., R. Corp., 4 Met. (Mass.) 49, 38 Am. Dec. 339, yet the latter has been usually regarded as the leading case in which the doctrine of fellow servants was first clearly enunciated and its principles engrafted into our law."

3. Application of Rule to Railway Companies in England.—*Hutchinson v. York*, etc., R. Co., 5 Exch. 343, 19 L. J. Exch. 296.

4. Cases in Which the Rule Is Applied.—The rule is so well settled that a citation of authorities to support it seems superfluous. The following cases in which the rule has been affirmed are, however, given:

England.—*Lovell v. Howell*, 1 C. P. Div. 161, 45 L. J. C. P. 387; *Waller v. South Eastern R. Co.*, 2 H. & C. 102; *Swainson v. North Eastern R. Co.*, 3 Exch. Div. 343; *Priestley v. Fowler*, 3 M. & W. 1; *Wigmore v. Jay*, 5 Exch. 354; *Hutchinson v. York*, etc., R. Co., 5 Exch. 343, 19 L. J. Exch. 296; *Searle v. Lindsay*, 11 C. B. N. S. 429, 103 E. C. L. 429; *Lovegrove v. London*, etc., R. Co., 16 C. B. N. S. 669, 111 E. C. L. 669; *Wiggett v. Fox*, 11 Exch. 832; *Morgan v. Vale of Neath R. Co.*, L. R. 1 Q. B. 149; *Tunney v. Midland R. Co.*, L. R. 1 C. P. 291.

Canada.—*Campbell v. General Min. Assoc.*, 1 Nova Scotia Dec. 415; *Matthews v. Hamilton Powder Co.*, 14 Ont. App. 261; *White v. Sydney*, etc., Coal, etc., Co., 25 Nova Scotia 384; *Deverill v. Grand Trunk R. Co.*, 25 U. C. Q. B. 517; *Plant v. Grand Trunk R. Co.*, 27 U. C. Q. B. 78; *McInnis v. Malaga Min. Co.*, 25 Nova Scotia 345; *O'Sullivan v. Victoria R. Co.*, 44 U. C. Q. B. 128; *Fairweather v. Owen Sound Stone Quarry Co.*, 26 Ont. Rep. 604.

United States.—*Jordan v. Wells*, 3 Woods (U. S.) 529; *Buckley v. Gould*, etc., *Silver Min. Co.*, 14 Fed. Rep. 833; *Thompson v. Chicago*, etc., R. Co., 18 Fed. Rep. 239; *Loneragan v. The Islands*, 28 Fed. Rep. 478; *Hough v. Texas*, etc., R. Co., 100 U. S. 213; *Randall v. Baltimore*, etc., R. Co., 109 U. S. 484; *Chicago*, etc., R. Co. v. *Ross*, 112 U. S. 377, 17 Am. & Eng. R. Cas. 501; *Coyne v. Union Pac. R. Co.*, 133 U. S. 370; *Quebec Steamship Co. v. Merchant*, 133 U. S. 375; *The Sachem*, 42 Fed. Rep. 66; *The Serbia*, 44 Fed. Rep. 943; *The Ravensdale*, 63 Fed. Rep. 624; *The Bolivia*, 59 Fed. Rep. 626; *Martin v. Chicago*, etc., R. Co., 65 Fed. Rep. 384; *The Louisiana*, 74 Fed. Rep. 748; *Yager v. Receivers*, 88 Fed. Rep. 773.

Alabama.—*Alabama*, etc., R. Co. v. *Waller*, 48 Ala. 459; *Mobile*, etc., R. Co. v. *Smith*, 59 Ala. 245; *Laughran v. Brewer*, 113 Ala. 509; *Sheffield v. Harris*, 101 Ala. 564.

Arizona.—*Hobson v. New Mexico*, etc., R. Co., (Arizona 1886) 28 Am. & Eng. R. Cas. 360.

Arkansas.—*Fones v. Phillips*, 39 Ark. 17, 43 Am. Rep. 264.

California.—*Yeomans v. Contra Costa Steam Navigation Co.*, 44 Cal. 71; *Hogan v. Central Pac. R. Co.*, 49 Cal. 128; *Collier v. Steinhart*, 51 Cal. 116; *McLean v. Blue Point Gravel Min. Co.*, 51 Cal. 256; *McDonald v. Hazletine*, 53 Cal. 35; *Brown v. Sennett*, 68 Cal. 225, 58 Am. Rep. 8; *Brown v. Central Pac. R.*

Co., 72 Cal. 523; *Fagundes v. Central Pac. R. Co.*, 79 Cal. 97; *Congrave v. Southern Pac. R. Co.*, 88 Cal. 360.

Colorado. — *Summerhays v. Kansas Pac. R. Co.*, 2 Colo. 484; *Colorado Cent. R. Co. v. Ogden*, 3 Colo. 499; *Denver, etc., R. Co. v. Sipes*, 23 Colo. 226; *Acme Coal Min. Co. v. McIver*, 5 Colo. App. 267; *Kindel v. Hall*, 8 Colo. App. 63.

Connecticut. — *Hayden v. Smithville Mfg. Co.*, 29 Conn. 548; *Burke v. Norwich, etc. R. Co.*, 34 Conn. 475; *Sullivan v. New York, etc., R. Co.*, 62 Conn. 209.

Florida. — *Parrish v. Pensacola, etc., R. Co.*, 28 Fla. 251.

Georgia. — *Shields v. Yonge*, 15 Ga. 349, 60 Am. Dec. 693; *Georgia R., etc., Co. v. Rhodes*, 56 Ga. 645; *Stanley v. Richmond, etc., Extension Co.*, 72 Ga. 202; *McGovern v. Columbus Mfg. Co.*, 80 Ga. 227; *Whately v. Block*, 95 Ga. 15; *Cater v. Itner*, 104 Ga. 679; *Kerr v. Crown Cotton Mills (Ga. 1898)* 31 S. E. Rep. 166.

Idaho. — *Palmer v. Utah, etc., R. Co.*, 2 Idaho 290; *Snyder v. Viola Min., etc., Co.*, 2 Idaho 771.

Illinois. — *Honner v. Illinois Cent. R. Co.*, 15 Ill. 550; *Illinois Cent. R. Co. v. Cox*, 21 Ill. 20, 71 Am. Dec. 293; *Moss v. Johnson*, 22 Ill. 633; *Chicago, etc., R. Co. v. Touhy*, 26 Ill. App. 99; *Chicago, etc., R. Co. v. Keefe*, 47 Ill. 108; *Anglo-American Packing, etc., Co. v. Lewandowski*, 26 Ill. App. 629; *Chicago, etc., R. Co. v. Libey*, 68 Ill. App. 144; *Chicago, etc., R. Co. v. Rush*, 84 Ill. 570; *Chicago, etc., R. Co. v. Moranda*, 93 Ill. 302, 34 Am. Rep. 168; *Chicago, etc., R. Co. v. May*, 108 Ill. 288, 15 Am. & Eng. R. Cas. 320; *Chicago, etc., R. Co. v. Geary*, 110 Ill. 383, 17 Am. & Eng. R. Cas. 606; *Stafford v. Chicago, etc., R. Co.*, 114 Ill. 244; *Tobin v. Friedman Mfg. Co.*, 67 Ill. App. 149; *World's Columbian Exposition v. Bell*, 76 Ill. App. 591.

Indiana. — *Ohio, etc., R. Co. v. Tindall*, 13 Ind. 366; *Ohio, etc., R. Co. v. Hammersley*, 28 Ind. 371; *Sullivan v. Toledo, etc., R. Co.*, 58 Ind. 26; *Robertson v. Terre Haute, etc., R. Co.*, 78 Ind. 77, 8 Am. & Eng. R. Cas. 175; *Boyce v. Fitzpatrick*, 80 Ind. 526; *Indiana Car Co. v. Parker*, 100 Ind. 191; *Capper v. Louisville, etc., R. Co.*, 103 Ind. 305, 21 Am. & Eng. R. Cas. 525; *Taylor v. Evansville, etc., R. Co.*, 121 Ind. 124, 16 Am. St. Rep. 372, 41 Am. & Eng. R. Cas. 437; *Evansville, etc., R. Co. v. Henderson*, 134 Ind. 636; *Evansville, etc., R. Co. v. Tohill*, 143 Ind. 49; *Spencer v. Ohio, etc., R. Co.*, 130 Ind. 181; *Salem Stone, etc., Co. v. Chastain*, 9 Ind. App. 453; *Clark County Cement Co. v. Wright*, 16 Ind. App. 630.

Iowa. — *Sullivan v. Mississippi, etc., R. Co.*, 11 Iowa 421; *Peterson v. Whitebreast Coal, etc., Co.*, 50 Iowa 673, 32 Am. Rep. 143; *Houser v. Chicago, etc., R. Co.*, 60 Iowa 230, 46 Am. Rep. 65; *Troughear v. Lower Vein Coal Co.*, 62 Iowa 576; *Benn v. Null*, 65 Iowa 407; *Fosburg v. Phillips Fuel Co.*, 93 Iowa 54; *Trcka v. Burlington, etc., R. Co.*, 100 Iowa 205.

Kansas. — *Atchison, etc., R. Co. v. Moore*, 29 Kan. 632, 11 Am. & Eng. R. Cas. 243; *Hannibal, etc., R. Co. v. Fox*, 31 Kan. 587, 15 Am. & Eng. R. Cas. 325; *Union Trust Co. v. Thomason*, 25 Kan. 1.

Kentucky. — *Louisville, etc., R. Co. v. Collins*, 2 Duv. (Ky.) 114, 87 Am. Dec. 486; *Doyle v. Swift Iron, etc., Works*, 5 Ky. L. Rep. 59; *Louisville, etc., R. Co. v. Cavens*, 9 Bush (Ky.) 559; *Volz v. Chesapeake, etc., R. Co.*, 95 Ky. 188, 15 Ky. L. Rep. 727; *Louisville, etc., R. Co. v. Moore*, 83 Ky. 675; *Casey v. Louisville, etc., R. Co.*, 84 Ky. 79; *Ft. Hill Stone Co. v. Orm*, 84 Ky. 183; *Coffman v. Louisville, etc., R. Co.*, 13 Ky. L. Rep. 866, (Ky. 1892) 18 S. W. Rep. 1012.

Louisiana. — *Satterly v. Morgan*, 35 La. Ann. 1166; *Poirier v. Carroll*, 35 La. Ann. 699.

Maine. — *Langlois v. Maine Cent. R. Co.*, 84 Me. 161; *Blake v. Maine Cent. R. Co.*, 70 Me. 60, 35 Am. Rep. 297; *Lawler v. Androscoggin R. Co.*, 62 Me. 463, 16 Am. Rep. 492; *Carle v. Bangor, etc., Canal, etc., Co.*, 43 Me. 269.

Maryland. — *Wonder v. Baltimore, etc., R. Co.*, 32 Md. 411, 3 Am. Rep. 143; *Hanrathy v. Northern Cent. R. Co.*, 46 Md. 280.

Massachusetts. — *Seaver v. Boston, etc., R. Co.*, 14 Gray (Mass.) 466; *Hodgkins v. Eastern R. Co.*, 119 Mass. 419; *Smith v. Lowell Mfg. Co.*, 124 Mass. 114; *Curran v. Merchants' Mfg. Co.*, 130 Mass. 374, 39 Am. Rep. 457; *Johnson v. Boston Tow-Boat Co.*, 135 Mass. 209, 46 Am. Rep. 458; *Mellen v. Wilson*, 159 Mass. 88; *O'Keefe v. Brownell*, 156 Mass. 131; *Howard v. Hood*, 155 Mass. 391; *Fitzgerald v. Boston, etc., R. Co.*, 156 Mass. 293; *Connors v. Holden*, 152 Mass. 598; *Thyng v. Fitchburg R. Co.*, 156 Mass. 13, 32 Am. St. Rep. 425; *Cunningham v. Washington Mills Co.*, (Mass. 1891) 26 N. E. Rep. 235; *Holden v. Fitchburg R. Co.*, 129 Mass. 268, 37 Am. Rep. 343; *McKinnon v. Norcross*, 148 Mass. 533; *Dodge v. Boston, etc., R. Co.*, 155 Mass. 448.

Michigan. — *Michigan Cent. R. Co. v. Leahey*, 10 Mich. 199; *Davis v. Detroit, etc., R. Co.*, 20 Mich. 105, 4 Am. Rep. 364; *Chicago, etc., R. Co. v. Bayfield*, 37 Mich. 205; *Smith v. Potter*, 46 Mich. 258; *Ryan v. Bagaley*, 50 Mich. 179, 45 Am. Rep. 35; *Hunn v. Michigan Cent. R. Co.*, 78 Mich. 513; *Timm v. Michigan Cent. R. Co.*, 98 Mich. 226; *Baron v. Detroit, etc., Steam Nav. Co.*, 91 Mich. 585; *Beesley v. Wheeler*, 103 Mich. 196.

Minnesota. — *Brown v. Winona, etc., R. Co.*, 27 Minn. 162, 38 Am. Rep. 285; *Fraker v. St. Paul, etc., R. Co.*, 32 Minn. 54, 15 Am. & Eng. R. Cas. 256; *Tierney v. Minneapolis, etc., R. Co.*, 33 Minn. 311, 53 Am. Rep. 35, 21 Am. & Eng. R. Cas. 545; *Anderson v. L. T. Sowle Elevator Co.*, 37 Minn. 539; *Friedrich v. St. Paul*, 68 Minn. 402.

Mississippi. — *New Orleans, etc., R. Co. v. Hughes*, 49 Miss. 258; *Howd v. Mississippi Cent. R. Co.*, 50 Miss. 178; *Memphis, etc., R. Co. v. Thomas*, 51 Miss. 639.

Missouri. — *Moran v. Brown*, 27 Mo. App. 487; *Harper v. Indianapolis, etc., R. Co.*, 47 Mo. 569, 4 Am. Rep. 353; *Gormly v. Vulcan Iron Works*, 61 Mo. 492; *Schaub v. Hannibal, etc., R. Co.*, 106 Mo. 74; *Jackson v. Missouri Pac. R. Co.*, (Mo. 1890) 14 S. W. Rep. 54; *Parker v. Hannibal, etc., R. Co.*, 109 Mo. 362, 50 Am. & Eng. R. Cas. 521, 46 Alb. L. J. 286, 35 Cent. L. J. 187; *Sherrin v. St. Joseph, etc., R. Co.*, 103 Mo. 378, 23 Am. St. Rep. 881; *Higgins v. Missouri Pac. R. Co.*, 104 Mo. 413; *Ring v. Missouri Pac. R. Co.*, 112 Mo. 220.

Nebraska. — *Chicago, etc., R. Co. v. Sulli-*

van, 27 Neb. 673, 41 Am. & Eng. R. Cas. 463; Omaha, etc., R. Co. v. Hall, 33 Neb. 229.

New Hampshire. — Hanley v. Grand Trunk R. Co., 62 N. H. 274; Nash v. Nashua Iron, etc., Co., 62 N. H. 406.

New Jersey. — Collyer v. Pennsylvania R. Co., 40 N. J. L. 59; McAndrews v. Burns, 39 N. J. L. 118; Ewan v. Lippincott, 47 N. J. L. 192, 54 Am. Rep. 148.

New Mexico. — Lutz v. Atlantic, etc., R. Co., 6 N. Mex. 496.

New York. — Coon v. Syracuse, etc., R. Co., 5 N. Y. 492; Brown v. Maxwell, 6 Hill (N. Y.) 592, 41 Am. Dec. 771; Sherman v. Rochester, etc., R. Co., 17 N. Y. 153; Boldt v. New York Cent. R. Co., 18 N. Y. 432; Wright v. New York Cent. R. Co., 25 N. Y. 562; Laning v. New York Cent. R. Co., 49 N. Y. 521, 10 Am. Rep. 417; Flike v. Boston, etc., R. Co., 53 N. Y. 549, 13 Am. Rep. 545; McCosker v. Long Island R. Co., 84 N. Y. 77; Murphy v. Boston, etc., R. Co., 88 N. Y. 146, 42 Am. Rep. 240; Smith v. New York Cent., etc., R. Co., 88 Hun (N. Y.) 468; Donnelly v. New York, etc., R. Co., 3 N. Y. App. Div. 408; Moeller v. Delaware, etc., R. Co., 13 N. Y. App. Div. 467; Kenny v. Cunard Steamship Co., 55 N. Y. Super. Ct. 558; Judson v. Olean, 116 N. Y. 655, 26 N. Y. St. Rep. 706; Ford v. Lake Shore, etc., R. Co., 117 N. Y. 638, 27 N. Y. St. Rep. 246, 41 Am. & Eng. R. Cas. 369; Arnold v. Delaware, etc., Canal Co., 125 N. Y. 15; Reichel v. New York Cent., etc., R. Co., 130 N. Y. 682, 42 N. Y. St. Rep. 510; Corcoran v. Delaware, etc., R. Co., (N. Y. 1891) 27 N. E. Rep. 1022, 126 N. Y. 673; McCoy v. Empire Warehouse Co., (Brooklyn City Ct.) 10 N. Y. Supp. 99, *affirmed* 125 N. Y. 764; Hebert v. Delaware, etc., Canal Co., (Supreme Ct.) 16 N. Y. Supp. 561; Thompson v. Libbey, (Brooklyn City Ct.) 19 N. Y. Supp. 680; Burke v. Syracuse, etc., R. Co., 69 Hun (N. Y.) 21; Kemmerer v. Manhattan R. Co., 81 Hun (N. Y.) 444; Moy v. Ocean Steamship Co., 12 Misc. Rep. (N. Y. Super. Ct.) 375; Soderman v. Kemp, 145 N. Y. 427.

North Carolina. — Hardy v. Carolina Cent. R. Co., 76 N. Car. 5; Hagins v. Cape Fear, etc., R. Co., 106 N. Car. 537; Riitenhouse v. Wilmington St. R. Co., 120 N. Car. 544.

Ohio. — Mad River, etc., R. Co. v. Barber, 5 Ohio St. 541, 67 Am. Dec. 312; Whaalan v. Mad River, etc., R. Co., 8 Ohio St. 249; Berea Stone Co. v. Kraft, 31 Ohio St. 287, 27 Am. Rep. 510; Kumlér v. Junction R. Co., 33 Ohio St. 150; Pittsburgh, etc., R. Co. v. Lewis, 33 Ohio St. 196; Lake Shore, etc., R. Co. v. Knittel, 33 Ohio St. 468; Pittsburgh, etc., R. Co., v. Ranney, 37 Ohio St. 665.

Oregon. — Willis v. Oregon R., etc., Co., 11 Oregon 257, 17 Am. & Eng. R. Cas. 539; Anderson v. Bennett, 16 Oregon 515, 8 Am. St. Rep. 311; Weeklund v. Southern Oregon Co., 20 Oregon 591.

Pennsylvania. — Ryan v. Cumberland Valley R. Co., 23 Pa. St. 384; Frazier v. Pennsylvania R. Co., 38 Pa. St. 104, 80 Am. Dec. 467; Cole v. Northern Cent. R. Co., 12 Pa. Co. Ct. Rep. 573; Weger v. Pennsylvania R. Co., 55 Pa. St. 460; Bemisch v. Roberts, 143 Pa. St. 1; Lehigh Valley Coal Co. v. Jones, 86 Pa. St. 432; Keystone Bridge Co. v. Newberry, 96 Pa. St. 246, 42 Am. Rep. 543; New York, etc., R. Co. v.

Bell, 112 Pa. St. 400; Allegheny Heating Co. v. Rohan, 118 Pa. St. 223; Hoffman v. Clough, 124 Pa. St. 505; Anderson v. Oliver, 138 Pa. St. 156; Pawling v. Hoskins, 132 Pa. St. 617, 19 Am. St. Rep. 617; Hoover v. Beech Creek R. Co., 154 Pa. St. 362; Barlow v. Standard Steel Casting Co., 154 Pa. St. 130.

Rhode Island. — Mann v. Oriental Print Works, 11 R. I. 152; Brodeur v. Valley Falls Co., 16 R. I. 448; Parker v. New York, etc., R. Co., 18 R. I. 773; Miller v. Coffin, 19 R. I. 164.

South Carolina. — Murray v. South Carolina R. Co., 1 McMull. L. (S. Car.) 385, 36 Am. Dec. 268; Calvo v. Charlotte, etc., R. Co., 23 S. Car. 526, 55 Am. Rep. 28, 28 Am. & Eng. R. Cas. 327; Boatwright v. Northeastern R. Co., 25 S. Car. 128; Hovis v. Richmond, etc., R. Co., 91 Ga. 36, decided under the law of *South Carolina*; Whaley v. Bartlett, 42 S. Car. 454.

Tennessee. — Nashville, etc., R. Co. v. Carroll, 6 Heisk. (Tenn.) 349; Nashville, etc., R. Co. v. Wheelless, 10 Lea (Tenn.) 741, 43 Am. Rep. 317, 4 Am. & Eng. R. Cas. 633.

Texas. — Robinson v. Houston, etc., R. Co., 46 Tex. 540; Houston, etc., R. Co. v. Willie, 53 Tex. 318, 37 Am. Rep. 756; Houston, etc., R. Co. v. Marcelles, 59 Tex. 334, 12 Am. & Eng. R. Cas. 231; Dallas v. Gulf, etc., R. Co., 61 Tex. 196, 21 Am. & Eng. R. Cas. 575; Houston, etc., R. Co. v. Rider, 62 Tex. 267; Houston, etc., R. Co. v. Gilmore, 62 Tex. 391; Galveston, etc., R. Co. v. Faber, 63 Tex. 344, 77 Tex. 153; Douglas v. Texas Mexican R. Co., 63 Tex. 564; Texas, etc., R. Co. v. Berry, 67 Tex. 238; Gulf, etc., R. Co. v. Blohn, 73 Tex. 637; Rose v. Gulf, etc., R. Co., (Tex. 1891) 17 S. W. Rep. 789; Galveston, etc., R. Co. v. Davis, 4 Tex. Civ. App. 468; Southern Cotton-Oil Co. v. De Vond, (Tex. Civ. App. 1894) 25 S. W. Rep. 43; Austin, etc., R. Co. v. Beatty, 6 Tex. Civ. App. 650; Houston, etc., R. Co. v. Suess, (Tex. Civ. App. 1896) 37 S. W. Rep. 378.

Utah. — Allen v. Logan City, 10 Utah 279.

Vermont. — Hard v. Vermont, etc., R. Co., 32 Vt. 473; Davis v. Central Vermont R. Co., 55 Vt. 84, 45 Am. Rep. 590, 11 Am. & Eng. R. Cas. 173.

Virginia. — Moon v. Richmond, etc., R. Co., 78 Va. 745, 49 Am. Rep. 401, 17 Am. & Eng. R. Cas. 531; Ayers v. Richmond, etc., R. Co., 84 Va. 679, 33 Am. & Eng. R. Cas. 269; Norfolk, etc., R. Co. v. Donnelly, 88 Va. 853, *citing* 7 AM. AND ENG. ENCYC. OF LAW (1st ed.) 821; Norfolk, etc., R. Co. v. Nuckels, 91 Va. 193.

Washington. — Sayward v. Carlson, 1 Wash. 29; Hughes v. Oregon Imp. Co., (Wash. 1898) 55 Pac. Rep. 119.

West Virginia. — Riley v. West Virginia Cent., etc., R. Co., 27 W. Va. 145; Criswell v. Pittsburgh, etc., R. Co., 30 W. Va. 798, 33 Am. & Eng. R. Cas. 232.

Wisconsin. — Moseley v. Chamberlain, 18 Wis. 700, *overruling* Chamberlain v. Milwaukee, etc., R. Co., 11 Wis. 238; Cooper v. Milwaukee, etc., R. Co., 23 Wis. 668; Brabbitts v. Chicago, etc., R. Co., 38 Wis. 289; Dwyer v. American Express Co., 55 Wis. 453; Lubcke v. Chicago, etc., R. Co., 59 Wis. 127, 15 Am. & Eng. R. Cas. 183; Schultz v. Chicago, etc., R. Co., 67 Wis. 616, 58 Am. Rep. 881; Peschel

The rule has also frequently been recognized in the statutory law.¹

Rule in Ireland and Scotland. — In Ireland the rule applied by the courts closely follows that of the English law.² And in Scotland, while the law was at one time understood to be otherwise,³ the House of Lords in 1860 declared the rule which had been established by the English courts to be the law of England and Scotland alike,⁴ and from that time the course of decision in the two countries has harmonized.⁵

Rule in Other Countries. — In certain other countries the matter is controlled by code provisions, though the courts have sometimes shown an inclination to favor a rule similar to that of the common law.⁶

v. Chicago, etc., R. Co., 62 Wis. 338, 17 Am. & Eng. R. Cas. 545; *Johnson v. Ashland Water Co.*, 77 Wis. 51; *Blazinski v. Perkins*, 77 Wis. 9; *Peterson v. Sherry Lumber Co.*, 90 Wis. 83; *Craven v. Smith*, 89 Wis. 119.

Rejection of Rule in Quebec. — At one time it appears to have been thought that the common-law rule formed a part of the law of Lower Canada. Thus in *Fuller v. Grand Trunk R. Co.*, 1 L. Can. L. J. 69, Mr. Justice Badgely, and in *Bourdeau v. Grand Trunk R. Co.*, 2 L. Can. L. J. 186, Mr. Justice Monk, expressed the opinion that a servant of a railway company had no action for damages against the company for any injury he might sustain through the negligence of his fellow servant. But in the case of the Canadian Pac. R. Co. *v. Robinson*, 14 Can. Sup. Ct. Rep. 105, Sir W. J. Ritchie, C. J., said that the fellow-servant rule is rejected by the French law which governs the decision of such questions in the province of Quebec. And it appears to be settled that the rule exempting a master from liability to his servant for the negligence of a fellow servant is not in force in the province of Quebec. *Filion v. Reg.*, 4 Can. Exch. Rep. 134, on appeal, *Reg. v. Filion*, 24 Can. Sup. Ct. Rep. 482.

Gross Negligence of Fellow Servant. — Except where it is so provided by a statute, a master is not liable even for the gross negligence of a fellow servant. *Casey v. Louisville, etc., R. Co.*, 84 Ky. 79; *Ft. Hill Stone Co. v. Orm*, 84 Ky. 183; *Volz v. Chesapeake, etc., R. Co.*, 95 Ky. 188; *Cincinnati, etc., R. Co. v. Palmer*, 98 Ky. 382; *Newport News, etc., Co. v. Eifort*, 15 Ky. L. Rep. 600, 49 Alb. L. J. 289.

Felonious Act of Fellow Servant. — Nor is a master liable for the felonious act of a servant resulting in the death of a fellow servant. *Harris v. Kentucky Timber, etc., Co.*, (Ky. 1897) 43 S. W. Rep. 462, rehearing denied, (Ky. 1898) 45 S. W. Rep. 94.

1. Statutory Recognition of the Rule. — By section 1970 of the *California Civil Code* it is provided as follows: "An employer is not bound to indemnify his employee for losses suffered by the latter in consequence of the ordinary risks of the business in which he is employed, nor in consequence of the negligence of another person employed by the same employer in the same general business, unless he has neglected to use ordinary care in the selection of the culpable employee." See *Collier v. Steinhart*, 51 Cal. 116; *McLean v. Blue Point Gravel Min. Co.*, 51 Cal. 255; *Trewatha v. Buchanan Gold Min., etc., Co.*, 96 Cal. 494; *Daves v. Southern Pac. R. Co.*, 98 Cal. 19, 35 Am. St. Rep. 133.

In *Georgia* it is provided by statute that "except in case of railroad companies, the master is not liable to one servant for injuries arising from the negligence or misconduct of other servants about the same business." Code Ga., 1895, § 2610. See also Code Ga., 1882, § 2202. See *Henderson v. Walker*, 55 Ga. 481; *McDonald v. Eagle, etc., Mfg. Co.*, 68 Ga. 839; *McGovern v. Columbus Mfg. Co.*, 80 Ga. 227; *Robinson v. Huidekoper*, 98 Ga. 306.

2. Rule in Ireland. — *McEnery v. Waterford, etc., R. Co.*, 8 Ir. C. L. Rep. 312; *Potts v. Plunkett*, 9 Ir. C. L. Rep. 290; *Carroll v. Hughes*, 6 Ir. Jur. N. S. 49.

3. Rule in Scotland. — The case of *Dixon v. Rankin*, 1 Am. R. Cas. 569, strongly asserted the liability of the employer, and asserted that the Scotch law was perfectly fixed, and admitted of no doubt whatever as to his liability. That case followed the earlier Scotch cases, and was decided in 1852. See also *Sword v. Cameron*, 1 Sc. Sess. Cas. 493; *Grey v. Brassey*, 15 Ct. Sess. Cas. 135.

4. Barton's Hill Coal Co. v. Reid, 3 Macq. H. L. Cas. 266.

5. McFarland v. Caledonian R. Co., 6 Macq. H. L. Cas. 102.

6. Rule in Continental Countries. — Sir Frederick Pollock, in discussing the rule of the English law, as it stood before 1880, as to the master not being liable to his servant for the negligence of a fellow servant, says that "no such doctrine appears to exist in the law of any other country in Europe." Pollock on Torts 85.

Same — France. — The very earliest time at which this question arose was possibly in the year 1834, where a man employed in loading a cargo was injured by the carelessness of a fellow servant, and brought suit for damages before the court of Lyons. Article 1384 of the Code Civil provided: "A person is liable, not only for the damage which he occasions by his own act, but also for that which is caused by the acts of persons for whom he must answer, or for the things which he has in his keeping." The court of first instance laid it down that the article did not apply to such a case, on the ground that the injured workman had accepted the danger. This judgment was affirmed on appeal, holding that when workmen are engaged together, and one sustains injury through the negligence of the other, the action lies against the wrongdoer, but as against the employer the salary was held to be set off against the risk. Dalloy, 1837, pt. 2, 161. This rule was followed in another case, Dalloy, 1839, pt. 2, 168. These rulings, however, were subsequently reversed, and it was

Rule of the Roman Law. — It has been said that "at no period under the Roman law was the master liable for the negligence of a servant in injuring his fellow servant."¹

IV. REASONS FOR THE RULE — Public Policy. — One of the reasons which have been assigned for the fellow-servant rule is that of supposed public policy which assumes that the exemption operates as a stimulant to diligence and caution on the part of the servants, who, because of the relation they sustain to each other and the business in which they are engaged, are better able than the employer to guard against risks and accidents resulting from each other's negligence, and therefore has a tendency both to promote the safety of the servants and to protect the master.²

Servant Presumed to Take upon Himself Ordinary Risks of His Employment. — But this theory has not met with general favor.³ According to the better-considered cases, as well as the preponderance of authority, the fellow-servant rule proceeds on the theory that the ordinary risks of the employment, of which the negligence of co-servants is one, are taken into consideration by both parties in agreeing upon the terms of a contract of employment, and in fixing the compensation, and that, therefore, every person who enters the service of another must be assumed to have taken upon himself all the ordinary risks of the employment, including the negligence of competent co-servants.⁴ Some

determined that the above-quoted article of the Code Civil rendered the employer liable. Dalloy, 1841, pt. 1, 271. And according to the best French authorities the fellow-servant rule of the common law is rejected by the French law. Demolombe, vol. 31, No. 628; Sourdat, vol. 2, No. 911; Canadian Pac. R. Co. v. Robinson, 14 Can. Sup. Ct. Rep. 114; Filion v. Reg., 4 Can. Exch. Rep. 134.

Same — Italy. — The Italian follows the French Code. Article 1153 of the Italian Code corresponds with article 1384 of the French, and would probably be given the same construction. Beven's Emp. Liab. Act, 1880, p. 6. The fact that an injury arose from the act of a fellow workman is not taken into consideration in the law.

Rule in Prussia. — The law as it stood until June 7, 1881, recognized the doctrine of the nonliability of the employer, when, as Professor Brun says, "these rules are not sufficient to meet the exigencies of modern life, especially in the case of such great industrial undertakings as railways, shipping, carriers, factories, mines, etc. If, in accordance with the rules of Roman law, the liability of the employer is limited to his negligence in selection and supervision (*culpa in eligendo et custodiendo*), whilst otherwise the employee in fault is alone liable, and in cases of accident there is no liability at all, the profit gained and the risk incurred by the employer would be out of all proportion to each other, and almost the whole risk would be transferred to the public and to the workman." For this reason the German Commercial Code has, in the case of carriage by land and by water, and especially in the case of railways, introduced a general liability on the carrier, from which *vis major* is the only exception, and has gone so far as to prohibit contracts in derogation of this liability. Further provision for the liability to pay compensation in the case of death or personal injuries occurring in connection with railways, mines, quarries, pits and factories is made by an imperial law of June 7, 1871.

Ev. Mr. C. P. Ilbert, Doc. 362, House Com. Eng. Parl. 1876, p. 27, Int. 315.

1. Beven's Emp. Liab. Act, 1880, p. 3.

2. **Basis of the Fellow-Servant Rule — Public Policy.** — Lowe, C. J., in *Sullivan v. Mississippi*, etc., R. Co., 11 Iowa 421; *Union Pac. R. Co. v. Erickson*, 41 Neb. 1; *St. Louis*, etc., R. Co. v. Welch, 72 Tex. 298; *Deverill v. Grand Trunk R. Co.*, 25 U. C. Q. B. 517.

3. In *Ell v. Northern Pac. R. Co.*, 1 N. Dak. 336, 26 Am. St. Rep. 621, the idea that the fellow-servant rule is based on the fact that the injured servant is in a position to exert an influence over the negligent one was distinctly repudiated.

And in the case of *Chicago*, etc., R. Co. v. Ross, 112 U. S. 377, Mr. Justice Field said of the theory that "the exemption operates as a stimulant to diligence and caution on the part of the servant, for his own safety as well as that of his master," that "it may be doubted whether the exemption has the effect thus claimed for it. We have never known parties more willing to subject themselves to dangers of life or limb because, if losing the one or suffering in the other, damages could be recovered by their representatives or themselves for the loss or injury. The dread of personal injury has always proved sufficient to bring into exercise the vigilance and activity of the servant."

4. **Same — Implied Contract — United States.** — *Union Pac. R. Co. v. Fort*, 17 Wall. (U. S.) 553; *Burke v. Anderson*, 69 Fed. Rep. 814.

Alabama. — *Buckalew v. Tennessee Coal, etc., Co.*, 112 Ala. 146, citing 7 AM. AND ENG. ENCYC. OF LAW (1st ed.) 821, 824.

Arkansas. — *St. Louis*, etc., R. Co. v. Triplett, 54 Ark. 289.

California. — *Yeomans v. Contra Costa Steam Nav. Co.*, 44 Cal. 71.

District of Columbia. — *Hughson v. Richmond*, etc., R. Co., (D. C. App.) 22 Wash. L. Rep. 55.

Kentucky. — *Volz v. Chesapeake*, etc., R. Co., 95 Ky. 188, 15 Ky. L. Rep. 727.

of the courts give their approval to both reasons.¹

V. EXTENT AND LIMITATIONS OF THE RULE — 1. Liability of Tortfeasor Not Affected — a. IN GENERAL. — The fellow-servant rule is, as has already been shown, a limitation upon the doctrine of *respondeat superior*, by the application of the primary rule that a person is liable only for the consequences of his own torts. But while materially limiting the doctrine of *respondeat superior*, it does not infringe upon the fundamental rule of law that a tortfeasor must answer for the consequences of his own acts.

b. LIABILITY OF THE NEGLIGENT FELLOW SERVANT. — For example, the fellow-servant doctrine does not relieve a negligent servant from liability to the servant who is injured. While it was at one time thought that many of the considerations of justice and policy which led to the adoption of the rule that a master is not responsible to one of his servants for the injurious consequences of the negligence of the others, were equally applicable to actions brought for like causes by one servant against another,² this clearly erroneous idea has given way to the more just and reasonable rule that where several persons are engaged in the same work, in which the negligent or unskilful performance of his part by one may cause danger to the others, and in which each must necessarily depend for his safety upon the good faith, skill, and prudence of each of the others in doing his part of the work, then it is the duty of each of the others engaged on the work to exercise the care and skill ordinarily employed by prudent men in similar circumstances, and each is liable for an injury occurring to any one of the others by reason of his neglect to use such care and skill.³ Certainly where the injury is caused, not by mere nonfeasance, but

Missouri. — *Schaub v. Hannibal, etc., R. Co.*, 106 Mo. 74.

New Hampshire. — *Fifield v. Northern R. Co.*, 42 N. H. 225; *Nash v. Nashua Iron, etc., Co.*, 62 N. H. 406.

North Dakota. — *Ell v. Northern Pac. R. Co.*, 1 N. Dak. 336, 26 Am. St. Rep. 621.

Oregon. — *Anderson v. Bennett*, 16 Oregon 515, 8 Am. St. Rep. 311.

Pennsylvania. — *Lewis v. Seifert*, 116 Pa. St. 628, 2 Am. St. Rep. 631.

1. Both Reasons Recognized. — *Farwell v. Boston, etc., R. Corp.*, 4 Met. (Mass.) 49, 38 Am. Dec. 339; *Union Pac. R. Co. v. Erickson*, 41 Neb. 1.

2. Responsibility of Servant for Injury to Fellow Servant. — *Southcote v. Stanley*, 1 H. & N. 247; *Albro v. Jaquith*, 4 Gray (Mass.) 99, 64 Am. Dec. 56, *overruled* in *Osborne v. Morgan*, 130 Mass. 102, 39 Am. Rep. 437.

3. Wright v. Roxburgh, 2 Ct. Sess. Cas. (4th ser.) 748; *Wiggett v. Fox*, 11 Exch. 832; *Degg v. Midland R. Co.*, 1 H. & N. 773; *Swainson v. North-Eastern R. Co.*, 3 Exch. Div. 341; *Warax v. Cincinnati, etc., R. Co.*, 72 Fed. Rep. 637; *Daves v. Southern Pac. Co.*, 98 Cal. 19, 35 Am. St. Rep. 133; *Hinds v. Harbou*, 58 Ind. 121; *Hinds v. Overacker*, 66 Ind. 547, 32 Am. Rep. 114; *Rogers v. Overton*, 87 Ind. 410; *Osborne v. Morgan*, 130 Mass. 102, 39 Am. Rep. 437, *overruling* *Albro v. Jaquith*, 4 Gray (Mass.) 99, 64 Am. Dec. 56; *Griffiths v. Wolfgram*, 22 Minn. 185; *Steinhauser v. Spraul*, 114 Mo. 551; *Fox v. Sandford*, 4 Sneed (Tenn.) 36, 67 Am. Dec. 587; *Kenney v. Lane*, 9 Tex. Civ. App. 150.

Liability of One Servant to Another for Nonfeasance. — It is the quite generally accepted rule that the servant is not liable to third persons for the consequences of the nonperformance of the duties committed to him by the

master. See the title AGENCY, vol. 1, p. 1131.

In the cases applying this rule a distinction is made between misfeasance and nonfeasance, and the servant is held liable to third persons in the one case, but not in the other. The theory underlying this restriction of the servant's liability to third persons is that the servant is bound to serve his master with fidelity, and for a breach of this duty becomes liable to the master, who in turn may be charged with damages for injuries to third persons occasioned by the nonfeasance of the servant. While this general rule governs the liability of a servant to strangers, it would seem that a different rule might be applied where a servant is sought to be held liable by another servant for an omission to discharge a duty which the former owes to the master; for, by the application of the fellow-servant doctrine, the injured servant, unlike a stranger, will have no action against the master for the injury sustained. It seems that the *New York* cases which are cited below can be reconciled with the rule laid down in the text by bearing in mind this possible distinction.

In *Murray v. Usher*, 117 N. Y. 542, the plaintiff, while employed upon a platform in a sawmill belonging to two of the defendants, sustained injuries by reason of the platform falling and causing his death. His administrator brought an action against the owners of the mill and one Lewis, who was the superintendent, having general charge of the business and being specially instructed to look after the necessary repairs, which included the duty of inspecting the platform from time to time to see that it was kept in a safe condition. Judgment was recovered against all of the defendants. In the Court of Appeals the question of the superintendent's liability was considered, the court holding that the omis-

by an act of misfeasance, there can be no question but that the negligent servant is liable.¹

c. LIABILITY OF MASTER FOR HIS OWN NEGLIGENCE — (1) General Rule. — The fellow-servant rule does not, of course, relieve the master from liability for the consequences of his own negligence; for injuries proceeding from his personal fault or negligence the master is under the same liability to his servants as to third persons towards whom he sustains no special relations.²

(2) *While Working with the Injured Servant.* — This is illustrated by the case of an injury to a servant through the negligence of the master while working with his servants.³

(3) *In Discharge of Positive Duties to Servants.* — Another, and an equally important, application of this rule occurs in connection with those positive duties to his servants which the law imposes upon the master. If the master

sion of the superintendent to perform the duty devolving upon him constituted nonfeasance, for which he was not liable in a civil action, but that his employers were.

In *Burns v. Pethcal*, 75 Hun (N. Y.) 443, an attempt was made to recover of a foreman for the loss of the life of an employee, due, it was charged, to the omission of the foreman to warn the deceased of the danger of working in a particular place. There was a recovery at the circuit, but the general term reversed the judgment, holding that a servant is not liable jointly with his master where the negligence of the servant consists of an omission of the duty devolved upon him by his employment, although he may be liable where he omits to perform a duty which rests upon him in his individual character and one which the law imposed upon him independently of his employment.

It does not clearly appear in either of these cases that the servant injured and the servant whose negligence caused the injury were really fellow servants.

1. Liability of One Servant to Another for an Act of Misfeasance. — *Sullivan v. Dunham*, 35 N. Y. App. Div. 342.

Without deciding the rule to be that for mere nonfeasance the servant of the master cannot be made responsible to third persons injured thereby, the court in *Warax v. Cincinnati, etc., R. Co.*, 72 Fed. Rep. 637, held that the act of an engineer in voluntarily backing an engine without giving notice to a switchman whom he knew or should have known to be between the cars was misfeasance instead of nonfeasance, and the engineer was responsible for the injuries sustained by the switchman.

2. Master Liable for His Own Negligence. — *Scott v. Craig*, 34 Jur. 401; *Laughran v. Brewer*, 113 Ala. 509; *Hunn v. Michigan Cent. R. Co.*, 78 Mich. 513; *Booth v. Boston, etc., R. Co.*, 73 N. Y. 38, 29 Am. Rep. 97; *Ford v. Lake Shore, etc., R. Co.*, 124 N. Y. 493; *Pittsburgh, etc., R. Co. v. Henderson*, 37 Ohio St. 549.

By section 1971 of the *California Civil Code* it is provided that "an employer must in all cases indemnify his employee for losses caused by the former's want of ordinary care." See *Gier v. Los Angeles Consol. Electric R. Co.*, 108 Cal. 133; *Matthews v. Bull*, (Cal. 1897) 47 Pac. Rep. 773.

Negligence of Master Superintending Work. — In

Scott v. Craig, 34 Jur. 401, a servant received injuries from the use of a defective scaffold, which was erected by a competent foreman and workmen under the supervision of the master. The court held that as the master himself superintended the work, the negligence was his and not that of a co-servant, and the fact that the work was done under the direction of his foreman did not relieve him from liability.

Where the plaintiff had been injured by the fall of a staging which had been erected before he entered the employment of the defendant by persons who were afterwards his fellow workmen, and the evidence tended to show that the staging was improperly constructed and insecure, either by reason of unsuitable materials used or by reason of neglect to fasten it together sufficiently by nailing, or for both or other reasons, the reviewing court held that it was error for the court below to restrict the plaintiff's right of recovery to the ground of negligence "in the selection and employment of competent and suitable men and in furnishing suitable lumber to build the staging." Upon the facts as proved it would have been competent for the jury to have found that the defendant had not furnished suitable materials and had not intrusted the preparation of the staging to any one else, but that he retained the direction and charge of it himself, and therefore was himself bound to exercise the proper degree of care in regard to it. *Arkerson v. Dennison*, 117 Mass. 407.

3. Liability of Master for Negligence while Working with Servant. — *Ashworth v. Stanwix*, 3 El. & El. 701, 107 E. C. L. 701, 7 Jur. N. S. 467, 30 L. J. Q. B. 183; *Mellors v. Shaw*, 30 L. J. Q. B. 333; *Macdonald v. Dick*, 34 U. C. Q. B. 623; *Grand Trunk R. Co. v. Cummings*, 106 U. S. 700; *Lorentz v. Robinson*, 61 Md. 64; *Busch v. Buffalo Creek R. Co.*, 29 Hun (N. Y.) 112; *Ryan v. Fowler*, 24 N. Y. 410, 82 Am. Dec. 315; *Leonard v. Collins*, 70 N. Y. 90; *Flynn v. Harlow*, 61 N. Y. Super. Ct. 293.

Liability of One Partner for Negligence of the Other. — If the master is a member of a partnership by whom the servant is employed and the work in which he takes part is within the scope of the common undertaking of the partnership, his copartners are jointly liable with him for the injury thus caused to the servant by his negligence. *Ashworth v. Stanwix*, 3 El. & El. 701, 107 E. C. L. 701, 7 Jur. N. S. 467.

is neglectful of any of these duties¹ and a servant suffers damages on account thereof,² the master is liable.

d. CONCURRENT NEGLIGENCE OF MASTER AND FELLOW SERVANT — In General. — It is a familiar principle that where an injury is caused by the concurrent negligence of two persons, either or both may be held responsible.³ The application of this general rule in the law of master and servant is not affected by the fellow-servant doctrine. Where the negligence of the master is combined with the negligence of a fellow servant in producing the injury, and the negligence of neither is alone the efficient cause, both the master and the fellow servant are liable, and the injured servant may maintain his action against either or both together.⁴

Liability of the Master. — The application of this rule occurs mostly in cases where the master is sued. That a master is liable for an injury to his servant caused by the concurrent negligence of himself and a fellow servant, but which would not have happened had the master performed his duty, is clear; it is only where the negligence of a fellow servant is the whole cause of the injury that the master is excused.⁵ And, while contributory negligence may relieve a master from liability, it must be that of the person injured; it is immaterial that the negligence of a third person contributed to the injury.⁶ If, therefore, a servant who is himself free from negligence receives an injury, caused in part by the negligence of his master, or, what amounts to the same thing, of a servant for whose negligence the master is responsible, and in part by that of a fellow servant, he can maintain an action against his master for such injury.⁷

1. Personal Duties of Master to Servant. — The chief of these duties are, to exercise reasonable care to furnish suitable machinery and appliances to carry on the business for which he employs the servant; to exercise like care in keeping such machinery and appliances in repair; to employ a sufficient number of competent servants; to provide the servants with a reasonably safe place in which to work; to instruct inexperienced and youthful servants in the dangers of the work. For a full discussion of these duties see the title MASTER AND SERVANT. See also the title SEAMEN.

2. Liability of Master for Negligence in Discharge of Positive Duties to Servants — United States. — *Northern Pac. R. Co. v. Peterson*, 162 U. S. 346.

California. — *Donnelly v. San Francisco Bridge Co.*, 117 Cal. 417.

Georgia. — *McDonald v. Eagle, etc., Mfg. Co.*, 68 Ga. 839; *Crusselle v. Pugh*, 67 Ga. 430, 44 Am. Rep. 724.

Illinois. — *National Syrup Co. v. Carlson*, 155 Ill. 210.

Indiana. — *Blondin v. Oolitic Quarry Co.*, 11 Ind. App. 395; *Pennsylvania Co. v. McCabrey*, 139 Ind. 430.

Kentucky. — *Ashland Coal, etc., Co. v. Wallace*, (Ky. 1897) 42 S. W. Rep. 744.

Missouri. — *Ryan v. McCully*, 123 Mo. 636.

New York. — *Ryan v. Fowler*, 24 N. Y. 410, 82 Am. Dec. 315; *Redington v. New York, etc., R. Co.*, 84 Hun (N. Y.) 231; *Pantzar v. Tilly Foster Iron Min. Co.*, 99 N. Y. 373; *Bushby v. New York, etc., R. Co.*, 107 N. Y. 374, 1 Am. St. Rep. 844.

North Carolina. — *Cowles v. Richmond, etc., R. Co.*, 84 N. Car. 309, 37 Am. Rep. 620.

Pennsylvania. — *Cannon v. Mears*, (C. Pl.) 7 Kulp (Pa.) 281, 11 Lanc. L. Rev. (Pa.) 215.

South Dakota. — *Gates v. Chicago, etc., R. Co.*, 2 S. Dak. 422.

Texas. — *International, etc., R. Co. v. Hall*, 78 Tex. 657; *Houston, etc., R. Co. v. McNamara*, 59 Tex. 255.

Wisconsin. — *Peschel v. Chicago, etc., R. Co.*, 62 Wis. 338.

And see the title MASTER AND SERVANT. See also *infra*, this section, *Vice-Principals*.

3. General Rule of Liability for Concurrent Negligence. — *Pullman Palace Car Co. v. Laack*, 143 Ill. 242; *Galveston, etc., R. Co. v. Croskell*, 6 Tex. Civ. App. 160. See the title NEGLIGENCE.

4. Application of Rule Between Master and Servant. — *Young v. New Jersey, etc., R. Co.*, 46 Fed. Rep. 160; *Pullman Palace Car Co. v. Laack*, 143 Ill. 242.

5. Myers v. Hudson Iron Co., 150 Mass. 125, 15 Am. St. Rep. 176; *Deweese v. Meramec Iron Min. Co.*, 54 Mo. App. 476; *Irmer v. St. Louis Brewing Co.*, 69 Mo. App. 17.

6. Hoosier Stone Co. v. McCain, 133 Ind. 231; *Paulmier v. Erie R. Co.*, 34 N. J. L. 151; *Richmond, etc., R. Co. v. George*, 88 Va. 223, 15 Va. L. J. 625; *Stetler v. Chicago, etc., R. Co.*, 46 Wis. 497. See the titles CONTRIBUTORY NEGLIGENCE, vol. 7, p. 424; NEGLIGENCE.

7. Master Liable Notwithstanding Concurrent Negligence of Fellow Servant — England. — *Potts v. Port Carlisle Dock Co.*, 2 L. T. N. S. 283.

Canada. — *Macdonald v. Dick*, 34 U. C. Q. B. 623.

United States. — *Grand Trunk R. Co. v. Cummings*, 106 U. S. 700, 12 Am. & Eng. R. Cas. 204; *McMahon v. Henning*, 1 McCrary (U. S.) 516; *The Phoenix*, 34 Fed. Rep. 760, *Anderson v. The Ashebrooke*, 44 Fed. Rep. 124; *Young v. New Jersey, etc., R. Co.*, 46 Fed. Rep. 160; *New Jersey, etc., R. Co. v. Young*, 49 Fed. Rep. 723, 1 U. S. App. 96; *Northern Pac. R. Co. v. Charless*, 51 Fed. Rep. 562, 7 U. S. App. 359, *affirmed* in 162 U. S. 359; *Pullman's Palace-Car Co. v. Harkins*,

Where Fellow Servant Could Have Prevented Injury. — If the accident would not

55 Fed. Rep. 932; Union Pac. R. Co. v. Callaghan, 56 Fed. Rep. 988, 12 U. S. App. 541; Northwestern Fuel Co. v. Danielson, 57 Fed. Rep. 915, 12 U. S. App. 688; Cincinnati, etc., R. Co. v. Clark, 57 Fed. Rep. 125, 16 U. S. App. 17; Clyde v. Richmond, etc., R. Co., 59 Fed. Rep. 394; Killien v. Hyde, 63 Fed. Rep. 172; Terre Haute, etc., R. Co. v. Mansberger, 65 Fed. Rep. 196, rehearing denied, 67 Fed. Rep. 67; Farmers' L. & T. Co. v. Toledo, etc., R. Co., 67 Fed. Rep. 73; Northern Pac. R. Co. v. Poirier, 67 Fed. Rep. 881, citing 7 AM. AND ENG. ENCYC. OF LAW (1st ed.) 828; The Joseph B. Thomas, 81 Fed. Rep. 578.

California. — Fisk v. Central Pac. R. Co., 72 Cal. 38, 1 Am. St. Rep. 22.

District of Columbia. — McDade v. Washington, etc., R. Co., 5 Mackey (D. C.) 144, 26 Am. & Eng. R. Cas. 325.

Delaware. — Wheatley v. Philadelphia, etc., R. Co., 1 Marv. (Del.) 305.

Georgia. — Ocean Steamship Co. v. Matthews, 86 Ga. 418; Cheeney v. Ocean Steamship Co., 92 Ga. 726, 44 Am. St. Rep. 113.

Illinois. — Chicago, etc., R. Co. v. Gillison, 173 Ill. 264, affirming 72 Ill. App. 207; Chicago, etc., R. Co. v. House, 172 Ill. 601, affirming 71 Ill. App. 147; Pullman Palace Car Co. v. Laack, 143 Ill. 242; Perry v. Ricketts, 55 Ill. 234; Chicago, etc., R. Co. v. Jackson, 55 Ill. 495, 8 Am. Rep. 661. See Rice, etc., Maltng Coal Co. v. Paulsen, 51 Ill. App. 123; Girard Coal Co. v. Wiggins, 52 Ill. App. 69.

Indiana. — Lake Shore, etc., R. Co. v. Stupak, 123 Ind. 222; Boyce v. Fitzpatrick, 80 Ind. 526; Cincinnati, etc., R. Co. v. Lang, 118 Ind. 579; Rogers v. Leyden, 127 Ind. 50; Louisville, etc., R. Co. v. Berkeley, 136 Ind. 181, quoting 7 AM. AND ENG. ENCYC. OF LAW (1st ed.) 828; Pennsylvania Co. v. McCaffrey, 139 Ind. 430; Ohio, etc., R. Co. v. Stein, 140 Ind. 61; Hancock v. Keene, 5 Ind. App. 408; Island Coal Co. v. Risher, 13 Ind. App. 98; Louisville, etc., Consol. R. Co. v. Miller, 140 Ind. 685; Lauter v. Duckworth, 19 Ind. App. 535.

Kansas. — Atchison, etc., R. Co. v. Holt, 29 Kan. 149, 11 Am. & Eng. R. Cas. 206; Atchison, etc., R. Co. v. Lannigan, 56 Kan. 109.

Louisiana. — Towns v. Vicksburg, etc., R. Co., 37 La. Ann. 630, 55 Am. Rep. 508; Van Amburg v. Vicksburg, etc., R. Co., 37 La. Ann. 650, 55 Am. Rep. 517; Faren v. Sellers, 39 La. Ann. 1011, 4 Am. St. Rep. 256; Stucke v. Orleans R. Co., (La. 1898) 23 So. Rep. 342.

Massachusetts. — Hayes v. Western R. Corp., 3 Cush. (Mass.) 270; Cayzer v. Taylor, 10 Gray (Mass.) 274, 69 Am. Dec. 317; Elmer v. Locke, 135 Mass. 575, 15 Am. & Eng. R. Cas. 300; Clark v. Soule, 137 Mass. 380; Griffin v. Boston, etc., R. Co., 148 Mass. 143, 12 Am. St. Rep. 526; Myers v. Hudson Iron Co., 150 Mass. 125, 15 Am. St. Rep. 176; Drommie v. Hogan, 153 Mass. 29.

Michigan. — Hunn v. Michigan Cent. R. Co., 78 Mich. 513; Town v. Michigan Cent. R. Co., 84 Mich. 214, citing 7 AM. AND ENG. ENCYC. OF LAW (1st ed.) 828.

Minnesota. — Franklin v. Winona, etc., R. Co., 37 Minn. 409, 5 Am. St. Rep. 856; Delude v. St. Paul City R. Co., 55 Minn. 63; Ransier

v. Minneapolis, etc., R. Co., 32 Minn. 331, 21 Am. & Eng. R. Cas. 601.

Missouri. — Young v. Shickle, etc., Iron Co., 103 Mo. 324; Deweese v. Meramec Iron Min. Co., 54 Mo. App. 476, affirmed 128 Mo. 423; Henry v. Wabash Western R. Co., 109 Mo. 488, distinguishing Schaub v. Hannibal, etc., R. Co., 106 Mo. 74; Browning v. Wabash Western R. Co., 124 Mo. 55; Ellingson v. Chicago, etc., R. Co., 60 Mo. App. 679; Hogue v. Sligo Furnace Co., 62 Mo. App. 491; Irmer v. St. Louis Brewing Co., 69 Mo. App. 17; Bluedorn v. Missouri Pac. R. Co., 108 Mo. 439, 32 Am. St. Rep. 615. See Steffen v. Mayer, 96 Mo. 420; Craig v. Chicago, etc., R. Co., 54 Mo. App. 523.

New Jersey. — Paulmier v. Erie R. Co., 34 N. J. L. 151.

New York. — Booth v. Boston, etc., R. Co., 73 N. Y. 38, 29 Am. Rep. 97; Cone v. Delaware, etc., R. Co., 81 N. Y. 206, 37 Am. Rep. 491, 2 Am. & Eng. R. Cas. 57; Ellis v. New York, etc., R. Co., 95 N. Y. 546, 17 Am. & Eng. R. Cas. 641; Stringham v. Stewart, 100 N. Y. 516; Benzing v. Steinway, 101 N. Y. 547; Anthony v. Leeret, 105 N. Y. 591; Lilly v. New York Cent., etc., R. Co., 107 N. Y. 566; O'Laughlin v. New York Cent., etc., R. Co., (Supreme Ct.) 9 N. Y. St. Rep. 384, affirmed 113 N. Y. 623; Coppins v. New York Cent., etc., R. Co., 122 N. Y. 557, 19 Am. St. Rep. 523, 44 Am. & Eng. R. Cas. 618, affirming 48 Hun (N. Y.) 292; Whittaker v. Delaware, etc., Canal Co., 126 N. Y. 544; Donohue v. Brooklyn City R. Co., (Brooklyn City Ct.) 14 N. Y. Supp. 639; Mulvaney v. Brooklyn City R. Co., 1 N. Y. Misc. Rep. (Brooklyn City Ct.) 425, affirmed 142 N. Y. 651; Bagley v. Consolidated Gas Co., 13 Misc. Rep. (N. Y. C. Pl.) 6; Crowell v. Thomas, 90 Hun (N. Y.) 193; Hollingsworth v. Long Island R. Co., 91 Hun (N. Y.) 641; Warn v. New York Cent., etc., R. Co., 80 Hun (N. Y.) 71; Bryant v. New York Cent., etc., R. Co., 81 Hun (N. Y.) 164; Dodd v. Bell, 15 N. Y. App. Div. 258; Bennett v. Long Island R. Co., 21 N. Y. App. Div. 25; Wood v. New York Cent., etc., R. Co., 32 N. Y. App. Div. 606; Auld v. Manhattan L. Ins. Co., 34 N. Y. App. Div. 491. See Shields v. Robins, 3 N. Y. App. Div. 582.

North Carolina. — Crutchfield v. Richmond, etc., R. Co., 76 N. Car. 320; Bean v. Western North Carolina R. Co., 107 N. Car. 731; Troxler v. Southern R. Co., 122 N. Car. 902.

Ohio. — New York, etc., R. Co. v. Lam-bright, 5 Ohio Cir. Ct. Rep. 433, 3 Ohio Cir. Dec. 213; Pittsburgh, etc., R. Co. v. Hender-son, 37 Ohio St. 552, 5 Am. & Eng. R. Cas. 529; Lake Erie, etc., R. Co. v. Mulcahy, 9 Ohio Cir. Dec. 82, 16 Ohio Cir. Ct. Rep. 204.

Oregon. — Knahtla v. Oregon Short Line, etc., R. Co., 21 Oregon 136.

Pennsylvania. — Kaiser v. Flaccus 138 Pa. St. 332.

Tennessee. — Louisville, etc., R. Co. v. Ken-ley, 92 Tenn. 207; Illinois Cent. R. Co. v. Spence, 93 Tenn. 173.

Texas. — St. Louis, etc., R. Co. v. McClain, 80 Tex. 85, citing 7 AM. AND ENG. ENCYC. OF LAW (1st ed.) 822; Gulf, etc., R. Co. v. John-son, 83 Tex. 628; Gulf, etc., R. Co. v. Pettis,

have occurred but for the negligence of the master, he is liable although the

69 Tex. 689; Gulf, etc., R. Co. v. Kizziah, 86 Tex. 81, *reviewing* 4 Tex. Civ. App. 362; Houston, etc., R. Co. v. Lowe, (Tex. 1889) 11 S. W. Rep. 1065; Mexican Nat. R. Co. v. Mussette, 7 Tex. Civ. App. 169; Galveston, etc., R. Co. v. Croskell, 6 Tex. Civ. App. 160; Missouri, etc., R. Co. v. Woods, (Tex. Civ. App. 1894) 25 S. W. Rep. 741; Galveston, etc., R. Co. v. Templeton, 87 Tex. 42; Howe v. St. Clair, 8 Tex. Civ. App. 101; International, etc., R. Co. v. Sipole, (Tex. Civ. App. 1895) 29 S. W. Rep. 686; Ft. Worth, etc., R. Co. v. Bell, 5 Tex. Civ. App. 28; San Antonio, etc., R. Co. v. Harding, 11 Tex. Civ. App. 497, 3 Am. & Eng. R. Cas. N. S. 389; International, etc., R. Co. v. Williams, (Tex. Civ. App. 1896) 34 S. W. Rep. 161; Houston, etc., R. Co. v. Kelley, (Tex. Civ. App. 1896) 35 S. W. Rep. 878; Gulf, etc., R. Co. v. Warner, (Tex. Civ. App. 1896) 36 S. W. Rep. 118; Galveston, etc., R. Co. v. Sweeney, 14 Tex. Civ. App. 216; Texas, etc., R. Co. v. Eberhart, (Tex. Civ. App. 1897) 40 S. W. Rep. 1060; Sincere v. Union Compress, etc., Co., (Tex. Civ. App. 1897) 40 S. W. Rep. 326; Missouri, etc., R. Co. v. Ferch, (Tex. Civ. App. 1898) 44 S. W. Rep. 317; Galveston, etc., R. Co. v. Jackson, (Tex. Civ. App. 1898) 44 S. W. Rep. 1072; Trinity, etc., R. Co. v. Brown, (Tex. Civ. App. 1898) 46 S. W. Rep. 926; Louisiana Western Extension R. Co. v. Carstens, (Tex. Civ. App. 1898) 47 S. W. Rep. 36; International, etc., R. Co. v. Bonatz, (Tex. Civ. App. 1898) 48 S. W. Rep. 767; Missouri, etc., R. Co. v. Hannig, (Tex. Civ. App. 1899) 49 S. W. Rep. 116; International, etc., R. Co. v. Zapp, (Tex. Civ. App. 1899) 49 S. W. Rep. 673. See Missouri, etc., R. Co. v. Rains, (Tex. Civ. App. 1897) 40 S. W. Rep. 635.

Utah. — Wright v. Southern Pac. R. Co., 14 Utah 383, 5 Am. & Eng. R. Cas. N. S. 559; Handley v. Daly Min. Co., 15 Utah 176.

Vermont. — Morrisey v. Hughes, 65 Vt. 553.

Virginia. — Norfolk, etc., R. Co. v. Nuckols, 91 Va. 193; Norfolk, etc., R. Co. v. Ampey, 93 Va. 108, 2 Va. L. Reg. 284; Richmond, etc., R. Co. v. George, 88 Va. 223, 15 Va. L. J. 625; Moon v. Richmond, etc., R. Co., 78 Va. 745, 49 Am. Rep. 401, *explained* in Norfolk, etc., R. Co. v. Nuckols, 91 Va. 193.

Wisconsin. — Stetler v. Chicago, etc., R. Co., 46 Wis. 497, 49 Wis. 609; Schultz v. Chicago, etc., R. Co., 48 Wis. 375; Sherman v. Menominee River Lumber Co., 72 Wis. 122; Craven v. Smith, 89 Wis. 119; Cowan v. Chicago, etc., R. Co., 80 Wis. 284; Johnson v. Ashland First Nat. Bank, 79 Wis. 414, 24 Am. St. Rep. 722; Lago v. Walsh, 98 Wis. 348.

In *Boyce v. Fitzpatrick*, 80 Ind. 526, it was said: "While a servant assumes the risk, more or less hazardous, of the service in which he engages, he has a right to assume that all reasonable attention will be given by his employer to his safety, and that he shall not be carelessly and needlessly exposed to risks which might be avoided by ordinary care and precaution on the part of his employer." And where, in the absence of such care and precaution, an employee is injured, the employer is liable although the negligence of a fellow servant contributed to the injury complained of. This principle was *approved* in Louisville,

etc., R. Co. v. Berkey, 136 Ind. 181. And in *Pennsylvania Co. v. McCaffrey*, 139 Ind. 430, Dailey, J., after citing these cases and quoting from the first one as above, said: "In our opinion the rule is a just and salutary one, and we ought not to depart from it."

Injuries Caused in Part by Defective Machinery or Appliances. — This rule is most frequently applied to cases of injuries caused by defective machinery. A master who is to provide safe machinery or appliances for the use of a servant is not relieved from responsibility to an employee for neglect of that duty by the fact that a fellow servant may have been guilty of negligence in using the unsafe apparatus which was committed to him to use.

England. — *Potts v. Port Carlisle Dock Co.*, 2 L. T. N. S. 283.

United States. — *McMahon v. Henning*, 1 McCrary (U. S.) 516; *Grand Trunk R. Co. v. Cummings*, 106 U. S. 700, 12 Am. & Eng. R. Cas. 204; *Anderson v. The Ashebrooke*, 44 Fed. Rep. 124; *Finley v. Richmond, etc., R. Co.*, 59 Fed. Rep. 419.

District of Columbia. — *McDade v. Washington, etc., R. Co.*, 5 Mackey (D. C.) 144, 26 Am. & Eng. R. Cas. 325.

Illinois. — *Perry v. Ricketts*, 55 Ill. 234; *Chicago, etc., R. Co. v. Jackson*, 55 Ill. 492, 8 Am. Rep. 661.

Indiana. — *Boyce v. Fitzpatrick*, 80 Ind. 526; *Louisville, etc., R. Co. v. Berkey*, 136 Ind. 181, *quoting* 7 AM. AND ENG. ENCYC. OF LAW (1st ed.) 828; *Ohio, etc., R. Co. v. Stein*, 140 Ind. 61.

Kansas. — *Atchison, etc., R. Co. v. Holt*, 29 Kan. 149, 11 Am. & Eng. R. Cas. 206; *Atchison, etc., R. Co. v. Lannigan*, 56 Kan. 109.

Massachusetts. — *Cayzer v. Taylor*, 10 Gray (Mass.) 274, 69 Am. Dec. 317; *Elmer v. Locke*, 135 Mass. 575, 15 Am. & Eng. R. Cas. 300; *Griffin v. Boston, etc., R. Co.*, 148 Mass. 143, 12 Am. St. Rep. 526; *Myers v. Hudson Iron Co.*, 150 Mass. 125, 15 Am. St. Rep. 176.

Michigan. — *Town v. Michigan Cent. R. Co.*, 84 Mich. 214, *citing* 7 AM. AND ENG. ENCYC. OF LAW (1st ed.) 828.

Minnesota. — *Ransier v. Minneapolis, etc., R. Co.*, 32 Minn. 331, 21 Am. & Eng. R. Cas. 601; *Delude v. St. Paul City R. Co.*, 55 Minn. 63.

Missouri. — *Hogue v. Sligo Furnace Co.*, 62 Mo. App. 491.

New Jersey. — *Pauhmier v. Erie R. Co.*, 34 N. J. L. 151.

New York. — *Ellis v. New York, etc., R. Co.*, 95 N. Y. 546, 17 Am. & Eng. R. Cas. 641; *Cone v. Delaware, etc., R. Co.*, 81 N. Y. 206, 37 Am. Rep. 491, 2 Am. & Eng. R. Cas. 57; *Anthony v. Leeret*, 105 N. Y. 591; *Lilly v. New York Cent., etc., R. Co.*, 107 N. Y. 566.

North Carolina. — *Troxler v. Southern R. Co.*, 122 N. Car. 902.

Texas. — Gulf, etc., R. Co. v. Pettis, 69 Tex. 689; Gulf, etc., R. Co. v. Kizziah, 86 Tex. 81, *reviewing* 4 Tex. Civ. App. 362; Missouri, etc., R. Co. v. Ferch, (Tex. Civ. App. 1898) 44 S. W. Rep. 317; Galveston, etc., R. Co. v. Jackson, (Tex. Civ. App. 1898) 44 S. W. Rep. 1072; International, etc., R. Co. v. Zapp, (Tex. Civ. App. 1899) 49 S. W. Rep. 673.

accident might not have happened had the negligent fellow servant used more care.¹

Master's Negligence Must Contribute to Injury. — But the mere fact that the master was negligent in a certain particular does not make him liable unless his negligence contributed to and was one of the causes of the injury.² According to

Vermont. — *Morrisey v. Hughes*, 65 Vt. 553.
Virginia. — *Richmond, etc., R. Co. v. George*, 88 Va. 223, 15 Va. L. J. 625.
Wisconsin. — *Stettler v. Chicago, etc., R. Co.*, 46 Wis. 497.

The plaintiff was injured by an edger in the defendant's sawmill, which by reason of its defects was unnecessarily dangerous. It was held that the defendant was not relieved from liability by the fact that the feeder of the edger was negligent in managing it, as his negligence simply contributed to the injury. *Sherman v. Menominee River Lumber Co.*, 72 Wis. 122.

Omission of Stationary Switch Light. — Where the omission by the defendant of a stationary switch light was a concurring cause of the accident which resulted in the injury to the plaintiff, it was held that the defendant was liable although the negligence of a fellow servant of the plaintiff contributed to the accident. *Ellingson v. Chicago, etc., R. Co.*, 60 Mo. App. 679.

Dangerous Character of Place to Work. — The negligence of a fellow servant contributing to the injury of the plaintiff will not preclude his recovery from his master for such injury, if it was caused by the master's requiring the servant to work in a place which the master knew, or ought to have known, was unsafe, if the injured servant was himself free from fault. *Hancock v. Keene*, 5 Ind. App. 408; *Island Coal Co. v. Risher*, 13 Ind. App. 98; *Irmer v. St. Louis Brewing Co.*, 69 Mo. App. 17; *Johnson v. Ashland First Nat. Bank*, 79 Wis. 414, 24 Am. St. Rep. 722.

Defective Trestlework of Railroad. — A brakeman in the employ of a railway corporation may maintain an action against the corporation for personal injuries occasioned, while in the exercise of due care, by the fall of a trestlework supporting a portion of a spur track, which was intended for use for an indefinite period of time, if the fall was caused partly by the defective construction of the trestlework and partly by negligence of the fellow servants of the plaintiff. *Elmer v. Locke*, 135 Mass. 575.

1. Master's Negligence Contributing to Injury. — *Ellis v. New York, etc., R. Co.*, 95 N. Y. 546.

Negligence of Servant Using Defective Machinery. — Where a master furnishes defective machinery for use in the prosecution of his business, he is not excused, by reason of the negligence of a servant in using the machinery from liability to a co-servant for an injury sustained in an accident which would not have happened had the machinery been suitable for the purpose to which it was applied. *Ocean Steamship Co. v. Matthews*, 86 Ga. 418; *Donohue v. Brooklyn City R. Co.*, (Brooklyn City Ct.) 14 N. Y. Supp. 639; *Sherman v. Menominee River Lumber Co.*, 72 Wis. 122. See *Hall v. Cooperstown, etc., R. Co.*, 49 Hun (N. Y.) 373.

Where an employee of a railroad company was injured in consequence of the sudden

starting of a locomotive, caused by its being defective and out of repair, the company was held liable notwithstanding the engineer (a fellow servant of the plaintiff) could have so managed the engine as to have prevented the accident. *Cone v. Delaware, etc., R. Co.*, 81 N. Y. 206, 37 Am. Rep. 491. In delivering the opinion of the court, Danforth, J., said that the jury could not "be permitted to inquire whether the exercise of extra diligence or skill on the part of the defendant's servant, the engineer, would not have neutralized the defendant's own negligence. This would require them to determine the 'comparative negligence' of master and servant, and 'strike a balance of negligence,' which, even as between plaintiff and defendant, is not permitted. *Wilds v. Hudson River R. Co.*, 23 How. Pr. (N. Y. Ct. App.) 402. Neither upon principle nor authority can it be held that negligence of the servant in using imperfect machinery excuses the principal from liability to a co-employee for an injury which could not have happened had the machinery been suitable for the use to which it was applied. Had the injury resulted solely from the servant's negligence, the case would have been different."

2. Master Not Liable Unless His Negligence Contributed to Injury. — *Edmonson v. Kentucky Cent. R. Co.*, (Ky. 1899) 49 S. W. Rep. 200; *Rose v. Gulf, etc., R. Co.*, (Tex. 1891) 17 S. W. Rep. 789; *Missouri, etc., R. Co. v. Woods*, (Tex. Civ. App. 1894) 25 S. W. Rep. 741; *Norfolk, etc., R. Co. v. Brown*, 91 Va. 668; *Richmond, etc., R. Co. v. Tribble*, (Va. 1896) 24 S. E. Rep. 278.

It has been said that the master is liable only if the accident would not have happened but for his negligence. *Whittaker v. Delaware, etc., Canal Co.*, 49 Hun (N. Y.) 400; *Hall v. Cooperstown, etc., R. Co.*, 49 Hun (N. Y.) 373; *McCabe v. Brainard*, 17 N. Y. App. Div. 45.

Although the machinery is defective, so that otherwise a recovery might be had for an injury received, yet if the promoting cause of the injury is the negligence of a fellow servant, no recovery can be had. *Gilman v. Eastern R. Corp.*, 10 Allen (Mass.) 233, 87 Am. Dec. 635; *King v. Boston, etc., R. Corp.*, 9 Cush. (Mass.) 112; *Hayes v. Western R. Corp.*, 3 Cush. (Mass.) 270; *New Orleans, etc., R. Co. v. Hughes*, 49 Miss. 258; *Memphis, etc., R. Co. v. Thomas*, 51 Miss. 637; *Harvey v. New York Cent., etc., R. Co.*, (Supreme Ct.) 10 N. Y. Supp. 645.

Where an engine had a defective headlight, but was furnished with hand lights which would throw a light five miles, to be used in an emergency, but the engineer negligently failed to use such lights and a collision occurred, causing injury to the plaintiff, it was held that the accident resulted, not from the negligence of the defendant company in failing to repair the defective headlight, but from the negligence of the engineer, who was the plaintiff's fellow servant, in failing to use the hand

some of the authorities, the master's negligence must be the proximate cause of the injury in order to charge him with liability.¹

Rule in Admiralty Law. — There seems to be especial reason why the rule that a master is liable to a servant for an injury resulting from the concurrent negligence of himself and a fellow servant should prevail in the admiralty law. The admiralty rule does not necessarily prevent the recovery of damages by a party injured in case of maritime tort occasioned by concurring negligence; the rule is to divide the damages.² If, therefore, a servant's own negligence is not a bar to his recovery, *a fortiori* the negligence of his fellow servants should not have that effect.³

2. Liability of Master for Negligence of Servants in Certain Cases — a. IN GENERAL. — The rule that a master is not liable for the negligence of a co-servant does not go to the extent of exempting him from liability in every case when it appears that he did not himself do or direct the doing of the negligent act; in certain cases he may be liable even when the immediate negligence is that of a person who in some sense is the co-servant of the person injured.

b. INCOMPETENT FELLOW SERVANTS — (1) General Rule. — Thus the master may, in a proper case, be charged with liability to a servant who is injured through the negligence of an incompetent fellow servant. This limitation of the fellow-servant rule may be broadly stated as follows: An employer

lights, and that the defendant was not liable. *New York, etc., R. Co. v. Perriguy*, 138 Ind. 414.

1. Applicability of the Doctrine of Proximate and Remote Cause. — In a few cases it seems to have been held that in order that the master may be held liable, his negligence must have been the "proximate cause" of the injury. *Little Rock, etc., R. Co. v. Barry*, 84 Fed. Rep. 944, 56 U. S. App. 37; *Kevern v. Providence Gold, etc., Min. Co.*, 70 Cal. 392; *Trewatha v. Buchanan Gold Min., etc., Co.*, 96 Cal. 494; *Lutz v. Atlantic, etc., R. Co.*, 6 N. Mex. 496. See also *Henry v. St. Louis, etc., R. Co.*, 76 Mo. 288.

In the case of *Fowler v. Chicago, etc., R. Co.*, 61 Wis. 159, 17 Am. & Eng. R. Cas. 536, a switchman was injured while making a coupling, by an engine being backed down upon him. The engine was not a regular switch engine, but it was a regular road engine, being used for switching purposes, and had been so used for sixteen days. The regular switch engine would not have had the goose-neck projection by which the employee was injured, and would have been so constructed as not to obstruct the view backward. It was held that the negligence of co-servants, and not any insufficiency or unfitness in the engine itself, was the proximate cause of the injury, and that the company was not liable.

And again in *Pease v. Chicago, etc., R. Co.*, 61 Wis. 163, 17 Am. & Eng. R. Cas. 527, where the chain coupling was broken and the brakeman had to go under the platform to make the coupling, and while he was under it the conductor, not knowing his position, gave the signal to the engineer to move up and thereby the brakeman was killed, it was held that it was the negligence of the brakeman, and not the imperfect coupling, that was the proximate cause of the injury, and therefore the company was not liable.

But in a dissenting opinion delivered by

Freeman, J., in *Lutz v. Atlantic, etc., R. Co.*, 6 N. Mex. 530, the learned judge objects to the application of the doctrine of proximate and remote, mediate and immediate causes to cases where the injury is the result in part of the negligence of the master and in part of that of the servant. He says: "I affirm without hesitation that wherever the facts of the case demonstrate that the negligence of the master contributed to the accident, negligence is regarded, as a matter of law, as direct and proximate." And it is to be observed that in most of the cases which lay down the rule that where an injury to a servant is caused in part by the negligence of the master and in part by that of his servant the master is liable, there is no reference to the doctrine of proximate and remote cause, but it is assumed that the master is liable if his negligence contributed to the injury.

Where machinery was held together by two clamps, which were improper appliances and made the use of the machinery dangerous, and one of these clamps broke, and the engineer continued to run the machinery with but one clamp, which rendered the use of the machinery more dangerous, and this afterwards broke and injured a workman engaged in the same general business, the employer was held not responsible; for the proximate cause of the injury was the carelessness of the engineer, who was a fellow servant of the injured man, in running his engine when it was dangerous. *Philadelphia Iron, etc., Co. v. Davis*, 111 Pa. St. 597, 56 Am. Rep. 305.

2. Anderson v. The Ashebrooke, 44 Fed. Rep. 124. See the title *COMPARATIVE NEGLIGENCE*, vol. 6, p. 365.

3. Concurrent Negligence Rule Applicable in the Admiralty Law. — *The Phoenix*, 34 Fed. Rep. 760; *Anderson v. The Ashebrooke*, 44 Fed. Rep. 124; *Killien v. Hyde*, 63 Fed. Rep. 172; *The Joseph B. Thomas*, 81 Fed. Rep. 578.

who negligently or knowingly employs or retains in his service an incompetent servant is liable for injuries to a fellow servant, sustained through the incompetency of the servant so employed and retained, unless the injured servant has assumed the risks incident to such incompetency.¹ This is a universally accepted rule,² and is recognized in every careful statement of the fellow-

1. **Statement of the Rule.** — The rule is thus stated by Mr. Thompson: "If the master has failed to exercise ordinary or reasonable care in the selection of his servants, in consequence of which he has in his employ a servant who, by reason of habitual drunkenness, negligence, or other vicious habits, or by reason of want of the requisite skill to discharge the duties which he is employed to perform, or for any other cause, is unfit for the service in which he is engaged, and if, in consequence of such unfitness, an injury happens to another servant, the master must answer for the damages suffered by such servant." 3 Thomp. on Negligence 974, *approved in* Ohio, etc., R. Co. v. Collarn, 73 Ind. 261, 38 Am. Rep. 134, 5 Am. & Eng. R. Cas. 554.

In the case of Evansville, etc., R. Co. v. Guyton, 115 Ind. 450, 33 Am. & Eng. R. Cas. 311, the rule is stated by Mitchell, C. J., as follows: "In case an employee proves to be incompetent for the duty assigned him, and ordinary care has not been used in his selection, or if he be retained after notice of his incompetency, the employer will be liable to a co-employee whose injury results proximately from the lack of qualification of the fellow servant, unless the person injured had notice of the incompetency, or had equal opportunities with the employer to obtain notice."

2. **Cases Recognizing and Applying the Rule** — *United States*. — Baltimore, etc., R. Co. v. Henthorne, 43 U. S. App. 113, 73 Fed. Rep. 634; Anderson v. New York, etc., Steam-ship Co., 47 Fed. Rep. 38; Louisville, etc., R. Co. v. Kelly, 63 Fed. Rep. 407, 24 U. S. App. 103; Wabash R. Co. v. McDaniels, 107 U. S. 454, 11 Am. & Eng. R. Cas. 158; Northern Pac. R. Co. v. Mares, 123 U. S. 710.

Alabama. — Walker v. Bolling, 22 Ala. 294; Mobile, etc., R. Co. v. Thomas, 42 Ala. 672; Alabama, etc., R. Co. v. Waller, 48 Ala. 459; Mobile, etc., R. Co. v. Smith, 59 Ala. 245; Tyson v. South, etc., Alabama R. Co., 61 Ala. 554, 32 Am. Rep. 8; Louisville, etc., R. Co. v. Davis, 91 Ala. 487; Conrad v. Gray, 109 Ala. 130.

Arkansas. — Fones v. Phillips, 39 Ark. 17, 43 Am. Rep. 264.

California. — Taylor v. Western Pac. R. Co., 45 Cal. 323.

Colorado. — Colorado Midland R. Co. v. O'Brien, 16 Colo. 219.

Connecticut. — McElligott v. Randolph, 61 Conn. 157, 29 Am. St. Rep. 181.

Illinois. — Illinois Cent. R. Co. v. Cox, 21 Ill. 20, 71 Am. Dec. 298; Chicago, etc., R. Co. v. Swett, 45 Ill. 197, 92 Am. Dec. 206; Illinois Cent. R. Co. v. Jewell, 45 Ill. 99, 92 Am. Dec. 240; Columbus, etc., R. Co. v. Troesch, 68 Ill. 545, 18 Am. Rep. 578; U. S. Rolling Stock Co. v. Wilder, 116 Ill. 100, 25 Am. & Eng. R. Cas. 414; Fraser v. Schroeder, 163 Ill. 459, 60 Ill. App. 519; Western Stone Co. v. Whalen, 151 Ill. 472, 42 Am. St. Rep. 244;

Consolidated Coal Co. v. Haenni, 146 Ill. 623; Charles Pope Glucose Co. v. Byrne, 60 Ill. App. 17. See Illinois Cent. R. Co. v. Cox, 21 Ill. 20, 71 Am. Dec. 298; Toledo, etc., R. Co. v. Durkin, 76 Ill. 395; Anglo-American Packing, etc., Co. v. Lewandowski, 26 Ill. App. 629.

Indiana. — Fitzpatrick v. New-Albany, etc., R. Co., 7 Ind. 436; Thayer v. St. Louis, etc., R. Co., 22 Ind. 26, 85 Am. Dec. 409; Chicago, etc., R. Co. v. Harney, 28 Ind. 28, 92 Am. Dec. 282; Pittsburgh, etc., R. Co. v. Ruby, 38 Ind. 294, 10 Am. Rep. 111; Ohio, etc., R. Co. v. Collarn, 73 Ind. 261, 38 Am. Rep. 134, 5 Am. & Eng. R. Cas. 554; Indiana Mfg. Co. v. Millican, 87 Ind. 87; Pennsylvania R. Co. v. Roney, 89 Ind. 453, 46 Am. Rep. 173; Nordyke, etc., Co. v. Van Sant, 99 Ind. 188; Indianapolis, etc., R. Co. v. Johnson, 102 Ind. 352; Evansville, etc., R. Co. v. Guyton, 115 Ind. 450, 33 Am. & Eng. R. Cas. 311; Lake Shore, etc., R. Co. v. Stupak, 123 Ind. 210; Cincinnati, etc., R. Co. v. Madden, 134 Ind. 462; Parker v. Sample, 11 Ind. App. 698; Brazil, etc., Coal Co. v. Cain, 98 Ind. 282; Chicago, etc., R. Co. v. Beatty, 13 Ind. App. 604.

Kansas. — Dow v. Kansas Pac. R. Co., 8 Kan. 642; Kansas Pac. R. Co. v. Salmon, 14 Kan. 512; Union Pac. R. Co. v. Young, 19 Kan. 488; Atchison, etc., R. Co. v. Moore, 29 Kan. 632, 11 Am. & Eng. R. Cas. 243.

Kentucky. — Chesapeake, etc., R. Co. v. McMannon, (Ky. 1888) 8 S. W. Rep. 18, 33 Am. & Eng. R. Cas. 308.

Louisiana. — Poirier v. Carroll, 35 La. Ann. 699.

Maine. — Blake v. Maine Cent. R. Co., 70 Me. 60, 35 Am. Rep. 297.

Maryland. — Campbell, etc., Co. v. Roediger, 78 Md. 601; Maryland Steel Co. v. Marney, (Md. 1898) 42 Atl. Rep. 60.

Massachusetts. — Farwell v. Boston, etc., R. Corp., 4 Met. (Mass.) 49, 38 Am. Dec. 339; Cayzer v. Taylor, 10 Gray (Mass.) 274, 69 Am. Dec. 317; Gilman v. Eastern R. Co., 13 Allen (Mass.) 433, 90 Am. Dec. 210, 10 Allen (Mass.) 233, 87 Am. Dec. 635; Colton v. Richards, 123 Mass. 484; Curran v. Merchants' Mfg. Co., 130 Mass. 374, 39 Am. Rep. 457; Keith v. New Haven, etc., Co., 140 Mass. 175; Sweat v. Boston, etc., R. Co., 156 Mass. 284; Olsen v. Andrews, 168 Mass. 261; McPhee v. Scully, 163 Mass. 216.

Michigan. — Hilts v. Chicago, etc., R. Co., 55 Mich. 437, 17 Am. & Eng. R. Cas. 628; Slater v. Chapman, 67 Mich. 523, 11 Am. St. Rep. 593; Lee v. Michigan Cent. R. Co., 87 Mich. 574. See Marquette, etc., R. Co. v. Taft, 28 Mich. 289; Quincy Min. Co. v. Kitts, 42 Mich. 34.

Minnesota. — Bunnell v. St. Paul, etc., R. Co., 29 Minn. 305; Smith v. E. W. Backus Lumber Co., 64 Minn. 447. See Brown v. Winona, etc., R. Co., 27 Minn. 162, 38 Am. Rep. 285.

servant doctrine.¹ It has, in some jurisdictions, been incorporated in the statutory law.²

(2) *Extent and Limitations of the Rule* — (a) *In General.* — A master does

Mississippi. — New Orleans, etc., R. Co. v. Hughes, 49 Miss. 258.

Missouri. — McDermott v. Pacific R. Co., 30 Mo. 115; Rohback v. Pacific R. Co., 43 Mo. 187; Harper v. Indianapolis, etc., R. Co., 47 Mo. 567; 4 Am. Rep. 353; Moss v. Pacific R. Co., 49 Mo. 167; McDermott v. Hannibal, etc., R. Co., 73 Mo. 516, 39 Am. Rep. 526, 2 Am. & Eng. R. Cas. 85; McDermott v. Hannibal, etc., R. Co., 87 Mo. 285, 28 Am. & Eng. R. Cas. 528; Maxwell v. Hannibal, etc., R. Co., 85 Mo. 95; Grube v. Missouri Pac. R. Co., 98 Mo. 330, 14 Am. St. Rep. 645; Loe v. Chicago, etc., R. Co., 57 Mo. App. 350; Williams v. Missouri Pac. R. Co., 109 Mo. 475.

New Jersey. — Nord Deutscher Lloyd Steamship Co. v. Ingebregsten, 57 N. J. L. 400.

New York. — Newell v. Ryan, 40 Hun (N. Y.) 286; Henry v. Brady, 9 Daly (N. Y.) 142; Sizer v. Syracuse, etc., R. Co., 7 Lans. (N. Y.) 67; Stewart v. New York, etc., R. Co., (Supreme Ct.) 28 N. Y. St. Rep. 215; Bossout v. Rome, etc., R. Co., (Supreme Ct.) 32 N. Y. St. Rep. 884; Laning v. New York Cent. R. Co., 49 N. Y. 521, 10 Am. Rep. 417; Baulec v. New York, etc., R. Co., 59 N. Y. 356, 17 Am. Rep. 325; Wall v. Delaware, etc., R. Co., 54 Hun (N. Y.) 454, affirmed 125 N. Y. 727; Fines v. Sillery, 73 Hun (N. Y.) 549; O'Loughlin v. New York Cent., etc., R. Co., 87 Hun (N. Y.) 538; Mann v. Delaware, etc., Canal Co., 91 N. Y. 495; Coppins v. New York Cent., etc., R. Co., 122 N. Y. 557, 44 Am. & Eng. R. Cas. 618, 19 Am. St. Rep. 523, affirming 48 Hun (N. Y.) 292; Sutton v. New York, etc., R. Co., (Supreme Ct.) 21 N. Y. Supp. 312, affirmed 142 N. Y. 623; Cameron v. New York Cent., etc., R. Co., 77 Hun (N. Y.) 519; Wood v. New York Cent., etc., R. Co., 32 N. Y. App. Div. 606.

Pennsylvania. — Frazier v. Pennsylvania R. Co., 38 Pa. St. 104, 80 Am. Dec. 467; Huntingdon, etc., R., etc., Co. v. Decker, 82 Pa. St. 119, 84 Pa. St. 419; Lebbering v. Struthers, 157 Pa. St. 312, 33 W. N. C. (Pa.) 99; Hughes v. Baltimore, etc., R. Co., 164 Pa. St. 178, 44 Am. St. Rep. 597; Huntsinger v. Trexler, 181 Pa. St. 497. See also Weger v. Pennsylvania R. Co., 55 Pa. St. 460; O'Donnell v. Allegheny Valley R. Co., 59 Pa. St. 239, 98 Am. Dec. 336; Delaware, etc., Canal Co. v. Carroll, 89 Pa. St. 374.

Tennessee. — Knoxville Iron Co. v. Dobson, 7 Lea (Tenn.) 367; Porter v. Waters-Allen Foundry, etc., Co., 94 Tenn. 370, citing 7 AM. AND ENG. ENCYC. OF LAW (1st ed.) 844, 848. See Fox v. Sandford, 4 Sneed (Tenn.) 36, 67 Am. Dec. 587.

Texas. — Houston, etc., R. Co. v. Myers, 55 Tex. 110; Texas Mexican R. Co. v. Whitmore, 58 Tex. 276, 11 Am. & Eng. R. Cas. 195; Bonner v. Whitcomb, 80 Tex. 178; Mexican Nat. R. Co. v. Musette, 7 Tex. Civ. App. 169; Galveston Rope, etc., Co. v. Burkett, 2 Tex. Civ. App. 308; Missouri Pac. R. Co. v. Patton, (Tex. Civ. App. 1894) 25 S. W. Rep. 339, affirmed (Tex. 1894) 26 S. W. Rep. 978; Campbell v. Cook, 86 Tex. 690, 40 Am. St. Rep. 878; Gulf, etc., R. Co. v. Pierce, 87 Tex. 144, 7 Tex. Civ. App. 597; Texas, etc., R. Co.

v. Johnson, 89 Tex. 519; International, etc., R. Co. v. Cook, 16 Tex. Civ. App. 386; East Line, etc., R. Co. v. Scott, 71 Tex. 703, 10 Am. St. Rep. 804.

Virginia. — Norfolk, etc., R. Co. v. Thomas, 90 Va. 205, 44 Am. St. Rep. 906; Norfolk, etc., R. Co. v. Nuckols, 91 Va. 193.

Washington. — Richardson v. Carbon Hill Coal Co., 6 Wash. 52.

West Virginia. — Core v. Ohio River R. Co., 38 W. Va. 456.

Wisconsin. — Haley v. Western Transit Co., 76 Wis. 344.

Canada. — St. Lawrence Sugar Refining Co. v. Campbell, Montreal L. R. 1 Q. B. 290; Baird v. Dunn, 33 New Bruns. 156.

See Haworth v. Seevers Mfg. Co., 87 Iowa 765, on rehearing (Iowa 1893) 54 N. W. Rep. 430; Fifield v. Northern R. Co., 42 N. H. 225; Hagins v. Cape Fear, etc., R. Co., 106 N. Car. 537; Willis v. Oregon R., etc., Co., 11 Oregon 257; Hard v. Vermont, etc., R. Co., 32 Vt. 473.

Convict Co-Employees. — An employee does not, by voluntarily engaging in labor with convicts in his master's employ, release the latter from liability for injuries sustained by him in consequence of the negligent or reckless act of his convict fellow servant, where the master failed to exercise the requisite care in employing and retaining the convict. "The duty of the master in this respect is affirmative and positive; and it is the same whether all of those employed be free laborers, or part of them be free and part convict as in the present case. The same reasons for the rule exist in both cases." Porter v. Waters-Allen Foundry, etc., Co., 94 Tenn. 370.

Selection of Incompetent for Particular Work. — Liability of a master to one servant for the negligence of another may arise also where a servant is selected and ordered to do a certain act which he is not qualified to perform. Fraser v. Schroeder, 163 Ill. 459.

1. Recognition of Rule in Statement of Fellow-Servant Doctrine. — The proposition that the master is answerable for the negligence of an incompetent fellow servant, it will be seen, is but the converse of the universally accepted rule that where an employer uses due care and diligence in selecting and retaining only competent and trustworthy servants he is not answerable to one of them for injuries resulting from the negligence of a fellow servant in the same service. See *supra*, this title, *Statement of Fellow-Servant Rule*.

2. Statutory Recognition of the Rule. — Under 43 & 44 Vict., c. 42, a master is liable to a servant for injury caused by the negligence of a fellow servant.

Under the *Kansas* Laws of 1874, c. 93, and the *Iowa* Laws of 1862, c. 169, § 7, a railroad company is liable to a servant for injury caused by the negligence of a fellow servant. *Kansas* Pac. R. Co. v. Peavey, 34 Kan. 472; *Hunt v. Chicago, etc., R. Co.*, 26 Iowa 363; *Kroy v. Chicago, etc., R. Co.*, 32 Iowa 357.

See also, as to the statutory law in *Louisiana*, the case of *Poirier v. Carroll*, 35 La. Ann. 699.

not, on the one hand, warrant the competency of his servants,¹ nor is he, on the other, relieved from liability for the negligence of an incompetent servant by the fact that he has no knowledge of the servant's incompetency.²

(b) **Degree of Care Required of Master.** — He is required to exercise ordinary or reasonable care and diligence in the selection and retention of his servants.³

1. Master Does Not Warrant Competency of Servants — England. — *Wilson v. Merry*, L. R. 11. L. Sc. 326; *Barton's Hill Coal Co. v. Reid*, 3 Macq. 11. L. Cas. 282; *Tarrant v. Webb*, 18 C. B. 797, 86 E. C. L. 797; *Wigmore v. Jay*, 5 Exch. 354.

Alabama. — *Conrad v. Gray*, 109 Ala. 130.

California. — *Stephens v. Doe*, 73 Cal. 26.

Colorado. — *Acme Coal Min. Co. v. McIver*, 5 Colo. App. 267; *Kindel v. Hall*, 8 Colo. App. 63.

Georgia. — *Keith v. Walker Iron, etc., Co.*, 81 Ga. 49, 12 Am. St. Rep. 296.

Maryland. — *Baltimore v. War*, 77 Md. 593; *Norfolk, etc., R. Co. v. Hoover*, 79 Md. 253, 47 Am. St. Rep. 392.

Pennsylvania. — *Reiser v. Pennsylvania Co.*, 152 Pa. St. 38, 34 Am. St. Rep. 620, 31 W. N. C. (Pa.) 221; *Mulhern v. Lehigh Valley Coal Co.*, 161 Pa. St. 270.

Texas. — *Gulf, etc., R. Co. v. Schwabbe*, 1 Tex. Civ. App. 573; *San Antonio, etc., R. Co. v. Taylor*, (Tex. Civ. App. 1896) 35 S. W. Rep. 855; *Pilkington v. Gulf, etc., R. Co.*, 70 Tex. 226.

In *Tarrant v. Webb*, 18 C. B. 797, 86 E. C. L. 797, the verdict for the plaintiff was set aside because the jurors had been instructed that the master was liable if the servant whose act caused the injury was incompetent, without requiring them to find whether the master knew, or, using due care, ought to have known, his incompetency, thus, in effect, holding the master to warrant the competency of the servants, which he was clearly not bound to do.

2. Knowledge of Incompetency by Master Not Necessary. — Upon the question of the master's liability for the negligence of an incompetent servant, it is wholly unimportant whether the master, in fact, knew of the character and habit of the servant; for the master cannot screen himself from liability on the ground that he did not know of the incompetency of the servant whose negligence caused injury to his fellow servant, if he might have known it by the exercise of reasonable care and caution. *Western Stone Co. v. Whalen*, 151 Ill. 472, 42 Am. St. Rep. 244; *Consolidated Coal Co. v. Haenni*, 146 Ill. 623; *Charles Pope Glucose Co. v. Byrne*, 60 Ill. App. 17; *Harper v. Indianapolis, etc., R. Co.*, 47 Mo. 567, 4 Am. Rep. 353. *Compare Illinois Steel Co. v. Paschke*, 51 Ill. App. 456.

As was said by Cooley, J., in *Davis v. Detroit, etc., R. Co.*, 20 Mich. 124, 4 Am. Rep. 364: "The ignorance itself is negligence in a case in which any proper inquiry would have obtained the necessary information, and where the duty to inquire was plainly imperative." *Citing Wright v. New York Cent. R. Co.*, 25 N. Y. 566.

3. Master Must Exercise Ordinary or Reasonable Care — England. — *Searle v. Lindsay*, 11 C. B. N. S. 429, 103 E. C. L. 429, 31 L. J. C. P. 106, 8 Jur. N. S. 746, 5 L. T. N. S. 427, 10 W. R.

89; *Wigmore v. Jay*, 5 Exch. 354, 19 L. J. Exch. 296, 14 Jur. 837; *Barton's Hill Coal Co. v. Reid*, 3 Macq. H. L. Cas. 266, 4 Jur. N. S. 767; *Lovegrove v. London, etc., R. Co.*, 16 C. B. N. S. 669, 111 E. C. L. 669, 33 L. J. C. P. 329; *Hutchinson v. York, etc., R. Co.*, 5 Exch. 352, 19 L. J. Exch. 296, 14 Jur. 837; *Brown v. Accrington Cotton Spinning, etc., Co.*, 3 H. & C. 511, 34 L. J. Exch. 208, 13 L. T. N. S. 94; *Feltham v. England, L. R. 2 Q. B. 33*; *Tarrant v. Webb*, 18 C. B. 797, 86 E. C. L. 797, 25 L. J. C. P. 261.

United States. — *Melville v. Missouri River, etc., R. Co.*, 48 Fed. Rep. 820.

Alabama. — *Alabama, etc., R. Co. v. Waller*, 48 Ala. 459; *Mobile, etc., R. Co. v. Smith*, 59 Ala. 245; *Holland v. Tennessee Coal, etc., Co.*, 91 Ala. 444.

California. — *Fagundes v. Central Pac. R. Co.*, 79 Cal. 97; *McLean v. Blue Point Gravel Min. Co.*, 51 Cal. 255; *Hogan v. Central Pac. R. Co.*, 49 Cal. 129.

Colorado. — *Acme Coal Min. Co. v. McIver*, 5 Colo. App. 267; *Summerhays v. Kansas Pac. R. Co.*, 2 Colo. 484.

Georgia. — *Cooper v. Mullins*, 30 Ga. 146, 76 Am. Dec. 638.

Illinois. — *Columbus, etc., R. Co. v. Troesch*, 68 Ill. 545, 18 Am. Rep. 578; *Illinois Cent. R. Co. v. Cox*, 21 Ill. 20, 71 Am. Dec. 298; *Chicago, etc., R. Co. v. Keefe*, 47 Ill. 108; *Webster Mfg. Co. v. Schmidt*, 77 Ill. App. 49.

Indiana. — *Parker v. Sample*, 11 Ind. App. 698; *Chicago, etc., R. Co. v. Beatty*, 13 Ind. App. 604; *Pittsburgh, etc., R. Co. v. Ruby*, 38 Ind. 294, 10 Am. Rep. 111; *Indiana, etc., R. Co. v. Snyder*, (Ind. 1892) 53 Am. & Eng. R. Cas. 225.

Iowa. — *Sullivan v. Mississippi, etc., R. Co.*, 11 Iowa 421; *Donaldson v. Mississippi, etc., R. Co.*, 18 Iowa 281, 87 Am. Dec. 391; *Hunt v. Chicago, etc., R. Co.*, 26 Iowa 363.

Kansas. — *Union Pac. R. Co. v. Milliken*, 8 Kan. 647.

Kentucky. — *Louisville, etc., R. Co. v. Collins*, 2 Duv. (Ky.) 114, 87 Am. Dec. 486.

Louisiana. — *Satterly v. Morgan*, 35 La. Ann. 1166.

Maine. — *Blake v. Maine Cent. R. Co.*, 70 Me. 60, 35 Am. Rep. 297; *Beaulieu v. Portland Co.*, 48 Me. 291.

Maryland. — *Norfolk, etc., R. Co. v. Hoover*, 79 Md. 253, 47 Am. St. Rep. 392.

Massachusetts. — *Farwell v. Boston, etc., R. Corp.*, 4 Met. (Mass.) 49, 38 Am. Dec. 339; *McPhee v. Scully*, 163 Mass. 216; *McDermott v. Boston*, 133 Mass. 349; *Colton v. Richards*, 123 Mass. 484; *Mackin v. Boston, etc., R. Co.*, 135 Mass. 201, 46 Am. Rep. 456.

Michigan. — *Hilts v. Chicago, etc., R. Co.*, 55 Mich. 437; *Davis v. Detroit, etc., R. Co.*, 20 Mich. 105, 4 Am. Rep. 364; *Michigan Cent. R. Co. v. Leahey*, 10 Mich. 193; *Jungnitsch v. Michigan Malleable Iron Co.*, 105 Mich. 270; *Lewis v. Emery*, 108 Mich. 641, *citing* 7 AM. AND ENG. ENCYC. OF LAW (1st ed.) 845.

(c) **What Constitutes Ordinary or Reasonable Care** — *aa. IN GENERAL.* — The question as to what amounts to such care has been the subject of much discussion, and of some difference of judicial opinion. It may, however, be asserted as the result of the best-considered cases that this ordinary or reasonable care on the part of the master implies, as between him and his employees, not simply the degree of diligence which is customary among those engaged in a like enterprise or business, but such as, having respect to the exigencies of the particular service, ought reasonably to be observed. It is such care as, in view of the consequences that may result from negligence on the part of the employees, is fairly commensurate with the perils or danger likely to be encountered.¹

Illustrations. — As illustrating the manner in which these principles have been applied by the courts, there are set forth in the notes certain cases in which it was found that the master had exercised,² and certain other cases in which

Missouri. — Rohback *v.* Pacific R. Co., 43 Mo. 187; Harper *v.* Indianapolis, etc., R. Co., 47 Mo. 567, 4 Am. Rep. 353; Williams *v.* Missouri Pac. R. Co., 109 Mo. 475; McDermott *v.* Pacific R. Co., 30 Mo. 115; O'Hare *v.* Chicago, etc., R. Co., 95 Mo. 662.

New York. — Sizer *v.* Syracuse, etc., R. Co., 7 Lans. (N. Y.) 67; Wright *v.* New York Cent. R. Co., 25 N. Y. 562; Chapman *v.* Erie R. Co., 55 N. Y. 579; Baulec *v.* New York, etc., R. Co., 59 N. Y. 356, 17 Am. Rep. 325; Warner *v.* Erie R. Co., 39 N. Y. 468; Burke *v.* Syracuse, etc., R. Co., 69 Hun (N. Y.) 21; Slater *v.* Jewett, 85 N. Y. 73, 39 Am. Rep. 627; Moran *v.* New York Cent., etc., R. Co., 3 Thomp. & C. (N. Y.) 770.

North Carolina. — Ponton *v.* Wilmington, etc., R. Co., 6 Jones L. (51 N. Car.) 245.

Ohio. — Columbus, etc., R. Co. *v.* Webb, 12 Ohio St. 475; Pittsburg, etc., R. Co. *v.* Devinney, 17 Ohio St. 197.

Pennsylvania. — Caldwell *v.* Brown, 53 Pa. St. 453; Reese *v.* Biddle, 112 Pa. St. 72.

Tennessee. — Fox *v.* Sandford, 4 Sneed (Tenn.) 36, 67 Am. Dec. 587.

Texas. — Pilkinton *v.* Gulf, etc., R. Co., 70 Tex. 226; Galveston, etc., R. Co. *v.* Davis, 4 Tex. Civ. App. 468; Houston, etc., R. Co. *v.* Willie, 53 Tex. 318, 37 Am. Rep. 756.

Vermont. — Hard *v.* Vermont, etc., R. Co., 32 Vt. 473; Noyes *v.* Smith, 28 Vt. 59, 65 Am. Dec. 222.

Wilful Negligence Not Necessary to Charge Master with Liability. — In Jordan *v.* Wells, 3 Woods (U. S.) 527, the United States Circuit Court for the northern district of Georgia held that in order to entitle one servant to recover for an injury received through the negligence of a fellow servant, it must be shown that not only was the servant incompetent but also that the master was wilfully negligent in employing him. But this is not the law. Wood's Master and Servant (2d ed.) 819; Tyson *v.* South, etc., Alabama R. Co., 61 Ala. 554, 32 Am. Rep. 8; McDonald *v.* Hazletine, 53 Cal. 35; Blake *v.* Maine Cent. R. Co., 70 Me. 60, 35 Am. Rep. 297; Delaware, etc., Canal Co. *v.* Carroll, 89 Pa. St. 374. See also cases cited *supra* in this note.

Highest Degree of Care Not Required. — In Jungnitsch *v.* Michigan Malleable Iron Co., 105 Mich. 270, it was held error for the court to instruct the jury as follows: "It is essential that the employer should use that care—

that responsible care — in the selection of his servants, that will, so far as possible, reduce the question of liability to accident to, we may say, in the ordinary course of affairs of life, a minimum." In the opinion delivered by Grant, J., it was said: "No such rule governs in the ordinary affairs of life, and especially in a case where the work to be done requires only sufficient strength and a moderate degree of intelligence. The reduction of danger to a minimum requires the exercise of the highest degree of care attainable. The law imposes no such duty upon the employer, but only the exercise of that reasonable care which the ordinarily prudent and careful man exercises in like or similar work."

1. Meaning of Words "Ordinary Care." — In Wabash R. Co. *v.* McDaniels, 107 U. S. 454, 11 Am. & Eng. R. Cas. 158, this question was fully discussed and the correct rule stated by the United States Supreme Court, *per* Harlan, J. See also Baltimore, etc., R. Co. *v.* Henthorne, 73 Fed. Rep. 634, 43 U. S. App. 113; Western Stone Co. *v.* Whalen, 151 Ill. 472, 42 Am. St. Rep. 244; Michigan Cent. R. Co. *v.* Gilbert, 46 Mich. 176, 2 Am. & Eng. R. Cas. 230; Williams *v.* Missouri Pac. R. Co., 109 Mo. 475; Wall *v.* Delaware, etc., R. Co., 54 Hun (N. Y.) 454, *affirmed* 125 N. Y. 727.

In Haworth *v.* Seevers Mfg. Co., 87 Iowa 765, it was said that ordinary care is such care "as an ordinary prudent man would exercise under the same or similar circumstances." To the same effect see Gulf, etc., R. Co. *v.* Schwabbe, 1 Tex. Civ. App. 573; Jungnitsch *v.* Michigan Malleable Iron Co., 105 Mich. 270.

In Kansas, etc., Coal Co. *v.* Brownlie, 60 Ark. 582, Bunn, C. J., said: "We know of no way of determining what ordinary care is, except to ascertain what men of ordinary care and prudence, engaged in a similar business on their own account, and for their own profit and success, are in the habit of doing."

For a discussion of the question as to what constitutes ordinary care, see the title NEGLIGENCE.

2. Instances of What Amounts to Ordinary Care. — In an action against a railroad company by an engineer, for an injury caused by the negligence of a freight conductor, evidence that he was put on the list of conductors some eight months before the accident, after having been employed as brakeman for a somewhat longer period, and that he had once by mistake car-

it was found that he had not exercised,¹ the proper degree of care in the selection and retention of his servants.

ried a passenger by his stopping place, and had for that reason spoken disparagingly of himself to his employer, but where it appears that he has nevertheless maintained a good standing, and that no fault has been found with him except by himself for this single blunder, does not make out a case of incompetence. *Michigan Cent. R. Co. v. Dolan*, 32 Mich. 510.

And in a *Texas* case the personal representatives of a brakeman sought damages on the ground that his death had been caused by the incompetence of the engineer. The latter had been a fireman on other roads, and also on the defendant's road for a year previous to his promotion as engineer, and had borne a good reputation as to his knowledge of his work and the performance of his duty. It was held that the defendant was not guilty of negligence in employing him in the latter capacity. *Texas, etc., R. Co. v. Berry*, 67 Tex. 238.

Promoting to the post of conductor a person who has served seven years as car coupler and shover, the duties of which place made him acquainted with the modes of making up trains, the dangers incurred by those employed in the work and by others, and the precautions necessary to guard against accidents, is not negligence nor evidence of negligence, it not appearing that such person had ever shown himself incompetent or unfaithful prior to the happening of the injury sued for. *Haskin v. New York Cent., etc., R. Co.*, 65 Barb. (N. Y.) 129.

The case of *Gibson v. Northern Cent. R. Co.*, 22 Hun (N. Y.) 289, was an action against a railroad company by an employee for an injury resulting from a defective car bumper. It was alleged that the car inspector was negligent in not having sent the car to the shops for repairs. It appeared that the inspector was sober and intelligent, but that he had no knowledge of machinery except that obtained by working one or two years in the defendant's carpenter shop, bolting, putting in brasses and boxes, and assisting in the shop. The court held that the defendant was not negligent in appointing him a car inspector.

In a *Pennsylvania* case it appeared that B., an engineer in the employ of a railroad company, was going through the yards of the company to his work; a locomotive of the company was backing slowly on one of the tracks; it struck B. and killed him. Whether he was walking on the track, or stepped suddenly upon it and in the way of the approaching engine, was not clearly shown. In an action against the company for damages, based on the negligence of the company, alleged to consist in placing the engine in charge of an engineer whose left eye was so badly diseased as to require the keeping of it bandaged, and whose right eye was defective in vision owing to sympathetic causes, the Supreme Court held that the plaintiff was properly nonsuited. *Keyes v. Pennsylvania Co.*, (Pa. 1886) 3 Atl. Rep. 15.

Care in Employment of Section Hand. — On the ground that any one of fair intelligence and the requisite physical ability is competent to

perform the work of a section hand it has been held that an employer need not inquire into the experience of an employee who is hired to do this kind of work, if he possesses such intelligence and physical ability. *Timm v. Michigan Cent. R. Co.*, 98 Mich. 226.

1. Instances of Want of Ordinary Care. — A railroad company placing one of its brakemen in a position where peculiar fitness is required, without being assured of his competency by instituting special inquiries, or from previous like service, is liable for any injuries which may happen to a fellow servant, without notice, the proximate cause of which was the incompetency of such brakeman. Thus, a conductor, having been but recently promoted from the position of brakeman, but without test as to his qualifications by any special examination, who is placed in charge of a "wild train," a service demanding special skill, and who, owing to his neglect of an order, causes a collision in which a brakeman on the train was injured, is incompetent for the position in which he was placed, and the company is remiss in its duty in selecting him, and is liable to the brakeman for the injuries he received. *Evansville, etc., R. Co. v. Guyton*, 115 Ind. 450, 33 Am. & Eng. R. Cas. 311.

And where the conductor of a train was injured in consequence of the mismanagement of a locomotive by a fireman, who had been placed in charge of the engine by the agents of the company, it was held, in an action for damages against the company, that it was responsible, on the ground that its agents were negligent or unmindful of their duty to employ competent and skilful servants in the execution of the company's business. *Harper v. Indianapolis, etc., R. Co.*, 47 Mo. 567, 4 Am. Rep. 353.

In an *Illinois* case it appeared that the defendant, a railroad company, employed an engineer who was given to fast running, addicted to drinking, and inattentive to his watch and timecard. It was held that the defendant was bound to know the qualifications of its employees in such responsible positions, and that where a brakeman was thrown from a car and killed by reason of the engineer's incompetency, his representatives could recover for his death. *Illinois Cent. R. Co. v. Jewell*, 46 Ill. 99. But Mr. McKinney, in his work on *Fellow Servants*, § 81, says of this case that "doubtless" it "states the rule of responsibility too strictly."

In a case decided by the *United States* Supreme Court a brakeman sought damages for an injury alleged to have resulted from the employment by the company of an incompetent train dispatcher. It appeared that the latter was a bright, industrious boy seventeen years of age, but that his whole knowledge of telegraphy had been acquired during one year's service as a messenger boy, during which he received instruction in the art; and that he had not been considered competent for some parts of the business. A judgment for damages was sustained. *Wabash R. Co. v. McDaniels*, 107 U. S. 454.

A manufacturing company, also, is liable

Employment of Person Generally Known to Be Incompetent. — It has been held that a master who employs a person generally known to be incompetent may be chargeable with negligence in not knowing the reputation of such person. Ignorance of the servant's general reputation, on the part of the master, is itself negligence in a case in which the proper inquiry would have obtained the necessary information, and where the duty to inquire was plainly imperative.¹

bb. NEGLIGENCE IN RETAINING INCOMPETENT SERVANTS — (*aa*) *In General.* — The want of that care in reference to the employment of servants with which the master is chargeable may consist in the retention of an incompetent servant in his employ; for not only is the master bound to employ competent servants, but he must see to it that they remain competent, and if the incompetency of a particular servant is known to the master, or has existed so long or under such circumstances that, exercising due care, he ought to have known it, he is responsible,² unless, of course, the injured servant knew of such incompetency and made no complaint about it to the employer.³

(*bb*) *With Actual Knowledge of Incompetency.* — Where a master obtains actual knowledge of the incompetency of a servant in his employ, he will, of course, be liable for any injury resulting from such unfitness, if he retains him in his employment an unreasonable length of time after obtaining such knowledge.⁴

for damages caused by placing a man, accustomed to the habitual use to excess of intoxicating liquors, in charge of business including the control and direction of persons operating dangerous machinery. *Kean v. Detroit Copper, etc., Rolling Mills*, 66 Mich. 277, 11 Am. St. Rep. 492.

And for a case where it was held that the evidence justified the submission to the jury of the question as to the negligent performance, by the defendant, of the duty it owed to its servants to use due care in the selection of competent servants, see *Mann v. Delaware, etc., Canal Co.*, 91 N. Y. 495, 12 Am. & Eng. R. Cas. 199.

1. Employing Person Whose Incompetency Is Generally Known. — *Tarrant v. Webb*, 18 C. B. 797, 86 E. C. L. 797; *Edwards v. — Railroad Co.*, 4 C. & F. 530; *Hayden v. Smithville Mfg. Co.*, 29 Conn. 557; *Norfolk, etc., R. Co. v. Hoover*, 79 Md. 253, 47 Am. St. Rep. 392; *Gilman v. Eastern R. Corp.*, 10 Allen (Mass.) 233, 87 Am. Dec. 635, 13 Allen (Mass.) 433, 90 Am. Dec. 210; *Summersell v. Fish*, 117 Mass. 312; *Hatt v. Nay*, 144 Mass. 186; *Davis v. Detroit, etc., R. Co.*, 20 Mich. 105, 4 Am. Rep. 364; *Mad River, etc., R. Co. v. Barber*, 5 Ohio St. 541, 67 Am. Dec. 312; *Texas, etc., R. Co. v. Johnson*, 89 Tex. 519. See also *Gier v. Los Angeles Consol. Electric R. Co.*, 108 Cal. 129.

2. Retention of Incompetent Servants. — *Gilman v. Eastern R. Corp.*, 10 Allen (Mass.) 233, 87 Am. Dec. 635, 13 Allen (Mass.) 433, 90 Am. Dec. 210; *Coppins v. New York Cent., etc., R. Co.*, 122 N. Y. 557, 19 Am. St. Rep. 523, 44 Am. & Eng. R. Cas. 618, affirming 48 Hun (N. Y.) 292.

3. Matthews v. Bull, (Cal. 1897) 47 Pac. Rep. 773, quoting 7 AM. AND ENG. ENCYC. OF LAW (1st ed.) 848. See *infra*, this section, *Where Injured Servant Has Knowledge of the Other's Incompetency*.

4. Same — With Actual Knowledge of Incompetency — California. — *Matthews v. Bull*, (Cal. 1897) 47 Pac. Rep. 773, quoting 7 AM. AND ENG. ENCYC. OF LAW (1st ed.) 848.

Indiana. — *Pittsburgh, etc., R. Co. v. Ruby*, 38 Ind. 294, 10 Am. Rep. 111; *Ohio, etc., R. Co. v. Collarn*, 73 Ind. 261, 38 Am. Rep. 134; *Louisville, etc., R. Co. v. Breedlove*, 10 Ind. App. 657.

Louisiana. — *Poirier v. Carroll*, 35 La. Ann. 699.

Massachusetts. — *Gilman v. Eastern R. Corp.*, 10 Allen (Mass.) 236, 87 Am. Dec. 635, 13 Allen (Mass.) 433, 90 Am. Dec. 210.

Michigan. — *Kean v. Detroit Copper, etc., Rolling Mills*, 66 Mich. 277, 11 Am. St. Rep. 492.

Mississippi. — *New Orleans, etc., R. Co. v. Hughes*, 49 Miss. 258.

Missouri. — *Neilon v. Kansas City, etc., R. Co.*, 85 Mo. 599.

New York. — *Chapman v. Erie R. Co.*, 55 N. Y. 579; *Cameron v. New York Cent., etc., R. Co.*, 77 Hun (N. Y.) 519.

Pennsylvania. — *Huntingdon, etc., R., etc., Co. v. Decker*, 82 Pa. St. 119, 84 Pa. St. 419; *Hughes v. Baltimore, etc., R. Co.*, 164 Pa. St. 178, 44 Am. St. Rep. 597.

Texas. — *Houston, etc., R. Co. v. Myers*, 55 Tex. 110.

This would seem to be the rule even under a statute providing that an employer shall not be responsible for the negligence of a fellow servant "unless he has neglected to use ordinary care in the selection of the culpable employee." *Gier v. Los Angeles Consol. Electric R. Co.*, 108 Cal. 129.

Knowledge by Railroad Company of Employee's Breach of Rules. — Thus, where a conductor of a train was injured by reason of the incompetency of a fireman whom the engineer permitted to manage the engine, it was held that if the company knew of such a practice on the part of the engineers on its road, and did not forbid it, and the conductor did not know that the engine was in charge of the fireman at the time, the company was liable for damages for the injury sustained. *Harper v. Indianapolis, etc., R. Co.*, 47 Mo. 567, 4 Am. Rep. 353.

And in an *Indiana* case the plaintiff was a

(cc) *Notice of Incompetency to Master's Agent*. — Although the master does not himself have actual notice of the incompetency of a servant, he is chargeable with such knowledge if it is possessed by an employee who is invested with the power to employ and discharge servants.¹ But knowledge of the incompe-

track repairer, and had been injured by an engine run by a fireman. It was held that the defendant was liable, although it had given orders to its engineers not to permit firemen to control its engines, because, having had notice of disobedience of such orders, it retained the disobedient engineers in its employ. *Ohio, etc., R. Co. v. Collarn*, 73 Ind. 261, 38 Am. Rep. 134, 5 Am. & Eng. R. Cas. 554.

Knowledge by Employee of Servant's Intemperate Habits. — In a *Michigan* case it appeared that a foreman, under whose directions the plaintiff claimed to have been injured, was in the habit of getting intoxicated, and that the master knew of such habit. The court said: "There can be no question, I apprehend, at this late day, but that it must be regarded as negligence and a want of ordinary care, in any of our large manufacturing institutions, to place men who are accustomed to the habitual use to excess of intoxicating liquor in charge of business requiring the control and direction of persons operating dangerous machinery, and that for any injury arising to the employed under the charge of an intoxicated foreman, arising from such cause, when the company has knowledge of such intemperate habits, it must and should make reasonable compensation." The case seems to have gone against the plaintiff because the danger was as apparent to him as to the foreman, and it was said that he should not have obeyed the order in question. *Kean v. Detroit Copper, etc., Rolling Mills*, 66 Mich. 277, 11 Am. St. Rep. 492. See also *Stevens v. San Francisco, etc., R. Co.*, 100 Cal. 554.

Single Act of Negligence by Servant. — It has been held that a single act of negligence on the part of a railroad employee, coming to the knowledge of the railroad company, is not necessarily sufficient to charge the company with negligence in retaining him in its service. *Baulec v. New York, etc., R. Co.*, 59 N. Y. 356, 17 Am. Rep. 325.

1. Notice to Servant Invested with Power to Employ and Discharge Servants. — *Baltimore, etc., R. Co. v. Henthorne*, 73 Fed. Rep. 634, 43 U. S. App. 113; *Maxwell v. Hannibal, etc., R. Co.*, 85 Mo. 95; *Texas, etc., R. Co. v. Whitmore*, 58 Tex. 276.

Notice to Managing Agent of Corporation. — It has been said that notice to an agent of a corporation relating to any matter of which he has the management and control, is notice to the corporation. In the case of *Pittsburgh, etc., R. Co. v. Ruby*, 38 Ind. 322, 10 Am. Rep. 111, Downey, J., speaking for the court, said: "We think that notice to an agent of a corporation, relating to any matter of which he has the management and control, is notice to the corporation, and we do not see any reason why this rule is not applicable here. * * * As it was the duty of the master of transportation to communicate all matters concerning his agency to his principal, it may be presumed that he did so. But whether he did so or not, notice to him is notice to his principal, when

it relates, as it did here, to the business which he was transacting for the company. He was placed in his position that he might make himself acquainted with the conduct of those who were placed under his direction and control, and he seems to have had the power to appoint and remove, promote and degrade, those who were engaged in the business of which he had the oversight." This language was quoted with approval in *Ohio, etc., Co. v. Collarn*, 73 Ind. 272, 38 Am. Rep. 134, 5 Am. & Eng. R. Cas. 554.

Certainly when the managing agent of a corporation is charged with the duty of employing the corporation's servants, notice to him of the incompetency of a servant is to be imputed to the corporation. In *Baulec v. New York, etc., R. Co.*, 59 N. Y. 356, 17 Am. Rep. 325, it was said that "when the master is a corporation, necessarily acting by and through agents, the acts of its general agents charged with the employment and discharge of servants, in the performance of that duty, must be regarded as its acts. The corporation should be regarded as constructively present in all acts performed by its general agents within the scope and range of their ordinary employment."

Notice to a Railroad Superintendent intrusted with the management of the road and the power of employing and discharging hands has been held to be notice to the company. *Neilon v. Kansas City, etc., R. Co.*, 85 Mo. 599; *Huntingdon, etc., R., etc., Co. v. Decker*, 82 Pa. St. 119, 84 Pa. St. 424; *Mexican Nat. R. Co. v. Musette*, 7 Tex. Civ. App. 169.

And it has been held that it is sufficient to charge the railroad company with notice if the superintendent's assistant has such notice. *Chapman v. Erie R. Co.*, 55 N. Y. 579.

Notice to the Master of Transportation and General Superintendent of the defendant railroad company was, in *Pittsburgh, etc., R. Co. v. Ruby*, 38 Ind. 294, 10 Am. Rep. 111, imputed to the company.

Notice to Foreman of Construction Crew. — It has been held that the knowledge by the foreman of a bridge construction crew of the carelessness of an engineer in charge of the engine with which a pile-driver used by the crew is operated is sufficient to charge the railroad company with knowledge of the engineer's incompetency. *Texas Mexican R. Co. v. Whitmore*, 58 Tex. 276, 11 Am. & Eng. R. Cas. 195.

Notice to Master Mechanic. — Notice to the master mechanic of the defendant railroad company, whose province it was to employ and discharge engineers and firemen, of the practice of the defendant's engineers of violating the rules by placing their engines in the hands of the firemen, has been held to be notice to the company. *Ohio, etc., R. Co. v. Collarn*, 73 Ind. 261, 38 Am. Rep. 134, 5 Am. & Eng. R. Cas. 554.

Notice to Roadmaster. — It has been held that to charge a railroad company with knowledge of the incompetence of one of its section fore-

tency of one servant by another who has no authority or control over the incompetent servant is not sufficient to charge the master with notice of such incompetency.¹ Thus knowledge by an employee who is not clothed with the power of employing servants will not affect the master with notice.²

(*dd*) *With Implied or Constructive Notice of Incompetency.* — But it is not only actual knowledge of the master, or of a servant charged with the duty of employing and discharging servants, that will render the master liable in case of the retention of an incompetent servant. If the incapacity of a servant has existed so long that, exercising due care, he ought to have known it, the master will be liable for an injury to another servant resulting from such incompetency.³

Drinking Habits of Servant. — This rule has frequently been applied in cases where a servant was addicted to the excessive use of intoxicants.⁴ But no definite rule can be laid down as to what length of time must elapse, where actual notice is not shown, to charge railroad companies with negligence in failing or neglecting to ascertain the habits of their employees with reference to drinking intoxicating liquors to excess. If they exercise due care and diligence in seeing that their employees are competent, careful, and sober, and fail to discover any vicious habits, they cannot be held liable for negligently retaining incompetent men.⁵

men, it is sufficient to prove that the road-master, whose duty it was to employ and discharge such foremen, had such knowledge. *McDermott v. Hannibal*, etc., R. Co., 73 Mo. 516, 39 Am. Rep. 526, 2 Am. & Eng. R. Cas. 85.

Notice to a Roundhouse Foreman, whose duty it is to look after the engines and the men, and to make reports to his superior, of the incompetence of an engineer, has been held sufficient to put the railroad company upon inquiry, and charge it with information that a reasonable pursuit of the inquiry would have disclosed. *Williams v. Missouri Pac. R. Co.*, 109 Mo. 475.

1. Notice to Servant Having No Authority or Control over Incompetent Servant. — *Acme Coal Min. Co. v. McIver*, 5 Colo. App. 267.

2. Notice to Servant Not Empowered to Employ and Discharge Servants. — *Reiser v. Pennsylvania Co.*, 152 Pa. St. 38, 34 Am. St. Rep. 620, 31 W. N. C. (Pa.) 221.

It has been held that notice of the incompetence of a fellow servant to one whose duty is confined to notifying trainmen when they are to be expected on duty is not notice to the railroad corporation. *Michigan Cent. R. Co. v. Dolan*, 32 Mich. 510.

And it has been held that notice of the habitual negligence and general bad habits of a car inspector, brought home to the master mechanic of a railroad company, will not make the company liable for an injury to another servant of the company, resulting from the negligence of the car inspector, unless it is shown that power to employ and discharge the car inspector was conferred by the company upon the master mechanic. *Kidwell v. Houston*, etc., R. Co., 3 Woods (U. S.) 313.

3. Implied Notice of Incompetency. — *Chicago*, etc., R. Co. *v. Doyle*, 18 Kan. 58; *Gilman v. Eastern R. Corp.*, 10 Allen (Mass.) 233, 87 Am. Dec. 635, 13 Allen (Mass.) 433, 60 Am. Dec. 210; *Michigan Cent. R. Co. v. Gilbert*, 46 Mich. 176, 2 Am. & Eng. R. Cas. 230; *Hilts v. Chicago*, etc., R. Co., 55 Mich. 437; *Laning v. New York Cent. R. Co.*, 49 N. Y. 521, 10 Am.

Rep. 417; *Coppins v. New York Cent.*, etc., R. Co., 122 N. Y. 557, 19 Am. St. Rep. 523, 44 Am. & Eng. R. Cas. 618; *Houston*, etc., R. Co. *v. Patton*, (Tex. 1888) 9 S. W. Rep. 175. See also *Davis v. Detroit*, etc., R. Co., 20 Mich. 105, 4 Am. Rep. 364.

4. Implied Notice of Servant's Drinking Habits. — *Baltimore*, etc., R. Co. *v. Henthorne*, 73 Fed. Rep. 634; *Chicago*, etc., R. Co. *v. Sullivan*, 63 Ill. 293; *Chicago*, etc., R. Co. *v. Doyle*, 18 Kan. 58; *Gilman v. Eastern R. Corp.*, 10 Allen (Mass.) 233, 87 Am. Dec. 635, 13 Allen (Mass.) 433, 60 Am. Dec. 210; *Hilts v. Chicago*, etc., R. Co., 55 Mich. 437, 17 Am. & Eng. R. Cas. 628; *Michigan Cent. R. Co. v. Gilbert*, 46 Mich. 176, 2 Am. & Eng. R. Cas. 230; *Kean v. Detroit Copper*, etc., Rolling Mills, 66 Mich. 277, 11 Am. St. Rep. 492; *Laning v. New York Cent. R. Co.*, 49 N. Y. 521, 10 Am. Rep. 417. *Contra*, *Chapman v. Erie R. Co.*, 55 N. Y. 579.

Thus habitual drunkenness of a railroad conductor, under circumstances bringing knowledge thereof to his employers, is sufficient to render them liable for injury resulting therefrom. *Chicago*, etc., R. Co. *v. Sullivan*, 63 Ill. 293.

And where a switchman was a habitual drunkard, and this fact was known or ought to have been known to the railroad company, and an injury resulted from his failure properly to adjust a switch, caused by his intoxication, it has been held that the company was liable. *Gilman v. Eastern R. Corp.*, 10 Allen (Mass.) 233, 87 Am. Dec. 635.

5. Same — Dependent on Continuance of Habits for What Period. — Thus where it was shown that an accident occurred through the negligent act of an engineer who was in an intoxicated condition, and that he had been in the habit of drinking to excess for a period of nine months while in the employment of the railroad company, and no actual notice or knowledge ever reached any superior officer of the engineer, it was held that a jury would be justified in finding that the company was negligent in failing to learn such habits, and in

(3) *Application of the Rule* — (a) **Prerequisites** — *aa. IN GENERAL.* — The application of the general rule governing the master's liability for the negligence of incompetent fellow servants depends upon the existence of three facts.

bb. INCOMPETENCY OF THE SERVANT. — Firstly, it must appear that the servant whose negligence caused the injury was incompetent.¹

cc. INJURY MUST BE DUE TO INCOMPETENCY. — Secondly, it must appear that the injury resulted from such servant's incompetency; in other words, a master is not liable for injuries to one servant by the negligence of another, on the ground of the unskilfulness of the latter, unless the injuries resulted from such unskilfulness.² Thus, unless the servant who is alleged to have been incom-

retaining the engineer in its employment. *Hilts v. Chicago, etc., R. Co., 55 Mich. 437, 17 Am. & Eng. R. Cas. 628.*

1. Incompetency of Negligent Servant Must Appear — *United States.* — *Gravelle v. Minneapolis, etc., R. Co., 10 Fed. Rep. 711.*

California. — *Gier v. Los Angeles Consol. Electric R. Co., 108 Cal. 129; Holland v. Southern Pac. R. Co., 100 Cal. 240.*

Colorado. — *Summerhays v. Kansas Pac. R. Co., 2 Colo. 484.*

Illinois. — *St. Louis Press Brick Co. v. Kenyon, 57 Ill. App. 640.*

Indiana. — *Evansville, etc., R. Co. v. Tohill, 143 Ind. 49; Ohio, etc., R. Co. v. Dunn, 138 Ind. 18.*

Maine. — *Corson v. Maine Cent. R. Co., 76 Me. 244, 17 Am. & Eng. R. Cas. 634.*

Maryland. — *Baltimore v. War, 77 Md. 593.*

Michigan. — *Timm v. Michigan Cent. R. Co., 98 Mich. 226; Thompson v. Lake Shore, etc., R. Co., 84 Mich. 281.*

Missouri. — *Zumwalt v. Chicago, etc., R. Co., 35 Mo. App. 661; McDermott v. Hannibal, etc., R. Co., 73 Mo. 516, 39 Am. Rep. 526, 2 Am. & Eng. R. Cas. 85; O'Hare v. Chicago, etc., R. Co., 95 Mo. 662.*

New York. — *Laning v. New York Cent. R. Co., 49 N. Y. 521, 10 Am. Rep. 417; Sutherland v. Troy, etc., R. Co., (Ct. App.) 35 N. Y. St. Rep. 853.*

North Carolina. — *Hagins v. Cape Fear, etc., R. Co., 106 N. Car. 537.*

Ohio. — *Consolidated Coal, etc., Co. v. Clay, 51 Ohio St. 542.*

Pennsylvania. — *Mulhern v. Lehigh Valley Coal Co., 161 Pa. St. 270; Snodgrass v. Carnegie Steel Co., 173 Pa. St. 228.*

Texas. — *Robinson v. Houston, etc., R. Co., 46 Tex. 540; Houston, etc., R. Co. v. Myers, 55 Tex. 110; Southern Cotton-Oil Co. v. De Vond, (Tex. Civ. App. 1894) 25 S. W. Rep. 43.*

2. Injury Must Result from Fellow Servant's Incompetency — *United States.* — *Central R. Co. v. Keegan, 82 Fed. Rep. 174, 51 U. S. App. 489.*

California. — *Cosgrove v. Pitman, 103 Cal. 268.*

Georgia. — *Dartmouth Spinning Co. v. Achord, 84 Ga. 14.*

Illinois. — *Hansell v. Jansen, 46 Ill. App. 335.*

Indiana. — *Chicago, etc., R. Co. v. Beatty, 13 Ind. App. 604; Salem Stone, etc., Co. v. Chastain, 9 Ind. App. 453.*

Kansas. — *Union Pac. R. Co. v. Young, 19 Kan. 488.*

Maryland. — *Norfolk, etc., R. Co. v. Hoover, 79 Md. 253, 47 Am. St. Rep. 392. See Mary-*

land Steel Co. v. Marney, (Md. 1898) 42 Atl. Rep. 60.

Missouri. — *McDermott v. Hannibal, etc., R. Co., 73 Mo. 516, 39 Am. Rep. 526, 2 Am. & Eng. R. Cas. 85; Murphy v. St. Louis, etc., R. Co., 71 Mo. 202, 2 Am. & Eng. R. Cas. 83; O'Hare v. Chicago, etc., R. Co., 95 Mo. 662; Roblin v. Kansas City, etc., R. Co., 119 Mo. 476; Smillie v. St. Bernard Dollar Store, 47 Mo. App. 402; Kersey v. Kansas City, etc., R. Co., 79 Mo. 362, 17 Am. & Eng. R. Cas. 638.*

New York. — *Wright v. New York Cent. R. Co., 25 N. Y. 562; Laning v. New York Cent. R. Co., 49 N. Y. 521, 10 Am. Rep. 417; Engelhardt v. Delaware, etc., R. Co., 78 Hun (N. Y.) 588. Compare Coppins v. New York Cent., etc., R. Co., 122 N. Y. 557, 19 Am. St. Rep. 523, 44 Am. & Eng. R. Cas. 618.*

Ohio. — *Consolidated Coal, etc., Co. v. Clay, 51 Ohio St. 542.*

Pennsylvania. — *Snodgrass v. Carnegie Steel Co., 173 Pa. St. 228, 37 W. N. C. (Pa.) 544.*

Texas. — *Gulf, etc., R. Co. v. Schwabbe, 1 Tex. Civ. App. 573; Mexican Nat. R. Co. v. Musette, 7 Tex. Civ. App. 169.*

Canada. — *St. Lawrence Sugar Refining Co. v. Campbell, Montreal L. R. 1 Q. B. 290.*

Where Servant Is Sick and Worn Out with Continuous Service. — The general rule of the non-liability of the master for injuries caused by a fellow servant is not changed by reason of the coemployee being sick or worn out with continuous service, if the negligence which caused the injury did not arise from his sickness or worn-out condition. *Johnston v. Pittsburgh, etc., R. Co., 114 Pa. St. 443.*

Drinking Habits of Fellow Servants. — It has been held that a servant cannot recover of a master for an injury sustained at the hands of a fellow servant, on the ground that such servant was incompetent because of his drinking habits, unless it appears that the injury was to some extent the result of such intemperate habits. *Crew v. St. Louis, etc., R. Co., 20 Fed. Rep. 87; Cosgrove v. Pitman, 103 Cal. 268; Norfolk, etc., R. Co. v. Hoover, 79 Md. 253, 47 Am. St. Rep. 392; Zumwalt v. Chicago, etc., R. Co., 35 Mo. App. 661; Harrington v. New York Cent., etc., R. Co., (Supreme Ct.) 19 N. Y. St. Rep. 20; Probst v. Delamater, 100 N. Y. 266; Campbell v. Wing, 5 Tex. Civ. App. 431; Bonner v. Whitcomb, 80 Tex. 178; Galveston, etc., R. Co. v. Davis, (Tex. 1898) 48 S. W. Rep. 570, reversing (Tex. Civ. App. 1898) 45 S. W. Rep. 956. See Williams v. Missouri Pac. R. Co., 109 Mo. 475; Engelhardt v. Delaware, etc., R. Co., 78 Hun (N. Y.) 588.*

petent was negligent at the time of the injury, there can be no recovery on this ground.¹

dd. NEGLIGENCE OF MASTER — General Rule. — Thirdly, it is not sufficient that the fellow servant was incompetent and that the injury resulted therefrom, but the master must have neglected to exercise the required care in the selection or retention of the servant by whose negligence or incompetency the injury was caused.²

In Retention of Incompetent Servants. — Thus, to warrant a recovery against the master on the ground of the master's retention of an incompetent servant, it must appear that such incompetency was known to the master, or should have been known if he had been in the exercise of ordinary diligence.³

Knowledge of Incompetency Not Alone Sufficient. — Nor is the mere knowledge of the

1. Where Negligence of Incompetent Servant Is Not Shown. — *Corson v. Maine Cent. R. Co.*, 76 Me. 244, 17 Am. & Eng. R. Cas. 634; *Thompson v. Lake Shore, etc., R. Co.*, 84 Mich. 281; *O'Hare v. Chicago, etc., R. Co.*, 95 Mo. 662; *Galveston, etc., R. Co. v. Faber*, 77 Tex. 153.

Engineer Permitting Operation of Engine by Experienced Fireman. — It has been held that it is not necessarily negligence on the part of the engineer of a switch engine to permit the engine to be handled, under his immediate direction, by his fireman, who had been employed by the defendant about twenty months as a fireman and six months as a brakeman. *Thompson v. Lake Shore, etc., R. Co.*, 84 Mich. 281.

2. Master Must Have Been Negligent — *United States*, — *Gravelle v. Minneapolis, etc., R. Co.*, 10 Fed. Rep. 711.

Arkansas, — *Kansas, etc., Coal Co. v. Brownlie*, 60 Ark. 582.

California, — *Stephens v. Doe*, 73 Cal. 26; *Congrave v. Southern Pac. R. Co.*, 88 Cal. 360; *Stevens v. San Francisco, etc., R. Co.*, 100 Cal. 554.

Colorado, — *Acme Coal Min. Co. v. McIver*, 5 Colo. App. 267; *Kindel v. Hall*, 8 Colo. App. 63.

Georgia, — *McDonald v. Eagle, etc., Mfg. Co.*, 67 Ga. 761, 68 Ga. 839.

Illinois, — *St. Louis Press Brick Co. v. Kenyon*, 57 Ill. App. 640.

Indiana, — *Ohio, etc., R. Co. v. Dunn*, 138 Ind. 18.

Maryland, — *Baltimore v. War*, 77 Md. 593; *Norfolk, etc., R. Co. v. Hoover*, 79 Md. 253, 47 Am. St. Rep. 392.

Massachusetts, — *Sullivan v. Lally*, 166 Mass. 265.

Michigan, — *Jungnitsch v. Michigan Malleable Iron Co.*, 105 Mich. 270.

Missouri, — *Smillie v. St. Bernard Dollar Store*, 47 Mo. App. 402; *Zumwalt v. Chicago, etc., R. Co.*, 35 Mo. App. 661; *Roblin v. Kansas City, etc., R. Co.*, 119 Mo. 476; *McDermott v. Hannibal, etc., R. Co.*, 73 Mo. 516, 39 Am. Rep. 526, 2 Am. & Eng. R. Cas. 85.

New York, — *Haskin v. New York Cent., etc., R. Co.*, 65 Barb. (N. Y.) 129; *Wall v. Delaware, etc., R. Co.*, 54 Hun (N. Y.) 454, *affirmed* 125 N. Y. 727; *Cameron v. New York Cent., etc., R. Co.*, 145 N. Y. 400.

Ohio, — *Consolidated Coal, etc., Co. v. Clay*, 51 Ohio St. 542.

Pennsylvania, — *Mulhern v. Lehigh Valley Coal Co.*, 161 Pa. St. 270; *Snodgrass v. Car-*

negie Steel Co., 173 Pa. St. 228, 37 W. N. C. (Pa.) 544; *Reiser v. Pennsylvania Co.*, 152 Pa. St. 38, 34 Am. St. Rep. 620, 31 W. N. C. (Pa.) 221.

Texas, — *Houston, etc., R. Co. v. Willic*, 53 Tex. 318, 37 Am. Rep. 756; *Houston, etc., R. Co. v. Myers*, 55 Tex. 110; *Pilkinton v. Gulf, etc., R. Co.*, 70 Tex. 226.

Instances. — Where a city commissioner who had charge of the construction of a sewer had picked out a man to operate a hoisting machine, but afterwards, on the recommendation of two citizens, one a member of the city council and also a locomotive engineer of ten years' experience, selected another engineer for the work, it was held that this, in the absence of evidence to show that a prudent man would not have regarded the recommendation, did not amount to negligence on the part of the commissioner in selecting the engineer. *Baltimore v. War*, 77 Md. 593.

In the case of *Fagundes v. Central Pac. R. Co.*, 79 Cal. 97, the plaintiff's intestate was a laborer employed by the defendant to work on its track. The offending servants were, respectively, the conductor of the train and the track walker, whose duty it was "to see that the track was clear of obstructions, and to signal when they existed." The decedent lost his life through the track walker's negligent interference with the switch, and the conductor's negligence "in not being sufficiently on the alert to prevent" such interference. The court held that as "there is nothing in the evidence which tends to show any negligence on the part of the defendant in the selection of the employees whose carelessness caused the casualty," it would not be held responsible.

Pennsylvania Mine Law. — It has been held that the Pennsylvania Mine Law of 1885, requiring a person employed at an engine to be sober and competent, does not change the common-law rule that notice of his insobriety or incompetence must have been brought home to the employer. *Mulhern v. Lehigh Valley Coal Co.*, 161 Pa. St. 270.

3. Retention of Incompetent Servant — Where Master Is Not Chargeable with Knowledge of Incompetency. — *Blake v. Maine Cent. R. Co.*, 70 Me. 60, 35 Am. Rep. 297. *Lee v. Michigan Cent. R. Co.*, 87 Mich. 574; *Huffman v. Chicago, etc., R. Co.*, 78 Mo. 50, 17 Am. & Eng. R. Cas. 625; *Zumwalt v. Chicago, etc., R. Co.*, 35 Mo. App. 661; *Cameron v. New York Cent., etc., R. Co.*, 145 N. Y. 400; *Chapman v. Erie R. Co.*, 55 N. Y. 579.

master that the servant is incompetent alone sufficient to charge him with liability; there can be no recovery against the master unless he is chargeable with negligence in retaining the incompetent servant after acquiring knowledge, actual or constructive, of his incompetency.¹

Reasonable Time Allowed for Action After Notice of Incompetency. — An employer is not liable to an employee who is injured by the negligence of a co-employee of whose negligent character he has been notified, provided the accident which occasioned the injury occurred before the expiration of a reasonable time for the employer to take proper action in the premises after such notice had been given.²

(b) **Where Injured Servant Has Knowledge of the Other's Incompetency.** — It is not, however, to be inferred from that which has just been said that the rule is applicable in all cases where these conditions exist; for when one employee has knowledge of the incompetency of the other, but continues in the service without complaint until he is injured through such incompetency, he is regarded as having assumed the risks incident to such incompetency,³ and as having contributed to the injury,⁴ and cannot recover of the master⁵ unless

1. Same — Negligence of Master Must Appear. — *Louisville, etc., R. Co. v. Breedlove*, 10 Ind. App. 657; *Lake Shore, etc., R. Co. v. Stupak*, 123 Ind. 210. *Compare Hughes v. Baltimore, etc., R. Co.*, 164 Pa. St. 178, 44 Am. St. Rep. 597.

A finding in a special verdict that the master knew of the incompetency of the servant by whose negligence the plaintiff was injured, but which did not show when the master acquired such knowledge, has been held insufficient to establish the fact that the master was negligent in retaining the incompetent servant after acquiring knowledge of his incompetency. *Lake Shore, etc., R. Co. v. Stupak*, 123 Ind. 210; *Louisville, etc., R. Co. v. Breedlove*, 10 Ind. App. 657.

2. Time Allowed for Removal After Notice — Four Weeks. — Four weeks has been held not to be an unreasonable time under certain circumstances. *Ross v. Chicago, etc., R. Co.*, 8 Fed. Rep. 544.

3. Continuance in Employment with Knowledge of Fellow Servant's Incompetency Viewed as an Assumption of the Risk. — *Seymour v. Maddox*, 16 Q. B. 326, 71 E. C. L. 326; *Skipp v. Eastern Counties R. Co.*, 9 Exch. 223; *Acme Coal Min. Co. v. McIver*, 5 Colo. App. 267; *Mad River R. Co. v. Barber*, 5 Ohio St. 563, 67 Am. Dec. 312; *Gulf, etc., R. Co. v. Schwabbe*, 1 Tex. Civ. App. 573. See the titles CONTRIBUTORY NEGLIGENCE, vol. 7, p. 413 *et seq.*; MASTER AND SERVANT.

4. Same — Viewed as Contributory Negligence. — In some cases the fact that the plaintiff had so continued in the service of the defendant seems to have been regarded as amounting to contributory negligence. *Porter v. Western North Carolina R. Co.*, 97 N. Car. 66, 2 Am. St. Rep. 272. But see the title CONTRIBUTORY NEGLIGENCE, vol. 7, p. 416.

5. Same — Nonliability of Master — Colorado. — *Acme Coal Min. Co. v. McIver*, 5 Colo. App. 267.

Georgia. — *Smith v. Sibley Mfg. Co.*, 85 Ga. 333.

Illinois. — *Illinois Steel Co. v. Paschke*, 51 Ill. App. 456; *Stafford v. Chicago, etc., R. Co.*, 114 Ill. 244; *Webster Mfg. Co. v. Schmidt*, 77

Ill. App. 49. See *Western Stone Co. v. Whalen*, 151 Ill. 472, 42 Am. St. Rep. 244.

Indiana. — *Lake Shore, etc., R. Co. v. Stupak*, 108 Ind. 1; *Indiana, etc., R. Co. v. Dailey*, 110 Ind. 75; *Spencer v. Ohio, etc., R. Co.*, 130 Ind. 181; *Chicago, etc., R. Co. v. Champion*, 9 Ind. App. 510; *Parker v. Sample*, 11 Ind. App. 698; *Toledo, etc., R. Co. v. Trimble*, 8 Ind. App. 333; *Chicago, etc., R. Co. v. Beatty*, 13 Ind. App. 604.

Iowa. — *Kroy v. Chicago, etc., R. Co.*, 32 Iowa 357.

Kansas. — *Kansas Pac. R. Co. v. Peavey*, 34 Kan. 474.

Massachusetts. — *Hatt v. Nay*, 144 Mass. 186.

Michigan. — *Davis v. Detroit, etc., R. Co.*, 20 Mich. 105, 4 Am. Rep. 364.

Missouri. — *McDermott v. Hannibal, etc., R. Co.*, 87 Mo. 285, 28 Am. & Eng. R. Cas. 528; *Grube v. Missouri Pac. R. Co.*, 98 Mo. 330, 14 Am. St. Rep. 645.

New York. — *Wright v. New York Cent. R. Co.*, 28 Barb. (N. Y.) 80; *Laning v. New York Cent. R. Co.*, 49 N. Y. 521, 10 Am. Rep. 417.

North Carolina. — *Porter v. Western North Carolina R. Co.*, 97 N. Car. 66, 2 Am. St. Rep. 272.

Ohio. — *Lake Shore, etc., R. Co. v. Knittel*, 33 Ohio St. 468; *Consolidated Coal, etc., Co. v. Clay*, 51 Ohio St. 542.

Pennsylvania. — *Frazier v. Pennsylvania R. Co.*, 38 Pa. St. 104, 80 Am. Dec. 467.

Texas. — *Robinson v. Houston, etc., R. Co.*, 46 Tex. 540; *Texas Mexican R. Co. v. Whitmore*, 58 Tex. 276, 11 Am. & Eng. R. Cas. 195; *Gulf, etc., R. Co. v. Schwabbe*, 1 Tex. Civ. App. 573; *Bonnet v. Galveston, etc., R. Co.*, (Tex. Civ. App. 1895) 31 S. W. Rep. 525.

Knowledge of Incompetency of Foreman. — If a workman knows that a foreman under whom he works is incompetent, but continues to work under him, making no complaint to the master, he must be held to have assumed the risk arising therefrom. *Hatt v. Nay*, 144 Mass. 186; *Davis v. Detroit, etc., R. Co.*, 20 Mich. 108, 4 Am. Rep. 364; *McDermott v. Hannibal, etc., R. Co.*, 87 Mo. 285, 28 Am. & Eng. R. Cas. 528.

he has a reasonable excuse for remaining in the service.¹

Presumption as to Competency of Fellow Servants. — A servant is warranted in assuming that the master has used reasonable care and prudence in the selection of those already employed in the same branch of service.² And it has been said that until notice to the contrary is brought home to the employee he may safely act upon that hypothesis.³ It certainly is not his duty, unless, at least, there is something to put him on inquiry as to his fellow servant's fitness, to institute any inquiry as to his qualifications.⁴

Equality of Master's and Servant's Means of Information. — According to some cases, however, it would seem that if the injured servant had the same means of knowing the incompetency of his fellow servant as the master possessed, he cannot recover for an injury resulting from such incompetence.⁵ But the courts have in some cases refused to accept this view.⁶

Promise by Employer to Remove Incompetent Servant. — While an employee who, with knowledge of the incompetency of a fellow servant, remains in the employment without protest cannot recover of the master for injuries sustained in consequence of such incompetency, yet if the master has promised the servant that an incompetent and unsafe servant shall be removed, the servant so promised may remain for a time in the service without being conclusively charged, as a matter of law, with contributory negligence, even though without such promise he would have been so chargeable.⁷

Using Ladder Made by Co-Servant of Known Incompetency. — It has been held that an employee who has the supervision of another employee and knows that the latter is an incompetent and careless workman, but who trusts himself upon a ladder constructed by the latter, without examining it, cannot recover from the master, although the latter failed to keep his promise to discharge the incompetent employee. *Bolton v. Georgia Pac. R. Co.*, 83 Ga. 659.

1. Circumstances Justifying Continuance in Service. — See *Northern Pac. R. Co. v. Mares*, 123 U. S. 710; *Williams v. Missouri Pac. R. Co.*, 109 Mo. 475.

Where Incompetent Servant Is Selected to Perform Particular Act. — It has been held that the rule that an employee cannot recover when he has knowledge of the incompetency of another, but continues in the service until he is injured through such incompetency, has no application in a case where one of the master's servants is selected to perform an act for which he is not properly qualified. *Fraser v. Schroeder*, 163 Ill. 459.

2. Right of Servant to Assume that Fellow Servant Is Competent. — *Western Stone Co. v. Whalen*, 151 Ill. 472, 42 Am. St. Rep. 244; *Chicago, etc., R. Co. v. Beatty*, 13 Ind. App. 604. See *Northern Pac. R. Co. v. Mares*, 123 U. S. 710.

3. Texas, etc., R. Co. v. Johnson, 89 Tex. 519; *U. S. Rolling Stock Co. v. Wilder*, 116 Ill. 100, 25 Am. & Eng. R. Cas. 414.

4. Pennsylvania R. Co. v. Roney, 89 Ind. 453, 46 Am. Rep. 173; *Chicago, etc., R. Co. v. Beatty*, 13 Ind. App. 604.

5. Equality of Master's and Servant's Means of Information. — *Acme Coal Min. Co. v. McIver*, 5 Colo. App. 267.

It has been said that this rule should obtain in cases where the injured servant held an intermediate position between the employer and the incompetent servant. *Davis v. Detroit, etc., R. Co.*, 20 Mich. 105, 4 Am. Rep. 364; *Indiana, etc., R. Co. v. Dailey*, 110 Ind. 75;

Haskin v. New York Cent., etc., R. Co., 65 Barb. (N. Y.) 129.

6. In the case of *Western Stone Co. v. Whalen*, 151 Ill. 472, 42 Am. St. Rep. 244, where it was insisted that the plaintiff had the same opportunity as the defendant of knowing of the reckless habits of the fellow servant through whose negligence he was injured, and that the failure of the plaintiff to inform himself in respect to the fellow servant's incompetency was negligence so contributing to the injury that no recovery could be had, the court said: "As already said, the plaintiff, upon entering the employment, had a right to assume that the defendant had discharged its legal duty in selecting his coemployees, and might act upon that assumption in the absence of anything putting him upon notice to the contrary. *Pullman Palace Car Co. v. Laack*, 143 Ill. 257."

In *Louisville, etc., R. Co. v. Kelley*, 63 Fed. Rep. 407, 24 U. S. App. 103, the counsel for the defendant requested the trial court to instruct the jury that "if the plaintiff knew, or had the same means of knowing," the fellow servant's incompetency "as the defendant, then he cannot recover for his injuries." In sustaining the court's refusal to give this instruction, the reviewing court said: "The railroad company owed to the defendant in error the duty to use due care in selecting firemen, engineers, and others with whom he was required to work, and to that end was bound to a diligent use of its means of knowledge; but the defendant in error was under no duty in that respect, and, therefore, could be affected only by the knowledge which he had, including what was within his observation at the time of the injury. But, as already stated, if he had actually known the fireman's incompetency, the question would have been one for the jury."

7. Continuing in Employment upon Master's Promising to Remove Incompetent Servant. — *Poirier v. Carroll*, 35 La. Ann. 699; *Lytle v.*

(c) *Where Master Delegates Employment of Servants to Agent.* — While the master may, of course, delegate the hiring of servants to another, he cannot thereby escape liability for the negligent performance of that duty; the employment of a sufficient number of competent servants is one of the positive duties which a master owes to his servants, and he is liable for the negligence of any person to whom he intrusts the performance of that duty, to the same extent that he would be liable for his own negligence in the same particular.¹

c. *SUPERIOR SERVANTS* — (1) *In General.* — The operation of the fellow-servant rule has been materially restricted in a number of the *United States* by the adoption, sometimes in common-law adjudications and sometimes by legislative enactment, of one form or another of what is known as the "superior-servant limitation."

(2) *At the Common Law* — (a) *In General.* — This doctrine will be first considered in the light of the common-law adjudications.

(b) *Origin of the Superior-Servant Limitation — Ohio Cases.* — While some traces of the limitation are to be found in the two cases which introduced the fellow-servant rule in the *United States*,² it received its first judicial sanction in *Ohio*.³

Chicago, etc., R. Co., 84 Mich. 289; *Lyberg v. Northern Pac. R. Co.*, 39 Minn. 15; *Laning v. New York Cent. R. Co.*, 49 N. Y. 521, 10 Am. Rep. 417. See the title MASTER AND SERVANT.

Thus, where the plaintiff, a blacksmith in the employ of the defendant, was assigned an incompetent helper, and the latter was changed on the plaintiff's complaint, but re-assigned May 4th, and the plaintiff again complained on the 6th, and was promised another helper, and was injured on the 10th, a verdict of the jury holding the plaintiff free from negligence should be sustained. *Lyberg v. Northern Pac. R. Co.*, 39 Minn. 15.

1. See *infra*, this section, *Vice-Principals*.

2. *Early References to the Limitation.* — The limitation was directly forecast by Chief Justice Shaw in his opinion in *Farwell v. Boston, etc., R. Corp.*, 4 Met. (Mass.) 49, 38 Am. Dec. 339, when he said: "To say that the master shall be responsible because the damage is caused by his agents is assuming the very point which remains to be proved. They are his agents to some extent, and for some purposes, but whether he is responsible, in a particular case, for their negligence is not decided by the single fact that they are, for some purposes, his agents."

It was also directly pressed upon the court in the early *South Carolina* case of *Murray v. South Carolina R. Co.*, 1 McMull. L. (S. Car.) 385, 36 Am. Dec. 268, where an engineer and a fireman were held to be fellow servants. Judge Evans disposed of the question in the following language: "The engineer no more represents the company than the plaintiff. Each in his several department represents his principal. The regular movement of the train of cars to its destination is the result of the ordinary performance, by each, of his several duties. If the fireman neglects his part, the engine stands still for want of steam; if the engineer neglects his, everything runs to riot and disaster. It seems to me it is, on the part of the several agents, a joint undertaking, where each one stipulates for the performance of his several part. They are not liable to the company for the conduct of each other, nor is

the company liable to one for the misconduct of another."

It is clearly seen from these extracts that the doctrine was not countenanced by either of the two cases to which we are indebted for the introduction of the fellow-servant rule in the *United States*.

3. *Recognition of the Limitation in Ohio.* — In 1851 the case of *Little Miami R. Co. v. Stevens*, 20 Ohio 416, came before the Supreme Court of Ohio, and it was adjudged, quoting from the syllabus, that "where an employer placed one person in his employ under the direction of another, also in his employ, such employer is liable for injury to the person of him placed in the subordinate situation, by the negligence of his superior." Applying this principle, the court held that a railroad company is liable where it places an engineer under the orders of a conductor and he is injured through the negligence of the latter. "We could easily suppose a case," said Caldwell, J., "where two persons employed by the same individual, and standing on a perfect equality — where the business was managed as much by one as the other — where they would stand on the same footing as men in the community generally do — in which the employer would not be liable for an injury done to one by the negligence of the other. But we regard this case as standing on entirely a different footing." The court specifically refused to be bound by the reasoning in the *Farwell* case and the *Murray* case, saying: "The case in 4 Metcalf denies the right of recovering, principally on two grounds, namely, that the person employed contracts with reference to the perils of the employment, and that he receives a compensation, in the way of wages, for such perils, and therefore he cannot recover; and that it would be contrary to public policy to permit a recovery, as the tendency would be to produce carelessness on the part of persons thus employed. The decision in 1 McMullan appears to be based principally on the first of these two propositions. We have noticed both of these propositions in our previous remarks. In both cases much stress is laid upon the fact

(c) **Ohio Doctrine.** — The doctrine of the Ohio case is this: Where one servant is placed by his employer in a position of subordination to and subject to the orders and control of another, and such inferior servant, without fault, and while in the discharge of his duties, is injured by the negligence of the superior servant, the master is liable for such injury.¹ The courts of this state have gone to the extent of holding that where the relation of superior and subordinate exists between the two servants, the fact that the superior servant whose negligence caused the injury was, at the time of the accident, performing the duties of a common workman, and not those strictly pertaining to his position as a superior, in no wise relieves the master from liability.²

(d) **Adoption of the Doctrine in the United States** — *aa. IN GENERAL.* — This doctrine, first applied in Ohio and there given its most comprehensive effect, has been recognized in a number of the United States, though usually in a modified form. While the central fact upon which the liability of the master depends under this rule is the superiority of the negligent over the injured servant, and the cases which recognize the limitation are, therefore, agreed that the master will not be liable unless the negligent servant is the superior of the one injured,³ they are not agreed, except to a very limited extent, upon the exact

that no precedent of a recovery under such circumstances is to be found. It is to be noticed that in both of these cases the facts differ in some particulars from the present: we must admit, however, that the reasoning in those cases would cover the one now before us. So far as those cases decide that a recovery cannot be had in a case like the one now before the court, we think they are contrary to the general principles of law and justice, and we cannot follow them as precedents." The doctrine thus became firmly rooted. The same court took the same view again in 1854 in the case of *Cleveland, etc., R. Co. v. Keary*, 3 Ohio St. 201. The decision in the Stevens case having been made by a divided court, and its correctness having been denied, the court again examined the grounds on which it was placed, and the rule there laid down met with the unanimous approval of the court. Judge Ranney carefully specified that the doctrine applied to corporations, which could not act in person, and went also to the full length of denying the doctrine of *Priestley v. Fowler*, 3 M. & W. 1, and *Farwell v. Boston, etc., R. Corp.*, 4 Met. (Mass.) 49, 38 Am. Dec. 339. He brought forward in support of this view the Scots case of *Dixon v. Rankin*, 1 Am. R. Cas. 569, 14 Ct. Sess. Cas. 420, decided in 1852, wherein the doctrines of the English cases were repudiated, and an exactly contrary decision was made. In subsequent cases, however, the court recognized and applied the ordinary rule and expressly stated that the earlier cases turned upon the subordination of the injured servant.

1. Rule in Ohio. — *Little Miami R. Co. v. Stevens*, 20 Ohio 415; *Cleveland, etc., R. Co. v. Keary*, 3 Ohio St. 201; *Murphy v. Holbrook*, 20 Ohio St. 137; *Berea Stone Co. v. Kraft*, 31 Ohio St. 287, 27 Am. Rep. 510; *Lake Shore, etc., R. Co. v. Lavalley*, 36 Ohio St. 221, 5 Am. & Eng. R. Cas. 549; *Cincinnati Ice Co. v. Higdon*, 7 Ohio Dec. (Reprint) 239; *Baltimore, etc., R. Co. v. Sutherland*, 1 Toledo Leg. N. (Ohio) 388, 4 Ohio Cir. Dec. 115, affirmed 52 Ohio St. 676; *Andrews v. Toledo, etc., R. Co.*, 8 Ohio Cir. Dec. 584; *Lake Erie, etc., R. Co. v. Mulcahy*, 9 Ohio Cir. Dec. 82, 16

Ohio Cir. Ct. Rep. 204. See also *Mad River, etc., R. Co. v. Barber*, 5 Ohio St. 541, 67 Am. Dec. 312; *Whaalan v. Mad River, etc., R. Co.*, 8 Ohio St. 249; *Pittsburg, etc., R. Co. v. Deviney*, 17 Ohio St. 107; *Lake Shore, etc., R. Co. v. Spangler*, 44 Ohio St. 471.

In the case of *Little Miami R. Co. v. Stevens*, 20 Ohio 415, an engineer, and in *Cleveland, etc., R. Co. v. Keary*, 3 Ohio St. 201, a brakeman, was injured by the negligence of the conductor, and in both of these cases it was held that the conductor represented the corporation, and that the corporation was, therefore, liable.

But in *Johnson v. Cleveland, etc., R. Co.*, 11 Ohio Cir. Ct. Rep. 553, 5 Ohio Cir. Dec. 290, it was held that a conductor on a freight train is not a superior as regards a car repairer working in the same yard.

2. Berea Stone Co. v. Kraft, 31 Ohio St. 287, 27 Am. Rep. 510.

In *Davies v. Griffith*, (Cinc. Super. Ct.) 27 Ohio L. J. 180, it was held that an employer is liable to an employee for the negligence of a superior standing in the employer's place, even though the work performed by the superior be similar to that done by the injured employee or by a fellow servant.

3. Master Liable for Negligence of Superior Servant Only — *Illinois.* — *Illinois Cent. R. Co. v. Meyer*, 65 Ill. App. 531.

Kentucky. — *Volz v. Chesapeake, etc., R. Co.*, 95 Ky. 188.

Missouri. — *Sherrin v. St. Joseph, etc., R. Co.*, 103 Mo. 378, 23 Am. St. Rep. 881.

Ohio. — *Mad River, etc., R. Co. v. Barber*, 5 Ohio St. 541, 67 Am. Dec. 312; *Whaalan v. Mad River, etc., R. Co.*, 8 Ohio St. 249; *Kumler v. Junction R. Co.*, 33 Ohio St. 150; *Pittsburgh, etc., R. Co. v. Lewis*, 33 Ohio St. 196; *Lake Shore, etc., R. Co. v. Knittal*, 33 Ohio St. 468; *Pittsburg, etc., R. Co. v. Ranney*, 37 Ohio St. 665; *Hartman v. Kloopfing*, 9 Ohio Cir. Ct. Rep. 433, 6 Ohio Cir. Dec. 393. But see *Dick v. Indianapolis, etc., R. Co.*, 38 Ohio St. 389, 8 Am. & Eng. R. Cas. 101.

Tennessee. — *Nashville, etc., R. Co. v. Wheless*, 10 Lea (Tenn.) 741, 43 Am. Rep. 317;

rule by which to determine the master's liability for the negligence of a superior servant. Some courts have adopted one form of the doctrine, and other courts a radically different form, so that there are now no less than five distinct interpretations of the superior-servant limitation.

bb. RULE IN ILLINOIS, TENNESSEE, AND UTAH. — The rule as it has been adopted in at least one and possibly three of the United States is that where the negligence of one servant causes injury to another as the result of the exercise by the negligent servant of the authority over the injured servant which has been conferred upon him by the master, the master is liable.¹

Nashville, etc., R. Co. *v.* Handman, 13 Lea (Tenn.) 423; Coal Creek Min. Co. *v.* Davis, 90 Tenn. 711; Hopkins *v.* Nashville, etc., R. Co., 96 Tenn. 409.

Thus, it has been held that a railroad company is not liable to a brakeman on a train for the negligence of the engineer, where, being deprived of their conductor, both pursue, independently of each other, the duties prescribed by the rules of the railroad company in such an emergency, the engineer not, in fact, assuming any control over the brakeman, though having the right to do so. Nashville, etc., R. Co. *v.* Wheless, 10 Lea (Tenn.) 741, 43 Am. Rep. 317; Hopkins *v.* Nashville, etc., R. Co., 96 Tenn. 409.

And in Pittsburg, etc., R. Co. *v.* Devinney, 17 Ohio St. 197, it was held that a railway company was not liable for damages to a brakeman on one of its branches for injuries sustained by him in a collision of his train with another train of the same company, where the collision occurred by means of negligence of the conductor or engineer, or both, of such other train, unless it appeared that the company was guilty of ordinary care in the selection and employment of the incompetent conductor or engineer through whose negligence the collision occurred.

But by statute in Ohio (87 Ohio Laws 150) the master is now made liable to inferior servants for the negligence of a servant who is the superior of any co-employee whatever. Cincinnati, etc., R. Co. *v.* Margrat, 51 Ohio St. 130; Columbus, etc., R. Co. *v.* Erick, 51 Ohio St. 146; McCann *v.* Pennsylvania Co., 10 Ohio Cir. Ct. Rep. 139, 6 Ohio Cir. Dec. 610, 3 Ohio Dec. 444. See Baltimore, etc., R. Co. *v.* Camp, 31 U. S. App. 213.

1. Rule in Illinois. — This rule has been most clearly explained in the Illinois cases. Chicago, etc., R. Co. *v.* May, 108 Ill. 283, 15 Am. & Eng. R. Cas. 320, Sheldon, C. J., and Scott and Craig, JJ., *dissenting*; Wabash, etc., R. Co. *v.* Hawk, 121 Ill. 259, 31 Am. & Eng. R. Cas. 306, 2 Am. St. Rep. 82, Sheldon, C. J., *dissenting*; Consolidated Coal Co. *v.* Wombacher, 134 Ill. 57; Illinois Steel Co. *v.* Schymanowski, 162 Ill. 447; West Chicago St. R. Co. *v.* Dwyer, 162 Ill. 482; Fanter *v.* Clark, 15 Ill. App. 470; Chicago, etc., R. Co. *v.* Blank, 24 Ill. App. 438; Chicago Dredging, etc., Co. *v.* McMahon, 30 Ill. App. 358; Fraser *v.* Hand, 33 Ill. App. 153; Hobbold *v.* Chicago Sugar Refining Co., 44 Ill. App. 418; Mobile, etc., R. Co. *v.* Massey, 52 Ill. App. 556, *affirmed* 152 Ill. 144; Canning *v.* McMillan, 55 Ill. App. 232; Gartside Coal Co. *v.* Turk, 47 Ill. App. 332, *affirmed* 147 Ill. 120; Chicago Anderson Pressed Brick Co. *v.* Sobkowiak, 148 Ill. 573;

Wenona Coal Co. *v.* Holmquist, 152 Ill. 581; Fraser *v.* Schroeder, 163 Ill. 459, *affirming* 60 Ill. App. 519; Leiter *v.* Kinnare, 68 Ill. App. 558; Fraser *v.* Collier, 75 Ill. App. 194. See also Lalor *v.* Chicago, etc., R. Co., 52 Ill. 401, 4 Am. Rep. 616; Toledo, etc., R. Co. *v.* Ingraham, 77 Ill. 309; Chicago Dredging, etc., Co. *v.* McMahon, 30 Ill. App. 358.

Where an employee of a master, having control over other servants of the same master, with the power to hire and to discharge them, while engaged in the same work of the master, gives a negligent order to one of such servants, who, in obeying, causes injury to another of such servants, the common master is responsible for the damages done. Chicago, etc., R. Co. *v.* Blank, 24 Ill. App. 438.

Rule in Tennessee. — The Tennessee cases contain a number of expressions to the effect that in order to charge the master, the superior servant must so far stand in the place of the master as to be charged, in the particular matter, with the performance of a duty towards the inferior servant which, under the law, the master owes to such servant. Nashville, etc., R. Co. *v.* Handman, 13 Lea (Tenn.) 423; Louisville, etc., R. Co. *v.* Lahr, 86 Tenn. 335; Coal Creek Min. Co. *v.* Davis, 90 Tenn. 711; Allen *v.* Goodwin, 92 Tenn. 385; Knox *v.* Southern R. Co., (Tenn. 1898) 47 S. W. Rep. 491.

And there is in the above-cited case of Knox *v.* Southern R. Co., (Tenn. 1898) 47 S. W. Rep. 491, a dictum to the effect that a "boss" over the "wipers" in an engine room is not the superior of one of the latter so as to charge the master with liability for his negligence.

But the Supreme Court of Tennessee, while avowedly adopting the test which has led the courts of other states to reject the superior-servant as distinguished from the vice-principal limitation, has, in its practical application of the test, failed to arrive at the same result as that reached by the courts mentioned; it has, on the other hand, sometimes expressed and frequently applied practically the same rule as the one which obtains in Illinois.

Thus, it has been declared in one of the Tennessee cases that the general rule exempting the employer from liability to one servant for injuries sustained in consequence of the negligence of his fellow servant does not apply when it appears from the facts in the case that an employee, in his subordinate position, has been injured by the negligence or improper conduct of another servant, placed by the master in a superior position over the former, and where such inferior servant is made subject to the orders of such superior, and when the injury occurs during the performance of

Application of the Illinois Rule. — It is at once apparent that under this, which may be called the Illinois rule, the mere superiority of the negligent over the injured servant is not alone sufficient to charge the master with liability; to have this effect the injury must arise out of and result from the exercise by

their duties. *Illinois Cent. R. Co. v. Spence*, 93 Tenn. 173. See also *Nashville, etc., R. Co. v. Wheless*, 10 Lea (Tenn.) 741, 43 Am. Rep. 317; *Louisville, etc., R. Co. v. Lahr*, 86 Tenn. 335.

In *Louisville, etc., R. Co. v. Kenley*, 92 Tenn. 207, Lurton, C. J., in delivering the opinion of the court, said: "The rule is well settled in this state that 'the master is liable for injuries resulting to one servant from the negligence of another servant who is the immediate superior of the first.'"

In *Coal Creek Min. Co. v. Davis*, 90 Tenn. 711, the court said: "If the servant has been injured by the negligence of a superior servant having a right to control, and while executing the order of such superior about a matter in which the superior had a right to control, then such superior servant is, as to the inferior, a vice-principal, and his negligence is that of the master."

And it has, in accordance with these expressions, been held that if a section hand is injured by the negligence of the section boss or track foreman the railroad company is liable. *Louisville, etc., R. Co. v. Bowler*, 9 Heisk. (Tenn.) 866; *Chattanooga Electric R. Co. v. Lawson*, (Tenn. 1898) 47 S. W. Rep. 489.

So, too, a railroad company has been held liable to a brakeman for the negligence of an engineer in charge of the train on which the brakeman was employed. *East Tennessee, etc., R. Co. v. Collins*, 85 Tenn. 227.

And in *Illinois Cent. R. Co. v. Spence*, 93 Tenn. 173, it was held that a conductor placed in charge of a freight train, with authority to direct and control its movements, is a representative of the company, charged with the performance of a duty which the company owes to the public and its employees on the train, and the company is liable to a fireman on the train who is injured by reason of the conductor's negligence.

In short, according to the Tennessee cases, where the negligent servant is the superior, permanently or temporarily, of the injured one, and has authority to direct or control the latter, the fellow-servant rule does not apply. *Nashville, etc., R. Co. v. Carroll*, 6 Heisk. (Tenn.) 347; *East Tennessee, etc., R. Co. v. De Armond*, 86 Tenn. 73, 6 Am. St. Rep. 816; *Haynes v. East Tennessee, etc., R. Co.*, 3 Coldw. (Tenn.) 222; *Nashville, etc., R. Co. v. Jones*, 9 Heisk. (Tenn.) 27. See also *Harley v. Louisville, etc., R. Co.*, 57 Fed. Rep. 144; *Washburn v. Nashville, etc., R. Co.*, 3 Head (Tenn.) 638, 75 Am. Dec. 784.

The limitation in the Tennessee cases is based not upon the idea of the relative rank of two servants or the general superiority of the one in position, intelligence, or skill, or in the wages received, but upon the ground that the one is placed under the orders and direction of the other, and required to submit to such orders in the performance of his duties; that the inferior is placed in the position of a servant to the superior. *Nashville, etc., R. Co. v.*

Wheless, 10 Lea (Tenn.) 746, 43 Am. Rep. 317; *Illinois Cent. R. Co. v. Spence*, 93 Tenn. 173.

Rule in Utah. — The earlier Utah cases do not afford any very strong support for the superior-servant limitation, and yet, from the language used and cases cited in the opinions, it is evident that the limitation is favored.

In the first case in this state which has any bearing on the question, a defendant mine owner was held liable to a laborer in its mines for the negligence of a foreman who had entire charge of the mine and all the workings, employed and discharged laborers, and prescribed their duties. *Reddon v. Union Pac. R. Co.*, 5 Utah 344. The negligence in this case consisted in placing the plaintiff at work in an unsafe place. The case might, therefore, have been decided in favor of the plaintiff on the theory that the foreman was charged with one of the master's duties, that of providing a safe place to work, and was, therefore, a vice-principal, for whose negligence the master was liable. Then, again, the master might have been held liable on the ground that the foreman was invested with the control and management of the defendant's entire business. But while the case is by no means a strong authority in support of the superior-servant limitation, it nevertheless seems that the court intended to give its approval to the limitation.

In *Andreson v. Ogden Union R., etc., Co.*, 8 Utah 128, the defendant was held liable to one of a gang of laborers engaged in taking gravel from a gravel pit for the negligence of the foreman of the gang, who had full charge of the work, with power to employ and discharge men. The court said: "In the present case the plaintiff was working under the supervision and control of Shea, who had authority to direct when and where he should work, and to discharge him whenever he chose; and we think they were not fellow servants, and that the court committed no error in so instructing the jury."

In *Armstrong v. Oregon Short Line, etc., R. Co.*, 8 Utah 420, the superior-servant limitation is at last clearly recognized. It was held in this case that a railroad company is liable to a member of a switch crew employed in switching cars for the negligence of the foreman of the crew. In delivering the opinion of the court in this case, Zane, C. J., said that the fellow-servant rule "will not prevent a recovery against the master for an injury to an employee in consequence of the negligence of a superior. * * * While it may be reasonable to infer that men laboring together with equal authority will, by their watchfulness, their suggestions, prudence, and their example, influence each other, it would be unreasonable to presume that they will so influence the men in authority over them, and to whose orders they are subject." See also *Openshaw v. Utah, etc., R. Co.*, 6 Utah 132.

While the scope of the limitation has not yet been clearly defined in the Utah cases, it

the superior servant of the delegated power. Accordingly, if the negligence complained of consists of an act or omission by the superior which relates, not to his supervisory duties, but to his duties as a collaborer with those under his control, the master is not liable.¹ On the other hand, the mere fact that the servant who is clothed with the power of direction and control sometimes, or generally, labors with the other servants as a common hand will not of itself exonerate the master from liability for such superior servant's negligence in the exercise of his authority over the other servants.² Nor will the fact that the negligent servant has no power to employ or discharge men place him in the category of servants for whose negligence the master is not liable.³

cc. RULE IN KENTUCKY. — The rule has been adopted in Kentucky to the extent of holding the master responsible for the gross negligence of a superior which results in the injury of a subordinate employee.⁴ But the liability of the

seems, from the case of *Allen v. Logan City*, 10 Utah 279, that there is a tendency to restrict the rule in much the same manner as has been done in Illinois and Tennessee. It was held in this case that the defendant was not liable to a laborer, working at the undermining of a gravel bank in connection with the construction of a road, who was injured through the negligence of another employee, named McCullough, whom the road supervisor had left in charge of the work, but who had no power to employ the workmen. The court said: "He [McCullough] was engaged at the bank, and in the same general department, and working at the same general character of work, with respondent, and Crockett [the plaintiff] was working at the same place, and in the same manner. It is clear that McCullough and Crockett were fellow servants with respondent, and for their negligence, if any be shown, appellant is not liable."

1. Extent and Limitation of the Illinois Rule — *Illinois*. — *Chicago, etc., R. Co. v. May*, 108 Ill. 288; *Gall v. Beckstein*, 173 Ill. 187, *affirming* 69 Ill. App. 616; *Chicago, etc., R. Co. v. Touhy*, 26 Ill. App. 99; *Chicago Dredging, etc., Co. v. McMahon*, 30 Ill. App. 358; *Fitzgerald v. Honkomp*, 44 Ill. App. 365; *Clay v. Chicago, etc., R. Co.*, 56 Ill. App. 235; *Illinois Cent. R. Co. v. Swisher*, 61 Ill. App. 611; *Illinois Cent. R. Co. v. Meyer*, 65 Ill. App. 531.

Tennessee. — *Fox v. Sandford*, 4 Sneed (Tenn.) 36, 67 Am. Dec. 587; *East Tennessee, etc., R. Co. v. Rush*, 15 Lea (Tenn.) 145; *Louisville, etc., R. Co. v. Lahr*, 86 Tenn. 335; *Allen v. Goodwin*, 92 Tenn. 385; *Illinois Cent. R. Co. v. Bolton*, 99 Tenn. 273; *Nashville, etc., R. Co. v. Gann*, (Tenn. 1898) 47 S. W. Rep. 493; *Chattanooga Electric R. Co. v. Lawson*, (Tenn. 1898) 47 S. W. Rep. 489; *Knox v. Southern R. Co.*, (Tenn. 1898) 47 S. W. Rep. 491.

Utah. — *Allen v. Logan City*, 10 Utah 279. See *Moore v. Wabash, etc., R. Co.*, 85 Mo. 583, 21 Am. & Eng. R. Cas. 509; *Sayward v. Carlson*, 1 Wash. 29.

2. *Chicago, etc., R. Co. v. May*, 108 Ill. 288; *Fanter v. Clark*, 15 Ill. App. 470.

3. *Chicago, etc., R. Co. v. May*, 108 Ill. 288; *Fraser v. Schroeder*, 163 Ill. 459; *Kolb v. Carrington*, 75 Ill. App. 159. See also *Chicago Dredging, etc., Co. v. McMahon*, 30 Ill. App. 358.

4. Kentucky Doctrine. — *Louisville, etc., R. Co. v. Collins*, 2 Duv. (Ky.) 114, 87 Am. Dec.

486; *Louisville, etc., R. Co. v. Robinson*, 4 Bush (Ky.) 508; *Louisville, etc., R. Co. v. Filbern*, 6 Bush (Ky.) 574, 99 Am. Dec. 690; *Louisville, etc., R. Co. v. Cavens*, 9 Bush (Ky.) 559; *Louisville, etc., R. Co. v. Brooks*, 83 Ky. 129; *Louisville, etc., R. Co. v. Moore*, 83 Ky. 675; *Louisville, etc., R. Co. v. Rains*, (Ky. 1893) 23 S. W. Rep. 505, 15 Ky. L. Rep. 423; *Louisville, etc., R. Co. v. Mitchell*, 87 Ky. 327; *Greer v. Louisville, etc., R. Co.*, 94 Ky. 169; *Cincinnati, etc., R. Co. v. Palmer*, 98 Ky. 382; *Louisville, etc., R. Co. v. Wallingford*, 15 Ky. L. Rep. 170, (Ky. 1893) 22 S. W. Rep. 439; *Newport News, etc., R. Co. v. Carroll*, (Ky. 1895) 31 S. W. Rep. 132. See also *Volz v. Chesapeake, etc., R. Co.*, 95 Ky. 188.

The case of *Louisville, etc., R. Co. v. Collins*, 2 Duv. (Ky.) 114, 87 Am. Dec. 486, is the first and the leading Kentucky case on this question. The facts were as follows: A common laborer, assisting an engineer in righting a locomotive, was injured by the gross negligence of the engineer in starting the locomotive while the plaintiff was working beneath it. He sued the company and obtained a verdict for five thousand dollars in the trial court. Upon appeal it was held that the company was legally liable to the plaintiff for the injury done to him by the gross negligence of its engineer.

In the case of *Louisville, etc., R. Co. v. Robinson*, 4 Bush (Ky.) 508, the question was whether the company was liable to its brakeman for damages resulting to him by reason of the gross negligence of its engineer, and it was held that, although the engineer and brakeman were in the same line of service, and for that reason must be presumed to have mutually undertaken to risk all the contingencies which the ordinary skill and care of each of them in his line of service could not avert, yet "this implied understanding between the company and its employees in the same class of service does not, as adjudged in the case of *Louisville, etc., R. Co. v. Collins*, 2 Duv. (Ky.) 114, 87 Am. Dec. 486, exonerate the company from liability for damage resulting to one of such co-agents from the extraordinary or gross negligence of another." This was upon the principle decided in the *Collins* case that it was the duty of the corporation to provide among other things a competent and faithful engineer, and those who were subordinate to him could not reasonably be presumed to expect or to hazard his gross negli-

master is limited to the gross negligence of the superior servant; he is not liable for the latter's ordinary negligence.¹

dd. RULE IN TEXAS. — The rule which is deducible from the Texas cases is that while the master is not liable for the negligence of every servant of a higher rank than that of the injured servant, the negligence, within the scope of his employment, of a superior servant who has dominion and control over the injured servant, with the authority to employ and discharge him, is chargeable to the master.² According to these cases the master is liable to a sub-

gence. See *Volz v. Chesapeake, etc., R. Co.*, 95 Ky. 188.

The case of *Louisville, etc., R. Co. v. Brooks*, 83 Ky. 129, was where a brakeman lost his life by reason of the gross negligence of an engineer on the same train. It was held that the engineer and brakeman were not co-equals and that the employer was, therefore, liable. And the case of *Louisville, etc., R. Co. v. Moore*, 83 Ky. 675, in which the injured brakeman sued for the loss of a leg, due to the gross negligence of the conductor, is to the same effect.

1. *Louisville, etc., R. Co. v. Rains*, (Ky. 1893) 23 S. W. Rep. 505, 15 Ky. L. Rep. 423; *Louisville, etc., R. Co. v. Mitchell*, 87 Ky. 327; *Greer v. Louisville, etc., R. Co.*, 94 Ky. 169; *Cincinnati, etc., R. Co. v. Palmer*, 98 Ky. 382; *Louisville, etc., R. Co. v. Brantley*, 96 Ky. 297; *Eastern Kentucky R. Co. v. Powell*, (Ky. 1895) 33 S. W. Rep. 629. See *Coffman v. Louisville, etc., R. Co.*, 13 Ky. L. Rep. 866, (Ky. 1892) 18 S. W. Rep. 1012; *Louisville, etc., R. Co. v. Foard*, (Ky. 1898) 47 S. W. Rep. 342; *Volz v. Chesapeake, etc., R. Co.*, 95 Ky. 188.

In the leading case of *Louisville, etc., R. Co. v. Collins*, 2 Duv. (Ky.) 114, 87 Am. Dec. 486, and which has been followed invariably since in Kentucky, Judge Robertson said: "It [the company] is therefore responsible for the negligence or unskilfulness of its engineer as its controlling agent in the management of its locomotives and running cars, and that responsibility is graduated by the classes of persons injured by the engineer's neglect or want of skill. As to strangers, ordinary negligence is sufficient; as to subordinate employees, associated with the engineer in conducting the cars, the negligence must be gross; but as to employees in a different department of service, unconnected with the running operations, ordinary negligence may be sufficient."

2. *Rule in Texas.* — Some expressions are to be found in the earlier Texas cases which would seem to indicate an inclination on the part of the courts of that state to reject the superior-servant limitation completely. See the opinion by Judge Moore in *Robinson v. Houston, etc., R. Co.*, 46 Tex. 550, *quoted with approval* in *Dallas v. Gulf, etc., R. Co.*, 61 Tex. 196, 21 Am. & Eng. R. Cas. 575.

But it is quite evident that this is not the view which the courts of this state have taken in the later cases. As is said by Judge Marr of the Texas Commission of Appeals, in the case of *Sweeney v. Gulf, etc., R. Co.*, 84 Tex. 433, 31 Am. St. Rep. 71, the doctrine that a vice-principal or *alter ego* of the master should only be considered as occupying that relation in reference to those nonassignable duties of the

master which the law devolves upon him, such as employing competent servants and providing suitable machinery, etc., seems to have been expressly repudiated by the courts of Texas.

The rule as settled by the Supreme Court of Texas is that, while mere grades of rank of employees of a railway company engaged in a common employment will not destroy the relation of fellow servants, yet where one is authorized to employ and discharge servants working under him his negligence is that of the master. *Douglass v. Texas Mexican R. Co.*, 63 Tex. 564. In this case a plumber employed in a railroad company's repair shops was directed by the master mechanic, to whose orders he was subject, to hold a piece of timber between a tender and an approaching engine to prevent a direct collision, and so holding he asked the master mechanic if that was right, to which the latter replied, "Yes, that will do." The engine, striking the timber higher up than the buffer of the tender, brought the timber violently against the plumber and severely injured him. The court held that the company was liable.

In *Missouri Pac. R. Co. v. Williams*, 75 Tex. 4, it was held that the servant of a railroad company may recover for an injury caused by the negligence of another employee of the company, under whose immediate supervision and control he was working, where such negligent employee had the power to employ and discharge those who were subject to his orders. It was accordingly decided that the defendant was liable to the plaintiff, a car repairer employed in its shops, who was injured through the negligence of the foreman of car repairers, who had the power to employ and discharge hands.

In *Galveston, etc., R. Co. v. Smith*, 76 Tex. 611, 18 Am. St. Rep. 78, the court declared that it was not prepared to recede from the ruling in the last cited case. It, however, distinguished the two cases, pointing out that in the case in hand the plaintiff was not employed under the immediate eye of the roadmaster through whose alleged negligence it was claimed that he was injured.

The later cases have invariably affirmed the rule. *Nix v. Texas Pac. R. Co.*, 82 Tex. 473; *International, etc., R. Co. v. Ilinzie*, 82 Tex. 623; *Sweeney v. Gulf, etc., R. Co.*, 84 Tex. 433, 31 Am. St. Rep. 71; *Ft. Worth, etc., R. Co. v. Peters*, 87 Tex. 222; *Austin Rapid Transit R. Co. v. Grothe*, 88 Tex. 262; *Texas, etc., R. Co. v. Reed*, 88 Tex. 439; *St. Louis, etc., R. Co. v. Lemon*, 83 Tex. 143; *Missouri Pac. R. Co. v. Sasse*, (Tex. Civ. App. 1893) 22 S. W. Rep. 187; *Ft. Worth, etc., R. Co. v. Peters*, 7 Tex. Civ. App. 78; *O'Connor v.*

ordinate servant for the negligence of only such superior servants as exercise the power of direction and control¹ and have authority to employ and discharge the servants over whom they have control.²

cc. RULE IN NORTH CAROLINA. — In North Carolina the liability of the master to one servant for the negligence of a superior is not, as in Ohio, made to depend wholly upon the relative rank of the two servants.³ The test applied in this state is whether the subordinate feels constrained to obey the orders of his superior, by reason of the fact that he has just grounds for believing that a failure or refusal so to obey will or may be followed by his discharge from the service; under these circumstances a master must answer for the negligence of the superior.⁴ That the superior servant has authority to employ and discharge his subordinates is not alone sufficient to charge the master with liability for his negligence.⁵ Nor, on the other hand, will the master be

Cook, (Tex. Civ. App. 1894) 26 S. W. Rep. 1113; Connor v. Saunders, 9 Tex. Civ. App. 56; Missouri, etc., R. Co. v. Hamilton, (Tex. Civ. App. 1895) 30 S. W. Rep. 679; Sulphur Lumber Co. v. Kelley, (Tex. Civ. App. 1895) 30 S. W. Rep. 696; Texas, etc., R. Co. v. Reed, (Tex. Civ. App. 1895) 32 S. W. Rep. 118; Missouri, etc., R. Co. v. Hannig, (Tex. Civ. App. 1897) 41 S. W. Rep. 196; Houston, etc., R. Co. v. Stuart, (Tex. Civ. App. 1898) 48 S. W. Rep. 799. See International, etc., R. Co. v. Smith, (Tex. Civ. App. 1895) 30 S. W. Rep. 501; San Antonio, etc., R. Co. v. McDonald, (Tex. Civ. App. 1895) 31 S. W. Rep. 72.

In Gulf, etc., R. Co. v. Schwabbe, 1 Tex. Civ. App. 573, it was held that the plaintiff, an engine wiper employed in the defendant's yard, could not recover of the defendant for injuries sustained through the negligence of the foreman of the yard in the handling of an engine while a coupling was being made by the plaintiff. Although the foreman had authority to employ and discharge the plaintiff, it was no part of his duty as foreman of the yard to handle the engine.

But it has been held that a master is liable for the negligence of a foreman in charge of work who has the power to employ and discharge the injured employee, although the character of the act in connection with which the negligence occurred may have been such as to make it the act of a mere fellow servant. Texas, etc., R. Co. v. Nix, (Tex. Civ. App. 1893) 23 S. W. Rep. 328.

1. Galveston, etc., R. Co. v. Smith, 76 Tex. 611, 18 Am. St. Rep. 78; Nix v. Texas Pac. R. Co., 82 Tex. 473. This is also the construction of the Texas Fellow Servants Act (Gen. Laws Texas, 1891, c. 24). Texas, etc., R. Co. v. Tatman, 10 Tex. Civ. App. 434.

2. Thus it has been held that a conductor, having superintendence and control over a brakeman but no authority to employ and discharge him, is not a superior servant for whose negligence the brakeman can recover of the railroad company. Campbell v. Cook, 86 Tex. 630, 40 Am. St. Rep. 878. See Ft. Worth, etc., R. Co. v. Peters, 87 Tex. 222; Austin Rapid Transit R. Co. v. Grothe, 88 Tex. 262; Texas, etc., R. Co. v. Reed, 88 Tex. 439. But see *infra*, this section, *Statutory Recognition of the Doctrine*.

3. North Carolina. — Dobbin v. Richmond, etc., R. Co., 81 N. Car. 446, 31 Am. Rep. 512; Kirk v. Atlanta, etc., R. Co., 94 N. Car. 625, 55 Am. Rep. 621.

The case of Cowles v. Richmond, etc., R. Co., 84 N. Car. 309, 37 Am. Rep. 620, apparently conflicts with this view. But see the comments on this case in Hanna v. Granger 18 R. I. 507.

4. Mason v. Richmond, etc., R. Co., 111 N. Car. 482, 114 N. Car. 718; Shadd v. Georgia, etc., R. Co., 116 N. Car. 970; Patton v. Western North Carolina R. Co., 96 N. Car. 455; Logan v. North Carolina R. Co., 116 N. Car. 940; Turner v. Goldsboro Lumber Co., 119 N. Car. 387.

5. Webb v. Richmond, etc., R. Co., 97 N. Car. 387.

A railroad company has been held liable for the negligence of a conductor resulting in an injury to a brakemen under him. Mason v. Richmond, etc., R. Co., 111 N. Car. 482, 114 N. Car. 718; Shadd v. Georgia, etc., R. Co., 116 N. Car. 968; Purcell v. Southern R. Co., 119 N. Car. 728.

In Logan v. North Carolina R. Co., 116 N. Car. 940, the plaintiff, a section hand in the defendant's employ, had been injured by the failure of the "section boss" to stop the hand-car on which the plaintiff was riding, in time to avoid a collision with an approaching train, and by the carelessness of the "boss" in directing the removal of the car from the track. The "boss," as was alleged in the complaint, had full power and authority to hire and discharge hands, and the plaintiff was bound to obey his orders and commands. It was held that the defendant was liable.

Since the question whether one servant may recover of the master for the negligence of another depends upon whether he had just reason for believing that the failure or refusal to obey the superior would have been followed by his discharge, there is no inflexible rule that a foreman exercising authority over those who work in a manufacturing establishment is or is not a vice-principal; but the question whether he is a fellow servant or an *alter ego* of the company depends upon the proof in each case of the relations existing between the two. Turner v. Goldsboro Lumber Co., 119 N. Car. 387.

Where, however, a servant never comes in direct contact with, or receives orders or instructions from, one higher in position or power than the foreman, he is justified in looking upon the latter as the representative of the company. Mason v. Richmond, etc. R. Co., 111 N. Car. 482; Turner v. Goldsboro Lumber Co., 119 N. Car. 387.

relieved from liability simply because the negligent servant has not been invested with this power; for, while the fact that the superior servant possesses this power may be evidence that the subordinate's fear of loss of employment is well founded, to make the master's liability dependent on the possession of this power by the negligent superior would afford the master an opportunity to evade just responsibility by vesting the actual power to discharge in another than the immediate superior, while the latter's recommendations of dismissal from service would always be acted upon favorably.¹

ff. RULE IN OTHER STATES. — There are a number of other states in which the superior-servant limitation is favored, but in view of the present condition of the authorities it is difficult to say how far the Ohio doctrine has been adopted, or to extract any definite rule from the decisions.²

1. *Mason v. Richmond, etc., R. Co.*, 111 N. Car. 482, 114 N. Car. 718; *Turner v. Goldsboro Lumber Co.*, 119 N. Car. 387.

2. *Rule in Other States.* — The decisions in these states are given below, but with no attempt to place them in reference to the different forms of the limitation which have already been discussed.

Arkansas. — In the case of *Fones v. Phillips*, 39 Ark. 17, 43 Am. Rep. 264, the Supreme Court of Arkansas seemed inclined to reject the superior-servant limitation. But in the later case of *Bloyd v. St. Louis, etc., R. Co.*, 58 Ark. 66, 41 Am. St. Rep. 85, which arose before the passage of the act defining who are fellow servants and who are not, it was held that the foreman of a squad of railroad workmen, whose charge extends to building and repairing many trestles and bridges, who has the power to employ and discharge the men, and whose duty is to oversee and direct their work, is so far a vice-principal of the railroad company that the latter will be liable for his negligence in giving inconsistent orders to the men whereby one of them is injured. In the opinion delivered by Mansfield, J., the court gives its approval to the view that where the work at which the injured servant was employed is such that skilful and careful supervision is necessary to the safety of the workmen, it is the duty of the master to bestow such supervision, and if he appoints an agent to perform that duty, he is responsible for the agent's negligence. It is evident that this view is very like that of the *Missouri* courts. See *infra*, this note.

Georgia. — In some of the Georgia cases the superior-servant limitation seems to have been rejected. See *Cates v. Itner*, 104 Ga. 679; *McGovern v. Columbus Mfg. Co.*, 80 Ga. 227.

But in a number of other Georgia cases the superior-servant limitation seems to be distinctly favored. See *Atlanta Cotton Factory Co. v. Speer*, 69 Ga. 137, 47 Am. Rep. 750. This case was extensively quoted from with approval in the later case of *Blackman v. Thomson-Houston Electric Co.*, 102 Ga. 64, where it was held that one who is employed in the capacity of engineer for an incorporated manufacturing company, but who is likewise under a duty to obey generally the orders of a person who is placed in authority over him, and who has power temporarily to withdraw him from the performance of the special duty for which he was employed, and to assign him to the performance of other and inconsistent

duties not connected with or embraced within his special employment, is not a fellow servant with such superior.

In a case where the plaintiff was a brakeman and car coupler on the defendant's train, and was injured by the negligence of the engineer, who had, by the direction of the defendant, sole charge and entire control and management of the train and of the plaintiff in his capacity as brakeman and coupler, it was held that the defendant was liable; that "the master had deputed to the engineer authority over those who were subordinate to him, and the negligence of the person exercising such authority was the negligence of the master itself. See *Chicago, etc., R. Co. v. Ross*, 112 U. S. 377." *Taylor v. Georgia Marble Co.*, 99 Ga. 512. See also *Prather v. Richmond, etc., R. Co.*, 80 Ga. 436, 12 Am. St. Rep. 263; *Mills v. East Tennessee, etc., R. Co.*, 87 Ga. 105.

It has been held that a conductor is not, when directing the movements of the train and giving orders to the brakeman and engineer in connection therewith, a fellow servant of such employees within the meaning of the rule as to fellow servants, but he is a vice-principal of the master. *Spencer v. Brooks*, 97 Ga. 681, 5 Am. & Eng. R. Cas. N. S. 202.

Idaho. — *Palmer v. Utah, etc., R. Co.*, 2 Idaho 290.

Kansas. — There are a few early Kansas cases which are sometimes cited in support of the superior-servant limitation, but which do not necessarily go to that extent, although they contain dicta which seem to favor the limitation.

The case of *Kansas Pac. R. Co. v. Little*, 19 Kan. 267, is frequently cited in support of the limitation, but an examination of the case will show that this is wrong. The superior servant in this case had entire charge of the machinery, and it was his duty to inspect the derrick, a defect in which caused the injury. In the language of the court, "If he had been merely a foreman working under a common employer, a common master, a common principal, along with the other employees, then we suppose under the authorities he would have been only a fellow servant with the others, and the company would not have been responsible for his negligence towards the others. But he was not merely a foreman working with the others under a common employer."

Still other of the earlier Kansas decisions are no more favorable to the limitation than is this case. Thus, the negligence of a road-

(e) **Rejection of the Doctrine** — *aa. IN GENERAL.* — The very great confusion which has been shown to exist in the law of fellow servants in those jurisdictions where the superior-servant limitation has been adopted, and the inability of

master upon whom is imposed the duty of directing the repairs of the road and keeping the roadbed in a safe condition has been held to be the negligence of the company. *Atchison, etc., R. Co. v. Moore*, 31 Kan. 197, 15 Am. & Eng. R. Cas. 312; *Atchison, etc., R. Co. v. Moore*, 29 Kan. 632, 11 Am. & Eng. R. Cas. 243.

And the negligence of a section boss in failing to keep the roadbed in proper condition, whereby an engineer was injured, has been held to be the negligence of the company, as it has in all well-considered cases where the question has arisen. *St. Louis, etc., R. Co. v. Weaver*, 35 Kan. 412. In this case the doctrine of the *Ross* case (*Chicago, etc., R. Co. v. Ross*, 112 U. S. 377, 17 Am. & Eng. R. Cas. 501), is termed "extreme." See also *Kansas Pac. R. Co. v. Salmon*, 14 Kan. 512, and *Hannibal, etc., R. Co. v. Fox*, 31 Kan. 586.

In a later case, that of *Missouri Pac. R. Co. v. Perego*, 36 Kan. 424, the court used the following language: "We concede the general rule to be that the negligence of a fellow servant is one of the risks assumed by the employee, and for which the employer is not liable; but there are exceptions to this general rule, and where the employer places an employee under the control and direction of another, and the latter, in the exercise of the authority so conferred, orders the former into a place of unusual danger, and thus exposes him to extraordinary peril, of the existence and extent of which he is not advised, the master is liable; and we think this case comes within the exceptions to the general rule. Here the employer placed deceased under the direction and control of a collaborer, and was ordered by him to move a trestle, to do which would place him under the engine frame, a place of hazard and danger of which he was entirely ignorant." The deceased in this case, however, was an ignorant and inexperienced boy, and according to the rule laid down in another section of this article (see *infra*, this division, the subdivision *Vice-Principals*), the company was properly held liable for his death.

But by several late cases it is now settled that the superior-servant limitation is recognized in Kansas at least to the extent that it prevails in Illinois. In *Walker v. Gillett*, 59 Kan. 214, a case in which the accident in which the plaintiff was injured occurred in Oklahoma, and the defendant's liability was therefore determined upon common-law principles, it was held that the defendant railroad was liable to a brakeman for injuries occasioned by the negligence of the conductor of the train on which he was employed, where the conductor had full charge of the movements of the train, and the brakeman was acting under his orders. In the opinion delivered in this case by Allen, J., it was said: "Where the general power to manage and command is given to one, and the duty of the others is merely to execute and obey, he who directs stands in the place of the principal, and the principal must respond to those under him for

his misconduct. * * * It may be that a mere matter of difference in the grade of service of the employees is not controlling, but where one is under the direct and personal supervision and control of the other, it does control. * * * Whoever has full and unrestricted authority to direct and command is a vice-principal, and for his negligence the master must respond." On the authority of this case it was held in *Kansas City Car, etc., Co. v. Sechrist*, (Kan. 1898) 54 Pac. Rep. 688, that a foreman directing the work of putting in car scales is not the fellow servant of a carpenter working under him. And in *Atchison, etc., R. Co. v. Carter*, (Kan. 1898) 55 Pac. Rep. 279, a railroad company was held liable for the death of a brakeman by reason of the negligence of an engineer. See also *Consolidated Kansas City Smelting, etc., Co. v. Peterson*, (Kan. App. 1899) 55 Pac. Rep. 673.

As to railroad employees, this question cannot now arise where the liability of the company is to be determined by the law of Kansas, for the reason that the fellow-servant rule, so far as it affects the employees of railroad companies, is abrogated by statute. See *infra*, this title and division, the subdivision *Statutory Limitations of the Rule*.

Missouri. — In the case of *McDermott v. Pacific R. Co.*, 30 Mo. 115, which was decided in 1860, and was the first case in Missouri in which the doctrine of fellow servants was discussed and announced, the controversy grew out of the breaking down of a railroad bridge. The plaintiff was a brakeman, and the train went down on account of the frailty of the bridge. Judge Napton, who delivered the opinion of the court, laid down the broad doctrine that a servant who is injured by the negligence or misconduct of a fellow servant can maintain no action against the master for such injury; and that the rule should be "applied in all cases alike, without regard to the degrees of subordination in which the different servants or agents may be placed with reference to each other."

And in the case of *Brothers v. Cartter*, 52 Mo. 373, 14 Am. Rep. 424, the court inclined to the view that it is the act out of the negligent performance of which the injury arose which determines whether the servant performing it is a fellow servant of the employee injured or a representative of the master.

But the view which seems to be favored in the earlier Missouri cases, that the fellow-servant rule is applicable without regard to the degrees of subordination in which the different servants or agents may be placed with reference to each other, has been disregarded in the later cases in that state (*Parker v. Hannibal, etc., R. Co.*, 109 Mo. 391), and it has been held that where the master gives to one servant power to superintend, control, and direct other servants, the master is liable for the negligence of such superior servants. *Stephens v. Hannibal, etc., R. Co.*, 86 Mo. 221; *McDermott v. Hannibal, etc., R. Co.*, 87 Mo. 285; *Dowling v. Allen*, 88 Mo. 293; *Hoke v. St.*

the courts of these different jurisdictions to agree upon some common principle by which to determine the master's liability for the negligence of a superior servant, furnish strong evidence that these courts have, in their recognition of

Louis, etc., R. Co., 88 Mo. 360; Smith v. Wabash, etc., R. Co., 92 Mo. 359; Tabler v. Hannibal, etc., R. Co., 93 Mo. 79; Dayharsh v. Hannibal, etc., R. Co., 103 Mo. 570, 23 Am. St. Rep. 900; Taylor v. Missouri Pac. R. Co., (Mo. 1891) 16 S. W. Rep. 206; Sullivan v. Hannibal, etc., R. Co., 107 Mo. 66, 28 Am. St. Rep. 388; Schroeder v. Chicago, etc., R. Co., 108 Mo. 322; Russ v. Wabash Western R. Co., 112 Mo. 45; Foster v. Missouri Pac. R. Co., 115 Mo. 165; Donahoe v. Kansas City, 136 Mo. 657; Bradley v. Chicago, etc., R. Co., 138 Mo. 293; Herriman v. Chicago, etc., R. Co., 27 Mo. App. 435; Cox v. Syenite Granite Co., 39 Mo. App. 424; Higgins v. Missouri Pac. R. Co., 43 Mo. App. 547; Hall v. St. Joseph Water Co., 48 Mo. App. 356; Hutson v. Missouri Pac. R. Co., 50 Mo. App. 300; Claybaugh v. Kansas City, etc., R. Co., 56 Mo. App. 630. See also Reber v. Tower, 11 Mo. App. 208. But compare Shortel v. St. Joseph, 104 Mo. 114, 24 Am. St. Rep. 317.

In the case of Moore v. Wabash, etc., R. Co., 85 Mo. 588, the plaintiff sued to recover damages for an injury sustained by him while in the employ of the defendant as a car repairer. It appeared that the company had established a rule requiring all repairers, when engaged in repairing cars, to set out red flags on each side of the place where they were at work, as signals of warning to approaching trains. Notwithstanding this rule, the foreman of car repairs directed the plaintiff, without any flags being set out as required by this rule, to repair a drawhead of the car, promising to protect him while so engaged. By reason of the foreman's negligence, an engine ran against the car and severely injured the plaintiff. The company was held liable on the ground that the foreman was the *alter ego* of the company, and his promise of protection was binding, although the rule provided to secure the safety of the men had not been observed.

In Miller v. Missouri Pac. R. Co., 109 Mo. 350, 32 Am. St. Rep. 673, it was held that the defendant railroad was liable for the death of a member of a crew of men engaged in repairing a railroad track, where such death was occasioned by the negligence either of the foreman of the crew or of a conductor of a material train, having control over it and its movements.

In Hutson v. Missouri Pac. R. Co., 50 Mo. App. 300, it was held that the negligence of a section foreman in striking a pick between the heads of two of the section men, whereby one of them was injured, was the act of a vice-principal, and not of a fellow servant.

It has been said that the status of a servant as a superior servant within this rule is not dependent on his power to employ and discharge servants. Hall v. St. Joseph Water Co., 48 Mo. App. 356; Foster v. Missouri Pac. R. Co., 115 Mo. 165.

And in one case the limitation recognized in *Illinois* seems to have been applied. Jones v. St. Louis, etc., Packet Co., 43 Mo. App. 398.

It was held in this case that a master is not liable for the acts of a superior servant in beating a subordinate for the purpose of making him work.

In a number of the *Missouri* cases the limitation seems to be upheld on the ground that the master, by appointing a foreman or other person to superintend work, with power to direct the men under him when and how to do it, thereby devolves upon such person the performance of duties which are personal to the master. See Miller v. Missouri Pac. R. Co., 109 Mo. 350, 32 Am. St. Rep. 673; Schroeder v. Chicago, etc., R. Co., 108 Mo. 322. That this must be the theory upon which the Supreme Court of Missouri holds the master liable to one servant for the negligence of a superior is further shown by the fact that in the case of Schaub v. Hannibal, etc., R. Co., 106 Mo. 74, which, however, is not an authority on the superior-servant question, Gantt, J., said: "It is conceived that much of the apparent conflict in the different cases on the liability of the master to his servant for the negligent acts of other servants grows out of the failure to keep in view those personal duties which the master himself owes to his servants, as distinguished from those they owe each other. For failure or negligence in the discharge of these personal duties of the master, resulting in injury, the master is liable whether he acts in person or by other servants. If he acts by servants in such cases, it makes no difference as to the grade of the servant. The servant is identified with the master. The master's duties are cast upon him, and for his default the master is liable, and in these cases the doctrine of 'fellow servants,' so called, has no application whatever."

It may be said of the *Missouri* cases that their value as authority in support of the proposition that a master is liable to one servant for the negligence of another who is invested with the power of supervision and control is much impaired by the fact that the reason given for the rule is that the superior servant stands in the place of the master because he is intrusted with one of the master's duties to his servants, *i. e.*, that of supervision and control. In this assumption that it is one of the personal obligations of the master to exercise supervision and control over his servants engaged in a particular piece of work, the *Missouri* court, it is believed, stands almost alone. The same theory was, indeed, advanced in the case of Bloyd v. St. Louis, etc., R. Co., 58 Ark. 66, 41 Am. St. Rep. 85, but supervision of the servant's work is not usually considered one of the master's personal duties to his servants. See the title MASTER AND SERVANT. In short, the reasons advanced by the courts of this state in support of a questionable doctrine are altogether insufficient.

Nebraska. — The Ohio cases have been followed in Nebraska, and the courts of this state have not yet adopted the restrictions upon the Ohio doctrine which have been recognized in other states.

this anomaly in the law, radically departed from sound principle. And that they have gone contrary to the vast preponderance of common-law authority cannot be doubted. Indeed, this has been admitted even in cases where the limitation has been applied.¹

The first case in this state in which the superior-servant question arose is that of *Chicago, etc., R. Co. v. Lundstrom*, 16 Neb. 254, 21 Am. & Eng. R. Cas. 528. It was held in this case that the conductor of a railroad construction train, having immediate charge of a gang of laborers, is, as to such men, the vice-principal of the railroad company, and not their fellow servant. Cobb, C. J., after quoting the rule laid down by Judge Ranney in *Cleveland, etc., R. Co. v. Keary*, 3 Ohio St. 201, said: "I think the law thus established and laid down in Ohio prevails substantially throughout the western states, and will ultimately prevail everywhere."

The decision in this case was adhered to in the later case of *Burlington, etc., R. Co. v. Crockett*, 19 Neb. 138. In this case the husband of the administratrix was loss or foreman of a gang of trackmen in the employ of the railroad company, and with his men was put to work on a gravel train hauling gravel and earth for repairing and strengthening the railway track. The gravel train and the section foreman and his men were all under the control and direction of the conductor of the gravel train. The foreman was killed by obeying an order of the conductor, which, it was alleged, was negligently given, and the court held that the conductor of the train, and Crockett the boss of the section gang, were not fellow servants, but that as to Crockett the conductor of the train was a vice-principal.

In *Sioux City, etc., R. Co. v. Smith*, 22 Neb. 775, it was held that a foreman of a company of men engaged in the business of repairing bridges, water tanks, etc., on a line of railway, who has power to control and direct the movements of the men, will render the company liable for acts of negligence committed by him whereby one of the men under his control is injured.

In *Chicago, etc., R. Co. v. Sullivan*, 27 Neb. 673, 41 Am. & Eng. R. Cas. 463, it was said that the defendant might be liable to an employee who was under the direction of a car repairer while learning the work, for the negligence of the latter. The judgment for the plaintiff in the lower court was, however, reversed because of an erroneous instruction.

And it has been said that the foreman of a section crew occupies toward a member of the crew the station of vice-principal. *Chicago, etc., R. Co. v. Anderson*, 38 Neb. 112.

In *Union Pac. R. Co. v. Doyle*, 50 Neb. 555, a case in which the earlier Nebraska cases are reviewed, it was held that a member of a section crew, which, with its boss, was under the control and direction and subject to the orders of a foreman, could recover of the defendant railroad company for injuries sustained by the foreman's negligence in giving an order. And the fact that the foreman was not invested with authority to hire and discharge the plaintiff was held not to prevent the former from being the defendant's vice-principal.

In *Clark v. Hughes*, 51 Neb. 780, the defend-

ant railroad company was held liable to a brakeman on a freight train for injuries sustained through the negligence of the conductor of the train.

South Carolina.—The Supreme Court of South Carolina has, in several cases, approved the proposition that the only true test as to whether the negligent servant occupies the position of a fellow servant to the one who is injured, or is a representative of the master, is whether the person whose status is in question is charged with the performance of a duty which properly belongs to the master. *Gunter v. Graniteville Mfg. Co.*, 18 S. Car. 262, 44 Am. Rep. 573; *Boatwright v. Northeastern R. Co.*, 25 S. Car. 128; *Calvo v. Charlotte, etc., R. Co.*, 23 S. Car. 528, 55 Am. Rep. 28, 28 Am. & Eng. R. Cas. 327; *Coleman v. Wilmington, etc., R. Co.*, 25 S. Car. 446, 60 Am. Rep. 516; *Jenkins v. Richmond, etc., R. Co.*, 39 S. Car. 507, 39 Am. St. Rep. 750.

But while the rule thus laid down has been avowedly followed in the South Carolina cases, it has not always been consistently applied. There are a number of cases in this state which, in effect, recognize the superior-servant limitation. Thus, it has been "assumed" that in the control and direction of his squad hands a section master was in the performance of the duties of the company, and to that extent its representative. *Couch v. Charlotte, etc., R. Co.*, 22 S. Car. 557, 28 Am. & Eng. R. Cas. 331. And following the United States Supreme Court in the case of *Chicago, etc., R. Co. v. Ross*, 112 U. S. 377, 17 Am. & Eng. R. Cas. 501, it has been held that a conductor of a train is the representative of the company, and not a fellow servant with other employees working on the train under his orders. *Boatwright v. Northeastern R. Co.*, 25 S. Car. 128; *Coleman v. Wilmington, etc., R. Co.*, 25 S. Car. 446, 60 Am. Rep. 516.

And it seems that under the South Carolina Constitution of 1895 an employee of a railroad corporation now has the same right to recover for his injury as other persons not employees have, when the injury results from negligence of a superior agent or officer of a corporation, or of a person having a right to control or direct the services of the injured person. *Bussey v. Charleston, etc., R. Co.*, 52 S. Car. 438.

Washington.—See *Northern Pac. R. Co. v. O'Brien*, 1 Wash. 599; *Zintek v. Stimson Mill Co.*, 6 Wash. 178.

1. Superior-Servant Limitation Contrary to Weight of Authority.—In the *Tennessee* case of *Nashville, etc., R. Co. v. Wheelless*, 10 Lea (Tenn.) 741, 43 Am. Rep. 317, it is admitted that the superior-servant limitation as it has been established in that state is opposed to the larger number of cases.

And in the dissenting opinions of Sheldon, C. J., and Scott and Craig, JJ., in the *Illinois* case of *Chicago, etc., R. Co. v. May*, 108 Ill. 302, it was said: "We believe the true rule now prevailing, as established by the great

bb. APPROVED DOCTRINE. — According to the view which harmonizes best with the analogies of the law, and which furnishes the safest guide in the majority of cases, the master's liability to one servant for the negligence of another in no wise depends upon the comparative rank of the negligent servant. True, the master may be liable for the negligence of a superior servant, but it is not because of his superior rank. It is because he is charged with the performance of one of the master's personal duties. If a servant is charged with the performance of one of the master's duties, then, as is said elsewhere in this article,¹ the master must answer for his negligence in the discharge of that duty. And it is immaterial whether the servant who is charged with, and fails in the performance of, the master's personal obligation ranks above or below the servant who is injured. The test, then, which determines the master's liability is the nature of the act in reference to which the negligence occurred; if the servant whose negligence caused the injury was at the time performing one of the master's duties to his servants, the master is liable; if, on the other hand, he was not performing a duty which the law imposes upon the master, the master is not liable. In neither case does the fact that the negligent servant is the superior of the injured servant, or *vice versa*, affect the question of the master's liability. Not only is this rule consonant with the analogies of the law, but it is supported by the vast preponderance of common-law authority.²

weight of authority, and the only one to be sustained on principle, is that the master cannot be held chargeable for any act of negligence on the part of the superior servant, except in so far as such servant is charged with the performance of the master's duty to his servants, such as the supplying of safe machinery, the selection of competent servants, etc.; and to the extent of the discharge of those duties which the master owes to his servants, by the superior servant, the latter stands in the place of the master, but as to all other matters he is a mere co-servant."

1. See *infra*, this section, *Vice-Principals*.

2. *Superior-servant Doctrine Rejected.* — Below will be found a list of the cases in the jurisdictions where the limitation has been repudiated, with a review of the authorities in some instances, especially of the cases in those jurisdictions where there has been some conflict in the decisions.

England. — *Wigmore v. Jay*, 5 Exch. 354; *Lovegrove v. London, etc.*, R. Co., 16 C. B. N. S. 669, 111 E. C. L. 669, 33 L. J. C. P. 329; *Feltham v. England, L. R.* 2 Q. B. 33; *Wilson v. Merry*, L. R. 1 H. L. Sc. 326; *Howells v. Landore Siemens Steel Co.*, L. R. 10 Q. B. 62.

Canada. — *Rudd v. Bell*, 13 Ont. Rep. 47; *Fairweather v. Owen Sound Stone Quarry Co.*, 26 Ont. Rep. 604; *O'Sullivan v. Victoria R. Co.*, 44 U. C. Q. B. 128; *Drew v. Corporation of East Whitby*, 46 U. C. Q. B. 107; *Matthews v. Hamilton Powder Co.*, 14 Ont. App. 261.

United States. — *Baltimore, etc., R. Co. v. Baugh*, 149 U. S. 368, *distinguishing Chicago, etc., R. Co. v. Ross*, 112 U. S. 377, 17 Am. & Eng. R. Cas. 501; *Northern Pac. R. Co. v. Hambly*, 154 U. S. 349; *Central R. Co. v. Keegan*, 160 U. S. 259; *Northern Pac. R. Co. v. Peterson*, 162 U. S. 346; *Northern Pac. R. Co. v. Charless*, 162 U. S. 359; *Martin v. Atchison, etc., R. Co.*, 166 U. S. 399; *Alaska Min. Co. v. Whelan*, 168 U. S. 86.

Whatever confusion exists in the federal cases on this question is due to the case of

Chicago, etc., R. Co. v. Ross, 112 U. S. 377, 17 Am. & Eng. R. Cas. 501, commonly known as the *Ross case*. The facts of this case were simple. The conductor of a freight train, taking his train out of Minneapolis, neglected to notify the engineer of an order which he had received from the train dispatcher. The engineer, without fault, upon his failure to receive the order, by the negligence of the conductor, ran his train into another and was injured. In an action against the company, the court below, the Circuit for the Minnesota District, instructed the jury that if the injury occurred by the fault of the conductor, without contributory negligence on the part of the engineer, the company was liable. A verdict was returned for the plaintiff and judgment had thereon. The case was taken to the United States Supreme Court, and the judgment was affirmed by a bare majority, Justices Blatchford, Gray, Matthews, and Bradley *dissenting*. Mr. Justice Field wrote the opinion of the court. After citing and reviewing a number of American and English decisions, he said: "There is, in our judgment, a clear distinction to be made, in their relation to their common principal, between servants of a corporation, exercising no supervision over others engaged with them in the same employment, and agents of the corporation, clothed with the control and management of a distinct department, in which their duty is entirely that of direction and superintendence. A conductor, having the entire control and management of a railway train, occupies a very different position from the brakemen, the porters, and other subordinates employed. He is in fact and should be treated as the personal representative of the corporation, for whose negligence it is responsible to subordinate servants. This view of his relation to the corporation seems to us a reasonable and just one, and it will insure more care in the selection of such agents, and thus give greater security to the servants engaged under him in

cc. REASONS FOR REJECTING THE LIMITATION. — As has been stated in an early part of this article, the true reason underlying the fellow-servant rule is that the

an employment requiring the utmost vigilance on their part, and prompt and unhesitating obedience to his orders. The rule which applies to such agents of one railway corporation must apply to all, and many corporations operate every day several trains over hundreds of miles at great distances apart each being under the control and direction of a conductor specially appointed for its management. We know from the manner in which railways are operated that, subject to the general rules and orders of the directors of the companies, the conductor has entire control and management of the train to which he is assigned. He directs when it shall start, at what speed it shall run, at what stations it shall stop, and for what length of time, and everything essential to its successful movements, and all persons employed on it are subject to his orders. In no proper sense of the term is he a fellow servant with the fireman, the brakemen, the porters, and the engineer. The latter are fellow servants in the running of the train under his direction; as to them and the train he stands in the place of and represents the corporation. * * * There are decisions in the courts of other states, more or less in conformity with those cited from Ohio and Kentucky, rejecting or limiting, to a greater or less extent, the master's exemption from liability to a servant for the negligent conduct of his fellows. We agree with them in holding — and the present case requires no further decision — that the conductor of a railway train, who commands its movements, directs when it shall start, at what stations it shall stop, at what speed it shall run, and has the general management of it, and control over the persons employed upon it, represents the company, and therefore that, for injuries resulting from his negligent acts, the company is responsible. If such a conductor does not represent the company, then the train is operated without any representative of its owner."

While it has sometimes been thought that this case practically recognizes the superior-servant rule (*Mason v. Edison Mach. Works*, 28 Fed. Rep. 228; *Atchison, etc., R. Co. v. Martin*, 7 N. Mex. 158; *Congrave v. Southern Pac. R. Co.*, 88 Cal. 360; *Shiras, J.*, in *Borgman v. Omaha, etc., R. Co.*, 41 Fed. Rep. 667), it is evident that the court did not intend to pass upon the propriety of that doctrine. Judge McCrary, who delivered the opinion of the Circuit Court, recognized the doctrine that the mere matter of subordination determines the liability of the employer; that wherever one servant stands subject to the orders of another servant whom the master employs, the negligence of the latter is the negligence of the master; so that if a section boss is guilty of negligence, whereby a section hand working under him is injured, the company is responsible. *Ross v. Chicago, etc., R. Co.*, 8 Fed. Rep. 544. But the Supreme Court declined to commit itself to that doctrine, and affirmed the judgment of the Circuit Court upon the theory that the servant guilty of negligence was the conductor — one having the sole control and management of a moving

train — and said that by virtue of the large control and great responsibility vested in him it was proper to hold him as a representative of the company, its *alter ego*, and his negligence the negligence of the company. See *Mealman v. Union Pac. R. Co.*, 37 Fed. Rep. 189. This is the construction which has been given to the decision in this case in the later case of *Baltimore, etc., R. Co. v. Baugh*, 149 U. S. 368, where it is said that the court in the *Ross* case "did not hold that it was universally true that, when one servant has control over another, they cease to be fellow servants within the rule of the master's exemption from liability." See *Northern Pac. R. Co. v. Hambley*, 154 U. S. 349; *Northern Pac. R. Co. v. Smith*, 59 Fed. Rep. 993, 15 U. S. App. 294.

For an exhaustive discussion of both the *Ross* and the *Baugh* cases see *Atchison, etc., R. Co. v. Martin*, 7 N. Mex. 158. See also *Illinois Cent. R. Co. v. Meyer*, 65 Ill. App. 531.

It has been doubted whether the *Ross* case is to be regarded as authority. *Coulson v. Leonard*, 77 Fed. Rep. 538. Indeed, it has been said that it is practically overruled by the *Baugh* case. *Illinois Cent. R. Co. v. Meyer*, 65 Ill. App. 531; *Jackson v. Norfolk, etc., R. Co.*, 43 W. Va. 380. In *St. Louis, etc., R. Co. v. Needham*, 63 Fed. Rep. 107, 27 U. S. App. 227, it was said that "the decision in the *Ross* case has been so limited and restricted by the subsequent decisions of the Supreme Court that it cannot now be treated as authority in any case which does not present substantially the same state of facts."

Very naturally, the *Ross* case was followed by the United States Circuit and District Courts in cases decided before the *Baugh* case. *The Titan*, 23 Fed. Rep. 413; *The Carolina*, 30 Fed. Rep. 199; *The Furnessia*, 30 Fed. Rep. 878; *Mason v. Edison Mach. Works*, 28 Fed. Rep. 228; *Garrahy v. Kansas City, etc., R. Co.*, 25 Fed. Rep. 258; *Van Wickle v. Manhattan R. Co.*, 32 Fed. Rep. 278; *Navlor v. New York Cent., etc., R. Co.*, 33 Fed. Rep. 801; *Robertson v. Cornelson*, 34 Fed. Rep. 716; *Central Trust Co. v. Wabash, etc., R. Co.*, 34 Fed. Rep. 616; *Van Avery v. Union Pac. R. Co.*, 35 Fed. Rep. 40; *Ragsdale v. Northern Pac. R. Co.*, 42 Fed. Rep. 383; *Atchison, etc., R. Co. v. Wilson*, 48 Fed. Rep. 57, 4 U. S. App. 25; *Northern Pac. R. Co. v. Cavanaugh*, 10 U. S. App. 197, 51 Fed. Rep. 517; *Cleveland, etc., R. Co. v. Brown*, 56 Fed. Rep. 804, 18 U. S. App. 10; *Union Pac. R. Co. v. Callaghan*, 56 Fed. Rep. 988, 12 U. S. App. 547. See also *Gravelle v. Minneapolis, etc., R. Co.*, 10 Fed. Rep. 711; *The Sachem*, 42 Fed. Rep. 66. But see *Stockmeyer v. Reed*, 55 Fed. Rep. 259; *Anderson v. Winston*, 31 Fed. Rep. 528; *The Frank and Willie*, 45 Fed. Rep. 494. But since the decision of the *Baugh* case these courts have usually applied the rule therein stated. *What Cheer Coal Co. v. Johnson*, 56 Fed. Rep. 810, 12 U. S. App. 490; *Harley v. Louisville, etc., R. Co.*, 57 Fed. Rep. 144; *Minneapolis v. Lundin*, 19 U. S. App. 245, 58 Fed. Rep. 525; *Northern Pac. R. Co. v. Smith*, 59 Fed. Rep. 993, 15 U. S. App. 294; *McGrath v. Texas, etc., R. Co.*, 60 Fed. Rep. 555, 23

servant in entering the master's service assumes the ordinary risks of the employment, including the negligence of his fellow servant. This being

U. S. App. 86; *St. Louis, etc., R. Co. v. Needham*, 63 Fed. Rep. 107, 27 U. S. App. 227; *Kansas, etc., R. Co. v. Waters*, 36 U. S. App. 31, 70 Fed. Rep. 28; *Deavers v. Spencer*, 70 Fed. Rep. 480, 25 U. S. App. 411; *Cleveland, etc., R. Co. v. Brown*, 73 Fed. Rep. 970; *Balch v. Haas*, 73 Fed. Rep. 974, 36 U. S. App. 603; *Reed v. Stockmeyer*, 74 Fed. Rep. 186; *The Louisiana*, 74 Fed. Rep. 748; *Coulson v. Leonard*, 77 Fed. Rep. 538, *criticising Woods v. Lindvall*, 48 Fed. Rep. 62, 4 U. S. App. 49; *Yager v. Receivers*, 88 Fed. Rep. 773. See also *Texas, etc., R. Co. v. Rogers*, 13 U. S. App. 547, 57 Fed. Rep. 378; *Alaska Treadwell Gold Min. Co. v. Whelan*, 29 U. S. App. 1, 64 Fed. Rep. 462. But see *Union Pac. R. Co. v. Callaghan*, 12 U. S. App. 541, 56 Fed. Rep. 988; *Canadian Pac. R. Co. v. Johnston*, 61 Fed. Rep. 738; *Northern Pac. R. Co. v. Poirier*, 67 Fed. Rep. 881; *The Transfer No. 4*, 61 Fed. Rep. 364, 20 U. S. App. 570.

Alabama. — *Mobile, etc., R. Co. v. Smith*, 59 Ala. 245.

California. — The cases construing section 1970 of the California Civil Code, which in effect places in the category of fellow servants all those who are employed by the same employer "in the same general business," have consistently held that the master is not liable to one servant for the negligence of another merely because the negligent servant is the superior of the one who is injured. *Collier v. Steinhart*, 51 Cal. 116; *McLean v. Blue Point Gravel Min. Co.*, 51 Cal. 255; *McDonald v. Hazletine*, 53 Cal. 35; *Brown v. Central Pac. R. Co.*, 72 Cal. 523; *Stephens v. Doe*, 73 Cal. 26; *Fagundes v. Central Pac. R. Co.*, 79 Cal. 97; *Congrave v. Southern Pac. R. Co.*, 88 Cal. 360; *Daves v. Southern Pac. R. Co.*, 98 Cal. 19, 35 Am. St. Rep. 133; *Stevens v. San Francisco, etc., R. Co.*, 100 Cal. 554; *Noyes v. Wood*, 102 Cal. 389; *Callan v. Bull*, 113 Cal. 593; *Donnelly v. San Francisco Bridge Co.*, 117 Cal. 417.

Colorado. — While there are a number of dicta in the Colorado cases which seem to favor the superior-servant limitation, the whole trend of the decisions in this state rather favors the rule stated in the text.

In *Denver, etc., R. Co. v. Driscoll*, 12 Colo. 520, 13 Am. St. Rep. 243, the plaintiff, while a workman in the defendant's employ, and engaged on the work of extending the defendant's railroad line, was injured through the negligence of an employee named Manly. Manly had full charge of the track laying, and had two foremen and quite a number of men under him, whom he employed and discharged at his pleasure, having such authority in the premises. He had employed the plaintiff, who was under his direction and control at the time of the accident. The defendant was held liable for the consequences of Manly's negligence. This case does not necessarily support the superior-servant limitation; it is supportable upon the theory that Manly was in charge of an entire department of the employer's business. And it is held, even in states where the superior-servant limitation proper is rejected, that an employee who has charge

of the master's entire business, or a distinct department of the business, is a vice-principal, for whose negligence the master must answer. See *infra*, this title and division, the subdivision *Vice-Principals*. Color is lent to the view that the case really decides nothing more than this by the fact that Mr. Justice Hayt, in delivering the opinion of the court, quotes from the case of *Chicago, etc., R. Co. v. Ross*, 112 U. S. 390, as follows: "There is, in our judgment, a clear distinction to be made, in their relation to their common principal, between servants of a corporation, exercising no supervision over others engaged with them in the same employment, and agents of the corporation, clothed with the control and management of a distinct department in which their duty is entirely that of direction and superintendence. A conductor, having the entire control and management of a railway train, occupies a very different position from the brakemen, the porters, and other subordinates employed. He is in fact, and should be treated as, the personal representative of the corporation, for whose negligence it is responsible to subordinate servants." In *Colorado Coal, etc., Co. v. Lamb*, 6 Colo. App. 255, Bissell, J., in delivering the opinion of the court, said in effect that when the *Ross* case was cited with approval in *Denver, etc., R. Co. v. Driscoll*, 12 Colo. 520, 13 Am. St. Rep. 243, the learned chief justice very happily chose, as an illustration of the basis on which the *Driscoll* case was put, a quotation which is very abundantly sustained by the principle underlying the law, and expressly approved by the later case of *Baltimore, etc., R. Co. v. Baugh*, 149 U. S. 368, which so largely modifies and interprets the *Ross* case.

The *Driscoll* case was cited with approval in the later case of *Colorado Midland R. Co. v. O'Brien*, 16 Colo. 219, 48 Am. & Eng. R. Cas. 235. The facts of this case were in the main identical with those of the earlier one, and must, therefore, have turned on the same principle. It also appeared that the accident might have resulted from the defective condition of the track over which the plaintiff was being transported. If this were so, the defendant might have been held liable on the ground that it had neglected one of the personal duties which a master owes to his servants.

Again in *Colorado Midland R. Co. v. Naylon*, 17 Colo. 501, 31 Am. St. Rep. 335, the defendant railroad company was held liable to a common laborer in its employ for the negligence of an employee who had charge of a particular piece of track laying. But the court seems to base its decision on the ground that the negligent employee was a general agent in charge of "a distinct department of the railroad construction." As the accident was due to the defective spiking, by the direction of such agent, of the ties upon a curve where a train was derailed, and the plaintiff, who was riding on such train at the time of the accident, having had nothing whatever to do with the spiking, the defendant was unquestionably liable, on the ground that there had been

the reason for the rule, the rule is not applicable where the negligence of the fellow servant occurs in connection with the discharge of one of those duties

negligence in the discharge of one of the master's personal duties. That the court does not, in this case, accept the superior-servant limitation to its full extent, if, indeed, properly speaking, it accepts the limitation at all, is shown by the fact that Mr. Justice Helm, in delivering the opinion of the court, said: "The mere fact that the servant whose negligence produces the injury is superior in rank to the servant injured does not alone fix the master's liability. The general powers vested in the superior servant and the character of the specific act in connection with which his negligence occurs are considerations rarely, if ever, omitted in pursuing the inquiry. The accepted general rule is that where the negligent agent or servant can fairly be said to take the place of the master and represent him so as to become in reality a vice-principal, and the negligence occurs in the discharge of his representative duties, the master's liability may attach."

While it is distinctly stated in *Deep Min., etc., Co. v. Fitzgerald*, 21 Colo. 533, that the so-called American rule, meaning the rule which has been declared in Ohio and certain other states, is the one adopted in Colorado, the superior-servant limitation was not and could not have been applied in this case. The injury to the defendant resulted from the negligence of an alleged vice-principal while performing the work of the inferior employees, and the court merely held that for all such acts of a vice-principal as relate to the common employment, and are on the level with the acts of a fellow laborer, except such acts as are done by the vice-principal against the reasonable objections of the injured servant, the master is not responsible.

From certain expressions contained in the opinion delivered by Mr. Justice Goddard in the case of *Denver, etc., R. Co. v. Sipes*, 23 Colo. 226, it would seem that the Supreme Court of Colorado is inclined to adopt the rule stated in the text. The question in that case was whether a railroad company is liable for an injury to an employee on one of its trains caused by the negligence of a conductor on another train in leaving a switch open that it was his duty to see closed. It was said: "The solution of this question depends upon whether the default on his part consisted in a dereliction of duty imposed by law upon the company, or is one the performance of which it may delegate to another. If the former, the company is liable. If the latter, the rule that exempts the employer from liability for the negligence of a fellow servant applies. The personal duties that the law imposes upon the master are well defined and understood, and are such as relate to the furnishing and keeping in repair of reasonably safe machinery and appliances for carrying on his business; a reasonably safe place in which to render the service, and the exercise of reasonable care in the selection of competent co-workmen; in brief, such acts as pertain to construction, preservation, and management, as distinguished from the work of operation. * * * In this case there is no claim that the company failed in its

duty to furnish a safe and sufficient switch, or to exercise the requisite care in selecting the conductor and brakeman whose duty it was to operate it; but, on the other hand, it appears that through their neglect to properly adjust it, the injury was caused. It is insisted, however, that under the doctrine announced in the *Denver, etc., R. Co. v. Driscoll*, 12 Colo. 520, 13 Am. St. Rep. 243, and *Colorado Midland R. Co. v. Naylor*, 17 Colo. 501, 31 Am. St. Rep. 335, the conductor occupied the position of vice-principal, or *alter ego* of the company; and hence his negligence in this particular instance was the negligence of the company. We do not think that the rule therein announced supports this conclusion. In those cases the negligence that caused the injury consisted in the failure to properly perform a duty that the law imposed upon the company, and not in the negligent performance of an assignable duty, as in this case. In the case before us, the accident is not attributable to the negligence of the conductor in the discharge of a duty in his capacity as the company's representative, but to his failure to see that a brakeman properly attended to his duty. The rule of the company making it his personal duty to see to the proper adjustment of the switches used in operating his train did not change the rule of law which governed the relations of the parties concerned, or take the handling of switches out of the category of assignable duties; and if, in the absence of such a rule, the company would not be liable for the negligence of a switch tender or a brakeman whose duty it is to perform such service, the adoption of such a precautionary measure, intended to better insure the performance of such duty by the brakeman, would not impose such a liability."

The case of *Lantry v. Silverman*, 1 Colo. App. 404, does not necessarily go any farther than to hold that an employee who is invested with the management of an entire department of the master's business is a vice-principal for whose negligence the master is liable. It was held in this case that a workman in a quarry who was injured through the negligence of an employee who was in charge of the quarry, and in full control of its operations and of the men who were at work there, could recover of the employer.

It was held in *Colorado Coal, etc., Co. v. Lamb*, 6 Colo. App. 255, that a mine owner is not responsible to the workmen in the mine for injuries resulting from the negligence of the mine boss, who is not shown to have been vested with any authority other than that prescribed by the Colorado Mining Act of 1885. In the opinion delivered in this case by Bissell, J., the court clearly shows that it prefers the rule expressed in *Baltimore, etc., R. Co. v. Baugh*, 149 U. S. 368, to the one which was adopted in *Chicago, etc., R. Co. v. Ross*, 112 U. S. 377, 17 Am. & Eng. R. Cas. 501.

Connecticut. — *Darrigan v. New York, etc., R. Co.*, 52 Conn. 285, 52 Am. Rep. 590; *McEligott v. Randolph*, 61 Conn. 157, 29 Am. St. Rep. 181; *Sullivan v. New York, etc., R. Co.*, 62 Conn. 209.

which the law imposes upon the master and of which the master cannot relieve himself by delegating its performance to an agent. The negligence of the

Florida.—See *South Florida R. Co. v. Weese*, 32 Fla. 212.

Indiana.—*Madison, etc., R. Co. v. Bacon*, 6 Ind. 205; *Columbus, etc., R. Co. v. Arnold*, 31 Ind. 174, 99 Am. Dec. 615; *Gormley v. Ohio, etc., R. Co.*, 72 Ind. 31; *Lake Shore, etc., R. Co. v. McCormick*, 74 Ind. 440; *Robertson v. Terre Haute, etc., R. Co.*, 78 Ind. 77; *Boyce v. Fitzpatrick*, 80 Ind. 526; *Umbach v. Lake Shore, etc., R. Co.*, 83 Ind. 191; *Louisville, etc., R. Co. v. Orr*, 84 Ind. 50; *Brazil, etc., Coal Co. v. Cain*, 98 Ind. 282; *Indiana Car Co. v. Parker*, 100 Ind. 181; *Atlas Engine Works v. Randall*, 100 Ind. 293, 50 Am. Rep. 798; *Indianapolis, etc., R. Co. v. Johnson*, 102 Ind. 352; *Capper v. Louisville, etc., R. Co.*, 103 Ind. 305; *Pittsburgh, etc., R. Co. v. Adams*, 105 Ind. 151; *Lake Shore, etc., R. Co. v. Stupak*, 108 Ind. 1; *Indiana, etc., R. Co. v. Dailey*, 110 Ind. 75; *Cincinnati, etc., R. Co. v. McMullen*, 117 Ind. 439, 10 Am. St. Rep. 67; *Justice v. Pennsylvania R. Co.*, 130 Ind. 321; *New Pittsburgh Coal, etc., Co. v. Peterson*, 136 Ind. 398, 43 Am. St. Rep. 327; *Bedford Belt R. Co. v. Brown*, 142 Ind. 659; *Robertson v. Chicago, etc., R. Co.*, 146 Ind. 486; *Louisville, etc., R. Co. v. Isom*, 10 Ind. App. 691; *New Pittsburgh Coal, etc., Co. v. Peterson*, 14 Ind. App. 634; *Louisville, etc., R. Co. v. Southwick*, 16 Ind. App. 486; *Salem Stone, etc., Co. v. Chastain*, 9 Ind. App. 453; *Peirce v. Oliver*, 18 Ind. App. 87. See also *Taylor v. Evansville, etc., R. Co.*, 121 Ind. 124, 16 Am. St. Rep. 372, 41 Am. & Eng. R. Cas. 437, 41 Alb. L. J. 173; *Wilson v. Madison, etc., R. Co.*, 18 Ind. 226; *Drinkout v. Eagle Mach. Works*, 90 Ind. 423.

Iowa.—*Peterson v. Whitebreast Coal, etc., Co.*, 50 Iowa 673, 32 Am. Rep. 143; *Troughear v. Lower Vein Coal Co.*, 62 Iowa 576; *Foley v. Chicago, etc., R. Co.*, 64 Iowa 644; *Benn v. Null*, 65 Iowa 407; *Baldwin v. St. Louis, etc., R. Co.*, 68 Iowa 37; *Wilson v. Dunreath Red-Stone Quarry Co.*, 77 Iowa 429, 14 Am. St. Rep. 304; *Hathaway v. Illinois Cent. R. Co.*, 92 Iowa 337; *Fosburg v. Phillips Fuel Co.*, 93 Iowa 54; *Newbury v. Getchel, etc., Lumber, etc., Co.*, 100 Iowa 441. *Compare Baldwin v. St. Louis, etc., R. Co.*, 63 Iowa 210.

Louisiana.—In the cases of *Towns v. Vicksburg, etc., R. Co.*, 37 La. Ann. 630, 55 Am. Rep. 508, and *Van Amburg v. Vicksburg, etc., R. Co.*, 37 La. Ann. 650, 55 Am. Rep. 517, the Supreme Court of Louisiana seemed inclined to adopt the doctrine announced by the Supreme Court of the United States in *Chicago, etc., R. Co. v. Ross*, 112 U. S. 377, 17 Am. & Eng. R. Cas. 501. But by a dictum in the later case of *Mattise v. Consumers' Ice Mfg. Co.*, 46 La. Ann. 1535, the same court expressly approved the view that the mere fact that one servant exercises control over another is not alone sufficient to make the master liable to the inferior servant for the superior servant's negligence. See also *McMaster v. Illinois Cent. R. Co.*, 65 Miss. 264, 7 Am. St. Rep. 653.

Maine.—*Beaulieu v. Portland Co.*, 48 Me. 295; *Lawler v. Androscoggin R. Co.*, 62 Me. 463, 16 Am. Rep. 492; *Blake v. Maine Cent.*

R. Co., 70 Me. 60, 35 Am. Rep. 297; *Doughty v. Penobscot Log Driving Co.*, 76 Me. 143; *Cassidy v. Maine Cent. R. Co.*, 76 Me. 488; *Conley v. Portland*, 78 Me. 217; *Dube v. Lewiston*, 83 Me. 211.

Maryland.—*O'Connell v. Baltimore, etc., R. Co.*, 20 Md. 212, 83 Am. Dec. 549; *Wonder v. Baltimore, etc., R. Co.*, 32 Md. 418, 3 Am. Rep. 143; *State v. Malster*, 57 Md. 287; *Baltimore Elevator Co. v. Neal*, 65 Md. 438; *Yates v. McCullough Iron Co.*, 69 Md. 370; *Baltimore v. War*, 77 Md. 593; *Norfolk, etc., R. Co. v. Hoover*, 79 Md. 253, 47 Am. St. Rep. 392.

Massachusetts.—*Albro v. Agawam Canal Co.*, 6 Cush. (Mass.) 75; *Gilman v. Eastern R. Co.*, 13 Allen (Mass.) 433, 90 Am. Dec. 210; *Summersell v. Fish*, 117 Mass. 312; *Hodgkins v. Eastern R. Co.*, 119 Mass. 419; *O'Connor v. Roberts*, 120 Mass. 227; *Zeigler v. Day*, 123 Mass. 152; *Walker v. Boston, etc., R. Co.*, 128 Mass. 8; *Holden v. Fitchburg R. Co.*, 129 Mass. 268, 37 Am. Rep. 343; *Floyd v. Sugden*, 134 Mass. 563; *Rogers v. Ludlow Mfg. Co.*, 144 Mass. 198, 59 Am. Rep. 68; *McKinnon v. Norcross*, 148 Mass. 533; *Howard v. Hood*, 155 Mass. 391; *Moody v. Hamilton Mfg. Co.*, 159 Mass. 70, 58 Am. St. Rep. 396; *O'Brien v. Rideout*, 161 Mass. 170.

Michigan.—The Supreme Court of Michigan has consistently refused to adopt the superior-servant limitation, and it is the settled law in this state that the mere superiority in grade does not make a servant the master's vice-principal, unless his authority is exclusive in his department.

In the case of *Quincy Min. Co. v. Kitts*, 42 Mich. 34, the plaintiff, a miner, sued the defendant for an injury alleged to have been sustained through the negligence of another servant named Wagner, who was what was called a timberman in the mine and had some authority over other timbermen, and might direct them in their work. The court denied the plaintiff's right to recover.

It has been repeatedly held in this state that a foreman of a department who takes part in the performance of labor with his men is a fellow servant as to acts which it is not the duty of the master to perform. *Dewey v. Parke*, 76 Mich. 631; *Beesley v. Wheeler*, 103 Mich. 196; *Schroeder v. Flint, etc., R. Co.*, 103 Mich. 213; *Findlay v. Russell Wheel, etc., Co.*, 108 Mich. 286.

In *Morch v. Toledo, etc., R. Co.*, 113 Mich. 154, it was held that a section hand who was assisting in the unloading of ties from a work train of the defendant could not recover for injuries sustained in consequence of the alleged negligence of a section foreman whom the roadmaster had placed in charge of the train, with authority to direct its movements for the time during which he was in charge.

And it has been held that a foreman of a section gang and the section men are fellow servants. *Hammond v. Chicago, etc., R. Co.*, 83 Mich. 334; *Timm v. Michigan Cent. R. Co.*, 98 Mich. 226.

In *Beesley v. Wheeler*, 103 Mich. 196, it is expressly stated, in an opinion delivered by Hooker, J., that the superior-servant, as dis-

servant in this case is the negligence of the master, and, therefore, does not come within the purview of the fellow-servant rule. But there is nothing in

tinguished from the *alter ego*, or vice-principal, limitation, has not been adopted in Michigan. And, quoting from Mr. McKinney's work on fellow servants, it was further said in this case, and also in the case of *Schroeder v. Flint*, etc., R. Co., 103 Mich. 213, that "the true test, it is believed, whether an employee occupies the position of a fellow servant to another employee or is the representative of the master is to be found, not from the grade or rank of the offending or injured servant, but it is to be determined by the character of the act being performed by the offending servant by which another employee is injured; or, in other words, whether the person whose status is in question is charged with the performance of a duty which properly belongs to the master." *McKinney on Fellow Servants*, § 23. See also *Harrison v. Detroit*, etc., R. Co., 79 Mich. 409, 19 Am. St. Rep. 180, in which case, Long, J., in delivering the opinion of the court, expresses the same view.

In *Andrew v. Winslow Bros. Elevator Co.*, (Mich. 1898) 76 N. W. Rep. 86, the court assumed that it is too well settled for further discussion that a foreman who is not charged with the performance of the master's personal duties is but a fellow servant with a laborer working under his direction.

Minnesota. — *Brown v. Winona*, etc., R. Co., 27 Minn. 162, 38 Am. Rep. 285; *Brown v. Minneapolis*, etc., R. Co., 31 Minn. 553; *Fraker v. St. Paul*, etc., R. Co., 32 Minn. 54; *Gonsior v. Minneapolis*, etc., R. Co., 36 Minn. 385; *Olson v. St. Paul*, etc., R. Co., 38 Minn. 117; *Lindvall v. Woods*, 41 Minn. 212; *Lundberg v. Shevlin-Carpenter Co.*, 68 Minn. 135. See also *Blomquist v. Chicago*, etc., R. Co., 60 Minn. 426; *Carlson v. Northwestern Telephone Exch. Co.*, 63 Minn. 428.

Mississippi. — The rule stated in the text would, it is apprehended, be the rule in Mississippi but for the change made in the law by section 193 of the Constitution of 1890. See *McMaster v. Illinois Cent. R. Co.*, 65 Miss. 264, 7 Am. St. Rep. 653; *Evans v. Louisville*, etc., R. Co., 70 Miss. 527.

Montana. — *Goodwell v. Montana Cent. R. Co.*, 18 Mont. 293; *Hastings v. Montana Union R. Co.*, 18 Mont. 493; *Mulligan v. Montana Union R. Co.*, 19 Mont. 139. But see *infra*, this section, *Statutory Recognition of the Doctrine*.

New Jersey. — *O'Brien v. American Dredging Co.*, 53 N. J. L. 291; *Gilmore v. Oxford Iron, etc., Co.*, 55 N. J. L. 39; *Maier v. Thropp*, 59 N. J. L. 186; *McLaughlin v. Camden Iron Works*, 60 N. J. L. 557.

New Mexico. — *Atchison*, etc., R. Co. *v. Martin*, 7 N. Mex. 158; *Deserant v. Cerrillos Coal R. Co.*, (N. Mex. 1898) 55 Pac. Rep. 290.

New York. — *Sherman v. Rochester*, etc., R. Co., 17 N. Y. 153; *Wright v. New York Cent. R. Co.*, 25 N. Y. 565; *Warner v. Erie R. Co.*, 39 N. Y. 468; *Laning v. New York Cent. R. Co.*, 49 N. Y. 528, 10 Am. Rep. 417; *Hofnagle v. New York Cent.*, etc., R. Co., 55 N. Y. 608; *Malone v. Hathaway*, 64 N. Y. 5, 21 Am. Rep. 573; *Crispin v. Babbitt*, 81 N. Y. 516, 37 Am. Rep. 521; *McCosker v. Long Island R. Co.*, 84

N. Y. 77, 5 Am. & Eng. R. Cas. 564; *Brick v. Rochester*, etc., R. Co., 98 N. Y. 211, 21 Am. & Eng. R. Cas. 605; *Loughlin v. State*, 105 N. Y. 159; *Hussey v. Coger*, 112 N. Y. 614, 8 Am. St. Rep. 787; *Cullen v. Norton*, 126 N. Y. 1; *Hankins v. New York*, etc., R. Co., 142 N. Y. 416, 40 Am. St. Rep. 616; *Keenan v. New York*, etc., R. Co., 145 N. Y. 190, 45 Am. St. Rep. 604; *Wooden v. Western New York*, etc., R. Co., 147 N. Y. 508; *Kimmer v. Weber*, 151 N. Y. 417, *reversing* 81 Hun (N. Y.) 599; *Monaghan v. New York Cent.*, etc., R. Co. 45 Hun (N. Y.) 113; *Hankins v. New York*, etc., R. Co., 55 Hun (N. Y.) 51; *Geoghegan v. Atlas Steamship Co.*, 3 Misc. Rep. (N. Y. C. Pl.) 224; *Riley v. O'Brien*, 53 Hun (N. Y.) 147; *Connolly v. Maurer*, 6 Misc. Rep. (N. Y. C. Pl.) 98; *Mele v. Delaware*, etc., Canal Co., 59 N. Y. Super. Ct. 367; *Griffiths v. New Jersey*, etc., R. Co., 8 Misc. Rep. (N. Y. Super. Ct.) 3, *affirming* 5 Misc. Rep. (N. Y.) 320; *Oellerich v. Hayes*, 8 Misc. Rep. (N. Y. C. Pl.) 211; *Collins v. Crimmins*, 11 Misc. Rep. (N. Y. Super. Ct.) 24; *Bagley v. Consolidated Gas Co.*, 13 Misc. Rep. (N. Y. C. Pl.) 6; *Mahoney v. Vacuum Oil Co.*, 76 Hun (N. Y.) 579; *Mancuso v. Cataract Constr. Co.*, 87 Hun (N. Y.) 519; *Smith v. Empire Transp. Co.*, 89 Hun (N. Y.) 588; *Murray v. Crimmins*, 14 Misc. Rep. (N. Y. City Ct.) 466; *Ludlow v. Groton Bridge Co.*, (Cir. Ct.) 36 N. Y. Supp. 452; *Vitto v. Farley*, 15 Misc. Rep. (N. Y. C. Pl.) 153, *affirmed* 15 N. Y. App. Div. 329; *Whallon v. Sprague Electric Elevator Co.*, 1 N. Y. App. Div. 264; *Sweeney v. Vacuum Oil Co.*, (Supreme Ct.) 38 N. Y. Supp. 96, 3 N. Y. App. Div. 615; *Bagley v. Consolidated Gas Co.*, 5 N. Y. App. Div. 432; *Rozelle v. Rose*, 3 N. Y. App. Div. 132; *Miller v. Thomas*, 15 N. Y. App. Div. 105; *White v. Eidlitz*, 19 N. Y. App. Div. 256; *Moore v. McNeil*, 35 N. Y. App. Div. 323; *Gibbons v. Brush Electric Illuminating Co.*, 36 N. Y. App. Div. 140.

North Dakota. — *Ell v. Northern Pac. R. Co.*, 1 N. Dak. 336, 26 Am. St. Rep. 621.

Oregon. — *Anderson v. Bennett*, 16 Oregon 515, 8 Am. St. Rep. 311; *Miller v. Southern Pac. Co.*, 20 Oregon 285; *Willis v. Oregon R.*, etc., Co., 11 Oregon 257; *Mast v. Kern*, (Oregon 1898) 54 Pac. Rep. 950.

Pennsylvania. — *Caldwell v. Brown*, 53 Pa. St. 453; *Lehigh Valley Coal Co. v. Jones*, 86 Pa. St. 432; *Keystone Bridge Co. v. Newberry*, 96 Pa. St. 246, 42 Am. Rep. 543; *New York*, etc., R. Co. *v. Bell*, 112 Pa. St. 400; *Lewis v. Seifert*, 116 Pa. St. 628, 2 Am. St. Rep. 631; *Duffy v. Oliver*, 131 Pa. St. 203; *Kinney v. Corbin*, 132 Pa. St. 341; *Ross v. Walker*, 139 Pa. St. 42, 23 Am. St. Rep. 160, 21 Pittsb. L. J. N. S. (Pa.) 256, 27 W. N. C. (Pa.) 165; *McCool v. Lucas Coal Co.*, 150 Pa. St. 638, 30 W. N. C. (Pa.) 251; *McGinley v. Levering*, 152 Pa. St. 366, 31 W. N. C. (Pa.) 384; *Greenway v. Conroy*, 160 Pa. St. 185, 34 W. N. C. (Pa.) 98; *Durst v. Carnegie Steel Co.*, 173 Pa. St. 162; *Prevost v. Citizens' Ice*, etc., Co., 185 Pa. St. 617.

It is held in Pennsylvania that a mine owner is not liable to a miner for the negligence of a competent mine boss who

the reason underlying the fellow-servant rule which prevents its application in

is employed in compliance with the statutory requirement in that state. *Lehigh Valley Coal Co. v. Jones*, 86 Pa. St. 432; *Delaware, etc., Canal Co. v. Carroll*, 89 Pa. St. 374; *Reese v. Biddle*, 112 Pa. St. 72; *Waddell v. Simonson*, 112 Pa. St. 567; *Redstone Coke Co. v. Roby*, 115 Pa. St. 364; *Lineoski v. Susquehanna Coal Co.*, 157 Pa. St. 153, 33 W. N. C. (Pa.) 204. This, however, is in part owing to the fact that the duty of appointing a mining boss is imposed upon the mine owners by statute, hence the responsibility of the latter would seem to cease when they had exercised due care in the selection of that person. *Lewis v. Seifert*, 116 Pa. St. 628, 2 Am. St. Rep. 631.

Rhode Island. — *Hanna v. Granger*, 18 R. I. 507; *Larich v. Moies*, 18 R. I. 513; *Di Marcho v. Builders' Iron Foundry*, 18 R. I. 514. See also *Miller v. Coffin*, 19 R. I. 164.

Vermont. — *Hard v. Vermont, etc., R. Co.*, 32 Vt. 473; *Davis v. Central Vermont R. Co.*, 55 Vt. 84, 45 Am. Rep. 590, 11 Am. & Eng. R. Cas. 173.

Virginia. — While the earlier cases in Virginia are decidedly confusing, it is evident, from the later and best-considered cases, that the superior-servant limitation has been finally rejected in this state.

Unquestionably the limitation is favored in some of the Virginia cases. The first of these cases is that of *Moon v. Richmond, etc., R. Co.*, 78 Va. 745, 49 Am. Rep. 401, 17 Am. & Eng. R. Cas. 531. Whatever indorsement this case gives to the limitation is to be found in the language of Fauntleroy, J., who, in delivering the opinion of the court, said: "The fellow servant or co-employee for whose negligence the company is not liable is one who is in the same common employment, that is, in the same shop, or placed with, and having no authority over, the one injured, and who is no more charged with the discretionary exercise of powers and duties imperatively resting on the company than the injured party; but where a person is placed in charge of the 'construction or repair of machinery,' the 'dispatching of trains,' the 'maintenance of way,' etc., he is not a fellow servant with those under him, nor with those in a different department of the company's service. He is the agent of the company, which has assumed through him the performance of duties which are absolute and imperative, the omission or the negligence of performing which the law will in no wise excuse." But in the case of *Norfolk, etc., R. Co. v. Nuckols*, 91 Va. 193, it is clearly shown that the true ground upon which the railroad company was held liable in this case was that the company had been negligent in keeping its track in a good and safe condition. See *Norfolk, etc., R. Co. v. Houchins*, 95 Va. 398. The facts of the case were that the plaintiff's intestate, a brakeman, had been injured by the negligence of the section master, who was making repairs upon the track where the dirt had not been filled in and properly rammed, but only "tamped," and who failed to signal the approaching train, which, in passing over the track in its unsafe condition, was derailed, and the plaintiff's intestate was

caught under the wreck, and died from the injuries thus received.

The case of *Torian v. Richmond, etc., R. Co.*, 84 Va. 192, which has sometimes been cited in support of the limitation, arose out of the same accident which gave rise to the case of *Moon v. Richmond, etc., R. Co.*, 78 Va. 745, 49 Am. Rep. 401, 17 Am. & Eng. R. Cas. 531, and the defendant's liability to the plaintiff, an employee on the train, was made to rest upon the proposition that the immediate cause of the injury was the running of the train, suddenly accelerated by additional steam, over a track left in an uneven and weakened condition by other employees of the company, who were employed to repair the track, and who failed to give warning of its condition. Here it appeared very distinctly that the uneven and weakened condition of the track was at least one of the proximate causes of the injury sustained, and the liability might very properly have been fastened upon the railroad company for that reason.

There are, however, several cases in this state which favor the limitation much more strongly than the two which have just been discussed. Thus, in several cases a railroad company has been held liable to a brakeman who was injured while discharging his duties as brakeman in obedience to the conductor's orders, by reason of the latter's negligence. *Ayers v. Richmond, etc., R. Co.*, 84 Va. 679; *Richmond, etc., R. Co. v. Williams*, 86 Va. 165, 19 Am. St. Rep. 876, 39 Am. & Eng. R. Cas. 326; *Richmond, etc., R. Co. v. Brown*, 89 Va. 749.

In thus following the decision of the United States Supreme Court in the case of *Chicago, etc., R. Co. v. Ross*, 112 U. S. 377, 17 Am. & Eng. R. Cas. 501, these cases, to a certain extent, at least, uphold the limitation. The same may, perhaps, be said of the case of *Richmond Granite Co. v. Bailey*, 92 Va. 554, in which the defendant was held responsible to a laborer, engaged in loading a car with stone, who was injured by the negligence of the foreman in charge of the defendant's quarry. This case, however, is not so strong as the others for the reason that the decision might be supported upon the ground that the negligent foreman was charged with the management of the defendant's entire business. See *infra*, this title and division, the subdivision *Vice-Principals*. But no reference is made to that principle in the opinion.

The first evidence of the dissatisfaction of the Supreme Court of Virginia with the superior-servant limitation is to be found in the case of *Norfolk, etc., R. Co. v. Donnelly*, 88 Va. 853, in which the article on FELLOW SERVANTS in vol. 7 of the AM. AND ENG. ENCYC. OF LAW (1st ed.), which strongly disapproves of the limitation, is extensively quoted. While all that was really decided in this case is that an injured engineman cannot recover of the railroad company for injuries to him by the negligent misconstruction of a right-of-way order by the conductor and engineman on another train, which collided with the train upon which the plaintiff was running, the reasoning of the court is distinctly unfavorable to the

cases where the negligent servant is merely the superior of the injured one;

superior-servant limitation. As was well said by Keith, P., in *Norfolk, etc., R. Co. v. Nuckols*, 91 Va. 193, the court, by its unanimous opinion, evinced a disposition to return to the simple terms of the rule stated by Chief Justice Shaw in the case of *Farwell v. Boston, etc., R. Corp.*, 4 Met. (Mass.) 49, 38 Am. Dec. 339. It throws aside the doctrine of "inferior and superior," of gradations in employment, and of "separate departments," and states forcibly and clearly that "all serving a common master, working under the same control, deriving authority and compensation from the same source, and engaged in the same general business, although in different grades or departments, are fellow servants, and take the risk of each other's negligence." See *Norfolk, etc., R. Co. v. Houchins*, 95 Va. 398. It was largely upon the reasoning of the court in this case that it was held, in *Norfolk, etc., R. Co. v. Nuckols*, 91 Va. 193, that a track repairer and engineman, though in different departments, were, by the very nature of their employment, brought in frequent contact, and the risk of negligence of the one must therefore be considered to have been in contemplation of the other when service under the common master was accepted. While this is an authority against the different-department rule rather than against the superior-servant limitation, it is declared in the course of an elaborate opinion delivered by Keith, P., that the liability of the master "does not depend upon gradations in employment unless the superiority of the person causing the injury was such as to put him in the category of principal or vice-principal."

But while these cases merely contain dicta adverse to the limitation, it has been unequivocally rejected in a couple of recent cases.

In *Richmond Locomotive Works v. Ford*, 94 Va. 627, the plaintiff had been injured, while employed as one of a lot of hands known as the "laborers' gang" in the defendant's locomotive works, through the alleged negligence of one Fogg, the foreman of the gang. Fogg received his instructions from the foreman of the machine shop, and directed the gang in its work, and worked with them himself, though there was some conflict in the testimony as to the extent and character of the work done by him. He had no power to employ or discharge members of the gang. If they refused to do what he directed he reported the fact to the foreman of the shops, who exercised that power. It was held that the defendant was not liable to the plaintiff for Fogg's negligence. In the opinion of the court, delivered by Buchanan, J., it was said: "The ground upon which it is insisted that Fogg and the plaintiff were not fellow servants is that Fogg occupied a higher position, was in charge and control of the plaintiff, and ordered him to do the work alleged to have been dangerous. Conceding that the leader or boss of the gang of hands occupies a higher position than the other members of the gang, and that he had control of and power to direct, and did direct, the gang in their work, which had been directed to be done by the foreman of the machine shops, it is clear that he was a fellow

servant with the other members of the gang. The mere fact that one servant is superior in authority to another does not have the effect of changing his relation of fellow servant, unless his superiority places him in the category of vice-principal. This is one of the propositions announced in the case of the *Norfolk, etc., R. Co. v. Nuckols*, 91 Va. 193, a late case, in which the question of the master's duty and liability was carefully considered. Fogg and his gang of hands, fifteen or sixteen in number, were under the control and direction of the foreman of the machine shops, and did such work as he directed done. Where the execution of work directed to be done by the master or his representative is intrusted to a gang or group of hands, it is necessary that one of them should be selected as the leader, boss, or foreman, to see to the execution of such work. 'This sort of superiority of service,' as has been said, 'is so essential and so universal that every workman, in entering upon a contract of service, must contemplate its being made in a proper case. He, therefore, makes his contract of service in contemplation of the risk of injury from the negligence of a boss or foreman, as well as from the negligence of another fellow workman. The foreman or superior servant stands to him in that respect in the precise position of his other fellow servants.' *O'Brien v. American Dredging Co.*, 53 N. J. L. 291; *Central R. Co. v. Keegan*, 160 U. S. 259; *North Pac. R. Co. v. Peterson*, 162 U. S. 346."

The decision in this case was approved in the later case of *Norfolk, etc., R. Co. v. Houchins*, 95 Va. 398, where it was held that a brakeman who had been injured in a collision which was caused by the negligence of the conductor of the train on which he was employed could not recover of the railroad company for his injuries. In the opinion of the court, delivered by Cardwell, J., the earlier cases of *Norfolk, etc., R. Co. v. Donnelly*, 88 Va. 853, and *Norfolk, etc., R. Co. v. Nuckols*, 91 Va. 193, were approved, and it was said that the test by which the company's liability should be determined was not whether the conductor was, by the rules of the company, given authority over his train and of the employees on it to direct and order them, but whether his negligent act, which resulted in the death of the brakeman, was an act done when in the performance of a duty which the law devolved upon the company, and therefore a nonassignable one for which the master was still liable, or one of mere operation.

In view of these authorities it is clear that the Supreme Court of Virginia must be understood to have fully rejected the superior-servant limitation. Of the cases decided by the Virginia Supreme Court of Appeals subsequently to its decision in *Norfolk, etc., R. Co. v. Donnelly*, 88 Va. 853, and holding the doctrine that a conductor is not a fellow servant of a brakeman under him, it was said in *Norfolk, etc., R. Co. v. Houchins*, 95 Va. 398, that they "rested mainly upon Moon's case [*Moon v. Richmond, etc., R. Co.*, 78 Va. 745, 40 Am. Rep. 401, 17 Am. & Eng. R. Cas. 531], and the case of *Chicago, etc., R. Co. v. Ross*, 112 U. S.

the negligence of a superior servant is as much one of the risks of the employment as is the negligence of a servant of equal rank.¹

dd. APPARENTLY INCONSISTENT APPLICATION OF THE TEST. — It seems that some of the courts which reject the superior-servant limitation have not always been wholly consistent in their application of the test which they avowedly adopt. While they unhesitatingly commit themselves to the view that the sole test by which to determine the master's liability to one servant for the negligence of another is whether the negligent servant was charged with, and was at the time in the performance of, one of the master's personal duties to his servants, some of these courts have given their approval to a doctrine which seems to make the master's liability depend more upon the extent and magnitude than upon the nature of the duties in the performance of which the offending servant was negligent. Thus, it has been held by some of the courts which reject the superior-servant limitation that the master is liable to one servant for the negligence of another who has charge of the master's entire business or a separate and distinct department of the business.²

(f) **Statutory Recognition of the Doctrine** — *aa.* IN GENERAL. — Statutory provisions which practically recognize the superior-servant limitation in one form or another have been enacted in *England* and in some of the *United States*.³

377, 17 Am. & Eng. R. Cas. 501, which latter decision has been completely overturned by the more recent decisions of the same court, and which are in thorough accord with the decisions of this court in *Donnelly's* case and *Nuckols's* case."

West Virginia. — While misapplying the test in some instances, the Supreme Court of West Virginia has frequently recognized the principle that to make the master liable for the act of his servant the act must relate to the discharge of some duty which the master owes to the injured employee. This was clearly done in the following cases: *Riley v. West Virginia Cent., etc., R. Co.*, 27 W. Va. 145; *Madden v. Chesapeake, etc., R. Co.*, 28 W. Va. 610, 57 Am. Rep. 695; *Criswell v. Pittsburgh, etc., R. Co.*, 30 W. Va. 798, 33 Am. & Eng. R. Cas. 232. And in *Jackson v. Norfolk, etc., R. Co.*, 43 W. Va. 380, Brannon, J., expresses his opinion that this is the general principle stated in *Daniel v. Chesapeake, etc., R. Co.*, 36 W. Va. 397, *Core v. Ohio River R. Co.*, 38 W. Va. 456, and *Flannegan v. Chesapeake, etc., R. Co.*, 40 W. Va. 449.

But while this is the recognized criterion by which to determine the liability of a master to one servant for the negligence of another, it has, in several cases, been misapplied. Thus, it has been held that the conductor of a train is a superior servant or vice-principal, and not a fellow servant with other employees. *Madden v. Chesapeake, etc., R. Co.*, 28 W. Va. 610, 57 Am. Rep. 695; *Daniel v. Chesapeake, etc., R. Co.*, 36 W. Va. 397; *Haney v. Pittsburgh, etc., R. Co.*, 38 W. Va. 570. But these cases were *overruled* in the case of *Jackson v. Norfolk, etc., R. Co.*, 43 W. Va. 380, in which it was held that a conductor is not a vice-principal, but a fellow servant with a brakeman and other servants on a train. The principles underlying this decision are discussed in an elaborate opinion by Brannon, J., with such ability and force as to leave no doubt as to the present status of the superior-servant limitation in West Virginia; it is absolutely rejected, and the master's liability is made to depend

actually, as theoretically it always has depended in this state, on the character of the negligent act, and not upon the grade of the servant.

Wisconsin. — *Howland v. Milwaukee, etc., R. Co.*, 54 Wis. 226, 5 Am. & Eng. R. Cas. 578; *Hoth v. Peters*, 55 Wis. 405; *Dwyer v. American Express Co.*, 55 Wis. 453, 8 Am. & Eng. R. Cas. 159; *Heine v. Chicago, etc., R. Co.*, 58 Wis. 525; *Pease v. Chicago, etc., R. Co.*, 61 Wis. 163, 17 Am. & Eng. R. Cas. 527; *Peschel v. Chicago, etc., R. Co.*, 62 Wis. 338, 17 Am. & Eng. R. Cas. 545; *Toner v. Chicago, etc., R. Co.*, 69 Wis. 188; *Johnson v. Ashland Water Co.*, 77 Wis. 51; *Dwyer v. American Express Co.*, 82 Wis. 307, 33 Am. St. Rep. 44, *citing* 7 AM. AND ENG. ENCYC. OF LAW (1st ed.) 834; *Kliegel v. Weisel, etc., Mfg. Co.*, 84 Wis. 148; *Stutz v. Armour*, 84 Wis. 623; *Hartford v. Northern Pac. R. Co.*, 91 Wis. 374; *Klochinski v. Shores Lumber Co.*, 93 Wis. 417. See also dissenting opinion by Cassoday, J., in *Luebke v. Chicago, etc., R. Co.*, 59 Wis. 127, 15 Am. & Eng. R. Cas. 183; *McMahon v. Ida Min. Co.*, 95 Wis. 308.

1. Reasons for Rejecting the Superior-Servant Limitation. — For a more elaborate presentation of this theory see the very able opinion by Corliss, C. J., in the case of *Ell v. Northern Pac. R. Co.*, 1 N. Dak. 336, 26 Am. St. Rep. 621. See also *O'Brien v. American Dredging Co.*, 53 N. J. L. 291.

2. Liability of Master for Negligence of Servant in Charge of Entire Business or Distinct Department. — Since the courts base their decisions to this effect upon the vice-principal doctrine, the matter will be treated in connection with the discussion of that doctrine. See *infra*, this section, *Vice-Principals*.

3. Statutory Recognition of the Superior-Servant Limitation — **Indiana.** — By subdivision 2 of section 1 of the Indiana Employers' Liability Act of 1893, it is provided that "every railroad or other corporation, except municipal, operating in this state, shall be liable for damages for personal injury suffered by any employee while in its service, the employee so injured

bb. LIABILITY FOR NEGLIGENCE OF SERVANTS EXERCISING SUPERINTENDENCE. — The Employers' Liability Acts of *England* and, in the United States, of *Alabama* and *Massachusetts* contain provisions which enlarge the liability of a master

being in the exercise of due care and diligence, in the following cases. * * * Second, where such injury resulted from the negligence of any person in the service of such corporation to whose order or direction the injured employee at the time of the injury was bound to conform, and did conform." Act 1893, p. 294, § 1, subdiv. 2; Burns's Rev. Stat. 1894, § 7083.

In *Hodges v. Standard Wheel Co.*, (Ind. 1893) 52 N. E. Rep. 391, it was held that a servant who was employed to do work similar to that done by the plaintiff when he was injured, but who was occasionally left in charge of a branch of the work during the temporary absence of the defendant's foreman, without being otherwise vested with authority, was a fellow servant of the plaintiff, and the defendant was not responsible for his negligence under the Employers' Liability Act, especially where the injury to the plaintiff resulted, not from an order given by him, but from his negligence while assisting in the work.

According to the express terms of the statute, a plaintiff, to entitle him to a recovery thereunder, must himself have exercised due care. *Perigo v. Indianapolis Brewing Co.*, (Ind. App. 1899) 52 N. E. Rep. 462.

Montana. — In a chapter of the General Laws of Montana relating to railroad corporations it is provided as follows: "That in every case the liability of the corporation to a servant or employee acting under the orders of his superior shall be the same in case of injury sustained by default or wrongful act of his superior, or to an employee not appointed or controlled by him, as if such servant or employee were a passenger." Comp. Stat. Mont., 1887, p. 817, § 697. In *Northern Pac. R. Co. v. Mase*, 27 U. S. App. 238, 63 Fed. Rep. 114, Judge Sanborn, speaking for the court, said: "This section is found in a chapter of the General Laws of Montana relating to railroad corporations, and it seems to affect the liability of such corporations only."

The interpretation which has been given to this statute is that it modifies the fellow-servant rule of the common law to the extent of establishing the principle that there is a difference in the grade of the employees engaged in a common employment, and giving a right of action against a master to a servant who is injured through the negligence of a superior employee or servant, when such injured servant is without negligence on his part, even though the superior does not control the injured servant. *Northern Pac. R. Co. v. Mase*, 27 U. S. App. 238, 63 Fed. Rep. 114; *Ragsdale v. Northern Pac. R. Co.*, 42 Fed. Rep. 383; *Criswell v. Montana Cent. R. Co.*, 17 Mont. 189; *Wastl v. Montana Union R. Co.*, 17 Mont. 213.

And it has been held that, within the meaning of this statute, a conductor or other employee charged with the control of one train is the superior of a fireman on another train. *Ragsdale v. Northern Pac. R. Co.*, 42 Fed. Rep. 383; *Northern Pac. R. Co. v. Mase*, 63 Fed. Rep. 114, 27 U. S. App. 238.

It has also been held that both the conductor and the engineer of a train are the superiors of a brakeman on the same train. *Criswell v. Montana Cent. R. Co.*, 17 Mont. 189.

While this statute of the territory of Montana was repealed by the adoption of the state constitution (*Criswell v. Montana Cent. R. Co.*, 18 Mont. 167; *Goodwell v. Montana Cent. R. Co.*, 18 Mont. 293; *Hastings v. Montana Union R. Co.*, 18 Mont. 493), it has been re-enacted, and is to be found in the Montana Civil Code of 1895. See 2 Mont. Codes, 1895, § 905.

Ohio. — Although the superior-servant limitation was established in Ohio independently of statute (see *supra*, this section, *Ohio Doctrine*), its application in actions against railroad companies has been recognized in an act passed April 2, 1890. Ohio Laws 1890, p. 149. See *Baltimore, etc., R. Co. v. Camp*, 31 U. S. App. 213, 65 Fed. Rep. 952; *Peirce v. Van Dusen*, 78 Fed. Rep. 693, 47 U. S. App. 339.

Texas. — As has been shown above, the common-law decisions in Texas have recognized the superior-servant limitations to some extent. See *supra*, this section, *Rule in Texas*. And by the Act of March 10, 1891 (Laws Texas, 1891, p. 25), which was amended by the Act of May 4, 1893 (Laws Texas, 1893, p. 121), railroad corporations are made liable for the negligence of servants who are intrusted "with the authority of superintendence, control, or command" of other servants. Rev. Stat. Texas, 1895, p. 908. This act has been held applicable to street-railway companies. *Austin Rapid Transit R. Co. v. Groethe*, (Tex. Civ. App. 1895) 31 S. W. Rep. 197.

It will at once be observed that, as to railroad corporations, this statute, by not requiring the superior servant to be invested with the authority to employ and discharge servants in order to make the master liable for his negligence, extends the superior-servant limitation as it existed in Texas at the common law to cases where it was not before applicable. *Texas Cent. R. Co. v. Frazier*, 90 Tex. 33, 4 Am. & Eng. R. Cas. N. S. 664.

In *Texas, etc., R. Co. v. Tatman*, 10 Tex. Civ. App. 434, it was said that the proper construction of the statute is that "a servant intrusted with superintendence and control over another is not a fellow servant with such other, but he may nevertheless be a fellow servant with employees over whom he has no such superintendence or control."

Under this statute it has been held that where a conductor has general superintendence over the movements of his train and command of all the employees engaged in its operation, the company is not liable to a brakeman for the negligence of the engineer merely because the rules of the company intrust the latter with discretion to signal the brakeman to apply brakes. *Texas Cent. R. Co. v. Frazier*, 90 Tex. 33, 4 Am. & Eng. R. Cas. N. S. 664, *reversing* (Tex. Civ. App. 1896) 34 S. W. Rep. 664, 3 Am. & Eng. R. Cas. N. S. 381.

Nor does the fact that the engineer has such authority prevent the conductor from being

for injuries to servants by extending it to cases in which the injury results from the negligence of fellow employees who are intrusted with "superintendence."¹

Construction of the Statutes — In General. — The marked similarity of these several provisions has very naturally resulted in considerable uniformity of construction.

Servant Must Be Intrusted with Superintendence. — It is hardly necessary to say that the master is not liable under these statutory provisions for the negligence of any person who is not intrusted with superintendence over other employees.²

Negligence Must Be Connected with the Exercise of the Superintendence. — And the

his superior within the meaning of the statute so as to charge the railroad company with liability for the conductor's negligence. *Culpepper v. International, etc., R. Co.*, 90 Tex. 627, *affirming* (Tex. Civ. App. 1897) 38 S. W. Rep. 818. See also *Moore v. Jones*, 15 Tex. Civ. App. 391.

A defendant railroad company has been held liable, under this statute, for the negligence of a foreman of a bridge gang, resulting in an injury to a mechanic working under him. *San Antonio, etc., R. Co. v. McDonald*, (Tex. Civ. App. 1895) 31 S. W. Rep. 72.

Constitutional Provisions in Mississippi. — It is provided by the Constitution of Mississippi that "every employee of any railroad corporation shall have the same right and remedies for any injury suffered by him from the act or omission of said corporation or its employees as are allowed by law to other persons not employees, where the injury results from the negligence of a superior agent or officer, or of a person having the right to control or direct the services of the party injured." Const. Miss., 1890, § 193. In *Evans v. Louisville, etc., R. Co.*, 70 Miss. 527, it was held that, in the operation of a train in accordance with rules, an engineer is not the superior of a brakeman within the meaning of this provision.

1. Statutory Provisions Relating to Servants Exercising Superintendence — England. — The English Employers' Liability Act of 1880 makes the master liable for a personal injury to a workman "by reason of the negligence of any person in the service of the employer who has any superintendence intrusted to him, whilst in the exercise of such superintendence." 43 & 44 Vict., c. 42, sec. 1, cl. 2. And by the eighth section of this act the expression "person who has superintendence intrusted to him" means "a person whose sole or principal duty is that of superintendence, and who is not ordinarily engaged in manual labor."

Alabama. — On February 12, 1885, the legislature of the state of Alabama passed an act regulating employers' liability for injuries to their employees, which was substantially copied from the English Act of 43 & 44 Victoria. This act was embodied, with some modifications intended, perhaps, to broaden its operation, in sections 2590 and 2591 of the Code of 1886, and now constitutes chapter 43 of the Code of 1896. Code Ala., 1896, §§ 1749, 1751. By subsection 2 of this act the master is made liable for a personal injury to a servant "when the injury is caused by reason of the negligence of any person in the service or employment of the master or employer who

has any superintendence intrusted to him, whilst in the exercise of such superintendence."

Massachusetts. — The Employer's Liability Act of Massachusetts makes the employer liable "by reason of the negligence of any person in the service of the employer, intrusted with and exercising superintendence, whose sole or principal duty is that of superintendence." Stat. Mass., 1887, c. 270, § 1, cl. 2.

2. Liability of Master Limited to Negligence of Superintendent. — *Dantzler v. De Bardeleben Coal, etc., Co.*, 101 Ala. 309; *Sheffield v. Harris*, 101 Ala. 564; *Drennen v. Smith*, 115 Ala. 396; *Whelton v. West End St. R. Co.*, (Mass.) 1899) 52 N. E. Rep. 1072. See *Seaboard Mfg. Co. v. Woodson*, 94 Ala. 143.

A master is not, of course, liable under the Alabama statute for the negligence of an employee whose sole duty is to be performed directly by his own acts of manual labor. *Dantzler v. De Bardeleben Coal, etc., Co.*, 101 Ala. 309. It was held in this case that an engineer who actually operates the engine with his own hands, and with the aid of a helper, in accordance with the directions of a common superior, is not a person "who has superintendence intrusted to him" so as to make the employer liable for his negligence under the statute. See *Culver v. Alabama Midland R. Co.*, 108 Ala. 330.

Irregularly Appointed Superintendent of Municipal Improvements. — In *Sheffield v. Harris*, 101 Ala. 564, it was contended by the defendant municipality that the superintendent for whose negligence the plaintiff sought to recover, had not been elected or appointed in the mode prescribed by law, and that, consequently, any injury caused by his negligence while serving or assuming to serve the city could not fasten a charge upon the municipality. But the court said: "There is nothing in this objection. If he served the city in the capacity of superintendent of this work, and the city authorities acquiesced in such service and took the benefit of his skill and labor, the city will not be heard to deny the legality of his appointment, nor its responsibility for acts done by him within the scope of the service he was rendering. So far as the question affects its liability, he must be treated as if he were duly and legally appointed, until the city itself renounces and repudiates his acts. It cannot appropriate the benefit and repudiate the burden."

Whether the Superintendence Must Be Over the Injured Person. — It has been held that the superintendence contemplated by subsection 2 of the Alabama act (Code Ala., 1896, § 1749,

damningly negligence must occur substantially while such superintendent is in the exercise of that superintendence which has been intrusted to him.¹

Extent of the Superintendence. — While the negligence for which the master will be chargeable must, under each of these provisions, be that of a person intrusted with superintendence, and must have occurred in the exercise by him of such superintendence, it is not clear that the master will be liable under the provision of the *Alabama* act for the negligence of a person only whose sole or principal duty is that of superintendence.² But this is not an open question under either the *English* or the *Massachusetts* statute; both of these acts expressly require the negligence which will charge the master with liability to be that of a person "whose sole or principal duty is that of superintendence," to which the *English* act adds "and who is not ordinarily engaged in manual labor."

What Constitutes a Person "Whose Sole or Principal Duty Is That of Superintendence." — While the *English* act is a little more explicit than that of *Massachusetts*, the construction of the two provisions has been quite uniform. It has been held that an employee who has the same work as the other employees and receives the same pay cannot be deemed a person whose sole or principal duty is that of superintendence.³ But the fact that the person whose negligence is relied

subsec. 2), is not necessarily superintendence over the injured person. *Kansas City, etc., R. Co. v. Burton*, 97 Ala. 240.

1. Liability Limited to Negligence Connected with the Exercise of Superintendence. — *Dantzler v. De Bardeleben Coal, etc., Co.*, 101 Ala. 309; *Sheffield v. Harris*, 101 Ala. 564; *Drennen v. Smith*, 115 Ala. 396; *Fitzgerald v. Boston, etc., R. Co.*, 156 Mass. 293; *Lynch v. Allyn*, 160 Mass. 248; *Burns v. Washburn*, 160 Mass. 457. See *Seaboard Mfg. Co. v. Woodson*, 94 Ala. 143.

Negligence of Superintendent While Engaged in Manual Labor. — Under this statutory provision the employer is not answerable for the negligence of a person intrusted with superintendence who at the time, and in doing the act complained of, is not exercising superintendence, but is engaged in mere manual labor, the duty of a common workman. *Cashman v. Chase*, 156 Mass. 342; *Brittain v. West End St. R. Co.*, 168 Mass. 10.

In *Whittaker v. Bent*, 167 Mass. 588, the plaintiff had been injured by the explosion of damp moulds which had been set up by the superintendent of the foundry without proper examination to discover if they were damp. According to the plaintiff's testimony, he asked the superintendent if the moulds were all right, and received the answer: "Yes, go ahead, Bob." It was held that the superintendent was not, in either instance, "exercising superintendence," within the meaning of the employers' liability act of *Massachusetts*, so as to render the master liable for his negligence.

Voluntary Act of Superintendent Without Direction or Approval of Employer. — And an act done voluntarily by a superintendent, without the direction or approval of the employer, is not an act of superintendence. *Shea v. Wellington*, 163 Mass. 364.

Instance of Yardmaster Exercising Superintendence. — In *Louisville, etc., R. Co. v. Mother-shed*, 97 Ala. 261, an action by a railroad employee who had been injured by the derailment of a car, it was held that if the yardmaster, whose alleged negligence was claimed to

have caused the accident and who was the superior of all the other employees present, personally took the place of the engineer and was running the engine at the time of the accident, or if the engineer was in charge of and running the engine, and the yardmaster was present, directing and controlling the engineer at the time, the yardmaster would be a person intrusted with and exercising supervision within the meaning of the *Alabama* statute and the defendant railroad would be liable for his negligence.

Instance of the Exercise of Superintendence by Superintendent of Sewer Construction. — Where a superintendent of sewer construction walked along the bank of a trench in which the laborers were working, and, while he was looking at them, the bank caved in, injuring one of the workmen, it was held that it was competent for the jury to find that in walking along the bank, and in stopping to look down at the workmen, the superintendent was exercising an oversight of the work, and therefore was engaged in an act of superintendence. *McCoy v. Westboro*, (Mass. 1899) 52 N. E. Rep. 1064.

2. Extent of the Superintendence Required by the Alabama Act. — The omission from the *Alabama* act of the definition which is contained in the *English* act of the phrase "person who has superintendence intrusted to him" has been said to be "a pregnant omission, implying an intent on the part of the legislature to make the common master liable whenever the injury complained of by one servant is caused by any person in the service who has any superintendence intrusted to him, whether superintendence be his sole or principal duty or not, and whether or not he is ordinarily engaged in manual labor, provided only that the damningly negligence occurs while such person is in the exercise of whatever superintendence is in fact intrusted to him." *Dantzler v. De Bardeleben Coal, etc., Co.*, 101 Ala. 309.

3. Instances of Persons Held Not to Be Superintendents. — *O'Brien v. Rideout*, 161 Mass. 170; *Dowd v. Boston, etc., R. Co.*, 162 Mass. 185; *Adasken v. Gilbert*, 165 Mass. 443.

upon as that of a superintendent does manual labor is not conclusive upon the question.¹ Where the manual labor done by a foreman is but slight the jury will be justified in finding that his principal duty is that of superintendence.² And it has been held that where the sole duty of the negligent person is that of superintendence the master is liable although such superintendent voluntarily co-operates in manual labor.³

cc. LIABILITY FOR NEGLIGENCE OF SERVANT TO WHOM INJURED SERVANT OWES OBEDIENCE.

— The Employers' Liability Acts of *England* and *Alabama* make the master liable for the negligence of a servant to whose orders or directions the injured servant must conform, and who was injured by reason of such conformance.⁴

It has been held that, although a person is employed to superintend blasting in a quarry, he is not a person whose "principal duty is that of superintendence" if he works with his own hands in attending to the fire under the steam boiler, in sharpening all the tools used by the workmen, in clearing out and charging the drill holes, and in other acts of manual labor which occupy the most of his time. *O'Neil v. O'Leary*, 164 Mass. 387. See also *Cunningham v. Lynn, etc.*, St. R. Co., 170 Mass. 298.

In an action to recover compensation under the *English Employers' Liability Act*, it appeared that the plaintiff, with other workmen, was employed by the defendant to stow bales of wool in the hold of a ship. The workmen were divided into gangs, the foreman of the plaintiff's gang being B.; B. was himself a laborer, working on deck, and he gave the signal to the men below when the bales were being dropped down the hatchway into the hold. The plaintiff, who was below, was injured by a bale which, according to his statement, was dropped down without sufficient warning being given by B. to enable him to get out of the way. It was held that the plaintiff was not entitled to recover, as B. was not a person who had superintendence intrusted to him within section 1, subsec. 2, as defined by section 8. *Kellard v. Rooke*, 21 Q. B. Div. 367, affirming 19 Q. B. Div. 585.

The plaintiff and one J. were employed with others by the defendants in loading sacks of corn into the hold of a ship. J.'s duty was to guide the beam of the crane by means of a guy rope, and to give directions when to lower and hoist the chain. He neglected to use the guy rope, and the sacks in consequence fell down the hatchway, and hurt the plaintiff, who was working in the hold. It was held that J. was "engaged in manual labor," and was not "a person having superintendence intrusted to him," within the meaning of the act. *Shaffers v. General Steam Nav. Co.*, 10 Q. B. Div. 356.

1. *Reynolds v. Barnard*, 168 Mass. 226; *Prendible v. Connecticut River Mfg. Co.*, 160 Mass. 131.

2. *Instances of Persons Held to Be Superintendents.* — *Malcolm v. Fuller*, 152 Mass. 160; *Crowley v. Cutting*, 165 Mass. 436; *Gardner v. New England Telephone, etc., Co.*, 170 Mass. 156.

3. *Osborne v. Jackson*, 11 Q. B. Div. 619. See also *Kansas City, etc., R. Co. v. Burton*, 97 Ala. 240.

In *McPhee v. Scully*, 163 Mass. 216, an action brought for an injury sustained through

the alleged negligence of the foreman of a gang of men, of which the plaintiff was a member, engaged in the work of driving piles, the defendant claimed that the plaintiff had not sustained the burden of showing that the foreman's sole or principal duty was that of superintendence. While there was a general superintendent over the foreman, the latter was, according to the defendant's testimony, the foreman of the gang, and had authority to employ and dismiss men, and frequently had charge of the jobs. There was abundant evidence that he had charge of the work upon which the gang was employed when the plaintiff was hurt, and gave all the directions which were given, and no testimony that he worked or was expected to work with his own hands. It was held that the evidence required a finding that on this occasion at least the foreman's sole or principal duty was that of superintendence.

Section Foreman. — In *Shepard v. Boston, etc., R. Co.*, 158 Mass. 174, it was held that the defendant could not be held liable to the plaintiff, who was injured while on the defendant's handcar, on the ground that the handcar was governed by a section foreman, and that such foreman was intrusted with and exercising superintendence, and that the negligence was due to his negligence while superintending.

But it has been held that a section foreman who does not himself work, but merely looks on and sees the work done, is a person intrusted with and exercising superintendence. *Davis v. New York, etc., R. Co.*, 159 Mass. 532.

And where it appeared that a section foreman had immediate charge and superintendence of a gang of five men, who were working all the time under his direction in handling freight, and it was his duty to take receipts, check the freight into the cars, and see that it was loaded into the right cars, it was held that the jury might well find that the principal duty of the foreman was that of superintendence. *Mahoney v. New York, etc., R. Co.*, 160 Mass. 573.

Weaver Operating Loom. — An ordinary weaver, whose usual work is merely to operate a loom, is not a person "intrusted with and exercising superintendence, whose sole or principal duty is that of superintendence," within the meaning of the *Massachusetts* statute, merely because it is also her duty, when her loom gets out of repair, to notify the loom fixer to put it in order. *Roseback v. Aetna Mills*, 158 Mass. 379.

4. **Statutory Provisions—England.** — By the *Employer's Liability Act*, 1880, a master is

Construction of the Statutes. — There can, of course, be no recovery under this statute unless the negligence is that of a person whose orders the plaintiff is bound to obey.¹ To authorize a recovery under this statute the injury must be the result of the negligent person giving the orders and of the plaintiff conforming to the orders.² It has, however, been held that it is not necessary that the order should be *per se* negligent, but if, while in obedience to orders, injury arises through the negligence of the one giving the orders, it is sufficient.³ And no specific order at the time of the injury is requisite; general prior orders suffice.⁴

d. VICE-PRINCIPALS — (1) *In General.* — An important and universally accepted restriction of the fellow-servant rule is what is known as the "vice-principal limitation," which holds the master liable to one servant for the negligent performance by another of the personal duties which every master owes to his servants.

(2) *Statement of Vice-Principal Limitation.* — The law imposes upon the master certain duties which concern the safety of his servants,⁵ and, while he may, of course, delegate the duties to another, his doing so in no wise affects his responsibility for their proper performance. If one servant is injured by reason of the negligent performance of one of these duties by another servant to whom it has been delegated by the master, the master cannot escape liability on the ground that the negligence was that of a fellow servant. In other words, where a servant is intrusted with the performance of one of the master's personal duties, he is, with respect to that duty, a vice-principal or representative of the master, who will be liable to another servant for the negligent performance by the vice-principal of the delegated personal duty to the same extent as for his own negligence.⁶

liable for personal injury caused to a workman "by reason of the negligence of any person in the service of the employer to whose orders or directions the workman, at the time of the injury, was bound to conform, and did conform, where such injury resulted from his having so conformed." 43 & 44 Vict., c. 42, § 1, subsec. 3.

Alabama. — By the Alabama act a master is liable for an injury to a servant "when such injury is caused by reason of the negligence of any person in the service or employment of the master or employer to whose orders or directions the servant or employee, at the time of the injury, was bound to conform, and did conform, if such injuries resulted from his having so conformed." Ala. Code, 1896, § 1749, subsec. 3.

1. Construction of the Provisions. — Howard v. Bennett, 58 L. J. Q. B. 129, 60 L. T. N. S. 152, 53 J. P. 359; Snowden v. Baynes, 24 Q. B. Div. 568, 25 Q. B. Div. 193; Garland v. Toronto, 23 Ont. App. 238.

2. Kellard v. Rooke, 21 Q. B. Div. 367; Dantzler v. De Bardeleben Coal, etc., Co., 101 Ala. 309.

3. Millward v. Midland R. Co., 14 Q. B. Div. 68; Wild v. Waygood, (1892) 1 Q. B. 783; Cox v. Hamilton Sewer Pipe Co., 14 Ont. Rep. 300. See Bridges v. Tennessee Coal, etc., Co., 109 Ala. 287; Lewis v. Montgomery, (Ala. 1894) 16 So. Rep. 34. But see Alabama Midland R. Co. v. McDonald, 112 Ala. 216.

4. Cox v. Hamilton Sewer Pipe Co., 14 Ont. Rep. 300; Millward v. Midland R. Co., 14 Q. B. Div. 68.

5. For a statement of these personal duties see the title MASTER AND SERVANT.

6. Master Liable for Negligence of Vice-Principal — *United States.* — Randall v. Baltimore, etc., R. Co., 109 U. S. 483; Northern Pac. R. Co. v. Herbert, 116 U. S. 647; Northern Pac. R. Co. v. Peterson, 162 U. S. 346; Lund v. Hersey Lumber Co., 41 Fed. Rep. 202; The Julia Fowler, 49 Fed. Rep. 277; Robertson v. Cornelison, 34 Fed. Rep. 716; Northern Pac. R. Co. v. Charless, 51 Fed. Rep. 562, 51 Am. & Eng. R. Cas. 198; Mase v. Northern Pac. R. Co., 57 Fed. Rep. 283; Wallace v. Standard Oil Co., 66 Fed. Rep. 260; Burke v. Anderson, 69 Fed. Rep. 814; Frost v. Oregon Short Line, etc., R. Co., 69 Fed. Rep. 936; Western Coal, etc., Co. v. Ingraham, 36 U. S. App. 1, 70 Fed. Rep. 219; Gowen v. Bush, 76 Fed. Rep. 349; Alaska Treadwell Gold Min. Co. v. Whelan, 29 U. S. App. 1, 64 Fed. Rep. 462; Northern Pac. R. Co. v. Poirier, 67 Fed. Rep. 881; Minneapolis v. Lundin, 19 U. S. App. 245, 58 Fed. Rep. 525.

Alabama. — Louisville, etc., R. Co. v. Davis, 91 Ala. 487.

Arkansas. — Fones v. Phillips, 39 Ark. 17, 43 Am. Rep. 264; St. Louis, etc., R. Co. v. Harper, 44 Ark. 524.

California. — Ryan v. Los Angeles Ice, etc., Co., 112 Cal. 244; Callan v. Bull, 113 Cal. 593; Higgins v. Williams, 114 Cal. 176; Verdelli v. Gray's Harbor Commercial Co., 115 Cal. 517; Donnelly v. San Francisco Bridge Co., 117 Cal. 417; Daves v. Southern Pac. R. Co., 98 Cal. 19, 35 Am. St. Rep. 133; Matthews v. Bull, (Cal. 1897) 47 Pac. Rep. 773, quoting 7 AM. AND ENG. ENCYC. OF LAW (1st ed.) 848.

Colorado. — Denver, etc., R. Co. v. Driscoll, 12 Colo. 520, 13 Am. St. Rep. 243; Colorado Midland R. Co. v. O'Brien, 16 Colo. 219, 48

Extent of Master's Liability for Negligence of Vice-principal. — But while the master's responsibility for the due performance of those positive duties which are imposed upon him by law is not in the least degree diminished by their dele-

Am. & Eng. R. Cas. 235; Colorado Midland R. Co. v. Naylor, 17 Colo. 501, 31 Am. St. Rep. 335; Denver, etc., R. Co. v. Sipes, 23 Colo. 226; Denver Tramway Co. v. Crumbaugh, 23 Colo. 363.

Connecticut. — Gerrish v. New Haven Ice Co., 63 Conn. 9.

Georgia. — Cheeney v. Ocean Steamship Co., 92 Ga. 726, 44 Am. St. Rep. 113, citing 7 AM. AND ENG. ENCYC. OF LAW (1st ed.) 834.

Illinois. — Pullman Palace Car Co. v. Laack, 143 Ill. 242, citing 4 AM. AND ENG. ENCYC. OF LAW (1st ed.) 59; Chicago, etc., R. Co. v. Kneirim, 152 Ill. 458, 43 Am. St. Rep. 259; Mobile, etc., R. Co. v. Godfrey, 155 Ill. 78; Fraser v. Schroeder, 163 Ill. 459.

Indiana. — Taylor v. Evansville, etc., R. Co., 121 Ind. 124, 16 Am. St. Rep. 372, 41 Am. & Eng. R. Cas. 437; Blondin v. Oolitic Quarry Co., 11 Ind. App. 395; Louisville, etc., R. Co. v. Berkey, 136 Ind. 181; Cole v. Wood, 11 Ind. App. 37; Louisville, etc., Consol. R. Co. v. Miller, 140 Ind. 685.

Iowa. — Fosburg v. Phillips Fuel Co., 93 Iowa 54.

Kansas. — Kansas Pac. R. Co. v. Salmon, 14 Kan. 512; Hannibal, etc., R. Co. v. Fox, 31 Kan. 586; Cherokee, etc., Coal. etc., Co. v. Britton, 3 Kan. App. 292.

Maine. — Donnelly v. Booth Bros., etc., Granite Co., 90 Me. 110.

Maryland. — State v. Malster, 57 Md. 287.

Massachusetts. — Kelley v. Norcross, 121 Mass. 508; Moynihan v. Hills Co., 146 Mass. 586; Elmer v. Locke, 135 Mass. 575; Bjbjian v. Woonsocket Rubber Co., 164 Mass. 214.

Michigan. — Harrison v. Detroit, etc., R. Co., 79 Mich. 409, 19 Am. St. Rep. 180, 41 Am. & Eng. R. Cas. 398; Brown v. Gilchrist, 80 Mich. 56, 20 Am. St. Rep. 496; Quincy Min. Co. v. Kitts, 42 Mich. 34.

Minnesota. — Tierney v. Minneapolis, etc., R. Co., 33 Minn. 311, 53 Am. Rep. 35.

Missouri. — Dutzi v. Geisel, 23 Mo. App. 676; Banks v. Wabash Western R. Co., 40 Mo. App. 458; Higgins v. Missouri Pac. R. Co., 43 Mo. App. 547; Taylor v. Missouri Pac. R. Co., (Mo. 1891) 16 S. W. Rep. 206; Schaub v. Hannibal, etc., R. Co., 106 Mo. 74; Coontz v. Missouri Pac. R. Co., 121 Mo. 652; Browning v. Wabash Western R. Co., 124 Mo. 55; Whalen v. Centenary Church, 62 Mo. 326; Dayharsh v. Hannibal, etc., R. Co., 103 Mo. 570, 23 Am. St. Rep. 900; Hughlett v. Ozark Lumber Co., 53 Mo. App. 87.

New Jersey. — Maher v. Thropp, 59 N. J. L. 186; Nord Deutscher Lloyd Steamship Co. v. Ingebregsten, 57 N. J. L. 400.

New York. — Flike v. Boston, etc., R. Co., 53 N. Y. 549, 13 Am. Rep. 545; Malone v. Hathaway, 64 N. Y. 5, 21 Am. Rep. 573; Booth v. Boston, etc., R. Co., 73 N. Y. 38, 29 Am. Rep. 97; Fuller v. Jewett, 80 N. Y. 46, 36 Am. Rep. 575, 1 Am. & Eng. R. Cas. 109; Dana v. New York Cent., etc., R. Co., 92 N. Y. 639; Pantzar v. Tilly Foster Iron Min. Co., 99 N. Y. 368; Stringham v. Stewart, 100 N. Y. 516; Bushby v. New York, etc., R. Co., 107 N. Y.

374, 1 Am. St. Rep. 844; Scarff v. Metcalf, 107 N. Y. 211, 1 Am. St. Rep. 807; Hussey v. Coger, 112 N. Y. 614, 8 Am. St. Rep. 787; Ford v. Lake Shore, etc., R. Co., 124 N. Y. 493; Cregan v. Marston, 126 N. Y. 568, 22 Am. St. Rep. 854; Hankins v. New York, etc., R. Co., 142 N. Y. 416, 40 Am. St. Rep. 616; Richards v. Hayes, 17 N. Y. App. Div. 422; Crowell v. Thomas, 90 Hun (N. Y.) 193.

North Dakota. — Ell v. Northern Pac. R. Co., 1 N. Dak. 336, 26 Am. St. Rep. 621.

Oregon. — Anderson v. Bennett, 16 Oregon 515, 8 Am. St. Rep. 311; Miller v. Southern Pac. Co., 20 Oregon 285; and cases cited.

Pennsylvania. — Lewis v. Seifert, 116 Pa. St. 628, 2 Am. St. Rep. 631.

Rhode Island. — Mulvey v. Rhode Island Locomotive Works, 14 R. I. 204; Brodeur v. Valley Falls Co., 16 R. I. 448.

South Carolina. — Gunter v. Graniteville Mfg. Co., 18 S. Car. 262, 44 Am. Rep. 573; Lasure v. Graniteville Mfg. Co., 18 S. Car. 275; Couch v. Charlotte, etc., R. Co., 22 S. Car. 557; Calvo v. Charlotte, etc., R. Co., 23 S. Car. 531, 55 Am. Rep. 28; Boatwright v. Northeastern R. Co., 25 S. Car. 128; Whaley v. Bartlett, 42 S. Car. 454; Wilson v. Charleston, etc., R. Co., 51 S. Car. 79.

Texas. — Texas, etc., R. Co. v. Whitmore, 58 Tex. 276; Houston, etc., R. Co. v. Dunham, 49 Tex. 181; Houston, etc., R. Co. v. Marcelles, 59 Tex. 334; Sabine, etc., R. Co. v. Ewing, 1 Tex. Civ. App. 531; Texas, etc., R. Co. v. Bingle, 16 Tex. Civ. App. 653; San Antonio, etc., R. Co. v. Adams, 6 Tex. Civ. App. 102.

Utah. — Chapman v. Southern Pac. Co., 12 Utah 30.

Vermont. — Davis v. Central Vermont R. Co., 55 Vt. 84, 45 Am. Rep. 590.

Virginia. — Moon v. Richmond, etc., R. Co., 78 Va. 745, 49 Am. Rep. 401, 17 Am. & Eng. R. Cas. 531, explained in Norfolk, etc., R. Co. v. Nuckols, 91 Va. 193; Baltimore, etc., R. Co. v. McKenzie, 81 Va. 71, 24 Am. & Eng. R. Cas. 395; Torian v. Richmond, etc., R. Co., 84 Va. 192; Norfolk, etc., R. Co. v. Ampey, 93 Va. 108.

Washington. — Ogle v. Jones, 16 Wash. 319.

Wisconsin. — Brabbitts v. Chicago, etc., R. Co., 38 Wis. 289; Shultz v. Chicago, etc., R. Co., 40 Wis. 589, 48 Wis. 375; Hulehan v. Green Bay, etc., R. Co., 58 Wis. 319; Cadden v. American Steel Barge Co., 88 Wis. 409; Haley v. Western Transit Co., 76 Wis. 344; Johnson v. Ashland First Nat. Bank, 79 Wis. 414, 24 Am. St. Rep. 722.

See also the title CONTRIBUTORY NEGLIGENCE, vol. 7, p. 422.

A Leading Case upon this subject is that of Davis v. Central Vermont R. Co., 55 Vt. 84, 45 Am. Rep. 590, 11 Am. & Eng. R. Cas. 173. It was there held that in an action on behalf of a fireman of a railway company, killed by the washing out of a culvert, the negligence of the company's bridge builder in constructing and of the roadmaster in repairing the culvert is attributable to the company, Ross, J., saying: "The doctrine now established by the United

gation to another, neither is it extended or increased. In other words, the liability of the master for the negligence of a servant intrusted with the performance of these positive duties is no greater than would be his liability for his own negligence in the same respect.¹

(3) *Who Are Vice-principals* — (a) *Definition of Term "Vice-principal."* — A vice-principal, then, as the term is used in the law of fellow servants, is a servant who represents the master in the discharge of those personal or absolute duties which every master owes to his servants.²

(b) *Vice-principals and Superior Servants Distinguished.* — While the courts in some of the United States where the superior-servant limitation has been adopted employ the term vice-principal as meaning a superior servant,³ this is neither

States Supreme Court, and by most of the courts of last resort in the several states, holds the master liable to his workman for injuries sustained from the negligent performance of duties which rest by the relation upon the master, whether the master performs such duties personally or through an agent or servant. * * * The master's liability has been made to rest upon whether the negligence arose in the performance of a duty for the careful discharge of which he became responsible when he assumed the relation of master to the injured servant."

Statutory Recognition of the Rule in Minnesota. — In Minnesota it has been declared by statute that "whenever a master or employer delegates to any one the performance of his duties which he as master or employer owes to his servants, or any part or portion of such duties, the person so delegated, while so acting for his master or employer, shall be considered the vice-principal and representative of the master." Gen. Laws Minn., 1895, c. 173, § 2.

1. Liability of Master Not Increased by Vice-principal Rule. — *Ross v. Walker*, 139 Pa. St. 42, 23 Am. St. Rep. 160, 21 Pittsb. L. J. N. S. (Pa.) 256-259, 27 W. N. C. (Pa.) 165.

Thus, with respect to his duty to furnish machinery or appliances and a place in which to work, the master is under a no greater obligation than that of furnishing reasonably safe machinery or appliances and a reasonably safe place in which to work (see the title MASTER AND SERVANT), and if a servant who is intrusted with these duties furnishes reasonably safe machinery or appliances or a place to work which is reasonably safe, the master's duty is performed, and there is no negligence for which the master can be held liable, even although a servant may have been injured through some defect in the machinery or premises. *Lasky v. Canadian Pac. R. Co.*, 83 Me. 461.

And again, a servant assumes the obvious dangers of his employment (see the title MASTER AND SERVANT), and if a servant to whom the master has intrusted the duty of providing a place in which to work furnishes a defective place, the master will nevertheless not be liable therefor if it is openly and obviously defective. *South Florida R. Co. v. Weese*, 32 Fla. 212.

A *New York* case illustrates this principle. The defendants were engaged in the manufacture of articles from wood. The lumber was planed on the first floor of their establishment and then passed up through an opening to the floor above. This opening was in a

passageway where those employed in the second floor passed back and forth in the performance of their work; when not in use it was closed by a heavy trapdoor. The plaintiff, an employee of the defendants, was going along the passageway in the performance of his work, when the trapdoor was suddenly raised from below by a workman in the planing room. The plaintiff fell through the opening and was injured. The plaintiff had been in the defendant's employ for about twenty-two months, and was fully informed as to the location and use of the trapdoor and the manner of its construction. The defendant had given instructions that the trapdoor should not be opened from below, and the employee who opened it had been so instructed by the foreman. It was held that the action was not maintainable, as the injury was caused by the negligence of a coemployee; that the location of the trapdoor in the passageway was not, *per se*, a wrongful act; that the defendants had a right to place it there, and were not bound to change the arrangement to secure greater safety to their employees, and that the plaintiff took the risk of the obvious dangers connected with his employment. *Anthony v. Leeret*, 105 N. Y. 591.

If, where a servant is ordered into a place of danger, the danger is so obvious that a prudent person, though acting in the capacity of a servant, would not obey the order, then he will be guilty of contributory negligence which will defeat a recovery against the master. *Shortel v. St. Joseph*, 104 Mo. 114, 24 Am. St. Rep. 317. See *Olson v. McMullen*, 34 Minn. 94.

Negligence of Vice-principal Necessary to Charge Master with Liability. — Where the plaintiff, one of two employees engaged in moving cotton, was injured by reason of his coemployee's throwing down a bale in a negligent manner, it was held that the master was not liable although the superintendent had told the negligent employee to "throw down cotton." This order could not be interpreted as an order to throw down the cotton in a negligent manner. *Gonin v. Wampanoag Mills*, (Mass. 1898) 51 N. E. Rep. 1078.

2. Vice-principal Defined. — *Mobile, etc., R. Co. v. Godfrey*, 155 Ill. 78; *Cole v. Wood*, 11 Ind. App. 37; *Van Dusen v. Tettellier*, 78 Mich. 492; *Ross v. Walker*, 139 Pa. St. 42, 23 Am. St. Rep. 160; *Prevost v. Citizens' Ice, etc., Co.*, 185 Pa. St. 617; *Hanna v. Granger*, 18 R. I. 507; *Ogle v. Jones*, 16 Wash. 319; *Dwyer v. American Express Co.*, 82 Wis. 307, 33 Am. St. Rep. 44.

3. Confusion of Terms "Vice-principal" and
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the correct nor the common use of the term. There is a marked and very clear distinction between a superior servant and a vice-principal. A superior servant is, generally speaking, one who exercises authority of direction and control over other servants, and may or may not be charged with the performance of any of the master's personal duties. On the other hand, the status of a servant as a vice-principal, in the proper sense of the term, is in nowise dependent upon his rank or the grade of his employment; it depends solely and wholly upon the character of his duties. If he is charged with and is in the performance of one of the master's personal duties, a servant is a vice-principal, regardless of whether he occupies a position superior or inferior to that of other servants.¹

(c) **Dual Status of Employees** — *aa. IN GENERAL.* — Since, then, the status of a servant as a vice-principal depends wholly upon the character of the duty which he is performing, it logically follows that a particular servant may occupy the dual position of a mere fellow servant and a vice-principal; he is a vice-principal while engaged in the performance of duties which are the absolute duties of the master, but while in the performance of other duties he may be a mere fellow servant. Whether he is the one or the other must be determined by an inquiry into the nature of the service which he was performing at the particular time of his alleged negligence.²

bb. VICE-PRINCIPAL DOING COSERVANT'S WORK. — If, therefore, a servant, although a vice-principal as to certain of his duties, is in the performance, not of such duties as are personal to or absolute upon the master, but of the ordinary duties of a servant, his negligence in that respect will not charge the master with liability to a fellow servant.³

"Superior Servant." — Notably in *Missouri* and *Nebraska* an employee who is invested with the supervision and control of other employees is frequently referred to as a vice-principal. See *supra*, this section, *Superior Servants*.

1. Status of a Servant as a Vice-principal Not Dependent on Rank — *California.* — *Daves v. Southern Pac. Co.*, 98 Cal. 19, 35 Am. St. Rep. 133.

Illinois. — *Libby v. Scherman*, 146 Ill. 552, 37 Am. St. Rep. 191.

Indiana. — *Justice v. Pennsylvania R. Co.*, 130 Ind. 321; *Robertson v. Chicago, etc., R. Co.*, 146 Ind. 486; *Salem Stone, etc., Co. v. Chastain*, 9 Ind. App. 453.

Michigan. — *Beesley v. Wheeler*, 103 Mich. 196.

Minnesota. — *Lindvall v. Woods*, 41 Minn. 212; *Carlson v. Northwestern Telephone Exch. Co.*, 63 Minn. 428, 2 Am. & Eng. Corp. Cas. N. S. 675.

New York. — *Tendrup v. John Stephenson Co.*, 51 Hun (N. Y.) 462, *affirmed* 121 N. Y. 681; *Hankins v. New York, etc., R. Co.*, 142 N. Y. 416, 40 Am. St. Rep. 616.

Texas. — *Galveston, etc., R. Co. v. Smith*, 76 Tex. 611, 18 Am. St. Rep. 78.

Utah. — *Chapman v. Southern Pac. Co.*, 12 Utah 30.

Virginia. — *Russell Creek Coal Co. v. Wells*, (Va. 1898) 31 S. E. Rep. 614.

West Virginia. — *Jackson v. Norfolk, etc., R. Co.*, 43 W. Va. 380.

Wisconsin. — *Dwyer v. American Express Co.*, 82 Wis. 307, 33 Am. St. Rep. 44, *citing* 7 AM. AND ENG. ENCYC. OF LAW (1st ed.) 834.

Canada. — *Drew v. Corporation of East Whitby*, 46 U. C. Q. B. 107.

And see *supra*, this section, *Superior Servants*.

As was said by McBride, J., in *Nall v. Louisville, etc., R. Co.*, 129 Ind. 269: "One occupying a subordinate position may be authorized or required by the master to perform certain duties for which the master cannot escape responsibility by delegating his authority, while one occupying the highest and most responsible position may, in a given case, be a mere coemployee."

2. Same Servant Both Vice-principal and Fellow Servant — *United States.* — *Lund v. Hersey Lumber Co.*, 41 Fed. Rep. 202.

California. — *Nixon v. Selby Smelting, etc., Co.*, 102 Cal. 458; *Donnelly v. San Francisco Bridge Co.*, 117 Cal. 417.

Indiana. — *Justice v. Pennsylvania R. Co.*, 130 Ind. 321; *New Pittsburgh Coal, etc., Co. v. Peterson*, 136 Ind. 398, 43 Am. St. Rep. 327; *Cole v. Wood*, 11 Ind. App. 37; *Louisville, etc., R. Co. v. Isom*, 10 Ind. App. 695.

Minnesota. — *Carlson v. Northwestern Telephone Exch. Co.*, 63 Minn. 428, 2 Am. & Eng. Corp. Cas. N. S. 675.

New Jersey. — *Maher v. Thropp*, 59 N. J. L. 186.

Oregon. — *Mast v. Kern*, (Oregon 1896) 54 Pac. Rep. 950.

Pennsylvania. — *Ross v. Walker*, 139 Pa. St. 42, 23 Am. St. Rep. 160.

Washington. — *Morgan v. Carbon Hill Coal Co.*, 6 Wash. 577.

3. Vice-principal Doing Fellow Servant's Work — Master Not Liable — *United States.* — *Quinn v. New Jersey Lighterage Co.*, 23 Fed. Rep. 363; *Stockmeyer v. Reed*, 55 Fed. Rep. 259; *Texas, etc., R. Co. v. Rogers*, 57 Fed. Rep. 378; *Minneapolis v. Lundin*, 58 Fed. Rep. 525.

(d) **Instances of Vice-principals** — *aa. IN GENERAL.* — The general rule for determining who are vice-principals having been stated and explained, it remains to show how this rule has been applied in the cases.¹

bb. EMPLOYEES PROVIDING MACHINERY AND APPLIANCES — (*aa*) *General Rule.* — Since it is one of the master's positive duties to provide his servants with reasonably safe machinery and appliances,² employees to whom this duty is delegated

Compare Hardy v. Minneapolis, etc., R. Co., 36 Fed. Rep. 657.

Arkansas. — *St. Louis, etc., R. Co. v. Torrey,* 58 Ark. 217.

California. — *Daves v. Southern Pac. Co.,* 98 Cal. 19, 35 Am. St. Rep. 133; *Noyes v. Wood,* 102 Cal. 389.

Colorado. — *Colorado Coal, etc., Co. v. Lamb,* 6 Colo. App. 255; *Deep Min., etc., Co. v. Fitzgerald,* 21 Colo. 533.

Connecticut. — *McElligott v. Randolph,* 61 Conn. 157, 29 Am. St. Rep. 181; *Sullivan v. New York, etc., R. Co.,* 62 Conn. 209.

Florida. — *South Florida R. Co. v. Weese,* 32 Fla. 212.

Indiana. — *Indiana Car Co. v. Parker,* 100 Ind. 181; *Atlas Engine Works v. Randall,* 100 Ind. 293, 50 Am. Rep. 798; *McBride v. Indianapolis Frog, etc., Co.,* 5 Ind. App. 482; *Salem Stone, etc., Co. v. Chastain,* 9 Ind. App. 453; *Nall v. Louisville, etc., R. Co.,* 129 Ind. 264; *Taylor v. Evansville, etc., R. Co.,* 121 Ind. 124, 16 Am. St. Rep. 372.

Massachusetts. — *McGinty v. Athol Reservoir Co.,* 155 Mass. 183; *McGuerty v. Hale,* 161 Mass. 51.

Michigan. — *Dewey v. Parke,* 76 Mich. 631; *Beesley v. Wheeler,* 103 Mich. 196; *Schroeder v. Flint, etc., R. Co.,* 103 Mich. 213; *Findlay v. Russell Wheel, etc., Co.,* 108 Mich. 286. But see *Shumway v. Walworth, etc., Mfg. Co.,* 98 Mich. 411.

Minnesota. — *Lindvall v. Woods,* 41 Minn. 212; *Cornelson v. Eastern R. Co.,* 50 Minn. 23.

Missouri. — *Moore v. Wabash, etc., R. Co.,* 85 Mo. 588.

New Mexico. — *Atchison, etc., R. Co. v. Martin,* 7 N. Mex. 158.

New York. — *Crispin v. Babbitt,* 81 N. Y. 516, 37 Am. Rep. 521; *Brick v. Rochester, etc., R. Co.,* 98 N. Y. 211; *Loughlin v. State,* 105 N. Y. 159; *Hussey v. Coger,* 112 N. Y. 614, 8 Am. St. Rep. 787; *Cullen v. Norton,* 126 N. Y. 1; *Hankins v. New York, etc., R. Co.,* 142 N. Y. 416, 40 Am. St. Rep. 616; *Kenny v. Cunard Steamship Co.,* 55 N. Y. Super. Ct. 558; *Connolly v. Maurer,* 6 Misc. Rep. (N. Y. C. Pl.) 98; *Griffiths v. New Jersey, etc., R. Co.,* 5 Misc. Rep. (N. Y. Super. Ct.) 320, *affirmed* 8 Misc. Rep. (N. Y.) 3; *Mahoney v. Vacuum Oil Co.,* 76 Hun (N. Y.) 579.

North Dakota. — *Ell v. Northern Pac. R. Co.,* 1 N. Dak. 336, 26 Am. St. Rep. 621, 43 Alb. L. J. 414.

Ohio. — *Berea Stone Co. v. Kraft,* 31 Ohio St. 287, 27 Am. Rep. 510.

Oregon. — *Anderson v. Bennett,* 16 Oregon 515, 8 Am. St. Rep. 311; *Mast v. Kern,* (Oregon 1898) 54 Pac. Rep. 950.

Pennsylvania. — *Ross v. Walker,* 139 Pa. St. 42, 23 Am. St. Rep. 160.

Rhode Island. — *Hanna v. Granger,* 18 R. I. 507, *citing* 7 AM. AND ENG. ENCYC. OF LAW (1st ed.) 842; *Larich v. Moies,* 18 R. I. 513; *Di*

Marcho v. Builders' Iron Foundry, 18 R. I. 514; *Frawley v. Sheldon,* (R. I. 1897) 38 Atl. Rep. 370.

South Carolina. — *Gunter v. Graniteville Mfg. Co.,* 18 S. Car. 263, 44 Am. Rep. 573; *Couch v. Charlotte, etc., R. Co.,* 22 S. Car. 557, 28 Am. & Eng. R. Cas. 331; *Wilson v. Charleston, etc., R. Co.,* 51 S. Car. 79.

Tennessee. — *Allen v. Goodwin,* 92 Tenn. 385; *Illinois Cent. R. Co. v. Bolton,* 99 Tenn. 273; *Nashville, etc., R. Co. v. Gann,* (Tenn. 1898) 47 S. W. Rep. 493.

Washington. — *Morgan v. Carbon Hill Coal Co.,* 6 Wash. 577.

West Virginia. — *Criswell v. Pittsburgh, etc., R. Co.,* 30 W. Va. 798, 33 Am. & Eng. R. Cas. 242; *Madden v. Chesapeake, etc., R. Co.,* 28 W. Va. 610, 57 Am. Rep. 695.

Wisconsin. — *Schultz v. Chicago, etc., R. Co.,* 48 Wis. 375; *Dwyer v. American Express Co.,* 82 Wis. 307, 33 Am. St. Rep. 44, *quoting* 7 AM. AND ENG. ENCYC. OF LAW (1st ed.) 834; *Stutz v. Armour,* 84 Wis. 623; *Kliegel v. Weisel, etc., Mfg. Co.,* 84 Wis. 148; *Klochinski v. Shores Lumber Co.,* 93 Wis. 417; *Hartford v. Northern Pac. R. Co.,* 91 Wis. 374.

But where a vice-principal, while in charge of work as foreman, directed the plaintiff to perform the work in a manner and under circumstances involving considerable danger, the employer cannot escape liability for the negligence of the foreman simply because the latter performed an act of manual labor, setting in motion the agency which caused the injury. *Crystal Ice Co. v. Sherlock,* 37 Neb. 19.

A rule which is somewhat analogous to the one stated in the text has been applied by some of the courts which have accepted the superior-servant limitation, in holding that a master is liable for the negligence of a superior servant only where the injury sustained by the plaintiff is the result of the exercise by the negligent servant of his supervisory authority. See *supra*, this section, *Superior Servants*.

1. Employee Transmitting Directions of Master.

— On the ground that it is the master's personal duty to give direction to the work in hand, and in the matter of communicating necessary directions for that work, by authority of the master, all employees represent the master, who will be liable if injury results from a want of ordinary care in the transmission of such directions or orders, it has been held that a locomotive fireman, in delivering a message from the roadmaster to a section foreman, is not the fellow servant of the latter, but a vice-principal. Accordingly, the defendant railroad was held liable to a section foreman whose eye was destroyed in consequence of the fireman on a passing train delivering such a message by throwing it, while tied to a piece of coal, from the train. *Card v. Eddy,* (Mo. 1893) 24 S. W. Rep. 746.

2. See the title MASTER AND SERVANT.

are, with respect to its performance, vice-principals of the master, who will be liable for their negligence in failing to supply reasonably safe machinery and appliances.¹

1. Servants Supplying Machinery and Appliances Are Vice-principals—

England.—Paterson *v.* Wallace, 1 Macq. H. L. Cas. 748; Barton's Hill Coal Co. *v.* Reid, 3 Macq. H. L. Cas. 266; Clarke *v.* Holmes, 7 H. & N. 937; Murphy *v.* Phillips, 35 L. T. N. S. 477.

United States.—Gilmore *v.* Northern Pac. R. Co., 18 Fed. Rep. 866; Lund *v.* Hersey Lumber Co., 41 Fed. Rep. 202; Texas, etc., R. Co. *v.* Barrett, 67 Fed. Rep. 214; Hough *v.* Texas, etc., R. Co., 100 U. S. 213; Great Northern R. Co. *v.* McLaughlin, 70 Fed. Rep. 669, 44 U. S. App. 189.

California.—Halloway *v.* Henley, 6 Cal. 209; Beeson *v.* Green Mountain Gold Min. Co., 57 Cal. 20; Trask *v.* California Southern R. Co., 63 Cal. 95; Nixon *v.* Selby Smelting, etc., Co., 102 Cal. 458; Mullin *v.* California Horseshoe Co., 105 Cal. 77; Higgins *v.* Williams, 114 Cal. 176; Donnelly *v.* San Francisco Bridge Co., 117 Cal. 417.

Colorado.—Wells *v.* Coe, 9 Colo. 159; Denver Tramway Co. *v.* Crumbaugh, 23 Colo. 363; Denver, etc., R. Co. *v.* Sipes, (Colo. 1899) 55 Pac. Rep. 1093.

Delaware.—Foster *v.* Pusey, 8 Houst. (Del.) 168.

District of Columbia.—McCauley *v.* Southern R. Co., 10 App. Cas. (D. C.) 560, 25 Wash. L. Rep. (D. C.) 331.

Georgia.—Savannah, etc., R. Co. *v.* Goss, 80 Ga. 524.

Illinois.—Chicago, etc., R. Co. *v.* Avery, 109 Ill. 314, 17 Am. & Eng. R. Cas. 649; Chicago, etc., R. Co. *v.* Jackson, 55 Ill. 492, 8 Am. Rep. 661; Columbus, etc., R. Co. *v.* Troesch, 68 Ill. 545, 18 Am. Rep. 578; Illinois Cent. R. Co. *v.* Swisher, 61 Ill. App. 611; Ambrose *v.* Angus, 61 Ill. App. 304; Edward Hines Lumber Co. *v.* Ligas, 68 Ill. App. 523; Illinois Cent. R. Co. *v.* Pirtle, 47 Ill. App. 498; Leonard *v.* Kinnare, 174 Ill. 532, *affirming* 75 Ill. App. 145.

Indiana.—Mitchell *v.* Robinson, 80 Ind. 281, 41 Am. Rep. 812; Indiana Car Co. *v.* Parker, 100 Ind. 187; Krueger *v.* Louisville, etc., R. Co., 111 Ind. 51; Louisville, etc., R. Co. *v.* Buck, 116 Ind. 566; Brazil Block Coal Co. *v.* Young, 117 Ind. 520; Cincinnati, etc., R. Co. *v.* McMullen, 117 Ind. 439, 10 Am. St. Rep. 67; Taylor *v.* Evansville, etc., R. Co., 121 Ind. 124, 16 Am. St. Rep. 372; Indiana, etc., R. Co. *v.* Snyder, 140 Ind. 647; Louisville, etc., Consol. R. Co. *v.* Miller, 140 Ind. 685.

Kansas.—Atchison, etc., R. Co. *v.* Moore, 29 Kan. 632, 11 Am. & Eng. R. Cas. 243; Atchison, etc., R. Co. *v.* McKee, 37 Kan. 592; Rouse *v.* Downs, 5 Kan. App. 549.

Maine.—Shanny *v.* Androscoggin Mills, 66 Me. 420; Donnelly *v.* Booth Bros., etc., Granite Co., 90 Me. 110.

Maryland.—Cumberland, etc., R. Co. *v.* State, 44 Md. 283.

Massachusetts.—Snow *v.* Housatonic R. Co., 8 Allen (Mass.) 441, 85 Am. Dec. 720; Ford *v.* Fitchburg R. Co., 110 Mass. 240, 114 Am. Rep. 598; Arkerson *v.* Dennison, 117 Mass. 407; Killea *v.* Faxon, 125 Mass. 485; Moynihan *v.* Hills Co., 146 Mass. 586.

Michigan.—Thomas *v.* Ann Arbor R. Co., 114 Mich. 59.

Minnesota.—Kelly *v.* Erie Tel., etc., Co., 34 Minn. 321; Blomquist *v.* Chicago, etc., R. Co., 60 Minn. 426.

Mississippi.—Memphis, etc., R. Co. *v.* Thomas, 51 Miss. 637.

Missouri.—Gibson *v.* Pacific R. Co., 46 Mo. 163, 2 Am. Rep. 497; Whalen *v.* Centenary Church, 62 Mo. 326; Covey *v.* Hannibal, etc., R. Co., 86 Mo. 635, 28 Am. & Eng. R. Cas. 382; Jones *v.* St. Louis, etc., Packet Co., 43 Mo. App. 398.

Nebraska.—Sioux City, etc., R. Co. *v.* Finlayson, 16 Neb. 578, 18 Am. & Eng. R. Cas. 77, 49 Am. Rep. 724.

New Jersey.—Smith *v.* Oxford Iron Co., 42 N. J. L. 467, 36 Am. Rep. 535; Maher *v.* Thropp, 59 N. J. L. 186; Comben *v.* Belleville Stone Co., 59 N. J. L. 226.

New York.—Bushby *v.* New York, etc., R. Co., 107 N. Y. 374, 1 Am. St. Rep. 844; Booth *v.* Boston, etc., R. Co., 67 N. Y. 593; Stringham *v.* Stewart, 100 N. Y. 516; Pantzar *v.* Tilly Foster Iron Min. Co., 99 N. Y. 368; Laning *v.* New York Cent. R. Co., 49 N. Y. 521, 10 Am. Rep. 417; Brickner *v.* New York Cent. R. Co., 2 Lans. (N. Y.) 506, *affirmed* 49 N. Y. 672; Ryan *v.* Fowler, 24 N. Y. 410, 82 Am. Dec. 315; Redington *v.* New York, etc., R. Co., 84 Hun (N. Y.) 231; O'Donnell *v.* East River Gas Co., 91 Hun (N. Y.) 184; Richards *v.* Hayes, 17 N. Y. App. Div. 422; McNamara *v.* Brooklyn City R. Co., 11 N. Y. Misc. Rep. (Brooklyn City Ct.) 667; Sciolina *v.* Erie Preserving Co., 7 N. Y. App. Div. 417, appeal denied in 151 N. Y. 50; Bernardi *v.* New York Cent., etc., R. Co., 78 Hun (N. Y.) 454; Tomaselli *v.* John Griffiths Cycle Corp., 9 N. Y. App. Div. 127.

North Carolina.—Cowles *v.* Richmond, etc., R. Co., 84 N. Car. 309, 37 Am. Rep. 620, 2 Am. & Eng. R. Cas. 90.

Pennsylvania.—O'Donnell *v.* Allegheny Valley R. Co., 59 Pa. St. 239, 98 Am. Dec. 336; Ardesco Oil Co. *v.* Gilson, 63 Pa. St. 146; Paterson *v.* Pittsburg, etc., R. Co., 76 Pa. St. 389, 18 Am. Rep. 412; Philadelphia, etc., R. Co. *v.* Keenan, 103 Pa. St. 124.

Rhode Island.—Mulvey *v.* Rhode Island Locomotive Works, 14 R. I. 204.

Texas.—Houston, etc., R. Co. *v.* Marcelles, 59 Tex. 334, 12 Am. & Eng. R. Cas. 231; Houston, etc., R. Co. *v.* Rider, 62 Tex. 267; Terrell Compress Co. *v.* Arrington, (Tex. Civ. App. 1898) 48 S. W. Rep. 59.

Utah.—Bowers *v.* Union Pac. R. Co., 4 Utah 215; Cunningham *v.* Union Pac. R. Co., 4 Utah 206.

Vermont.—Davis *v.* Central Vermont R. Co., 55 Vt. 84, 45 Am. Rep. 590, 11 Am. & Eng. R. Cas. 173; Noyes *v.* Smith, 28 Vt. 59, 65 Am. Dec. 222; Houston *v.* Brush, 66 Vt. 331.

Washington.—Ogle *v.* Jones, 16 Wash. 319.

Wisconsin.—Schultz *v.* Chicago, etc., R. Co., 48 Wis. 375; Peschel *v.* Chicago, etc., R. Co., 62 Wis. 338.

A railroad company has been held liable for damages to an employee who, in assisting to

(*bb*) *Limitations of the Rule.* — But the application of this rule is subject to certain just limitations.

Machinery Must Have Been Furnished for Use of Employee. — To hold the master responsible for unsafe machinery, it must have been placed in the employee's hands for use.¹

Where Providing or Adjusting Appliances Is Part of Injured Servant's Employment. — And where the master does not himself undertake the duty of furnishing or adapting the appliances by which the work is to be performed, but this work is intrusted to or assumed by the workmen themselves, within the scope of their employment, he is exempt from responsibility, if suitable materials are furnished and suitable workmen are employed by him, even if they negligently do that which they thus undertake.²

Appliance Provided by Workman Not Charged with That Duty. — A master should not be charged with liability for the negligence of a workman who furnishes an appliance without having been authorized by the master to discharge that duty.³ And if the defective appliance which caused the injury was con-

get a car off the track, was injured by the breaking of an old worn rope used by the direction of the roadmaster superintending the job. *Galveston, etc., R. Co. v. Delahunty*, 53 Tex. 206.

A defective maul was furnished to a bridge carpenter by his section foreman, whereby the former was injured; the company was held liable for negligence of the foreman, as standing for and representing the master. *Guthrie v. Louisville, etc., R. Co.*, 11 Lea (Tenn.) 372, 47 Am. Rep. 286.

In an action by a wife for damages for the death of her husband, occurring in the employment of the defendant, it appeared that the death was caused by a fire originating from a defective pipe put up under the supervision of the defendant's superintendent; and it did not appear that the deceased knew or had reason to know of the defect. It was held that the superintendent was not a fellow employee of the deceased in the sense intended by section 1970 of the *California Civil Code*; that the work of putting up the pipe, being done under his supervision, was the same as though done by him in person; that the deceased had the right to rely upon the implied engagement of the defendant that the pipe was properly placed and constructed, and that the defendant was therefore liable. *Beeson v. Green Mountain Gold Min. Co.*, 57 Cal. 20.

Agents Intrusted with Purchase of Locomotive. — It has been held that the agents of a railroad company intrusted with the duty of purchasing a locomotive are not to be regarded as the fellow servants of those operating it. *Cumberland, etc., R. Co. v. State*, 44 Md. 283.

Boiler Makers and Repairers. — A railroad company which places a locomotive with a defective boiler in the hands of an engineer and fireman is liable for any injury which may happen to such employees through the negligence of the boiler makers or repairers. *Fuller v. Jewett*, 80 N. Y. 46, 36 Am. Rep. 575; *Pennsylvania, etc., Canal, etc., Co. v. Mason*, 109 Pa. St. 296, 58 Am. Rep. 722; *Nashville, etc. R. Co. v. Jones*, 9 Heisk. (Tenn.) 27.

1. Defect in Locomotive Being Repaired. — This is illustrated by the New York case of *Murphy v. Boston, etc., R. Co.*, 88 N. Y. 146, 42 Am. Rep. 240, 8 Am. & Eng. R. Cas. 510.

2. Appliances Constructed or Adjusted by Workmen Using Them — *United States.* — *The Kensington*, 91 Fed. Rep. 681.

California. — *Burns v. Sennett*, 99 Cal. 363, (Cal. 1896) 44 Pac. Rep. 1068.

Massachusetts. — *Kelley v. Norcross*, 121 Mass. 508; *Zeigler v. Day*, 123 Mass. 152; *Holden v. Fitchburg R. Co.*, 129 Mass. 268, 37 Am. Rep. 343; *McKinnon v. Norcross*, 148 Mass. 533; *McGinty v. Athol Reservoir Co.*, 155 Mass. 183; *McKay v. Hand*, 168 Mass. 270.

Minnesota. — *Ling v. St. Paul, etc., R. Co.*, 50 Minn. 160.

Missouri. — *Jones v. St. Louis, etc., Packet Co.*, 43 Mo. App. 398.

New York. — *Jenkinson v. Carlin*, 10 N. Y. Misc. Rep. (Brooklyn City Ct.) 22; *Kennedy v. Jackson Agricultural Iron Works*, 12 Misc. Rep. (N. Y. Super. Ct.) 336; *Watts v. Beard*, 18 N. Y. App. Div. 243; *Divver v. Hall*, 21 Misc. Rep. (N. Y. Supreme Ct.) 452, reversing 20 Misc. Rep. (N. Y. City Ct.) 677; *McC Campbell v. Cunard Steamship Co.*, 144 N. Y. 552.

Wisconsin. — *Peschel v. Chicago, etc., R. Co.*, 62 Wis. 338.

But compare *Leonard v. Kinnare*, 174 Ill. 532, affirming 75 Ill. App. 145.

Ladder Adjusted for Use by the Workmen. — Where a safe ladder had been furnished by the master, but by reason of its being insecurely fastened it fell and the plaintiff was injured, it was held that, since the adjustment of the ladder in place for use was a detail in the execution of their work which it was the duty of the plaintiff and his coservants to perform, the defendant was not liable for the injury. *Quinn v. Fish*, 6 Misc. Rep. (N. Y. C. Pl.) 105.

Injured Servant Employed Later than the Others. — It has been held that the fact that the date of the injured servant's employment is a day or two later than the employment of some of the other men does not affect the operation of the rule stated in the text. *Burns v. Sennett*, 99 Cal. 363.

3. Unauthorized Act of Servant in Furnishing Appliance. — *Callaway v. Allen*, 64 Fed. Rep. 297, 24 U. S. App. 388. See *Telander v. Sunlin*, 44 Fed. Rep. 564.

Tramway Constructed by Workman Not Authorized to Provide Appliances. — *Wilson v. Dunreath*

structed by a servant no part of whose employment it was to construct such appliances for anybody but himself, there can be no recovery.¹

Selection of Defective Appliance or Material from Supply Provided by Master. — Where the master has furnished his workmen with suitable material or a sufficient number of suitable appliances, within convenient reach, he is not liable to one servant for the negligence of a co-employee in failing to select a suitable appliance or suitable material from the stock so provided.²

Employee Charged with Care of Switches. — Although it has been held that a railroad conductor who is, by the rules of the company, charged with the care of switches is a vice-principal,³ this view is neither supportable upon principle, nor is it in accord with the weight of authority. A master's duty with respect to appliances is discharged where he has furnished reasonably safe appliances and made suitable provision for their inspection and repair, and he is not liable to one employee for the negligence of another employee who is intrusted with their use or management. Accordingly, where a conductor is, by the rules of the railroad company, made responsible for the proper adjustment of switches, he does not thereby become a vice-principal with respect to the discharge of that duty.⁴

Unskilful or Negligent Use of Appliances by Servants. — A master is not, of course, responsible to one servant for the negligent or unskilful use by other servants

Red-Stone Quarry Co., 77 Iowa 429, 14 Am. St. Rep. 304.

1. Thus, the owner of a building is not liable to a mason employed by him for injuries occasioned by the defective construction of a ladder by a carpenter also employed by him, it being no part of the carpenter's employment to make ladders for the use of other workmen than himself. *Mercer v. Jackson*, 54 Ill. 397.

2. **Selection by Fellow Servant of the Defective Appliance** — *Massachusetts*. — *Thyng v. Fitchburg R. Co.*, 156 Mass. 13, 32 Am. St. Rep. 425; *Carroll v. Western Union Tel. Co.*, 160 Mass. 152; *Young v. Boston, etc., R. Co.*, 168 Mass. 219.

Michigan. — *Rawley v. Collian*, 90 Mich. 31; *Kehoe v. Allen*, 92 Mich. 464, 31 Am St. Rep. 608.

Minnesota. — *Hefferen v. Northern Pac. R. Co.*, 45 Minn. 471; *Ling v. St. Paul, etc., R. Co.*, 50 Minn. 160.

New Jersey. — *Maher v. Thropp*, 59 N. J. L. 186; *Guggenheim Smelting Co. v. Flanigan*, (N. J. 1898) 41 Atl. Rep. 844.

New York. — *Dwyer v. Hickler*, (Super. Ct.) 16 N. Y. Supp. 814; *Ludlow v. Groton Bridge, etc., Co.*, 11 N. Y. App. Div. 452, (Cir. Ct.) 36 N. Y. Supp. 452; *Webber v. Piper*, 109 N. Y. 496; *Whallon v. Sprague Electric Elevator Co.*, 1 N. Y. App. Div. 264; *Moore v. McNeil*, 35 N. Y. App. Div. 323. Compare *Williams v. New York, etc., R. Co.*, 2 Misc. Rep. (N. Y. Super. Ct.) 30.

Ohio. — *Hartman v. Kloeppinger*, 3 Ohio Dec. 19, 9 Ohio Cir. Ct. Rep. 433, 6 Ohio Cir. Dec. 393.

Pennsylvania. — *Prescott v. Ball Engine Co.*, 176 Pa. St. 459, 38 W. N. C. (Pa.) 476; *Ross v. Walker*, 139 Pa. St. 42, 23 Am. St. Rep. 160, 27 W. N. C. (Pa.) 165, 21 Pittsb. Leg. J. N. S. (Pa.) 256.

Wisconsin. — *Van den Heuvel v. National Furnace Co.*, 84 Wis. 636.

It has been held that a building contractor who has provided safe and suitable machinery is not liable for a personal injury to an em-

ployee occasioned by co-employees' errors or negligence in selecting the particular appliances, as portions of a derrick employed in setting stone. *Harms v. Sullivan*, 1 Ill. App. 251.

In *Maher v. Thropp*, 59 N. J. L. 186, it was held that if safe and proper tools are supplied by the master he is not liable for an injury which his servant receives by using, pursuant to the direction of the foreman, a tool not furnished for or adapted to the work. This case was followed in *Guggenheim Smelting Co. v. Flanigan*, (N. J. 1898) 41 Atl. Rep. 844.

But where the defendant had at its warehouse at C. an abundance of suitable material, and delegated a foreman in its employ to select and take to M., eighty miles away, where a bridge was to be built, proper and suitable material, it was held that in the performance of this task the foreman represented the master. *Thomas v. Ann Arbor R. Co.*, 114 Mich. 59.

And in *Lund v. Hersey Lumber Co.*, 41 Fed. Rep. 202, the plaintiff was injured by reason of the giving way of a rope used in the hauling of a barge out of the water. Campbell, the superintendent of the defendant, had ordered one Lynch to procure blocks, tackle, and ropes for this purpose. The defendant had in its sawmill, near at hand, ropes old and new, chains, blocks, and tackle. It was held that in making the selection Lynch represented the master. See also *Telander v. Sunlin*, 44 Fed. Rep. 564; *Great Northern R. Co. v. McLaughlin*, 70 Fed. Rep. 669, 44 U. S. App. 189.

3. **Conductor Charged with Care of Switches Held a Vice-principal.** — *Mase v. Northern Pac. R. Co.*, 57 Fed. Rep. 283.

4. **Same — Held Not to Be a Vice-principal.** — *St. Louis, etc., R. Co. v. Needham*, 63 Fed. Rep. 107, 27 U. S. App. 227; *Denver, etc., R. Co. v. Sipes*, 23 Colo. 226; *Miller v. Southern Pac. Co.*, 20 Oregon 285, 43 Alb. L. J. 354; *Guthrie v. Southern Pac. R. Co.*, (Oregon 1891) 26 Pac. Rep. 76.

of the necessary and reasonably safe tools and appliances furnished.¹

OF EMPLOYEES PROVIDING PLACE TO WORK — (aa) *General Rule.* — Since the duty of providing his servants with a reasonably safe place in which to work is another of those absolute duties which are imposed by law upon every master,² an employee who is charged with that duty is a vice-principal for whose negligence in its discharge the master will be liable.³

1. Negligent or Unskilful Use of Appliances by Fellow Servants — *United States.* — The Ravensdale, 63 Fed. Rep. 624; Cleveland, etc., R. Co. v. Brown, 73 Fed. Rep. 970, 34 U. S. App. 759; Peirce v. Kile, 80 Fed. Rep. 865, 53 U. S. App. 291.

Indiana. — Hoosier Stone Co. v. McCain, 133 Ind. 231.

Massachusetts. — Ashley v. Hart, 147 Mass. 573; Wosbigian v. Washburn, etc., Mfg. Co., 167 Mass. 20; O'Keefe v. Brownell, 156 Mass. 131.

New York. — McDonough v. Walsh, (Supreme Ct.) 21 N. Y. Supp. 303; Kemmerer v. Manhattan R. Co., 81 Hun (N. Y.) 444; Dana v. Crown Point Iron Co., 67 Hun (N. Y.) 586; Leary v. Lehigh Valley R. Co., 76 Hun (N. Y.) 575; Stringham v. Stewart, 111 N. Y. 188; Ludlow v. Groton Bridge Co., 16 Misc. Rep. (N. Y. Supreme Ct.) 222.

Pennsylvania. — Barlow v. Standard Steel Casting Co., 154 Pa. St. 130.

Negligence of Engineer or Fireman on Failing to Replenish Sandbox. — The negligence of an engineer or fireman in failing to have sand in the dome of a locomotive has been held to be the negligence of a fellow servant of a brakeman who, while coupling cars, was injured in consequence of there being no sand to put on the rails. *Illinois Cent. R. Co. v. Jones*, (Miss. 1894) 16 So. Rep. 300.

Negligence of Servant Assisting in Operation of Winch. — Where the libellant, a stevedore who was operating a winch which was reasonably safe, had his hand caught in the cogs by reason of turning his head to watch the hatchway so as to see for himself when and how to use the winch, although a fellow stevedore was stationed at the hatchway to give him the necessary information, it was held that if the libellant felt called upon to look behind him to watch the hatchway where the stevedore was placed to notify him what to do, because the stevedore so stationed did not do his duty and call out to him what to do, this was the negligence of a fellow employee. *The Serapis*, 51 Fed. Rep. 91, 8 U. S. App. 49, reversing 49 Fed. Rep. 393.

Negligent Misplacement of Switch by Station Employee. — Where a station employee, while laboring under the delusion that a switch was set wrong, opened it and thereby derailed an approaching train, it was held that the railroad company was not liable for the death of the engineer on the train. *Burke v. Syracuse, etc., R. Co.*, 69 Hun (N. Y.) 21.

2. See the title MASTER AND SERVANT.

3. Employees Providing Place to Work Are Vice-principals — *United States.* — The Frank and Willie, 45 Fed. Rep. 494; Pullman's Palace-Car Co. v. Harkins, 55 Fed. Rep. 932; Northwestern Fuel Co. v. Danielson, 57 Fed. Rep. 915; Gardner v. Michigan Cent. R. Co., 150

U. S. 349; Western Coal, etc., Co. v. Ingraham, 70 Fed. Rep. 219, 36 U. S. App. 1, 2 Am. & Eng. Corp. Cas. N. S. 689. See Hermann v. Port Blakely Mills Co., 71 Fed. Rep. 853.

California. — Elledge v. National City, etc. R. Co., 100 Cal. 282, 38 Am. St. Rep. 290; Nixon v. Selby Smelting, etc., Co., 102 Cal. 458; Mullin v. California Horseshoe Co., 105 Cal. 77.

Colorado. — Grant v. Varney, 21 Colo. 329.

Connecticut. — Gerrish v. New Haven Ice Co., 63 Conn. 9.

Illinois. — Hess v. Rosenthal, 160 Ill. 621; Edward Hines Lumber Co. v. Ligas, 68 Ill. App. 523; Westville Coal Co. v. Schwartz, 75 Ill. App. 468.

Indiana. — Nall v. Louisville, etc., R. Co., 129 Ind. 268, 48 Am. & Eng. R. Cas. 315, questioning Columbus, etc., R. Co. v. Arnold, 31 Ind. 174, 99 Am. Dec. 615, and following Taylor v. Evansville, etc., R. Co., 121 Ind. 124, 16 Am. St. Rep. 372; Linton Coal, etc., Co. v. Persons, 11 Ind. App. 264; Cole v. Wood, 11 Ind. App. 37.

Kansas. — Hannibal, etc., R. Co. v. Fox, 31 Kan. 587, 15 Am. & Eng. R. Cas. 325; Atchison, etc., R. Co. v. Moore, 29 Kan. 632, 11 Am. & Eng. R. Cas. 243; Cherokee, etc., Coal, etc., Co. v. Britton, 3 Kan. App. 292.

Massachusetts. — Fitzsimmons v. Taunton, 160 Mass. 223.

Michigan. — Van Dusen v. Letellier, 78 Mich. 492; Sadowski v. Michigan Car Co., 84 Mich. 100; Roux v. Blodgett, etc., Lumber Co., 94 Mich. 607; Balhoff v. Michigan Cent. R. Co., 106 Mich. 606; Anderson v. Michigan Cent. R. Co., 107 Mich. 591.

Minnesota. — Carlson v. Northwestern Telephone Exch. Co., 63 Minn. 428; Kelly v. Erie Tel., etc., Co., 34 Minn. 321.

Missouri. — Whalen v. Centenary Church, 62 Mo. 326.

New Jersey. — Van Steenburgh v. Thornton, 58 N. J. L. 160.

New York. — Sellick v. Langdon, (Supreme Ct.) 13 N. Y. Supp. 858, 59 Hun (N. Y.) 627; Stephens v. Hudson Valley Knitting Co., 69 Hun (N. Y.) 375; Ballard v. Hitchcock Mfg. Co., 71 Hun (N. Y.) 582; Simmons v. Peters, 20 N. Y. App. Div. 251; Marks v. Rochester R. Co., 146 N. Y. 181, reversing 77 Hun (N. Y.) 77.

Ohio. — New York, etc., R. Co. v. Lam-bright, 5 Ohio Cir. Ct. Rep. 433, 3 Ohio Cir. Dec. 213.

Oregon. — Anderson v. Bennett, 16 Oregon 515, 8 Am. St. Rep. 311.

Wisconsin. — Johnson v. Ashland First Nat. Bank, 79 Wis. 414, 24 Am. St. Rep. 722; Eingartner v. Illinois Steel Co., 94 Wis. 70. See Haley v. Western Transit Co., 76 Wis. 344. Compare Kliegel v. Weisel, etc., Mfg. Co., 84 Wis. 148.

(bb) *Application of the Rule* — **In General.** — This rule has been applied under a variety of circumstances.¹

Railway Track and Roadbed. — An important instance of its application occurs in connection with the track and roadbed of railroads. An employee intrusted with the duty of constructing a reasonably safe track and roadbed for a railroad is, of course, a vice-principal, for whose negligence in the discharge of that duty the railroad company is liable.² And this obligation of a railroad company to provide its servants with a reasonably safe roadbed and track necessarily includes the obligation of keeping the road in repair.³

1. Instances of the Application of the Rule. — In *Krantz v. Long Island R. Co.*, 123 N. Y. 1, the plaintiff's intestate, an employee of the defendant, entered by direction a trench which had been opened to clean out an underground water pipe, and was killed by the caving in of the earth. It was held that the defendant owed him the duty of providing him a reasonably safe place to perform the work which he was directed to do, and that he had a right to assume that it had been made reasonably safe. Similar to this was the case of *Wannamaker v. Rochester*, 137 N. Y. 529.

And where an employee of a street-railroad company entered a hole through which the cable ran and which was dangerous when the cable was running, upon being assured by his superior, the trackmaster, that the engineer would be ordered not to start the cable, it was held that the trackmaster represented the company and that the plaintiff was entitled to recover for injuries received in consequence of the trackmaster's failure to instruct the engineer not to start the cable. *Mullane v. Houston*, etc., R. Co., 21 Misc. Rep. (N. Y. Supreme Ct.) 10, *affirming* 20 Misc. Rep. (N. Y. City Ct.) 434.

Where the defendant's foreman, who was charged with the care of explosives, stored them in the blacksmith shop of the defendant against the objections of the plaintiff, who worked in the shop and who was injured by an explosion caused by a spark from the anvil, it was held that the master was liable. *Birmingham Water Works Co. v. Hubbard*, 85 Ala. 179, 7 Am. St. Rep. 35.

In the case of *Heckman v. Mackey*, 35 Fed. Rep. 353, decided upon the authority of *Chicago*, etc., R. Co. *v. Ross*, 112 U. S. 377, it appeared that the plaintiff, under the direction of the defendant's foreman, put up a staging about twenty-eight feet high, firmly nailing the two planks which constituted the floor. During his absence another workman, under direction of the foreman, removed one of the planks, placing another in its place without fastening it. The plaintiff, not knowing that any change had been made, returned to his work on the staging, which let him fall to the ground. It was held that not the failure of the plaintiff's fellow workman to nail the plank which replaced the nailed one, but the act of the foreman in misleading the plaintiff into danger, was the cause of the injury, for which the defendant was liable.

And where it was the duty of a boss car repairer to notify car repairers at work under a car of the approach of other cars on the same track, it was held that the railroad company was liable for his negligence in the discharge

of that duty. *Hannibal*, etc., R. Co. *v. Fox*, 31 Kan. 587, 15 Am. & Eng. R. Cas. 325. See also *St. Louis*, etc., R. Co. *v. Triplett*, (Ark. 1891) 15 S. W. Rep. 831.

Brakeman Required to Protect Car Repairer Working under Car. — It has been held that where a brakeman who has been intrusted with the duty of notifying a car repairer of the entrance of a switch engine upon the repair track neglects to give such notice, and the car repairer is injured, the company is liable. *Evansville*, etc., R. Co. *v. Holcomb*, 9 Ind. App. 198.

Conductor with Discretion to Proceed over Dangerous or Difficult Track. — In an action by a brakeman to recover for injuries received in consequence of the train leaving the track as it was being taken down a mountain, it was held that the conductor, who had authority to decide whether he should take the train over the pass as it was made up or should obtain assistance, was the *alter ego* of the defendant and not a fellow servant with the plaintiff. *Wooden v. Western New York*, etc., R. Co., 5 Misc. Rep. (N. Y. Super. Ct.) 537, 16 N. Y. Supp. 840, 18 N. Y. Supp. 768.

Timberman. — It has been said that an employee in a mine who is charged with the duty of timbering a drift is a vice-principal. *Grant v. Varney*, 21 Colo. 329.

Yardmaster Required to Guard Repair Track. — A yardmaster is performing one of the duties of the master when he is charged with the duty of seeing that the yard employees do not run cars in upon a repair track so as to injure car repairers, and the company is liable to a car repairer who is injured by reason of the yardmaster's neglect of this duty. *St. Louis*, etc., R. Co. *v. Triplett*, 54 Ark. 289.

2. Employee Constructing Railroad Track — *Georgia.* — *Central R. Co. v. Mitchell*, 63 Ga. 173, 1 Am. & Eng. R. Cas. 145.

Illinois. — *Chicago*, etc., R. Co. *v. Swett*, 45 Ill. 197, 92 Am. Dec. 206; *Illinois Cent. R. Co. v. Welch*, 52 Ill. 183, 4 Am. Rep. 593.

Kansas. — *St. Louis*, etc., R. Co. *v. Weaver*, 35 Kan. 412, 28 Am. & Eng. R. Cas. 341.

Missouri. — *Bowen v. Chicago*, etc., R. Co., 95 Mo. 268.

Pennsylvania. — *Patterson v. Pittsburg*, etc., R. Co., 76 Pa. St. 389, 18 Am. Rep. 412.

Vermont. — *Davis v. Central Vermont R. Co.*, 55 Vt. 84, 45 Am. Rep. 590, 11 Am. & Eng. R. Cas. 173.

3. Gardner v. Michigan Cent. R. Co., 150 U. S. 349; *Snow v. Housatonic R. Co.*, 8 Allen (Mass.) 441, 85 Am. Dec. 720; *O'Donnell v. Allegheny Valley R. Co.*, 59 Pa. St. 239, 98 Am. Dec. 336.

But for a discussion of the liability of rail-

Staging and Scaffold Cases. — The rule which requires the master to furnish his servants with a reasonably safe place in which to work, and holds him liable for the negligence of an employee who is intrusted with that duty, finds frequent application in cases where an employee is injured by reason of a defective staging or scaffold. The liability of the master in such cases very naturally depends upon whether the injured servant was using a scaffold or staging furnished by the master or one which he himself had assisted in constructing. Where it is no part of the duties of the injured servant to construct or assist in the construction of the scaffold or staging upon which he is to work, and he has no hand in its construction, he can recover of the master for injuries sustained by reason of the negligence of the employees to whom the master has delegated the duty of furnishing the necessary structure.¹ But where the duty of erecting the necessary scaffold or staging is devolved upon workmen as a part of or as incident to the work which they are to perform, they are all fellow servants, and the master is not liable to one of them for the negligence of his fellow workman in the construction of the scaffold,² although, of

road companies for the negligence of employees intrusted with the duty of inspecting and keeping its road in proper condition, see *infra*, this section, *Employees Charged with Inspection and Repairs*.

1. Where Completed Scaffold Is Furnished to Servant — *California*. — *McNamara v. McDonough*, 102 Cal. 575.

Illinois. — *Chicago, etc., R. Co. v. Maroney*, 67 Ill. App. 618; *Edward Hines Lumber Co. v. Ligas*, 68 Ill. App. 523, 2 Chicago L. J. 160.

Massachusetts. — *Arkerson v. Dennison*, 117 Mass. 407; *Mulchey v. Methodist Religion Soc.*, 125 Mass. 487. See *Twomey v. Swift*, 163 Mass. 273.

Minnesota. — *Sims v. American Steel-Barge Co.*, 56 Minn. 68, 45 Am. St. Rep. 451.

Missouri. — *Bowen v. Chicago, etc., R. Co.*, 95 Mo. 268.

New York. — *Manning v. Hogan*, 78 N. Y. 615; *Green v. Banta*, 48 N. Y. Super. Ct. 156; *Bryer v. Foerster*, 9 N. Y. App. Div. 542; *Benzing v. Steinway*, 101 N. Y. 550; *Richards v. Hayes*, 17 N. Y. App. Div. 422; *McLean v. Standard Oil Co.*, (Supreme Ct.) 50 N. Y. St. Rep. 626; *Kimmer v. Weber*, 76 Hun (N. Y.) 432.

Wisconsin. — *Cadden v. American Steel-Barge Co.*, 88 Wis. 409.

In *Benzing v. Steinway*, 101 N. Y. 547, the defective platform was provided for the work in view, and the plaintiff was called from his other service to perform upon the platform some work not in the line of his general employment. It was held that the defective condition of the platform which caused the plaintiff's injury was chargeable to the negligence of the defendant, although the platform was placed there by another in his service.

2. Where Construction of Scaffold Is Incidental to Work Being Done — *California*. — *Burns v. Sennett*, 99 Cal. 363; *Noyes v. Wood*, 102 Cal. 389.

Iowa. — *Benn v. Null*, 65 Iowa 407.

Massachusetts. — *Kelley v. Norcross*, 121 Mass. 508; *Colton v. Richards*, 123 Mass. 484; *Killea v. Faxon*, 125 Mass. 485; *Hoppin v. Worcester*, 140 Mass. 222; *O'Connor v. Neal*, 153 Mass. 281; *Kennedy v. Spring*, 160 Mass. 203; *Adasken v. Gilbert*, 165 Mass. 443.

Michigan. — *Dewey v. Parke*, 76 Mich. 631.

Minnesota. — *Marsh v. Herman*, 47 Minn. 537.

New York. — *Judson v. Olean*, 116 N. Y. 655, 26 N. Y. St. Rep. 706; *Butler v. Townsend*, 126 N. Y. 105, reversing 57 Hun (N. Y.) 591, 10 N. Y. Supp. 809; *Griffiths v. New Jersey, etc., R. Co.*, 8 Misc. Rep. (N. Y. Super. Ct.) 3, affirmed 149 N. Y. 595; *Kimmer v. Weber*, 151 N. Y. 418, reversing 81 Hun (N. Y.) 599; *Hogan v. Field*, 44 Hun (N. Y.) 72; *McCone v. Gallagher*, 16 N. Y. App. Div. 272; *Hogan v. Smith*, 125 N. Y. 774, 35 N. Y. St. Rep. 870; *Nugent v. Atlas Steamship Co.*, (Supreme Ct.) 16 N. Y. Supp. 66, 61 Hun (N. Y.) 626, approving 51 Hun (N. Y.) 306; *Moore v. McNeill*, 35 N. Y. App. Div. 323; *Thompson v. Libbey*, (Brooklyn City Ct.) 19 N. Y. Supp. 680.

Oregon. — *Willis v. Oregon R., etc., Co.*, 11 Oregon 257, 17 Am. & Eng. R. Cas. 539.

Wisconsin. — *Behm v. Armour*, 58 Wis. 1. See also *Perigo v. Indianapolis Brewing Co.*, (Ind. App. 1899) 52 N. E. Rep. 462; *Bowen v. Chicago, etc., R. Co.*, 95 Mo. 268.

In *Maier v. Megrath*, 58 N. J. L. 469, the defendant was a contractor for the erection of a brick building, and employed the plaintiff, who was a laborer in attendance upon masons also in the defendant's employ. The plaintiff, while engaged in such employment, was injured by the fall of a scaffold constructed by said masons, which fall was due to improper and negligent construction. It was held that the negligence which produced the plaintiff's injury was that of his fellow servants, and his employer was not liable therefor.

An extreme application of the rule stated in the text is to be found in the *Massachusetts* case of *Killea v. Faxon*, 125 Mass. 485. This case was followed in the later one of *O'Connor v. Rich*, 164 Mass. 560, in which the facts were very similar.

And in *Michigan* the courts have gone so far as to hold that where a particular work is being done by several gangs of workmen, one servant, although he belongs to a gang which had nothing to do with the construction of the scaffold on which he is working, cannot recover of the master for injuries sustained by the fall of the scaffold in consequence of its negligent construction by the gang of workmen

course, he may be liable for negligence, whether his own or that of a servant, in furnishing defective material.¹

Foreman Assigning Servant Place to Work. — It has been held that a foreman, in respect to his duty of assigning the servants under him to their respective places, stands in the place of the master, who will be liable for the consequences of the foreman's negligence in directing a servant to work in a dangerous place.² But in order to charge the master with liability for the negligence of a servant who directs another servant to work in a particular place, the act of direction must have been authorized by the master.³

Where Servant's Work Involves Furnishing Work Place. — It is held that the rule that the master must provide his servants with a safe place in which to work applies only where the work and the place are not connected, and that when the supplying of a work place is part of or necessarily results from the work being done, and is to be done by the servants themselves, the master will not be liable to one of the servants engaged in the work for the negligence of a coservant, resulting in the place being rendered dangerous.⁴

Place Rendered Unsafe by Progress of Work. — And where the work place is necessarily rendered unsafe by the progress of the very work at which the injured servant is engaged, the rule holding a master liable for the negligence of a servant in furnishing a place in which to work is, of course, inapplicable.⁵

to whom that work had been intrusted. *Beesley v. Wheeler*, 103 Mich. 106; *Petaja v. Aurora Iron Min. Co.*, 106 Mich. 463. See *Hoar v. Merritt*, 62 Mich. 386.

1. *Goldie v. Werner*, 50 Ill. App. 297, affirmed in 151 Ill. 551; *Twomey v. Swift*, 163 Mass. 273; *Richards v. Hayes*, 17 N. Y. App. Div. 422. Compare *Nugent v. Atlas Steamship Co.*, 51 Hun (N. Y.) 306, approved 16 N. Y. Supp. 66, 61 Hun (N. Y.) 626.

2. **Superior Servant Directing Subordinate to Work in Dangerous Place** — *United States*. — *Finley v. Richmond*, etc., R. Co., 59 Fed. Rep. 419; *Lindvall v. Woods*, 44 Fed. Rep. 855, *California*. — *Foley v. California Horseshoe Co.*, 115 Cal. 184.

Indiana. — *Noblesville Foundry, etc., Co. v. Yeaman*, 3 Ind. App. 521; *Nall v. Louisville*, etc., R. Co., 129 Ind. 268, 48 Am. & Eng. R. Cas. 315; *Lebanon v. McCoy*, 12 Ind. App. 500. *Minnesota*. — *Carlson v. Northwestern Telephone Exch. Co.*, 63 Minn. 428.

New York. — *Cullen v. Norton*, 52 Hun (N. Y.) 9; *McC Campbell v. Cunard Steamship Co.*, 69 Hun (N. Y.) 131.

Wisconsin. — *McMahon v. Ida Min. Co.*, 95 Wis. 308; *Neilon v. Marinette*, etc., Paper Co., 75 Wis. 579.

Thus it has been held that where one servant, who has been invested with authority to do so, orders another servant into a position of greater danger than exists in the ordinary course of his employment, and which he would not otherwise have incurred, and he obeys and is thereby injured, the master is liable unless the danger is so apparent that to obey would be an act of recklessness. *Cooper v. Wabash R. Co.*, 11 Ind. App. 211; *Lebanon v. McCoy*, 12 Ind. App. 500; *Louisville*, etc., R. Co. v. *Hanning*, 131 Ind. 528. See *Shortel v. St. Joseph*, 104 Mo. 114, 24 Am. St. Rep. 317.

And a master has frequently been held liable to a minor employee who is directed, by another employee having the requisite authority, to do work different from and more dangerous than that which he was employed to perform,

and who is injured while performing such work. *Union Pac. R. Co. v. Fort*, 17 Wall. (U. S.) 553; *Northern Pac. Coal Co. v. Richmond*, 58 Fed. Rep. 756, 15 U. S. App. 262; *Weaver v. Iselin*, 161 Pa. St. 386.

But where a servant stationed himself in a dangerous place, erroneously thinking that he had been ordered there by certain motions of the foreman, but which were not made for that purpose, and the foreman did not know that he had gone to the dangerous place, it was held that the plaintiff could not recover of the defendant railroad company for injuries sustained while in the dangerous position. *McCarthy v. Chicago*, etc., R. Co., 83 Iowa 485.

3. **Where Servant Acts Without Authority in Assigning Place to Work.** — *Keenan v. New York*, etc., R. Co., 145 N. Y. 190, 45 Am. St. Rep. 604, affirming 2 Misc. Rep. (N. Y. Super. Ct.) 34; *Watts v. Hart*, 7 Wash. 178.

Engineer Directing a Coupling in Violation of Rules. — It has been held that an engineer, in temporary charge of cars during the absence of the conductor, has no authority to waive a rule of the company prohibiting brakemen from coupling and uncoupling cars except with a stick, and that a brakeman who, upon being ordered to do so by the engineer, goes between cars and attempts to make a coupling without the use of a stick cannot recover of the railroad company for injuries sustained while trying to make a coupling in this manner. *Richmond*, etc., R. Co. v. *Finley*, 63 Fed. Rep. 228, 25 U. S. App. 16, reversing *Finley v. Richmond*, etc., R. Co., 59 Fed. Rep. 419.

4. **Where the Work Place and Employment Are Independent.** — *Callon v. Bull*, 113 Cal. 593; *Stourbridge v. Brooklyn City R. Co.*, 9 N. Y. App. Div. 129; *Thompson v. Libbey*, (Brooklyn City Ct.) 19 N. Y. Supp. 680.

5. **Where Work Place Is Necessarily Unsafe by Reason of Nature of Work** — *Colorado*. — *Colorado Coal*, etc., Co. v. *Lamb*, 6 Colo. App. 255. *Massachusetts*. — *Zeigler v. Day*, 123 Mass. 152; *Flynn v. Salem*, 134 Mass. 351.

Minnesota. — *Canty, J.*, in *Carlson v. North-*

Place Rendered Unsafe by Negligence of Fellow Servant. — If the master has provided his servants with a reasonably safe place in which to work, there can be no recovery against him if it is rendered unsafe by the negligence of a fellow servant of the plaintiff.¹

44. EMPLOYEES CHARGED WITH INSPECTION AND REPAIRS — (aa) *In General.* — Undoubtedly the master's duty to furnish employees with reasonably safe machinery and appliances and place in which to work is a continuing one, requiring him to provide for the inspection, and if need be for the repair, of the premises and appliances.²

(bb) *Employees Making General Provision for Inspection and Repairs.* — And the master will, of course, be liable for the negligence of an employee to whom he has intrusted the duty of making provision for reasonably necessary inspection and repairs.³

western Telephone Exch. Co., 63 Minn. 428; Lindvall v. Woods, 41 Minn. 212.

New York. — Collins v. Crimmins, 11 Misc. Rep. (N. Y. Super. Ct.) 24.

Ohio. — Consolidated Coal, etc., Co. v. Clay, 51 Ohio St. 542.

Texas. — Allen v. Galveston, etc., R. Co., 14 Tex. Civ. App. 344.

It has been held that a workman employed in the construction of a railroad bridge assumes the risks incident to the nature of the work, and the risk of any temporary oversight or mismanagement of the foreman intrusted with the general charge of the work. Yager v. Receivers, 4 Hughes (U. S.) 192.

In *Brick v. Rochester, etc., R. Co.*, 98 N. Y. 211, 21 Am. & Eng. R. Cas. 605, B., the plaintiff's intestate, was one of a number of laborers in the defendant's employ engaged in repairing a track, the use of which had been partially abandoned, and which had fallen into decay. A construction train upon which B. was riding ran off the track at a crossing and he was killed. Rain had fallen the night before, and the space alongside the rails for the flanges of the wheels to run in had become filled up with mud, which had frozen and so caused the accident. T. was the defendant's general foreman, having charge of the work of reconstruction and repairs. He had charge of the train at the time of the accident. It was his duty to see that the crossings were properly cleaned and kept in safe condition. He attempted to perform this duty, but failed to do it properly. In an action to recover damages for alleged negligence causing the death, it was held that the negligence causing the injury was that of a coemployee, and that the defendant was not liable; also that the fact that the duty of reconstructing the entire road was imposed upon T. did not alter his relations as coemployee here.

1. Work Place Rendered Unsafe by Negligence of Fellow Servant — *United States.* — Hermann v. Port Blakely Mills Co., 71 Fed. Rep. 853.

California. — Daves v. Southern Pac. R. Co., 98 Cal. 19, 35 Am. St. Rep. 133.

Illinois. — Banon v. Sanden, 68 Ill. App. 164.

Massachusetts. — Murch v. Wilson, 168 Mass. 408; Meehan v. Spiers Mfg. Co., (Mass. 1899) 52 N. E. Rep. 518.

Michigan. — Baron v. Detroit, etc., Steam Nav. Co., 91 Mich. 585.

New York. — Geoghegan v. Atlas Steamship

Co., 3 Misc. Rep. (N. Y. C. Pl.) 224; Ludlow v. Groton Bridge Co., 16 Misc. Rep. (N. Y. Supreme Ct.) 222; Cullen v. Norton, 126 N. Y. 5, reversing (Supreme Ct.) 9 N. Y. Supp. 174; Bagley v. Consolidated Gas Co., 5 N. Y. App. Div. 432; Moeller v. Delaware, etc., R. Co., 13 N. Y. App. Div. 467; Rhodes v. Lauer, 32 N. Y. App. Div. 206; Golden v. Sieghardt, 33 N. Y. App. Div. 161.

Ohio. — Hawks v. Lake Shore, etc., R. Co., 8 Ohio Cir. Dec. 414.

Virginia. — Russell Creek Coal Co. v. Wells, (Va. 1898) 31 S. E. Rep. 614.

Wisconsin. — Dahlke v. Illinois Steel Co., 100 Wis. 431.

But see *Tendrup v. John Stephenson Co.*, 51 Hun (N. Y.) 462; *Freeman v. Glens Falls Paper Mill Co.*, 61 Hun (N. Y.) 125. Compare *Elledge v. National City, etc., R. Co.*, 100 Cal. 282, 38 Am. St. Rep. 290; *Cole v. Wood*, 11 Ind. App. 37; *Blondin v. Oolitic Quarry Co.*, 11 Ind. App. 395; *Stephens v. Hudson Valley Knitting Co.*, 69 Hun (N. Y.) 375.

A plaintiff, who was employed in operating a machine used for punching boiler plate, was injured in consequence of the negligence of a carpenter, employed in the defendant's shops, in failing to nail a plank in the floor at a place near the machine which the plaintiff was operating. It was held that this was the negligence of a fellow servant, and that the plaintiff could not recover. *Nemier v. Riter*, 179 Pa. St. 557.

2. Master Must Provide for Inspection and Repair of Machinery and Premises. — *Snow v. Housatonic R. Co.*, 8 Allen (Mass.) 441, 85 Am. Dec. 720; *Ford v. Fitchburg R. Co.*, 110 Mass. 240, 14 Am. Rep. 598; *Keith v. New Haven, etc., Co.*, 140 Mass. 175; *Coffee v. New York, etc., R. Co.*, 155 Mass. 21; *Harrison v. Central R. Co.*, 31 N. J. L. 293. See the title MASTER AND SERVANT.

3. Employees Charged with Duty of Providing for Inspection and Repairs. — *Bushby v. New York, etc., R. Co.*, 107 N. Y. 374, 1 Am. St. Rep. 844; *Lake Shore, etc., R. Co. v. Gilday*, 16 Ohio Cir. Ct. Rep. Appendix 649, 9 Ohio Cir. Dec. 27. See *Hough v. Texas, etc., R. Co.*, 100 U. S. 213; *St. Louis, etc., R. Co. v. Rice*, 51 Ark. 467.

Corcraan v. Holbrook, 59 N. Y. 517, 17 Am. Rep. 369, was a case where the general agent of the proprietors of a cotton mill was held to represent his principal in neglecting to repair certain machinery, he knowing of the defects.

(cc) *Employees Executing Inspection and Repairs*—aaa. *In General.*—But just how far he will be liable for the negligence of competent employees who are intrusted with the duty of actually making such inspection and repairs is very difficult to say in view of the present condition of the authorities.

bbb. *Conflicting Doctrines.*—Governing this question there are two radically conflicting views. According to one, the master's duty is discharged where, by the employment of a suitable number of competent employees to execute reasonably necessary inspection and repairs under proper superintendence and in accordance with appropriate rules and instruction, he has made reasonably adequate provision for inspection and repairs, and, while liable for the negligence of an employee who is intrusted with the establishment and maintenance of such a system,¹ he is not liable to one employee for the negligence of a competent fellow employee who is intrusted with the duty of actually making the required inspection and repairs.² According to the other view, no distinction is to be made between employees charged with the duty of making general provision for, and employees charged with the duty of executing, the reasonably necessary inspection and repairs, but it is declared that the duty of furnishing reasonably safe machinery and appliances and a reasonably safe place in which to work is a continuing one, and requires the master also to

The court held that he could not be considered a fellow servant of an employee who was injured while using such machinery, *Rapallo, J.*, remarking: "As to acts which a master or principal is bound as such to perform towards his employees, if he delegates the performance of them to an agent the agent occupies the place of the master, and the latter is deemed present, and liable for the manner in which they are performed."

1. See dictum by Sandels, J., in *St. Louis, etc., R. Co. v. Rice*, 51 Ark. 467.

2. *View that Inspectors and Repairers Are Not Vice-principals—England.*—*Wilson v. Merry*, L. R. 1 H. L. Sc. 329; *Waller v. South Eastern R. Co.*, 2 H. & C. 102; *Feltham v. England*, L. R. 2 Q. B. 33; *Wigmore v. Jay*, 5 Exch. 354; *Hall v. Johnson*, 3 H. & C. 589; *Tarrant v. Webb*, 18 C. B. 797, 86 E. C. L. 797; *Lovegrove v. London, etc., R. Co.*, 16 C. B. N. S. 669, 111 E. C. L. 669; *Gordon v. Pyper*, H. L. Sc. (1892) W. N. 169. See *Searle v. Lindsay*, 11 C. B. N. S. 429, 103 E. C. L. 429, 31 L. J. C. P. 106.

Canada.—*McFarlane v. Gilmour*, 5 Ont. Rep. 302.

Alabama.—*Mobile, etc., R. Co. v. Thomas*, 42 Ala. 672; *Nashville, etc., R. Co. v. Foster*, 10 Lea (Tenn.) 351, 11 Am. & Eng. R. Cas. 180, decided under the law of Alabama.

Maryland.—*Wonder v. Baltimore, etc., R. Co.*, 32 Md. 411, 3 Am. Rep. 143; *Yates v. McCullough Iron Co.*, 69 Md. 370.

Massachusetts.—*Johnson v. Boston Towboat Co.*, 135 Mass. 209, 46 Am. Rep. 458, explaining *Ford v. Fitchburg R. Co.*, 110 Mass. 240, 14 Am. Rep. 598; *Jones v. Granite Mills*, 126 Mass. 84, 30 Am. Rep. 661; *McGee v. Boston Cordage Co.*, 139 Mass. 445; *Rice v. King Philip Mills*, 144 Mass. 229, 59 Am. Rep. 80. See *Bjbjian v. Woonsocket Rubber Co.*, 164 Mass. 214. But see *Daley v. Boston, etc., R. Co.*, 147 Mass. 101.

New Jersey.—*McAndrews v. Burns*, 39 N. J. L. 117; *Rogers Locomotive, etc., Works v. Hand*, 50 N. J. L. 464. See also *Essex County Electric Co. v. Kelly*, 57 N. J. L. 100. But see

Nord Deutscher Lloyd Steamship Co. v. Ingebregetsen, 57 N. J. L. 400, *Beasley, C. J.*, dissenting.

In *Harrison v. Central R. Co.*, 31 N. J. L. 293, which was an action to recover for injuries sustained in consequence of the defective condition of a bridge of the defendant railroad, *Beasley, C. J.*, said: "If, as was stated on the argument, the company in point of fact directed its agents, who were possessed of competent skill, to examine, at stated periods, the bridge in question, and such agents reported to the company that the structure was in a secure condition, and no circumstances existed which were calculated to impair a reasonable confidence in such report, I think it is plain * * * that even if the agents making such report acted carelessly in the discharge of their duties, or even falsely reported their conclusions to the company, under such a state of facts the plaintiff could not sustain this suit."

A was employed in the blacksmith shop of a locomotive and machine works, and, upon the direction of an officer of the company, repaired a chain which had been used in raising the locomotive driving wheels to be worked on by B, employed by the works for that purpose. When repaired, the chain was again given to B, and used by him for the same purpose, and B was injured by its breaking at the link which had been repaired. It was held that A and B were fellow servants in a common employment, and that an instruction to the jury that A was the agent of the employer, who was responsible for any failure on A's part actually to exercise reasonable care and skill in making such repairs, was erroneous. *Rogers Locomotive, etc., Works v. Hand*, 50 N. J. L. 464.

Negligence of Mine Boss in Pennsylvania.—It has been held that a mine owner is not liable for the negligence of a competent mine boss employed in compliance with the statute of the state requiring the employment of such a person. *Lineoski v. Susquehanna Coal Co.*, 157 Pa. St. 153, 33 W. N. C. (Pa.) 204.

keep such machinery, appliances, and place to work in a reasonably safe condition, and that, therefore, an employee who is charged with the duty of inspecting and repairing the premises and appliances stands in the place of and represents the master, who will be liable for his negligence in the discharge of that duty.¹

1. View that Inspectors and Repairers Are Vice-principals—*United States*.—Little Rock, etc., R. Co. v. Mosley, 56 Fed. Rep. 1009, 12 U. S. App. 514; Texas, etc., R. Co. v. Barrett, 67 Fed. Rep. 214, *affirmed* 166 U. S. 617; Western Coal, etc., Co. v. Ingraham, 70 Fed. Rep. 219, 36 U. S. App. 1, 2 Am. & Eng. Corp. Cas. N. S. 689; Texas, etc., R. Co. v. Thompson, 70 Fed. Rep. 944, 71 Fed. Rep. 531, 30 U. S. App. 549; Gowen v. Bush, 76 Fed. Rep. 349, 40 U. S. App. 349; Northern Pac. R. Co. v. Herbert, 116 U. S. 642, 24 Am. & Eng. R. Cas. 407; Hough v. Texas, etc., R. Co., 100 U. S. 213.

Colorado.—Colorado Cent. R. Co. v. Ogden, 3 Colo. 499; Wells v. Coe, 9 Colo. 159; Denver Tramway Co. v. Crumbaugh, 23 Colo. 363.

District of Columbia.—Baltimore, etc., R. Co. v. Elliott, 9 App. Cas. (D. C.) 341, 24 Wash. L. Rep. 760.

Illinois.—Chicago, etc., R. Co. v. Jackson, 55 Ill. 492, 8 Am. Rep. 661; Tudor Iron Works v. Weber, 31 Ill. App. 356, *affirmed* 129 Ill. 535; Monmouth Min., etc., Co. v. Erling, 148 Ill. 521, 39 Am. St. Rep. 187, *affirming* 45 Ill. App. 411; Chicago, etc., R. Co. v. Kneirim, 152 Ill. 458, 43 Am. St. Rep. 259, *affirming* 48 Ill. App. 243.

Indiana.—Taylor v. Evansville, etc., R. Co., 121 Ind. 124, 16 Am. St. Rep. 372; Cincinnati, etc., R. Co. v. McMullen, 117 Ind. 439, 10 Am. St. Rep. 67; Indiana, etc., R. Co. v. Snyder, 140 Ind. 647; Mitchell v. Robinson, 80 Ind. 281, 41 Am. Rep. 812; Ohio, etc., R. Co. v. Stein, 140 Ind. 61. See *Romana Oolitic Stone Co. v. Phillips*, 11 Ind. App. 118. But see *Neutz v. Jackson Hill Coal, etc., Co.*, 139 Ind. 411.

Iowa.—Greenleaf v. Illinois Cent. R. Co., 29 Iowa 14, 4 Am. Rep. 181; Brann v. Chicago, etc., R. Co., 53 Iowa 595, 36 Am. Rep. 243. Compare *Theleman v. Moeller*, 73 Iowa 108.

Kansas.—Solomon R. Co. v. Jones, 30 Kan. 601, 15 Am. & Eng. R. Cas. 201; Atchison, etc., R. Co. v. McKee, 37 Kan. 592.

Maine.—Buzzell v. Laconia Mfg. Co., 48 Me. 113, 77 Am. Dec. 212; Shanny v. Androscoggin Mills, 66 Me. 420.

Michigan.—Fox v. Spring Lake Iron Co., 89 Mich. 387; Roux v. Blodgett, etc., Lumber Co., 94 Mich. 607; Van Dusen v. Letellier, 78 Mich. 492, *citing* 7 AM. AND ENG. ENCYC. OF LAW (1st ed.) 824-830, and *distinguishing* Smith v. Potter, 46 Mich. 258; Anderson v. Michigan Cent. R. Co., 107 Mich. 591. But see *Balhoff v. Michigan Cent. R. Co.*, 106 Mich. 606; Smith v. Potter, 46 Mich. 258, 2 Am. & Eng. R. Cas. 140; Dewey v. Detroit, etc., R. Co., 97 Mich. 329, 37 Am. St. Rep. 348.

Missouri.—Porter v. Hannibal, etc., R. Co., 71 Mo. 66, 36 Am. Rep. 454, 2 Am. & Eng. R. Cas. 44; Covey v. Hannibal, etc., R. Co., 86 Mo. 635, 28 Am. & Eng. R. Cas. 382; Hughlett v. Ozark Lumber Co., 53 Mo. App. 87; Long v. Pacific R. Co., 65 Mo. 225; Bowen v. Chicago, etc., R. Co., 95 Mo. 268; McMillan v.

Union Press Brick Works, 6 Mo. App. 434; Dutzi v. Geisel, 23 Mo. App. 676; Rodney v. St. Louis Southwestern R. Co., 127 Mo. 676.

New York.—Fuller v. Jewett, 80 N. Y. 46, 36 Am. Rep. 575, 1 Am. & Eng. R. Cas. 109; Ballard v. Hitchcock Mfg. Co., 71 Hun (N. Y.) 582; Warner v. Erie R. Co., 39 N. Y. 468; Corcoran v. Holbrook, 59 N. Y. 517, 17 Am. Rep. 369; Cone v. Delaware, etc., R. Co., 15 Hun (N. Y.) 172; Kain v. Smith, 89 N. Y. 375; Egan v. Dry Dock, etc., R. Co., 12 N. Y. App. Div. 556; Ballard v. Hitchcock Mfg. Co., 71 Hun (N. Y.) 582; McNamara v. Brooklyn City R. Co., 11 Misc. Rep. (N. Y. City Ct.) 667; Scherer v. Holly Mfg. Co., 86 Hun (N. Y.) 37; Fox v. Le Comte, 2 N. Y. App. Div. 61.

North Carolina.—Johnson v. Richmond, etc., R. Co., 81 N. Car. 453; Chesson v. John L. Roper Lumber Co., 118 N. Car. 59.

South Carolina.—Gunter v. Graniteville Mfg. Co., 18 S. C. 262, 44 Am. Rep. 573.

Texas.—Houston, etc., R. Co. v. Marcelles, 59 Tex. 334, 12 Am. & Eng. R. Cas. 231; Missouri Pac. R. Co. v. McElyea, 71 Tex. 386; Sabine, etc., R. Co. v. Ewing, 1 Tex. Civ. App. 531.

Vermont.—Houston v. Brush, 66 Vt. 331.

Wisconsin.—Shultz v. Chicago, etc., R. Co., 40 Wis. 589, 48 Wis. 375; Brabbitts v. Chicago, etc., R. Co., 38 Wis. 298.

In *Van Dusen v. Letellier*, 78 Mich. 492, an employee was injured by the collapse of a wharf, the supports to which became rotten and gave way. The plaintiff was a laborer piling lumber. The owners lived in another county and had a superintendent, who looked after the business in a general way, and who hired competent men to inspect the wharf before the lumber was piled. It was held that the master was liable for the negligence of these employees.

It has been said that a foreman in a lumber yard who is charged with the duty of maintaining and inspecting the lumber piles in reference to their security against falling upon those employed near them, is in the performance of a duty of the master, and is therefore a vice-principal. *Baldwin v. St. Louis, etc., R. Co.*, 68 Iowa 37.

But it has been held that where an engineer, employed in a manufacturing establishment to keep the machines in order, had been directed to repair a machine, but neglected to do so, his negligence was that of a fellow servant of another employee who was injured by the defective machinery. *Schulz v. Rohe*, 149 N. Y. 132, *reversing* 8 Misc. Rep. (N. Y. Super. Ct.) 683.

And in *Fosburg v. Phillips Fuel Co.*, 93 Iowa 51, it was held that a workman employed by a vice-principal to put a work place in proper repair does not himself become a vice-principal, but is a fellow servant with another servant employed by the same master and working in the place being repaired.

Engine Repairers.—In *Pennsylvania* it has

ccc. Car Inspectors and Repairers. — According to the first of these views, a railroad company is liable for the negligence of an employee who is charged with the duty of making suitable provision for the inspection and repair of cars,¹ but the negligence of the persons employed to actually inspect and repair the cars cannot be attributed to the company so as to make it liable to train hands or other employees who are injured by reason of such negligence.² But according to the other view a car inspector and repairer must be considered to be charged with one of the master's positive duties, and is a vice-principal, for

been decided that where an engineer and a fireman were killed by the explosion of a locomotive boiler which had been recently and insufficiently repaired in the shops of the railroad company, the company was liable, although the repairers and the deceased were under the same superintendent. *Pennsylvania, etc., Canal, etc., Co. v. Mason*, 109 Pa. St. 296, 58 Am. Rep. 722. *Gordon, J.*, said: "Nor are those agents who are charged with the business of supplying the necessary machinery to be regarded as fellow servants, but rather as charged with the duty which the master owes to the servant, and the neglect of such agent is to be regarded as the neglect of the master. So is the employer equally chargeable whether the failure is found in the original tool or machine or in a subsequent want of repair by which it becomes dangerous. There can, indeed, be no essential difference in these particulars, and the only question is whether the defect from which the accident arose was known, or might, by the exercise of reasonable diligence, have been known, to the master or his agents."

Conductor Charged with Inspection of Car Couplings. — It has been held that where the inspection of the couplings and brakes of cars is devolved, by the rules of the company, upon the conductor, he is, with respect to this duty, a vice-principal of the company, which will be liable for his negligence in its discharge. *Sabine, etc., R. Co. v. Ewing*, 1 Tex. Civ. App. 531; *Norfolk, etc., R. Co. v. Ampey*, 93 Va. 108, 2 Va. L. Reg. 284.

Foreman Required to Repair and Keep Derrick in Safe Condition. — It has been held that a railway company is liable to a laborer working at a derrick of the company, assisting in hoisting stone and giving signals, for injuries caused by the negligence of the foreman, whose duty it was to direct repairs and keep the derrick in safe condition, if such laborer is without fault. *Union Pac. R. Co. v. Fray*, 43 Kan. 750.

1. Employee Charged with Making General Provision for Car Inspection. — Thus, the Supreme Court of *Arkansas* has made a distinction between general inspectors of cars and appliances and mere yard inspectors. In the case of *St. Louis, etc., R. Co. v. Rice*, 51 Ark. 467, in holding that a yard inspector whose duties are to examine all cars as soon as they arrive, and a yard foreman who is injured by the failure of the inspector to make proper examination, are fellow servants. Judge Sandels says: "The railway company must have its repair shops to maintain its tools, rolling stock, etc., in good repair, and it must have its inspectors, not only at its termini, where a general overhauling of property is had, but at

convenient stations along its line, to detect such injuries as may have been received *en route*. And should such company knowingly employ and retain persons incompetent for the performance of this high service, it would be liable to the person injured, though such person were the fellow servant of the inspector. * * * While we recognize the liability of the railway company for the wilful or negligent default of its chief inspectors, and those deputed to supervise the condemnation of unsuitable tools, rolling stock, etc., we cannot assent to the proposition that every yard inspector on the line of a railroad is a vice-principal. Upon what we conceive to be the soundest principles, and the weight of authority, we hold that the appellee and the yard inspector were fellow servants, and hence that appellee had no cause of action against the appellant."

2. Car Inspectors and Repairers Not Vice-principals — *United States*. — *Kidwell v. Houston, etc., R. Co.*, 3 Woods (U. S.) 313.

Alabama. — *Smoot v. Mobile, etc., R. Co.*, 67 Ala. 13; *Nashville, etc., R. Co. v. Foster*, 10 Lea (Tenn.) 351, 11 Am. & Eng. R. Cas. 180, decided under the law of Alabama.

Arkansas. — *St. Louis, etc., R. Co. v. Rice*, 51 Ark. 467; *St. Louis, etc., R. Co. v. Gaines*, 46 Ark. 555.

Maryland. — See *Wonder v. Baltimore, etc., R. Co.*, 32 Md. 411, 3 Am. Rep. 143.

Massachusetts. — *Seaver v. Boston, etc., R. Co.*, 14 Gray (Mass.) 466; *Mackin v. Boston, etc., R. Co.*, 135 Mass. 201, 46 Am. Rep. 456, 15 Am. & Eng. R. Cas. 106; *Keith v. New Haven, etc., Co.*, 140 Mass. 175; *Walsh v. New York, etc., R. Co.*, 160 Mass. 571, 39 Am St. Rep. 514; *Bowers v. Connecticut River R. Co.*, 162 Mass. 312. See also *Coffee v. New York, etc., R. Co.*, 155 Mass. 21.

Ohio. — *Columbus, etc., R. Co. v. Webb*, 12 Ohio St. 475, *Little Miami R. Co. v. Fitzpatrick*, 42 Ohio St. 318, 17 Am. & Eng. R. Cas. 578; *Lake Shore, etc., R. Co. v. Lamphere*, 9 Ohio Cir. Ct. Rep. 263, 4 Ohio Cir. Dec. 26, 1 Toledo Leg. N. (Ohio) 67; *Lake Shore, etc., R. Co. v. Gilday*, 16 Ohio Cir. Ct. Rep. Appendix 649, 9 Ohio Cir. Dec. 27.

Pennsylvania. — See *Philadelphia, etc., R. Co. v. Hughes*, 119 Pa. St. 301.

Employee Charged with Inspection of Loaded Cars. — In *Byrnes v. New York, etc., R. Co.*, 113 N. Y. 251, the *New York* Court of Appeals held that a railroad company which has provided a proper car for loading, and has established a system and provided competent servants for the inspection of loaded cars before they are taken out, is not liable for an injury to a servant employed on its train, caused by the improper manner in which the car is

whose negligence the master, under well-established principles, is liable to his other servants.¹

ddd. Employees Intrusted with Maintenance of Railroad Track. — So, too, the liability of a railroad for the negligence of employees intrusted with the maintenance of its

loaded, such injury being the result of the negligence of the fellow servants of the injured person.

1. Car Inspector and Repairer Held to Be a Vice-principal — *United States*. — *Northern Pac. R. Co. v. Herbert*, 116 U. S. 642; *Carpenter v. Mexican Nat. R. Co.*, 39 Fed. Rep. 315; *Little Rock, etc., R. Co. v. Moseley*, 56 Fed. Rep. 1009; *Atchison, etc., R. Co. v. Myers*, 63 Fed. Rep. 793; *Terre Haute, etc., R. Co. v. Mansberger*, 65 Fed. Rep. 196, 24 U. S. App. 551, *rehearing denied* 67 Fed. Rep. 67; *Texas, etc., R. Co. v. Thompson*, 70 Fed. Rep. 944, 71 Fed. Rep. 531. See also *King v. Ohio, etc., R. Co.*, 14 Fed. Rep. 277.

Colorado. — *Denver Tramway Co. v. Crumbaugh*, 23 Colo. 363.

Illinois. — *Chicago, etc., R. Co. v. Jackson*, 55 Ill. 492, 8 Am. Rep. 661; *Chicago, etc., R. Co. v. Hoyt*, 122 Ill. 369, 31 Am. & Eng. R. Cas. 309, *Chicago, etc., R. Co. v. Kneirim*, 48 Ill. App. 243, *affirmed* 152 Ill. 458, 43 Am. St. Rep. 259.

Indiana. — *Cincinnati, etc., R. Co. v. McMullen*, 117 Ind. 439, 10 Am. St. Rep. 67; *Ohio, etc., R. Co. v. Percy*, 128 Ind. 197; *Indiana, etc., R. Co. v. Snyder*, 140 Ind. 647. See *Louisville, etc., R. Co. v. Bates*, 146 Ind. 564; but compare *Neutz v. Jackson Hill Coal, etc., Co.*, 139 Ind. 411.

Iowa. — *Braun v. Chicago, etc., R. Co.*, 53 Iowa 595, 36 Am. Rep. 243.

Kansas. — *Missouri Pac. R. Co. v. Dwyer*, 36 Kan. 58; *Missouri Pac. R. Co. v. Barber*, 44 Kan. 612; *Atchison, etc., R. Co. v. Seeley*, 54 Kan. 21.

Kentucky. — See *Illinois Cent. R. Co. v. Hilliard*, 99 Ky. 684, 18 Ky. L. Rep. 505.

Michigan. — *Morton v. Detroit, etc., R. Co.*, 81 Mich. 423. But see *Smith v. Potter*, 46 Mich. 258, 2 Am. & Eng. R. Cas. 140, *explained* in *Van Dusen v. Letellier*, 78 Mich. 492; *Dewey v. Detroit, etc., R. Co.*, 97 Mich. 329, 37 Am. St. Rep. 348.

Minnesota. — *Fay v. Minneapolis, etc., R. Co.*, 30 Minn. 231, 11 Am. & Eng. R. Cas. 193; *Tierney v. Minneapolis, etc., R. Co.*, 33 Minn. 311, 53 Am. Rep. 35, 21 Am. & Eng. R. Cas. 545; *Macy v. St. Paul, etc., R. Co.*, 35 Minn. 200.

Missouri. — *Long v. Pacific R. Co.*, 65 Mo. 225; *Condon v. Missouri Pac. R. Co.*, 78 Mo. 567, 17 Am. & Eng. R. Cas. 583; *Rodney v. St. Louis Southwestern R. Co.*, 127 Mo. 676.

New York. — *Bailey v. Rome, etc., R. Co.*, 139 N. Y. 302; *Jennings v. New York, etc., R. Co.*, 12 Misc. Rep. (N. Y. C. Pl.) 408. See also *Hankins v. New York, etc., R. Co.*, 142 N. Y. 416, 40 Am. St. Rep. 616. But see *Gibson v. Northern Cent. R. Co.*, 22 Hun (N. Y.) 289.

Texas. — *Houston, etc., R. Co. v. Marcelles*, 59 Tex. 334, 12 Am. & Eng. R. Cas. 231; *International, etc., R. Co. v. Kernan*, 78 Tex. 294; *St. Louis, etc., R. Co. v. Putnam*, 1 Tex. Civ. App. 142.

West Virginia. — *Cooper v. Pittsburgh, etc., R. Co.*, 24 W. Va. 38.

Master Mechanic Held to Be a Vice-principal. —

Where a railroad company has placed its engines and other machinery under the immediate charge, control, and direction of a master mechanic, and has furnished him with adequate materials and resources for their repair, his negligence in respect to such engines and machinery is the negligence of the company. He stands in its place and has delegated to him the performance of one of the primary duties which the company owes to its employees, viz., that of overseeing and repairing machinery and appliances. It has accordingly been held that a division master mechanic is not a fellow servant of a locomotive fireman, and a railroad company is liable for the death of the latter caused by the parting of the locomotive and the tender, owing to their difference in height, after the master mechanic had been notified of the defect. *Krueger v. Louisville, etc., R. Co.*, 111 Ind. 51, 31 Am. & Eng. R. Cas. 329. This decision squarely overrules the case of *Columbus, etc., R. Co. v. Arnold*, 31 Ind. 174, 99 Am. Dec. 615, where it was held that a master machinist who has the immediate charge, control, and direction of the engines and other machinery of a railroad company and the repairs thereof, and the control and direction of the engineers and firemen on the trains, is a fellow servant of such a fireman. It is a curious fact, however, that the opinion in the *Krueger* case, *supra*, makes no mention of this case, although the opinion in both cases was written by the same judge. But in *Indiana Car Co. v. Parker*, 100 Ind. 181, the court said that the *Arnold* case "is an extreme one, and does, perhaps, carry the doctrine beyond its limits."

An engineer who was injured in consequence of certain defects in his engine, which would not have existed had the master mechanic and the foreman of the roundhouse exercised reasonable care and diligence in the discharge of their respective duties touching the machinery and physical appliances supplied to employees engaged in running trains, has been held to be entitled to recover of the company. *Hough v. Texas, etc., R. Co.*, 100 U. S. 213.

Engineer Charged with Inspection of Engine. —

A locomotive engineer charged with the duty of inspecting his engine is, in respect to that duty, a vice-principal of the company. *Atchison, etc., R. Co. v. Mulligan*, 67 Fed. Rep. 569, 34 U. S. App. 1; *Coontz v. Missouri Pac. R. Co.*, 121 Mo. 652.

And it has been held that where an engineer is charged with the duty of reporting to the company any defects in the engine, he is a vice-principal, and where he has knowledge of the loss of the engine step, and promises to have it replaced, this is, in effect, a promise by the company. *Texas, etc., R. Co. v. Bingle*, 16 Tex. Civ. App. 653.

Yard Foreman Having Care of Engines. — A yard foreman whose duty it was to see that the engines that a railroad company used were in

track in a reasonably safe condition depends upon whether the first or the second of these conflicting rules is to be applied. In jurisdictions where the first of these views is favored, a railroad company will not be held liable to one employee for the negligent discharge of the duty of inspecting and repairing the track by a fellow employee to whom that duty is intrusted.¹ But where the stricter rule is adopted, a servant to whom the company has intrusted the duty of keeping the road in proper condition is a vice-principal, for whose negligence in the discharge of that duty the master is liable.² Railroad companies have accordingly in such jurisdictions been held responsible for the damages resulting from the negligence of roadmasters,³ section foremen,⁴

good repair, and who failed to do so, whereby an employee was injured, has been held to represent the company. *Houston, etc., R. Co. v. Marcelles*, 59 Tex. 334, 12 Am. & Eng. R. Cas. 231.

Employee Charged with Inspection of Loaded Cars. — In cases where injury had resulted to train hands in consequence of the improper loading of cars, it has been held that the railroad company was not liable, although there had been negligence in the inspection of the loaded cars by the employee intrusted with that duty. *Dewey v. Detroit, etc., R. Co.*, 97 Mich. 329, 37 Am. St. Rep. 348; *Byrnes v. New York, etc., R. Co.*, 113 N. Y. 251, explained in *Jennings v. New York, etc., R. Co.*, 12 Misc. Rep. (N. Y. C. Pl.) 408.

Where Injured Servant Is Charged with Duty of Inspection. — Where the injured brakeman was himself charged with the duty of inspection, but he neglected the duty, the court refused to hold the railroad company liable for the negligence of a car inspector. *Eaton v. New York Cent., etc., R. Co.*, 14 N. Y. App. Div. 20.

1. Servants Charged with Maintenance of Track Not Vice-principals. — *Waller v. South Eastern R. Co.*, 2 H. & C. 102; *Mobile, etc., R. Co. v. Smith*, 59 Ala. 245; *Howd v. Mississippi Cent. R. Co.*, 50 Miss. 178. See also *New Orleans, etc., R. Co. v. Hughes*, 49 Miss. 258; *Harrison v. Central R. Co.*, 31 N. J. L. 293; *Burrell v. Gowen*, 134 Pa. St. 527.

2. Servants Charged with Maintenance of Track Held to Be Vice-principals. — *Louisville, etc., R. Co. v. Ward*, 61 Fed. Rep. 927; *Kansas City, etc., R. Co. v. Kier*, 41 Kan. 661, 13 Am. St. Rep. 311; *Balhoff v. Michigan Cent. R. Co.*, 106 Mich. 606, Grant, J., *dissenting*; *Anderson v. Michigan Cent. R. Co.*, 107 Mich. 591, Grant, J., *dissenting*; *Bowen v. Chicago, etc., R. Co.*, 95 Mo. 268; *Davis v. Central Vermont R. Co.*, 55 Vt. 84, 45 Am. Rep. 590, 11 Am. & Eng. R. Cas. 173, practically *overruling* *Hard v. Vermont, etc., R. Co.*, 32 Vt. 473.

A railroad company is liable, said the Supreme Court of *Kansas*, in *Atchison, etc., R. Co. v. Moore*, 29 Kan. 632, 11 Am. & Eng. R. Cas. 243, "to any one of its servants operating its road for the negligence of any other one of its servants whose duty it was to keep the road in good condition, and who culpably failed to perform such duty, or to give proper warning; for in such a case the two classes of servants would not be fellow servants or co-employees, but the latter class would really be the representative of the master, the representative of the railroad company; and the failure of the servant would be within the line of his duty."

Where, immediately preceding the injury

complained of, section hands employed by a railroad company dug away the earth around a switchrod so as to leave a cavity, in consequence of which a brakeman, in the discharge of his duty in uncoupling cars, was injured, these section hands were not considered fellow servants of the brakeman in such a sense as to relieve the company from liability for the injury, but their act was taken to be as the act of the company. *Vautrain v. St. Louis, etc., R. Co.*, 8 Mo. App. 538.

In the case of *Torian v. Richmond, etc., R. Co.*, 84 Va. 192, an action was brought to recover damages against a railroad company for the negligent killing of a brakeman on a material train. It was shown that the immediate cause of the brakeman's death was the rapid running of the train, suddenly accelerated by putting on additional steam, over a track left in an uneven and weakened condition by other employees of the defendant company, whose duty it was to repair the track in question and who failed to give warning of the dangerous condition of the road. The Court of Appeals held that the negligence of such employees was the negligence of the company, and that plaintiff's intestate was not a co-employee. Cases of this kind might be multiplied, but it is sufficient to say that the rule is sustained by the great weight of authority in the United States.

But it has been held that a railroad employee engaged in making repairs on a pit between the tracks is a fellow servant of another employee engaged in coupling cars, who while attempting to couple cars is injured by falling into the pit which the repairer has negligently left uncovered, and there can be no recovery against the company for such negligence. *Filbert v. Delaware, etc., Canal Co.*, 121 N. Y. 207.

3. Same — Roadmasters. — *Atchison, etc., R. Co. v. Moore*, 29 Kan. 633, 11 Am. & Eng. R. Cas. 243, 31 Kan. 197, 15 Am. & Eng. R. Cas. 312; *Houston, etc., R. Co. v. Dunham*, 49 Tex. 181; *Davis v. Central Vermont R. Co.*, 55 Vt. 84, 45 Am. Rep. 590, 11 Am. & Eng. R. Cas. 173. Compare *Mobile, etc., R. Co. v. Smith*, 59 Ala. 245.

4. Same — Section Foreman — Kansas. — *St. Louis, etc., R. Co. v. Weaver*, 35 Kan. 420, 28 Am. & Eng. R. Cas. 341. See *Atchison, etc., R. Co. v. Moore*, 29 Kan. 633, 11 Am. & Eng. R. Cas. 243.

Maine. — *Shanny v. Androscoggin Mills*, 66 Me. 420.

Michigan. — *Balhoff v. Michigan Cent. R. Co.*, 106 Mich. 606; *Anderson v. Michigan Cent. R. Co.*, 107 Mich. 591.

track inspectors,¹ bridge builders,² and employees charged with the duty of keeping the track free from obstructions.³ But such employees are, of course, vice-principals only in respect to the duty of maintaining the road in a reasonably safe condition.⁴

(*dd*) *Where the Inspection and Repairs Are Incidental to Use of Appliances.* — The above-stated doctrine, making the master liable to one servant for the negligent inspection and repair of machinery and appliances by another who has been intrusted with that duty, is subject to the limitation that where the employee's duty to inspect and repair the appliance is incidental to his duty to use the appliance in the common employment, then he is not intrusted with the master's duty to his fellow servant, and the master is not responsible to his fellow servant for his negligence in respect to the inspection and repair of the appliance.⁵

(*ee*) *Where Injured and Negligent Employees Are Both Repairers.* — The rule does not

Missouri. — *Lewis v. St. Louis, etc., R. Co.*, 59 Mo. 495, 21 Am. Rep. 385; *Hall v. Missouri Pac. R. Co.*, 74 Mo. 298, 8 Am. & Eng. R. Cas. 106; *Vautrain v. St. Louis, etc., R. Co.*, 8 Mo. App. 538.

Oregon. — *Wellman v. Oregon Short Line, etc., R. Co.*, 21 Oregon 530; *Fisher v. Oregon Short Line, etc., R. Co.*, 22 Oregon 533.

South Carolina. — *Calvo v. Charlotte, etc., R. Co.*, 23 S. Car. 526, 55 Am. Rep. 28, 28 Am. & Eng. R. Cas. 327.

Texas. — *Houston, etc., R. Co. v. Dunham*, 49 Tex. 181.

Virginia. — *Moon v. Richmond, etc., R. Co.*, 78 Va. 745, 49 Am. Rep. 401, 17 Am. & Eng. R. Cas. 531; *Torian v. Richmond, etc., R. Co.*, 84 Va. 192.

Washington. — *Bateman v. Peninsular R. Co.*, (Wash. 1898) 54 Pac. Rep. 996.

And see *Chicago, etc., R. Co. v. Moranda*, 108 Ill. 576, 17 Am. & Eng. R. Cas. 564; *Baltimore, etc., R. Co. v. McKenzie*, 81 Va. 71, 24 Am. & Eng. R. Cas. 395; *Drymala v. Thompson*, 26 Minn. 40. Compare *Mobile, etc., R. Co. v. Smith*, 59 Ala. 245.

1. *Same* — *Track Inspectors.* — *Durkin v. Sharp*, 88 N. Y. 225.

2. *Same* — *Bridge Builders.* — *Davis v. Central Vermont R. Co.*, 55 Vt. 84, 45 Am. Rep. 590, 11 Am. & Eng. R. Cas. 173.

3. *Employees Charged with Duty of Keeping Track Free from Obstructions.* — An employee of a railroad company who is charged with the duty of keeping the track free from obstructions is, with respect to this duty, a vice-principal. *Hall v. Missouri Pac. R. Co.*, 74 Mo. 298, 8 Am. & Eng. R. Cas. 106; *Baltimore, etc., R. Co. v. McKenzie*, 81 Va. 71, 24 Am. & Eng. R. Cas. 395; *Hulehan v. Green Bay, etc., R. Co.*, 68 Wis. 520, 31 Am. & Eng. R. Cas. 322.

4. *Roadmaster, as to Duties Not Connected with Maintenance of Road, Not a Vice-principal.* — Thus, the mere negligence of a roadmaster in misplacing a switch will not render the company liable to any engineer and fireman who are injured thereby. Through the negligence of a competent roadmaster of a railroad corporation a switch was misplaced, and a locomotive engine and a train of cars were turned upon a side track, the sleepers of which were rotten; the engine and train were thrown from the track, and the engineer and fireman of the engine were injured. It was held that they

were fellow servants with the roadmaster and could not maintain an action against the corporation. *Walker v. Boston, etc., R. Co.*, 128 Mass. 8, 1 Am. & Eng. R. Cas. 141.

And where the roadmaster assumes to act as a mere "boss" or foreman of a gang, and one of the laborers under his control is injured, they are fellow servants. *Lawler v. Androscoggin R. Co.*, 62 Me. 463, 16 Am. Rep. 492; *Brown v. Winona, etc., R. Co.*, 27 Minn. 162, 38 Am. Rep. 285.

In *Hoke v. St. Louis, etc., R. Co.*, 88 Mo. 360, reversing 11 Mo. App. 574, a different conclusion apparently is reached. There a roadmaster of a railroad, having general superintendence of its track, while engaged in superintending and directing the removal of a wrecked train, but not in the manual work of removing a wreck, gave a wrong signal to the engineer of a train assisting in removing the wreck, whereby a laborer engaged in the work of removal was injured. It was held (erroneously, it is believed) that the company was liable.

5. *Where Inspection and Repairs Are Incidental to Use of the Appliance.* — *Theleman v. Moeller*, 73 Iowa 108; *Johnson v. Boston Tow-Boat Co.*, 135 Mass. 209, 46 Am. Rep. 458; *Cregan v. Marston*, 126 N. Y. 568, 22 Am. St. Rep. 854; *Webber v. Piper*, 109 N. Y. 496; *Harley v. Buffalo Car Mfg. Co.*, 142 N. Y. 31; *Headifen v. Cooper*, 6 Misc. Rep. (N. Y. City Ct.) 263; *Rozelle v. Rose*, 3 N. Y. App. Div. 132; *Conway v. New York Cent., etc., R. Co.*, 13 Misc. Rep. (N. Y. C. Pl.) 53, reversing 11 Misc. Rep. (N. Y. City Ct.) 641. See *Nord Denmark Lloyd Steamship Co. v. Ingebregsten*, 57 N. J. L. 400.

Where a servant employed by a master to operate a machine assists other operatives in repairing it, he is a fellow servant of those who made the repairs, and if, upon the completion of the repairs, and after he has resumed the operation of the machine, he is injured by a defect therein due to the negligence of those who made the repairs, to which negligence he did not contribute, he cannot recover against the master. *Reading Iron Works v. Devine*, 109 Pa. St. 246.

Supplying New Wick in Headlight of Locomotive. — The failure of an engineer to replace an old wick in the headlight of a locomotive with a new one has been held not to be the negligence of a vice-principal. *Simpson v. Central Vermont R. Co.*, 5 N. Y. App. Div. 614.

make the master liable for the negligence of one repairer resulting in an injury to another employee engaged at the same work.¹

(ff) *Inspection of Cars Received for Transportation.* — It has sometimes been contended that where a car is received from one railroad company by another for transportation over its road, it does not owe to its servants the duty of testing the safety of the car, but may assume that it is safe unless the contrary appears.² Such a rule, however, does not hold a railroad company to its full duty with respect to supplying its servants with reasonably safe appliances, and it is not the law.³ While a railroad company is not liable for latent defects in the original construction of such cars received from another road merely for transportation,⁴ it is bound to make the same reasonable inspection of such cars as of its own, and its liability for the negligence of its inspectors is the same in both cases.⁵

ee. *EMPLOYEES CHARGED WITH SELECTION AND RETENTION OF SERVANTS.* — It has sometimes been contended that where the master delegates to another the duty of selecting fellow workmen or servants, he is under no further obligation than that of exercising reasonable care in the selection of a competent person for the purpose.⁶ But this view is contrary to the vast preponderance of authority, and is not supportable upon principle. The employment of a sufficient number of competent servants is one of the absolute duties which a master owes to his servants,⁷ and any per-

1. *Injury to One Repairer Through Negligence of Another.* — Thus it has been held that employers are not liable to an employee engaged in the repair of a machine, where some other workman in the same shop has so carelessly done his prior part of the work of repair as to leave the machine unfit to have any additional work done upon it, and in consequence thereof an employee is injured. *Murphy v. Boston, etc., R. Co.*, 59 How. Pr. (N. Y. Supreme Ct.) 197, affirmed in 88 N. Y. 146, 42 Am. Rep. 240, 8 Am. & Eng. R. Cas. 510. See also *Perigo v. Indianapolis Brewing Co.*, (Ind. App. 1899) 52 N. E. Rep. 462; *Arnold v. Delaware, etc., Canal Co.*, 125 N. Y. 15.

2. *Cars of Other Roads Received for Transportation.* — See *Neutz v. Jackson Hill Coal, etc., Co.*, 139 Ind. 411; *Gutridge v. Missouri Pac. R. Co.*, (Mo. 1888) 7 S. W. Rep. 476.

3. The case of *Michigan Cent. R. Co. v. Smithson*, 45 Mich. 212, which is sometimes cited as supporting this proposition, hardly goes to that length. That was a case where a brakeman had his hand crushed while coupling a freight car furnished with double dead-woods, and received from another road on which cars of this description were in general use. The court expressly refused to find from the evidence that it was negligence on the part of the defendant railroad to receive and use this car. Moreover, the brakeman knew or should have known that such cars were in use, and the danger incident to coupling them to other cars was apparent. A case very similar to this one is that of *Baldwin v. Chicago, etc., R. Co.*, 50 Iowa 680. But compare *O'Neil v. St. Louis, etc., R. Co.*, 9 Fed. Rep. 337.

4. *Mackin v. Boston, etc., R. Co.*, 135 Mass. 201, 46 Am. Rep. 456; *Thyng v. Fitchburg R. Co.*, 156 Mass. 13, 32 Am. St. Rep. 425; *Ballou v. Chicago, etc., R. Co.*, 54 Wis. 269, 41 Am. Rep. 31, 5 Am. & Eng. R. Cas. 480. Compare *Spaulding v. W. N. Flynt Granite Co.*, 159 Mass. 587. See the title MASTER AND SERVANT.

5. *Mackin v. Boston, etc., R. Co.*, 135 Mass. 201, 46 Am. Rep. 456; *Keith v. New Haven, etc., Co.*, 140 Mass. 175; *Coffee v. New York, etc., R. Co.*, 155 Mass. 21; *Walsh v. New York, etc., R. Co.*, 160 Mass. 571, 39 Am. St. Rep. 514; *Bowers v. Connecticut River R. Co.*, 162 Mass. 312; *Smith v. Potter*, 46 Mich. 258; *Gutridge v. Missouri Pac. R. Co.*, (Mo. 1888) 7 S. W. Rep. 476. See *Sawyer v. Minneapolis, etc., R. Co.*, 38 Minn. 103, 8 Am. St. Rep. 618, 33 Am. & Eng. R. Cas. 394.

6. *View that Master is Liable Only for Selection of Competent Agent.* — Campb. Law of Neg. (2d ed.) 154, citing *Balleny v. Cree*, 11 Sess. Cas. (3d ser.) 626, and *Smith v. Howard*, 22 L. T. N. S. 130; *Wilson v. Hume*, 30 U. C. C. P. 542.

In *Smith v. Howard*, 22 L. T. N. S. 130, the accident which caused the injury occurred through the incompetency of a boy for work of the nature he had to perform. The boy was engaged by one Maclaren, the defendant's foreman, whose duty it was to engage or discharge the person employed for the purpose of assisting the plaintiff; and shortly before the accident the plaintiff had complained to Maclaren, who had promised to provide him with more efficient assistance. The plaintiff was nonsuited. *In arguendo*, *Herschell, Q. C.*, for the plaintiff said: "The boy was incompetent. It is true the master did not engage him, but it is contended that he cannot discharge himself of his duty to take due care to employ competent servants, by delegating his functions in this respect. If he leaves the employment of his servants to a foreman, he is liable if such foreman employ incompetent persons." *Wilson v. Merry, L. R. 1 H. L. Sc. 326*, was cited. The court, *Kelly, C. B.*, *Martin, B.*, and *Channell, B.*, discharged the rule holding that the master could be liable only if he employed an incompetent foreman.

7. See the title MASTER AND SERVANT. See also *supra*, this section, *Incompetent Fellow Servants*.

son to whom the master intrusts the performance of this duty¹ is, with respect to its discharge, the *alter ego* or vice-principal of the master, who will be liable for its negligent performance by such vice-principal to the same extent that he would be liable for his own negligence in the same particular.²

1. *Ellington v. Beaver Dam Lumber Co.*, 93 Ga. 53.

2. **View that Master Is Liable for Agent's Negligence** — *United States*. — *Northern Pac. R. Co. v. Herbert*, 116 U. S. 642; *Wabash Western R. Co. v. Brow*, 65 Fed. Rep. 941, 31 U. S. App. 192; *Lindvall v. Woods*, 44 Fed. Rep. 855; *Baltimore, etc., R. Co. v. Henthorne*, 73 Fed. Rep. 634, 43 U. S. App. 113. See *Baltimore, etc., R. Co. v. Baugh*, 149 U. S. 369.

Alabama. — *Walker v. Bolling*, 22 Ala. 294; *Tyson v. South, etc., Alabama R. Co.*, 61 Ala. 554, 32 Am. Rep. 8; *Louisville, etc., R. Co. v. Davis*, 91 Ala. 487.

California. — *Matthews v. Bull*, (Cal. 1897) 47 Pac. Rep. 773.

Georgia. — *Cheaney v. Ocean Steamship Co.*, 92 Ga. 726, 44 Am. St. Rep. 113.

Illinois. — *Fraser v. Schroeder*, 163 Ill. 459, affirming 60 Ill. App. 519.

Indiana. — *Ohio, etc., R. Co. v. Collarn*, 73 Ind. 261, 38 Am. Rep. 134, 5 Am. & Eng. R. Cas. 554.

Massachusetts. — *Olsen v. Andrews*, 168 Mass. 261; *McPhee v. Scully*, 163 Mass. 216.

Michigan. — *Michigan Cent. R. Co. v. Dolan*, 32 Mich. 510; *Quincy Min. Co. v. Kitts*, 42 Mich. 34; *Brown v. Gilchrist*, 80 Mich. 56, 20 Am. St. Rep. 496.

Missouri. — *McDermott v. Hannibal, etc., R. Co.*, 87 Mo. 285, 28 Am. & Eng. R. Cas. 528.

New York. — *Laning v. New York Cent. R. Co.*, 49 N. Y. 521, 10 Am. Rep. 417, explaining and limiting *Wright v. New York Cent. R. Co.*, 25 N. Y. 562; *Baulec v. New York, etc., R. Co.*, 59 N. Y. 356, 17 Am. Rep. 325; *Malone v. Hathaway*, 64 N. Y. 5, 21 Am. Rep. 573; *Henry v. Brady*, 9 Daly (N. Y.) 142; *Stevenson v. Jewett*, 16 Hun (N. Y.) 210. See *Flike v. Boston, etc., R. Co.*, 53 N. Y. 549, 13 Am. Rep. 545.

Pennsylvania. — *Frazier v. Pennsylvania R. Co.*, 38 Pa. St. 104, 80 Am. Dec. 467; *Huntingdon, etc., R., etc., Co. v. Decker*, 84 Pa. St. 419; *Weaver v. Iselin*, 161 Pa. St. 386.

Texas. — *Missouri Pac. R. Co. v. Patton*, (Tex. 1894) 26 S. W. Rep. 978; *Texas Mexican R. Co. v. Whitmore*, 58 Tex. 276, 11 Am. & Eng. R. Cas. 195.

See *Norfolk, etc., R. Co. v. Thomas*, 90 Va. 205, 44 Am. St. Rep. 906.

In commenting upon the cases of *Norfolk, etc., R. Co. v. Hoover*, 79 Md. 253, 47 Am. St. Rep. 392, and *Michigan Cent. R. Co. v. Dolan*, 32 Mich. 510, Taft, Circuit Judge, in delivering the opinion of the court in *Baltimore, etc., R. Co. v. Henthorne*, 73 Fed. Rep. 634, 43 U. S. App. 113, said: "It is held in these cases that the duty of a corporation as master to a servant, of using due care in the selection of competent fellow servants, is fully discharged when its general or representative officers have exercised due diligence in the selection and appointment of the subordinate officers whose duty it is to employ and discharge servants. These cases are based upon the same view as those in which it is held that a master

sufficiently performs his duty to his servant, of furnishing reasonably safe machinery and keeping the same in safe repair, when he exercises proper and reasonable caution and diligence in the selection of those servants whose duty it is to make the repairs and to supervise the condition of the machinery. *Wonder v. Baltimore, etc., R. Co.*, 32 Md. 418, 3 Am. Rep. 143. The Supreme Court of the United States, in a series of cases, has left nothing to be desired in the clearness with which it has drawn a line of distinction quite at variance with the views of the courts just referred to. Its holding is that, where the law recognizes a positive duty owing from the master to the servant, a violation of such duty creates a liability to the servant, whether it arises from the personal neglect of the master or from that of any subordinate, however inferior, to whom the discharge of such duty may have been delegated by the master." The learned judge then cited the case of *Baltimore, etc., R. Co. v. Baugh*, 149 U. S. 369, and, after quoting from the opinion of Mr. Justice Brewer in *Baltimore, etc., R. Co. v. Baugh*, 149 U. S. 369, continued: "It is manifest from the foregoing passage that the duty of the master to select fit and competent persons is viewed by the Supreme Court in the same light as the duty of the master to provide reasonably safe machinery, and that neither duty can be so delegated as to relieve the master from liability for a failure on the part of his subordinate to whom the duty is delegated to exercise proper care in its discharge. See also *Northern Pac. R. Co. v. Herbert*, 116 U. S. 642; *Hough v. Texas, etc., R. Co.*, 100 U. S. 218; *Fuller v. Jewett*, 80 N. Y. 46, 36 Am. Rep. 575; *Wabash Western R. Co. v. Brow*, 31 U. S. App. 192, 65 Fed. Rep. 947."

Conductor Charged with Making Up Train. — Where a train was sent out without its full complement of men, by a head conductor whose duty it was to see that trains were properly equipped with sufficient crews, the company was held liable to members of the crew who were injured in an accident proximately resulting from the conductor's neglect of this duty. *Flike v. Boston, etc., R. Co.*, 53 N. Y. 550, 13 Am. Rep. 545; *Booth v. Boston, etc., R. Co.*, 73 N. Y. 38, 29 Am. Rep. 97.

Engineer or Conductor Permitting Fireman to Run Engine. — Where an engineer is authorized to permit the fireman to handle the engine, and does so, the railroad company is responsible for a mistake or negligence of the engineer in permitting a fireman who is incompetent for the duty to handle the engine. *Harper v. Indianapolis, etc., R. Co.*, 47 Mo. 567, 4 Am. Rep. 353; *Core v. Ohio River R. Co.*, 38 W. Va. 456; *Norfolk, etc., R. Co. v. Thomas*, 90 Va. 205, 44 Am. St. Rep. 906.

Although there is an order of the defendant prohibiting engineers from placing their engines in the hands of their firemen, if it is known to the master mechanic of the defendant, whose province it is to employ and dis-

ff. EMPLOYEES CHARGED WITH ESTABLISHMENT OF PROPER RULES AND REGULATIONS — (aa) General Rule. — Since it is the duty of a master to make and promulgate such rules and regulations for the safety of employees as will afford them reasonable protection against the dangers incident to the performance of their respective duties,¹ an employee who is clothed with the power at his own discretion to make and suspend rules and regulations is to be regarded as the representative of the master.² But when this duty of establishing and promulgating proper rules and regulations is performed, the master's responsibility is at an end; he cannot be charged with liability to one servant for the failure of another servant to comply with the prescribed rules and regulations.³

(bb) Employees Having Control of Train Schedules. — A duty rests upon railroad companies to establish and promulgate, either by timetables or other suitable means, appropriate and sufficient rules and regulations for the safe running of their trains,⁴ and an employee who is charged with this duty is, with respect to its performance, a vice-principal. Consequently, it is held that a railroad employee who is invested with the control of the movement of trains is a vice-principal whether he be a train dispatcher,⁵ superintendent or assistant superin-

charge engineers and firemen, that the order is being continually violated, the defendant will be liable to a servant who is injured by reason of the practice. *Ohio, etc., R. Co. v. Collarn*, 73 Ind. 261, 38 Am. Rep. 134, 5 Am. & Eng. R. Cas. 554.

One Railroad Company Using Servants of Another. — Where a railroad company whose road formed a junction with another road intrusted a person employed and paid by such other road with the business of attending to trains at such junction, and such person was incompetent, whereby death resulted to one of its engineers, it was held liable in damages to his representatives. *Taylor v. Western Pac. R. Co.*, 45 Cal. 323.

1. *Redington v. New York, etc., R. Co.*, 84 Hun (N. Y.) 231. See the title MASTER AND SERVANT.

2. **Servant Making Special Order with Respect to Management of Train.** — Where, therefore, an employee of a railroad, having authority to do so, makes a special order with respect to the management of a particular train, which is, under the circumstances, unreasonable, and by the execution of such order a servant of the corporation, himself without fault, is injured, it will be no answer to an action by the injured party to say that the immediate cause of the injury was the negligence of a fellow servant of such injured party in the execution of the unreasonable order. *Pittsburgh, etc., R. Co. v. Henderson*, 37 Ohio St. 549, 5 Am. & Eng. R. Cas. 529. *Citing Chicago, etc., R. Co. v. McLallen*, 84 Ill. 109; *Chicago, etc., R. Co. v. Moranda*, 93 Ill. 302, 34 Am. Rep. 168; *Hough v. Texas, etc., R. Co.*, 100 U. S. 213; *Fuller v. Jewett*, 80 N. Y. 46, 36 Am. Rep. 575, 1 Am. & Eng. R. Cas. 109; *Smith v. Oxford Iron Co.*, 42 N. J. L. 467, 36 Am. Rep. 535; *Ohio, etc., R. Co. v. Collarn*, 73 Ind. 261, 38 Am. Rep. 134, 5 Am. & Eng. R. Cas. 554; *Patterson v. Pittsburgh, etc., R. Co.*, 76 Pa. St. 389, 18 Am. Rep. 412; *Cumberland, etc., R. Co. v. State*, 44 Md. 283; *Ford v. Fitchburg R. Co.*, 110 Mass. 240, 14 Am. Rep. 598; *Berea Stone Co. v. Kraft*, 31 Ohio St. 287, 27 Am. Rep. 510; *Lake Shore, etc., R. Co. v. Lavalley*, 36 Ohio St. 221, 15 Am. & Eng. R. Cas. 549.

3. **Liability of Master for Want of Compliance with Rules.** — *Robertson v. Terre Haute, etc., R. Co.*, 78 Ind. 77, 8 Am. & Eng. R. Cas. 175; *Chicago, etc., R. Co. v. Doyle*, 60 Miss. 977, 8 Am. & Eng. R. Cas. 171; *Rose v. Boston, etc., R. Co.*, 58 N. Y. 217; *Slater v. Jewett*, 85 N. Y. 62, 39 Am. Rep. 627, 5 Am. & Eng. R. Cas. 515; *Smith v. New York Cent., etc., R. Co.*, 88 Hun (N. Y.) 468; *Moeller v. Delaware, etc., R. Co.*, 13 N. Y. App. Div. 467; *Kennelly v. Baltimore, etc., R. Co.*, 166 Pa. St. 60, 36 W. N. C. (Pa.) 50, 25 Pittsb. L. J. N. S. (Pa.) 316.

In some jurisdictions it is held that it is the duty of the master not only to establish proper rules and regulations for his service, but he must enforce those rules and regulations in order to exempt himself from liability for the negligence of those agents whose duty it is to enforce and comply with them. *Madden v. Chesapeake, etc., R. Co.*, 28 W. Va. 610, 57 Am. Rep. 695. And see *Moore v. Wabash, etc., R. Co.*, 85 Mo. 588, 21 Am. & Eng. R. Cas. 509; *Crisswell v. Pittsburgh, etc., R. Co.*, 30 W. Va. 798, 33 Am. & Eng. R. Cas. 232. But these cases are opposed to the weight of authority sustaining the general rule that the master's duty in this regard is fully performed when he establishes and promulgates proper rules and regulations.

4. See the titles MASTER AND SERVANT; TIME-TABLES.

5. **Employees Controlling Movement of Trains — Train Dispatcher** — *United States.* — *Crew v. St. Louis, etc., R. Co.*, 20 Fed. Rep. 87; *Baltimore, etc., R. Co. v. Camp*, 65 Fed. Rep. 952, 31 U. S. App. 213; *Clyde v. Richmond, etc., R. Co.*, 69 Fed. Rep. 673. See *Cincinnati, etc., R. Co. v. Clark*, 57 Fed. Rep. 125.

Arkansas. — *Little Rock, etc., R. Co. v. Barry*, 58 Ark. 198.

California. — *McKune v. California Southern R. Co.*, 66 Cal. 302, 17 Am. & Eng. R. Cas. 589.

Connecticut. — *Darrigan v. New York, etc., R. Co.*, 52 Conn. 285, 52 Am. Rep. 590, 23 Am. & Eng. R. Cas. 438, 24 Am. L. Reg. 453.

Idaho. — See *Palmer v. Utah, etc., R. Co.*, 2 Idaho 290.

Illinois. — *Chicago, etc., R. Co. v. Young*,

tendent,¹ division superintendent,² telegraph operator,³ or other employee.⁴ But obedience to these regulations must be intrusted to the employees having charge of the trains. If, therefore, the want of such obedience results in injury to a fellow servant and no negligence can be imputed to the railroad company, there can be no recovery.⁵

(cc) *Telegraph Operators.* — A distinction is ordinarily to be made between mere telegraph operators, and train dispatchers as well as the other employees of a railroad mentioned above. A telegraph operator ordinarily is not invested with any control over the running of trains, and it has been held that a telegraph operator does not occupy the position of a train dispatcher merely because he transmits or delivers the orders for the movement of trains, and that his negligence cannot be said to be the negligence of the company.⁶

26 Ill. App. 115; Chicago, etc., R. Co. v. McLallen, 84 Ill. 109.

Kansas. — See Hannibal, etc., R. Co. v. Kanaley, 39 Kan. 1.

Kentucky. — McLeod v. Ginther, 80 Ky. 399.

Michigan. — Hunn v. Michigan Cent. R. Co., 78 Mich. 513.

Missouri. — Smith v. Wabash, etc., R. Co., 19 Mo. App. 120, 92 Mo. 359. But see Blessing v. St. Louis, etc., R. Co., 77 Mo. 410, 15 Am. & Eng. R. Cas. 298.

New York. — Hankins v. New York, etc., R. Co., 142 N. Y. 416, 40 Am. St. Rep. 616, reversing 55 Hun (N. Y.) 51; McChesney v. Panama R. Co., (Supreme Ct.) 21 N. Y. Supp. 207, 66 Hun (N. Y.) 627, approved 74 Hun (N. Y.) 150. See also Slater v. Jewett, 85 N. Y. 62, 39 Am. Rep. 627, 5 Am. & Eng. R. Cas. 515; Sutherland v. Troy, etc., R. Co., 125 N. Y. 737, 35 N. Y. St. Rep. 853.

Pennsylvania. — Lewis v. Seifert, 116 Pa. St. 628, 2 Am. St. Rep. 631.

Tennessee. — Haynes v. East Tennessee, etc., R. Co., 3 Coldw. (Tenn.) 222; Washburn v. Nashville, etc., R. Co., 3 Head (Tenn.) 638, 75 Am. Dec. 784.

Texas. — Hogan v. Missouri, etc., R. Co., 88 Tex. 679.

West Virginia. — Flannegan v. Chesapeake, etc., R. Co., 40 W. Va. 436.

Wisconsin. — Phillips v. Chicago, etc., R. Co., 64 Wis. 475, 23 Am. & Eng. R. Cas. 453.

But see Robertson v. Terre Haute, etc., R. Co., 78 Ind. 77, 8 Am. & Eng. R. Cas. 175, which seems to deny the rule stated in the text.

And in Millsaps v. Louisville, etc., R. Co., 69 Miss. 423, an action for the death of the plaintiff's intestate, which occurred, while the said intestate was acting as a fireman, in a collision occasioned by the negligence of the defendant's train dispatcher, who was charged with the duty of directing the movements of trains, the court held that the train dispatcher was the fellow servant of the intestate.

1. *Same* — *Superintendent or Assistant Superintendent.* — Chicago, etc., R. Co. v. McLallen, 84 Ill. 109; Sheehan v. New York Cent., etc., R. Co., 91 N. Y. 332; Dana v. New York Cent., etc., R. Co., 92 N. Y. 639; Pittsburgh, etc., R. Co. v. Henderson, 37 Ohio St. 552, 5 Am. & Eng. R. Cas. 529; Galveston, etc., R. Co. v. Smith, 76 Tex. 611, 18 Am. St. Rep. 78.

2. *Same* — *Division Superintendent.* — Galveston, etc., R. Co. v. Arispe, 5 Tex. Civ. App. 611.

3. *Same* — *Telegraph Operator.* — Of course, if a telegraph operator is invested with the control of the movement of trains, he should be considered a vice-principal of the railroad company. But see *infra*, this subsection, *Telegraph Operators.*

4. *Same* — *Other Employees.* — Phillips v. Chicago, etc., R. Co., 64 Wis. 475, 23 Am. & Eng. R. Cas. 453.

5. Robertson v. Terre Haute, etc., R. Co., 78 Ind. 77, 8 Am. & Eng. R. Cas. 175; Chicago, etc., R. Co. v. Doyle, 60 Miss. 977, 8 Am. & Eng. R. Cas. 171; Rose v. Boston, etc., R. Co., 58 N. Y. 217; Slater v. Jewett, 85 N. Y. 62, 39 Am. Rep. 627, 5 Am. & Eng. R. Cas. 515; Kennelly v. Baltimore, etc., R. Co., 166 Pa. St. 60, 36 W. N. C. (Pa.) 50, 25 Pittsb. L. J. N. S. (Pa.) 316; Healy v. New York, etc., R. Co., (R. I. 1897) 37 Atl. Rep. 676. And see Sheehan v. New York Cent., etc., R. Co., 91 N. Y. 332.

6. *Telegraph Operators Ordinarily Not Vice-principals.* — In a suit by a fireman on one of the defendant's trains, who had been injured in a collision caused by the negligence of a telegraph operator in failing to stop another train by displaying the prescribed signals and informing the persons who were operating the train of orders sent by the train dispatcher, it was held that the negligence of the operator in this respect was the negligence of the plaintiff's fellow servant. McKaig v. Northern Pac. R. Co., 42 Fed. Rep. 288.

But in Northern Pac. R. Co. v. Charless, 51 Fed. Rep. 562, 7 U. S. App. 359, 51 Am. & Eng. R. Cas. 198, it was considered to be a positive duty of the railroad company to keep the employees of a certain section of its road informed of the movements of trains, and, this duty having been delegated to a telegraph operator, it was held that the defendant company was liable to a section hand for the operator's negligence in its discharge. This case has, however, been distinguished if not adversely criticised in the later federal cases. Cincinnati, etc., R. Co. v. Clark, 57 Fed. Rep. 125, 16 U. S. App. 17; Baltimore, etc., R. Co. v. Camp, 65 Fed. Rep. 952, 31 U. S. App. 213; Oregon Short Line, etc., R. Co. v. Frost, 74 Fed. Rep. 965.

In the case of Cincinnati, etc., R. Co. v. Clark, 57 Fed. Rep. 125, 16 U. S. App. 17, it was held that where the rules of the railroad company impose upon telegraph operators the duty of displaying signals to prevent one train from following another too closely, the negli-

§8. EMPLOYEES CHARGED WITH DUTY OF INSTRUCTING SERVANTS. — A master may use all due care in rendering the employment safe, and yet, by reason of the necessarily dangerous character of the business, considerable danger may attend its prosecution, in which case he must give due information and timely warning of the accompanying danger to those in his service who are ignorant of its extent, before calling upon them to incur the risk.¹ And any employee who is charged with the duty of imparting this information to the other employees represents the master as a vice-principal, and the master will be liable for his negligence in the discharge of that duty.² While this rule is applicable in the case of inexperienced adult servants,³ it is, of course, especially applicable in the case of inexperienced minor employees.⁴

gence of a telegraph operator in the discharge of this duty is the negligence of a fellow servant of the trainmen.

And again in *Baltimore, etc., R. Co. v. Camp*, 65 Fed. Rep. 952, 31 U. S. App. 213, it was held that a telegraph operator who has no control over the movement of trains, but merely receives orders from the train dispatcher relating to the movements of trains and transmits them to the trainmen, is a fellow servant of the latter.

The decisions in these cases are not only in accordance with correct principle, but are also in line with the better-considered cases. See *Oregon Short Line, etc., R. Co. v. Frost*, 74 Fed. Rep. 965, 44 U. S. App. 606, reversing *Frost v. Oregon Short Line, etc., R. Co.*, 69 Fed. Rep. 936; *Price v. Detroit, etc., R. Co.*, 145 U. S. 651; *Slater v. Jewett*, 85 N. Y. 62, 39 Am. Rep. 627; *Dana v. New York Cent., etc., R. Co.*, 23 Hun (N. Y.) 473; *Monaghan v. New York Cent., etc., R. Co.*, 45 Hun (N. Y.) 113; *Reiser v. Pennsylvania Co.*, 152 Pa. St. 38, 34 Am. St. Rep. 620; *Dealey v. Philadelphia, etc., R. Co.*, (Pa. 1886) 3 Cent. Rep. 112.

A different view has been taken in *Illinois Cent. R. Co. v. Hunter*, 70 Miss. 471; *East Tennessee, etc., R. Co. v. De Armond*, 86 Tenn. 75, 6 Am. St. Rep. 816; *Madden v. Chesapeake, etc., R. Co.*, 28 W. Va. 610, 57 Am. Rep. 695; and *Hall v. Galveston, etc., R. Co.*, 39 Fed. Rep. 18. But the decision in each of these cases is based upon the different department rule. See *Cincinnati, etc., R. Co. v. Clark*, 57 Fed. Rep. 130, and *Baltimore, etc., R. Co. v. Camp*, 65 Fed. Rep. 952.

1. See the title MASTER AND SERVANT.

2. General Rule. — *Pullman's Palace Car Co. v. Harkins*, 55 Fed. Rep. 932; *Burke v. Anderson*, 69 Fed. Rep. 814, 34 U. S. App. 132; *Fl. Smith Oil Co. v. Slover*, 58 Ark. 168; *Wheeler v. Wason Mfg. Co.*, 135 Mass. 204; *Brennan v. Gordon*, 118 N. Y. 489, 16 Am. St. Rep. 775; *Lebbering v. Struthers*, 157 Pa. St. 312, 33 W. N. C. (Pa.) 99. See *Burns v. Matthews*, (N. Y. 1895) 40 N. E. Rep. 731. But compare *Perry v. Rogers*, 157 N. Y. 251, reversing 91 Hun (N. Y.) 243.

In the case of *Smith v. Oxford Iron Co.*, 42 N. J. L. 467, 36 Am. Rep. 535, the question was whether an incorporated company was liable to an injured servant whose injury was occasioned by the neglect of its president. The case showed that the superintendence of the business of the company had been committed to its president. He introduced the use of a highly dangerous explosive without instructing the

workmen directed to use it in respect to its dangerous qualities. It was held that, under the circumstances, a duty devolved on the company to give notice of the qualities of the explosive, a failure to perform which would be negligence; that, having intrusted to its general executive officer the superintendence of its business, it became his duty to give the required information, and that his failure or neglect in that respect was imputable to the company and rendered it liable to its servant injured in the use of the explosive.

3. Application of the Rule — In Case of Inexperienced Adult Employees. — *Brennan v. Gordon*, 13 Daly (N. Y.) 208; *Bradley v. New York Cent. R. Co.*, 3 Thomp. & C. (N. Y.) 288.

4. Same — In Case of Inexperienced Minor Employees. — *Grizzle v. Frost*, 3 F. & F. 622; *Dowling v. Allen*, 74 Mo. 13. And see *Siegel v. Schantz*, 2 Thomp. & C. (N. Y.) 353, to the same effect.

Those courts, however, which adhere to the doctrine that where the employer places any servant under the direction of a laborer the latter must be deemed to act for the master, seem to prefer placing cases of this kind upon that ground, *i. e.*, the superior-servant rule, rather than upon the grounds above stated. *Kansas* is usually considered to be one of these states, and it has there been held that where an ignorant boy seventeen years old, an apprentice in a machine shop, was directed by the foreman in charge to obey the call and direction of W., another employee, engaged in drilling an engine frame, which work required a skilled mechanic to handle safely, and W., being also an unskilled apprentice, negligently removed the clamp that was provided to hold the frame from falling, and in that position attempted to move the engine frame, and directed the boy to move the trestle farther under the frame, when it fell and killed the boy, W. and the boy were not fellow servants, and the negligence of W. was the negligence of the employer. The court observed: "Where the employer places an employee under the control and direction of another, and the latter, in the exercise of the authority so conferred, orders the former into a place of unusual danger, and thus exposes him to extraordinary peril, of the existence and extent of which he is not advised, the master is liable; and we think this case comes within the exceptions to the general rule." *Missouri Pac. R. Co. v. Peregoy*, 36 Kan. 424.

Experienced Minor Employee. — But if the minor has had experience in the work at which he is injured, the rule exempting a master

hh. EMPLOYEES INTRUSTED WITH SUPERVISION. — In at least one of the states it is considered that the exercise of a proper supervision of the work on which his servants are engaged is, in some instances, one of the master's personal duties.¹ While this view is at direct variance with the consensus of judicial opinion,² still, wherever it obtains, it necessarily follows that any servant who is intrusted with this duty of supervision stands in the place of the master as his vice-principal.³

ii. EMPLOYEE IN CHARGE OF ENTIRE BUSINESS OR DISTINCT DEPARTMENT — General Rule. — A number of courts of excellent authority have held that an employee to whom the master has intrusted the entire management and supervision of the whole business or the entire management and supervision of a distinct and separate department of the business is a vice-principal or representative of the master.⁴

from liability for the negligence of a fellow servant will be applicable. Thus, where a boy between fourteen and fifteen years of age, while cleaning machinery in a mill, was injured by the negligence of a fellow servant in starting the machinery, it was held that he could not maintain an action against his employer, it appearing that he had done such work for two years and a half. *Curran v. Merchants' Mfg. Co.*, 130 Mass. 374, 39 Am. Rep. 457.

1. Employees Exercising Supervision. — See *Boyd v. St. Louis, etc.*, R. Co., 58 Ark. 66, 41 Am. St. Rep. 85. See *supra*, this title and division, the subdivision *Superior Servants*.

2. It must be inferred from many if not most of the cases which reject the superior-servant limitation (see *supra*, this section, *Superior Servants — Rejection of the Doctrine*) that the supervision of his servants' work is not recognized to be one of the master's personal duties to his servants. See also the title MASTER AND SERVANT.

3. *Boyd v. St. Louis, etc.*, R. Co., 58 Ark. 66, 41 Am. St. Rep. 85.

4. General Rule — United States. — *Borgman v. Omaha, etc.*, R. Co., 41 Fed. Rep. 667; *Minneapolis v. Lundin*, 58 Fed. Rep. 527, 19 U. S. App. 245; *Northern Pac. Coal R. Co. v. Richmond*, 58 Fed. Rep. 756, 15 U. S. App. 262; *Northern Pac. R. Co. v. Poirier*, 67 Fed. Rep. 881; *Balch v. Haas*, 73 Fed. Rep. 980; *Coulson v. Leonard*, 77 Fed. Rep. 538; *Baltimore, etc.*, R. Co. v. *Baugh*, 149 U. S. 368; *Northern Pac. R. Co. v. Peterson*, 162 U. S. 346. See *Harley v. Louisville, etc.*, R. Co., 57 Fed. Rep. 144; *Woods v. Lindvall*, 48 Fed. Rep. 62. But see *Northern Pac. R. Co. v. Peterson*, 51 Fed. Rep. 182.

Colorado. — *Denver, etc.*, R. Co. v. *Driscoll*, 12 Colo. 520, 13 Am. St. Rep. 243; *Colorado Midland R. Co. v. O'Brien*, 16 Colo. 219, 48 Am. & Eng. R. Cas. 235; *Colorado Midland R. Co. v. Naylor*, 17 Colo. 501, 31 Am. St. Rep. 335; *Lantry v. Silverman*, 1 Colo. App. 404.

Indiana. — *Taylor v. Evansville, etc.*, R. Co., 121 Ind. 124, 16 Am. St. Rep. 372, 41 Am. & Eng. R. Cas. 437, 41 Alb. L. J. 173; *Nall v. Louisville, etc.*, R. Co., 129 Ind. 268, 48 Am. & Eng. R. Cas. 315, 44 Alb. L. J. 230; *Hoosier Stone Co. v. McCain*, 133 Ind. 231.

Iowa. — *Beck, J.*, in *Troughear v. Lower Vein Coal Co.*, 62 Iowa 576; *Hathaway v. Des Moines*, 97 Iowa 333.

Michigan. — *Quincy Min. Co. v. Kitts*, 42

Mich. 34; *Ryan v. Bagaley*, 50 Mich. 179, 45 Am. Rep. 35; *Slater v. Chapman*, 67 Mich. 523, 11 Am. St. Rep. 593; *Hunn v. Michigan Cent. R. Co.*, 78 Mich. 513; *Harrison v. Detroit, etc.*, R. Co., 79 Mich. 409, 19 Am. St. Rep. 180, 41 Am. & Eng. R. Cas. 398; *Lytle v. Chicago, etc.*, R. Co., 84 Mich. 289; *Palmer v. Michigan Cent. R. Co.*, 93 Mich. 363, 32 Am. St. Rep. 507; *Erickson v. Milwaukee, etc.*, R. Co., 93 Mich. 414; *Shumway v. Walworth, etc.*, Mfg. Co., 98 Mich. 411; *Schroeder v. Flint, etc.*, R. Co., 103 Mich. 223; *Anderson v. Michigan Cent. R. Co.*, 107 Mich. 612.

Montana. — *Kelley v. Fourth of July Min. Co.*, 16 Mont. 484. See *Goodwell v. Montana Cent. R. Co.*, 18 Mont. 293.

New Jersey. — *Smith v. Oxford Iron Co.*, 42 N. J. L. 467, 36 Am. Rep. 535; *O'Brien v. American Dredging Co.*, 53 N. J. L. 291.

North Carolina. — *Dobbin v. Richmond, etc.*, R. Co., 81 N. Car. 446, 31 Am. Rep. 512; *Turner v. Goldsboro Lumber Co.*, 119 N. Car. 387.

Oregon. — *Anderson v. Bennett*, 16 Oregon 515, 8 Am. St. Rep. 311.

Pennsylvania. — *Mullan v. Philadelphia, etc., Mail Steamship Co.*, 78 Pa. St. 25, 21 Am. Rep. 2; *New York, etc.*, R. Co. v. *Bell*, 112 Pa. St. 400, 28 Am. & Eng. R. Cas. 338; *Lewis v. Seifert*, 116 Pa. St. 647, 2 Am. St. Rep. 631; *Prevost v. Citizens' Ice, etc.*, Co., 185 Pa. St. 617.

See also *Mattise v. Consumers' Ice Mfg. Co.*, 46 La. Ann. 1535; *Whaley v. Bartlett*, 42 S. Car. 454; *Zintek v. Stimson Mill Co.*, 9 Wash. 395; *McDonough v. Great Northern R. Co.*, 15 Wash. 244.

Application of the Rule. — In *Baltimore, etc.*, R. Co. v. *Camp*, 31 U. S. App. 213, 65 Fed. Rep. 952, the court was of the opinion that a train dispatcher who has complete control of the movement of all trains of an entire division of a railroad is a representative of the company and not a fellow servant with the trainmen. The case, however, turned on the interpretation of an *Ohio* statute, and the common-law status of an employee in charge of a distinct department was not actually involved in the decision.

But one of six or eight mine bosses, whose authority extended over eight or ten men, and who was himself subject to the control of the pit boss, who in turn was controlled by the superintendent or general manager, has been held to be a mere fellow servant of the men

Criticism of the Rule. — But this rule has been adopted in only a limited number of the *United States*, and has been expressly rejected in at least one of them.¹ It wholly ignores the true criterion for determining whether an employee is or is not a vice-principal, by making the general manager's status as a vice-principal depend not upon the nature of his duties, but upon their importance and extent. According to the only certain rule for determining who are vice-principals, an employee is not a vice-principal merely because he has charge of the master's entire business or a separate and distinct department thereof. Like his more humble coemployees, he is a vice-principal with respect to such of his duties as the law imposes upon the master, and with respect to those duties alone.² While this is a comparatively certain rule for determining who are vice-principals, the doctrine of departmental control, besides being illogical, can lead only to uncertainty and confusion.³

e. DIFFERENT-DEPARTMENT LIMITATION — (1) *In General.* — In addition to the liability for the negligence of a servant charged with the performance of the master's positive duties to his servants, there has been laid upon the master, by some courts, a further liability for the negligence of a servant engaged in a department of the same general business which is separate and distinct from the department in which the injured servant is employed.

(2) *Statement of the Limitation.* — This rule may be stated as follows: Where a servant is employed in a department of the general service which is separate and distinct from that of the servant or servants whose negligence caused the injury, the fellow-servant rule has no application, and the master is liable.⁴

under him. *What Cheer Coal Co. v. Johnson*, 56 Fed. Rep. 810, 12 U. S. App. 490.

And it has been held that the foreman of a switching crew, engaged in the yard of a railroad company, under the general control of a yardmaster, cannot be regarded as the head of a distinct branch or department of a railroad company's service. *Harley v. Louisville, etc., R. Co.*, 57 Fed. Rep. 144.

A section foreman of a railroad is not the head or manager of a distinct department in such sense as to constitute him a vice-principal, but is the fellow servant of those who work under him and are subject to his orders. *Kansas, etc., R. Co. v. Waters*, 70 Fed. Rep. 28.

Nor is a "track foreman," employed by a railroad, who is the subordinate of the supervisor, and who cannot hire or discharge the men under him without the approval of the supervisor, and who performs manual labor, a vice-principal of the railroad; he is a fellow servant with the men in his gang. *Deavers v. Spencer*, 70 Fed. Rep. 480, 25 U. S. App. 411.

A foreman of a railroad bridge gang who has authority to hire and discharge the men under him and sole power to direct and control them in their work, but who is a subordinate of the superintendent of bridges, is not in charge of a department so as to constitute him a vice-principal. *Cleveland, etc., R. Co. v. Brown*, 73 Fed. Rep. 970.

1. Rejection of the Rule in Massachusetts. — In *Albro v. Agawan Canal Co.*, 6 Cush. (Mass.) 75, the court held that a superintendent to whom the master had intrusted the entire charge of a factory, with authority to hire and discharge the operatives, was a fellow servant with one of the operatives. And this rule was adhered to in the later case of *Hollden v. Fitchburg R. Co.*, 120 Mass. 268, 37 Am. Rep. 343.

2. Apparent Adoption of the Rule. — And this

is all that is really decided in some of the cases which are usually cited in support of the rule. Thus, in *Brickner v. New York Cent. R. Co.*, 2 Lans. (N. Y.) 506, *affirmed* 49 N. Y. 672, after a full review of the cases, it was said in effect that where a corporation through its directors commits the charge of its business to the hands of an agent, exercising no superintendence over him, the corporation will be liable to a subordinate employee for the negligence of such agent in employing coemployees, or in providing suitable appliances for the work. See also *Malone v. Hathaway*, 64 N. Y. 5, 21 Am. Rep. 573.

3. Uncertainty of the Rule. — Of the view that the question whether a person is a vice-principal is to be determined solely by the magnitude or importance of the work that may have been committed to his charge, Judge Thayer, in *Northern Pac. R. Co. v. Peterson*, 51 Fed. Rep. 187, said that it "is open to the objection that it furnishes no practical or certain test by which to determine in a given case whether an employee has been vested with such departmental control, or has been 'so lifted up in the grade or extent of his duties,' as to constitute him the personal representative of the master. That this would frequently be a difficult and embarrassing question to decide, and that courts would differ widely in their views, if the doctrine of departmental control was adopted, is well illustrated by the case of *Borgman v. Omaha, etc., R. Co.*, 41 Fed. Rep. 669."

4. Cases Applying the Different-department Limitation. — This has been called the doctrine of *Illinois, Georgia, Kentucky, and Tennessee*. It has been recognized in all of these states, as well as in others.

Arizona. — *Hobson v. New Mexico, etc., R. Co.*, (Arizona 1886) 11 Pac. Rep. 545, 28 Am. & Eng. R. Cas. 360.

(3) *Origin of the Doctrine.* — This doctrine was first judicially recognized in *Indiana*, in the year 1854;¹ but it has since been repudiated in this state.² It was adopted in *Kentucky*, however, in 1865, and was subsequently taken up in other states.³

(4) *Reasons for the Doctrine.* — The different-department limitation, or the doctrine of consociation, seems to be founded entirely upon the fact that servants in different departments of a large industrial enterprise are unable to exercise any influence upon each other in the encouragement of caution, and,

Georgia. — *Cooper v. Mullins*, 30 Ga. 150, 76 Am. Dec. 638; *Krogg v. Atlanta*, etc., R. Co., 77 Ga. 202, 4 Am. St. Rep. 79.

Illinois. — *Ryan v. Chicago*, etc., R. Co., 60 Ill. 171, 14 Am. Rep. 32; *Pittsburgh*, etc., R. Co. v. *Powers*, 74 Ill. 341; *Toledo*, etc., R. Co. v. *O'Connor*, 77 Ill. 391; *Toledo*, etc., R. Co. v. *Ingraham*, 77 Ill. 309; *Chicago*, etc., R. Co. v. *Moranda*, 93 Ill. 302, 34 Am. Rep. 168, 108 Ill. 576, 17 Am. & Eng. R. Cas. 564; *Ryan v. Chicago*, etc., R. Co., 60 Ill. 171, 14 Am. Rep. 32; *North Chicago Rolling Mill Co. v. Johnson*, 114 Ill. 57; *Western Stone Co. v. Whalen*, 51 Ill. App. 512, *affirmed* 151 Ill. 472; *Chicago*, etc., R. Co. v. *Kelly*, 127 Ill. 637. See *Illinois Steel Co. v. Bauman*, 178 Ill. 351, *affirming* 78 Ill. App. 73.

Kentucky. — *Louisville*, etc., R. Co. v. *Collins*, 2 Duv. (Ky.) 114, 87 Am. Dec. 486; *Louisville*, etc., R. Co. v. *Cavens*, 9 Bush (Ky.) 559; *Volz v. Chesapeake*, etc., R. Co., 95 Ky. 188; *Kentucky Cent. R. Co. v. Ackley*, 87 Ky. 278; *Illinois Cent. R. Co. v. Hilliard*, 99 Ky. 684, 18 Ky. L. Rep. 505; *Louisville*, etc., R. Co. v. *Rains*, (Ky. 1893) 23 S. W. Rep. 505, 15 Ky. L. Rep. 423.

Missouri. — *Sullivan v. Missouri Pac. R. Co.*, 97 Mo. 113; *Black, J.*, in *Parker v. Hannibal*, etc., R. Co., 109 Mo. 362, 50 Am. & Eng. R. Cas. 521, 46 Alb. L. J. 286, 35 Cent. L. J. 187; *Dixon v. Chicago*, etc., R. Co., 109 Mo. 413; *Schlereth v. Missouri Pac. R. Co.*, 115 Mo. 87; *Musick v. Jacob Dold Packing Co.*, 58 Mo. App. 322.

Nebraska. — *Union Pac. R. Co. v. Erickson*, (Neb. 1894) 59 N. W. Rep. 347.

Tennessee. — *Nashville*, etc., R. Co. v. *Jones*, 9 Heisk. (Tenn.) 27; *Nashville*, etc., R. Co. v. *Carroll*, 6 Heisk. (Tenn.) 347.

Utah. — *Pool v. Southern Pac. R. Co.*, 7 Utah 303; *Webb v. Denver*, etc., Western R. Co., 1 Utah 363; *Daniels v. Union Pac. R. Co.*, 6 Utah 357.

West Virginia. — *Madden v. Chesapeake*, etc., R. Co., 28 W. Va. 610, 57 Am. Rep. 695.

See also *Pike v. Chicago*, etc., R. Co., 41 Fed. Rep. 95; *Garrahy v. Kansas City*, etc., R. Co., 25 Fed. Rep. 258.

The case of *Palmer v. Utah*, etc., R. Co., 2 Idaho 290, in which a railroad company was held liable for the death of a carpenter in its employ who was killed while riding on one of the company's trains, in an accident caused by a broken rail, of which defect the train dispatcher had notice, but failed to notify the conductor of the train, distinctly favors the different-department limitation.

Recognition of the Limitation in the Mississippi Constitution. — By section 193 of the Mississippi Constitution of 1890 it is provided that actions

may be maintained against a corporation by its employees to recover for injuries suffered by the negligence of fellow servants engaged in different departments of labor. See *Illinois Cent. R. Co. v. Hunter*, 70 Miss. 471, where it was held that a fireman on a locomotive engine and a telegraph operator are engaged in different departments, and about a different piece of work, within the meaning of this provision.

Statutory Recognition of the Limitation — In Texas. — The second section of the Texas Fellow-servants Act of 1891 (Gen. Laws Texas, 1891, c. 24) excludes from its definition of fellow servants employees of a railroad corporation who are engaged in different departments of the service. See *Texas*, etc., R. Co. v. *Tatman*, 10 Tex. Civ. App. 434, where it was held that foremen of switch engines in the same yard, engaged in moving cars, etc., under a common superior, but whose duties are separate and distinct, are fellow servants notwithstanding this statute.

But in *Missouri*, etc., R. Co. v. *Whitlock*, 16 Tex. Civ. App. 176, it was held that an engineer of a road engine, temporarily in the yards for the purpose of taking out a train, is not a fellow servant of the foreman and members of the yard crew, within the Texas Revised Statutes of 1895, art. 4560g.

Same — In Ohio. — In Ohio, what seems to be a partial recognition of the different-department limitation is to be found in the third section of an act passed April 2, 1890 (87 Ohio Laws 150), by which it is in effect provided that every person in the employ of a railroad company, having charge or control of employees in any separate branch or department, shall be held to be a superior and not a fellow servant of employees in any other branch or department who have any power to direct or control in the branch or department in which they are employed. It has been held that an engineer on one train of a railroad company is in a branch or department of its service separate from that of a brakeman on another train of the same company, within the meaning of the phrase "separate branch or department" as it is employed in this statute. *Cincinnati*, etc., R. Co. v. *Margrat*, 51 Ohio St. 130.

1. **Indiana Cases.** — *Gillenwater v. Madison*, etc., R. Co., 5 Ind. 339, 61 Am. Dec. 101; *Fitzpatrick v. New Albany*, etc., R. Co., 7 Ind. 436; *King v. Ohio*, etc., R. Co., 14 Fed. Rep. 277, 8 Am. & Eng. R. Cas. 119.

2. *Columbus*, etc., R. Co. v. *Arnold*, 31 Ind. 174, 99 Am. Dec. 615; *Slattery v. Toledo*, etc., R. Co., 23 Ind. 81; *Gormley v. Ohio*, etc., R. Co., 72 Ind. 31.

3. See *supra*, this subsection, *Statement of the Limitation*.

the supposed reason for the rule failing, the courts refuse to apply the fellow-servant rule.¹

(5) *Application of the Doctrine* — **View that Application of Doctrine Depends upon Consociation** — **In General.** — Since the want of consociation between the servants is the idea underlying the so-called different-department limitation, the application of the doctrine has, in a number of cases, been made to depend more upon the existence or nonexistence of a consociation between the employees than upon their employment in the same or separate departments of the master's business.

Want of Consociation Between Servants in Same Department. — According to this view, servants working in the same departments are not fellow servants, within the rule as to the master's liability, unless they directly co-operate with each other in the same line of employment, or by their usual duties are brought into habitual association so that they may exercise a mutual influence upon each other promotive of proper caution.²

Consociation Between Servants in Different Departments. — And, on the other hand, the doctrine must, according to these cases, be considered to be inapplicable where there is a close association of the injured and negligent servants, even though they may in some sense be employed in different departments.³

Instances in the Application of the Doctrine. — The greater number of cases have, however, applied the doctrine without recognizing this distinction.⁴

1. Basis of the Different-department Limitation. — See the luminous and explicit exposition of the rule by Judge Dickey, of *Illinois*, in the case of *Chicago, etc., R. Co. v. Moranda*, 93 Ill. 302, 34 Am. Rep. 168.

The reasons for applying the limitation against railroad companies are stated by Lorton, J., in *Coal Creek Min. Co. v. Davis*, 90 Tenn. 711, as follows: "The doctrine rests upon the theory that the vast extent of the business of railway companies has led to the division of their business into separate and distinct departments; that by reason of this division a servant in one branch or department has no sort of association or connection with one in another department; that this absence of association gives such servant no opportunity of observing the character of a servant in another department of labor, and no opportunity to guard against the negligence of such servant. The want of consociation is the idea underlying this limitation."

2. Servants in Same Department Not Necessarily Fellow Servants. — *Chicago, etc., R. Co. v. O'Brien*, 155 Ill. 630, affirming 53 Ill. App. 198; *E. Hines Lumber Co. v. Ligas*, 68 Ill. App. 523, affirming 172 Ill. 315.

Apparently on the ground of want of consociation, it was held in *Alton Lime, etc., Co. v. Calvey*, 47 Ill. App. 343, that a former servant of the defendant who had placed dynamite in a stone, which exploded and injured the plaintiff, was not a fellow servant with the plaintiff.

3. Rule Inapplicable Where Close Consociation Exists Between the Servants. — *Joliet Steel Co. v. Shields*, 146 Ill. 603, affirming 45 Ill. App. 453. See *Houston, etc., R. Co. v. Suess*, (Tex. Civ. App. 1896) 37 S. W. Rep. 378.

It has been held that where a mine employee, while engaged in firing a ventilation furnace in a coal mine, was suffocated by smoke caused by the burning of certain wooden buildings, the fire being caused by the negligence of an engineer in charge of an engine at

the entrance of the mine, the company was not liable, because there was the closest association between these employees. *Coal Creek Min. Co. v. Davis*, 90 Tenn. 711.

It has been held that a night yard clerk whose duty it is to take the numbers and seals of the cars delivered to his employer, note the time of receipt and delivery thereof, and make record of and report the same, without interfering with the work of the switching crew employed in the yard, assumes the risk of their negligence. *East St. Louis Connecting R. Co. v. O'Hara*, 59 Ill. App. 649.

And although servants work under different overseers, if they are engaged in the same line of employment, such as necessarily brings them into frequent contact with each other in the prosecution of their work, they are fellow servants. *Chicago, etc., R. Co. v. O'Bryan*, 15 Ill. App. 134.

In the case of *Cleveland, etc., R. Co. v. McLaughlin*, 56 Ill. App. 53, it was intimated that servants may be employed in different departments of labor, and be wholly separated and disconnected in the performance of their duties, and yet, in performing their separate and distinct functions, they may be so habitually thrown together or consociated as to exercise an influence upon each other promotive of proper caution, in which case, it seems to be assumed, the fellow-servant rule will be applicable.

4. Instances of the Application of the Doctrine. — On the ground that the injured and the negligent servants were engaged in different departments, and therefore were not fellow servants, the following employees have been held entitled to recover of the common master for the injuries received:

A common laborer employed in loading and unloading cars, injured through the negligence of a railroad engineer. *Louisville, etc., R. Co. v. Collins*, 2 Duv. (Ky.) 114, 87 Am. Dec. 486.

A foreman in the shipping department of an

Doctrine Restricted to Cases Against Railroads. — In at least one of the United States in which the limitation has been recognized, the courts have clearly shown a disposition not to apply the doctrine except in cases against railroad companies.¹

ice manufactory, injured through the negligence of carpenters who removed the cover from a hot-water tank under the floor of the factory while placing a guard around the opening. *Musick v. Jacob Dold Packing Co.*, 58 Mo. App. 322.

A carpenter working on a railroad bridge, injured through the negligence of an engineer. *Gillenwater v. Madison, etc.*, R. Co., 5 Ind. 339, 61 Am. Dec. 101.

An engineer on one train injured through the negligence of an employee in charge of another train. *Cooper v. Mullins*, 30 Ga. 146, 76 Am. Dec. 638.

A fireman, killed by the explosion of a boiler through the carelessness of a boiler manufacturer. *Nashville, etc.*, R. Co. v. *Jones*, 9 Heisk. (Tenn.) 27.

A teamster hauling ties in the construction of a railroad, injured through the negligence of the engine driver of a train on which the workmen rode to dinner. *Hobson v. New Mexico, etc.*, R. Co., (Arizona 1886) 28 Am. & Eng. R. Cas. 360.

An employee of a railroad company, injured while executing his duties as an "overhauler" of cars, through the negligence of an engineer of a shifting engine employed by the same company. *Richmond, etc.*, R. Co. v. *Norment*, 84 Va. 167, 10 Am. St. Rep. 827.

A section hand, injured while standing at the side of the track to avoid a passing train, by being struck by a lump of coal cast by the fireman of the train from the tender. *Chicago, etc.*, R. Co. v. *Moranda*, 93 Ill. 302, 34 Am. Rep. 168, 108 Ill. 576, 17 Am. & Eng. R. Cas. 564.

A section hand, injured by a piece of coal falling from the tender of a passing train. *Union Pac. R. Co. v. Erickson*, (Neb. 1894) 59 N. W. Rep. 347.

A track walker on a railroad, injured by the negligence of the engineer or fireman on a passenger train. *Sullivan v. Missouri Pac. R. Co.*, 97 Mo. 113.

A brakeman, injured by the bursting of a boiler owing to the negligence of the foreman at the roundhouse in sending out an unsafe engine. *Chicago, etc.*, R. Co. v. *Shannon*, 43 Ill. 338.

A fireman, injured by the negligence of a track repairer in not keeping a bridge or culvert in proper repair. *Chicago, etc.*, R. Co. v. *Swett*, 45 Ill. 197, 92 Am. Dec. 206.

A sailor, injured by the negligence of other servants of the same master, whose duty it was to see that the rigging and tackle of the vessel should not be set out in bad order. *Schooner Norway v. Jensen*, 52 Ill. 373.

A brakeman, injured through the negligence of other servants in placing an awning at the station in dangerous proximity to the operatives on passing trains. *Illinois Cent. R. Co. v. Welch*, 52 Ill. 183, 4 Am. Rep. 593.

A fireman, injured through the negligence of other servants, not connected with the running of the train, in negligently placing a mail

catcher too near the track. *Chicago, etc.*, R. Co. v. *Gregory*, 58 Ill. 272.

A common laborer in the carpenter shop of a railroad company, injured by the negligence of the engineer in charge of a passing train. *Ryan v. Chicago, etc.*, R. Co., 60 Ill. 171, 14 Am. Rep. 32.

A station agent and switchman at a way station, injured by the negligence of other servants of the company, whose duty it was to see that cars should have proper lights and proper brakes. *Chicago, etc.*, R. Co. v. *Taylor*, 69 Ill. 461, 18 Am. Rep. 626.

A switchman, injured through the negligence of car inspectors in permitting a caboose to go out on the road with a defective drawbar. *Toledo, etc.*, R. Co. v. *Fredericks*, 71 Ill. 294.

A track laborer, injured by the negligence of an engineer upon a passing locomotive. *Toledo, etc.*, R. Co. v. *O'Connor*, 77 Ill. 391; *Schlereth v. Missouri Pac. R. Co.*, 115 Mo. 87. See also *Chicago, etc.*, R. Co. v. *Kelly*, 127 Ill. 637.

An engineer, injured by the negligence of a train dispatcher. *Chicago, etc.*, R. Co. v. *McLallen*, 84 Ill. 109.

It has been held that a laborer working in the defendant's quarry, under the direction of a foreman having no connection with the train service, is not a fellow servant of employees operating a passenger train on the defendant's line. *Dixon v. Chicago, etc.*, R. Co., 109 Mo. 413.

And in *Chicago, etc.*, R. Co. v. *Swan*, 176 Ill. 424, affirming 70 Ill. App. 331, it was held that a baggageman, whose work was confined to the baggage car, was not a fellow servant of the engineer on the same train.

But the members of two switching crews working near each other in the same yard and often on the same track have been held to be fellow servants. *Chicago, etc.*, R. Co. v. *Driscoll*, 176 Ill. 330, reversing 70 Ill. App. 91.

And where the deceased had been working with a number of other painters on a large job of painting, side by side on adjoining swinging platforms or stages, or on stages in other parts of the same work, for over two months, it was held that they were all fellow servants. *World's Columbian Exposition v. Bell*, 76 Ill. App. 597.

Some decisions hold that the telegraph service is a separate and distinct department in the operation of a railroad, and that persons, such as telegraph operators and others, engaged in that service are not fellow servants of conductors, engineers, brakeman, and other employees in the immediate management and control of trains. *Hall v. Galveston, etc.*, R. Co., 39 Fed. Rep. 18; *East Tennessee, etc.*, R. Co. v. *De Armond*, 86 Tenn. 75, 6 Am. St. Rep. 816; *Madden v. Chesapeake, etc.*, R. Co., 28 W. Va. 610, 57 Am. Rep. 695.

1. Application of the Doctrine Restricted to Cases against Railroads. — *Coal Creek Min. Co. v. Davis*, 90 Tenn. 711.

(6) *Criticism of the Doctrine.* — The different-department limitation rests upon the assumption that the sole or at least the principal reason for the fellow-servant rule is that it necessarily has a tendency to increase the likelihood of servants' influencing each other, by example, advice, encouragement, and reporting delinquencies to the master, to the exercise of constant caution in the master's work. If this were the sole or even the principal reason for the fellow-servant rule, the propriety of this limitation could not be disputed. But it is not the only reason for the rule, nor, indeed, the fundamental one. The fellow-servant rule rests upon a more logical basis than considerations of public policy. This may be roughly stated as follows: When a contract of employment is being made, the ordinary risks of the employment naturally enter into the contemplation of the parties in agreeing upon the terms and fixing the compensation. It is, therefore, considered that when a person enters the employment of another, he assumes all the ordinary risks of the employment; and since the negligence of fellow servants is one of these risks, he assumes that risk as well.¹ This being the fundamental reason for the fellow-servant rule, its application should not be confined to those servants alone whose duties bring them into such consociation as enables them to exert a mutual influence to caution.² While it would not be unreasonable to hold that the fellow-servant rule is inapplicable where the negligent servant is employed in a department so far removed from that of the injured servant that the former's negligence could not have been regarded as one of the ordinary risks of the employment,³ the different-department limitation, as ordinarily stated, is not supportable upon principle.

1. See *supra*, this title, *Reasons for the Rule.*

2. **Different-department Limitation Criticised.** — The Supreme Court of *Rhode Island*, in a recent case, after quoting the language of Judge Shaw in *Farwell v. Boston, etc., R. Corp.*, 4 Met. (Mass.) 49, 38 Am. Dec. 339, said: "The reasons here set forth are a strong answer to the position taken in the Illinois cases [see *Chicago, etc., R. Co. v. Moranda*, 93 Ill. 302, 34 Am. Rep. 168]. They show an obvious impracticability in trying to gauge the liability of an employer in a complex business by the independence of its different branches, or by the intercommunication of those employed. Not only would it be almost impossible, in many cases, to separate the work into distinct departments and to discern their dividing lines, but incidental duties, changing the relations of workmen to each other, would vary also the master's liability. He would thus be liable for the negligence of a servant at one time or place and not at another. Without a personal supervision of all his help in all their work he could not know when he was responsible and when he was not. Moreover, such a rule would govern the liability of a master when the groundwork upon which the rule is founded did not exist. For if the test of liability be that of the separate and independent duties of the servants, they may nevertheless be so near each other as to be able to exert a mutual influence to caution; or, if it be that of association, they may still be in the same department, but unable, from their duties or position, to exert such influence. But aside from these considerations we do not think the rule is correct in principle. The principle upon which the determination of *Farwell v. Boston, etc., R. Corp.*, 4 Met. (Mass.) 49, 38 Am. Dec. 339, proceeded is the same that has

been generally followed in England and in this country, namely, that the rights and liabilities of both master and servant are those which grow out of their contract relation. The master impliedly agrees to use due care for the safety of his servant, in providing suitable places and appliances for work; and, as is universally conceded, the servant agrees to assume the ordinary risks of his employment. The most common risks of service spring from the negligence of fellow servants. When one works with others he knows that his safety depends on the exercise of care by those around him, as their safety depends also upon his own caution. No man can enter into an employment without a thought of this. Negligence, therefore, among workmen is a breach of the duty which each owes to the others, and not a breach of the master's duty, if he has exercised the care that is required of him." *Brodeur v. Valley Falls Co.*, 16 R. I. 448.

3. **Qualification of the Different-department Limitation.** — *Pike v. Chicago, etc., R. Co.* 41 Fed. Rep. 95.

In *St. Louis Southwestern R. Co. v. Henson*, 61 Ark. 302, the fact that the plaintiff who was injured, and the engineer whose negligence caused the injury, belonged to separate departments was declared to be "of no consequence" further than it may tend to show whether or not the injury complained of was within the risks ordinarily incident to the service undertaken."

In *Northern Pac. R. Co. v. Hamby*, 154 U. S. 349, Mr. Justice Brown said: "If the departments of the two servants are so far separated from each other that the possibility of coming in contact, and hence of incurring danger from the negligent performance of the duties of such other department, could not be

(7) *Rejection of the Doctrine.* — That the doctrine is contrary to the weight of authority has been admitted even by courts which have adopted the limitation,¹ and is not a debatable question; it has been expressly rejected in a large number of well-considered cases.²

3. Statutory Limitations of the Rule—*a. IN GENERAL.* — As has been shown in former parts of this article, some of the statutes, commonly known as employers' liability acts, have limited the operation of the common-law rule governing the liability of a master to one servant for the negligence of another, by recognizing the superior-servant³ and different-department limitations.⁴ Besides this, some of these acts, which will be discussed at this place, have imposed even more radical limitations upon the fellow-servant doctrine. There are, however, to be found in several jurisdictions statutes authorizing recovery in certain cases which do not affect the fellow-servant rule. Such are statutes making railroad companies liable to "any person" injured by reason of the neglect or omission of the company in certain matters, or making them liable whenever "any person" shall die from an injury resulting from or occasioned by the negligence, unskillfulness, or criminal intent of any officer, agent, or servant of the company. The courts have very generally held that this legislation merely provides a remedy unknown to the common law, but has not the effect of abrogating the rule of nonliability of an employer for injuries sustained by reason of the negligence of fellow-servants.⁵

said to be within the contemplation of the person injured, the doctrine of fellow service should not apply."

"The liability does not depend upon the fact that the servant injured may be in a different department of the service from the wrongdoer. The test is, were the departments so far separated from each other as to exclude the probability of contact, and of danger from the negligent performance of their duties by employees of the different departments? If they are so separated, then the servant is not to be deemed to have contracted with reference to the negligent performance of the duties of his fellow servant in such other department." *Norfolk, etc., R. Co. v. Nuckols*, 91 Va. 207.

1. Doctrine Contrary to Weight of Authority. — *Nashville, etc., R. Co. v. Carroll*, 6 Heisk. (Tenn.) 347; *Coal Creek Min. Co. v. Davis*, 90 Tenn. 711.

2. Cases Rejecting the Doctrine — *England.* — *Morgan v. Vale of Neath R. Co.*, L. R. 1 Q. B. 149.

Arkansas. — *St. Louis, etc., R. Co. v. Triplett*, (Ark. 1891) 15 S. W. Rep. 831.

Indiana. — *Slattery v. Toledo, etc., R. Co.*, 23 Ind. 81; *Gormley v. Ohio, etc., R. Co.*, 72 Ind. 31.

Maryland. — *Baltimore Elevator Co. v. Neal*, 65 Md. 438; *Wonder v. Baltimore, etc., R. Co.*, 32 Md. 411, 3 Am. Rep. 143.

Massachusetts. — *Holden v. Fitchburg R. Co.*, 129 Mass. 268, 37 Am. Rep. 343, 2 Am. & Eng. R. Cas. 94.

Michigan. — *Quincy Min. Co. v. Kitts*, 42 Mich. 34; *Adams v. Iron Cliffs Co.*, 78 Mich. 271, 18 Am. St. Rep. 441, 41 Am. & Eng. R. Cas. 414.

Minnesota. — *Foster v. Minnesota Cent. R. Co.*, 14 Minn. 360; *Lindvall v. Woods*, 41 Minn. 212.

New York. — *Wright v. New York Cent. R. Co.*, 25 N. Y. 562.

North Carolina. — *Kirk v. Atlanta, etc., Air-*

Line R. Co., 94 N. Car. 625, 55 Am. Rep. 621, 25 Am. & Eng. R. Cas. 507.

Pennsylvania. — *Keystone Bridge Co. v. Newberry*, 96 Pa. St. 246, 42 Am. Rep. 543; *New York, etc., R. Co. v. Bell*, 112 Pa. St. 400, 28 Am. & Eng. R. Cas. 338.

Rhode Island. — *Brodeur v. Valley Falls Co.*, 16 R. I. 448; *Hanna v. Granger*, 18 R. I. 507.

Texas. — *Dallas v. Gulf, etc., R. Co.*, 61 Tex. 196, 21 Am. & Eng. R. Cas. 575; *Texas, etc., R. Co. v. Harrington*, 62 Tex. 597, 21 Am. & Eng. R. Cas. 571; *Galveston, etc., R. Co. v. Farmer*, 73 Tex. 87; *International, etc., R. Co. v. Ryan*, 82 Tex. 565; *St. Louis, etc., R. Co. v. Welch*, 72 Tex. 298; *Houston, etc., R. Co. v. Rider*, 4 Tex. L. Rev. 292.

Virginia. — While the earlier Virginia cases seem to give some support to the different department limitation (*Moon v. Richmond, etc., R. Co.*, 78 Va. 745, 49 Am. Rep. 401, 17 Am. & Eng. R. Cas. 531; *Richmond, etc., R. Co. v. Norment*, 84 Va. 167, 10 Am. St. Rep. 827; *Richmond, etc., R. Co. v. Williams*, 86 Va. 165, 9 Am. St. Rep. 876), the doctrine has been rejected in the later decisions. *Norfolk, etc., R. Co. v. Donnelly*, 88 Va. 853; *Norfolk, etc., R. Co. v. Nuckols*, 91 Va. 193; *Norfolk, etc., R. Co. v. Houchins*, 95 Va. 398.

3. Limitations of the Rule by Statute. — See *supra*, this section, *Superior Servants*.

4. See *supra*, this section, *Different-department Limitation*.

5. Statutes Allowing Recovery by "Any Person" Injured, etc. — *United States.* — *Randall v. Baltimore, etc., R. Co.*, 109 U. S. 478.

Colorado. — *Atchison, etc., R. Co. v. Farrow*, 6 Colo. 498.

Iowa. — *Sullivan v. Mississippi, etc., R. Co.*, 11 Iowa 422.

Kentucky. — *Casey v. Louisville, etc., R. Co.*, 84 Ky. 79.

Maine. — *Carle v. Bangor, etc., Canal, etc., Co.*, 43 Me. 269.

Mississippi. — *New Orleans, etc., R. Co. v. Hughes*, 49 Miss. 258.

b. EXCEPTIONS APPLICABLE TO RAILROAD EMPLOYEES — (1) In General. — In several of the *United States*, while the general rule is still in force,¹ an exception has been made by statute in the case of employees of railroad companies. In some states these statutes are applicable specially and only to the employees of railroad companies, and embrace either all employees of this class or all railroad employees who are exposed to the peculiar hazards incident to the use and operation of railroads. In other states the employers' liability acts contain a provision rendering railroad companies liable for injuries resulting to employees from the negligent acts or omissions of persons in charge or control of engines, switches, and other specified railroad appliances or departments of railroad work. These statutes and statutory provisions will now be considered.

(2) *Contracts Limiting Liability.* — Agreements limiting the railroad's liability under these statutes to its employees for negligence are, either by special statutory provisions or by judicial construction, unlawful and void.²

(3) *General Statutes Whose Scope Is Confined to Railroad Employees — (a) In General.* — These statutes excepting railroads from the operation of the fellow-servant rule differ widely in their terms and scope, but they all agree in certain particulars. Thus liability arises under them only when the railroad company

Missouri. — Proctor *v.* Hannibal, etc., R. Co., 64 Mo. 112, overruling Schultz *v.* Pacific R. Co., 36 Mo. 13, and Connor *v.* Chicago, etc., R. Co., 59 Mo. 308; Elliott *v.* St. Louis, etc., R. Co., 67 Mo. 272.

New Mexico. — Lutz *v.* Atlantic, etc., R. Co., 6 N. Mex. 496.

Rhode Island. — Miller *v.* Coffin, 19 R. I. 164.
Tennessee. — See East Tennessee, etc., R. Co. *v.* Rush, 15 Lea (Tenn.) 145.

Contra. — Le May *v.* Canadian Pac. R. Co., 17 Ont. App. 293, 44 Am. & Eng. R. Cas. 627.

The Revised Statutes of *Missouri* of 1879, § 2121, giving a penalty of a certain amount whenever any person shall die from an injury caused by the negligence of any officer, servant, etc., while running or managing a locomotive, train, etc., includes the negligence of any and all servants who are engaged in running or managing said locomotive, train, etc. Rine *v.* Chicago, etc., R. Co., 100 Mo. 228.

1. The general rule is still of force in *Georgia*, Code 1873, § 2202; Code 1895, §§ 2610, 3030; Robinson *v.* Huidekoper, 98 Ga. 306.

2. *Agreements of Employees Limiting Railroad's Liability.* — The statute of *Iowa* makes illegal any agreement between the railroad and an employee made for the purpose of restricting the liabilities of the railroad for injuries received by such employee (Code 1873, § 1307; Code 1897, § 2071); but a paper containing such an agreement may be introduced in evidence to show the existence of a rule of the railroad for the government of its employees and the knowledge of the rule on the part of the employee who executed the agreement. Sedgwick *v.* Illinois Cent. R. Co., 73 Iowa 158.

Clause in Membership Certificate in Relief Department Agreeing to Forfeit Benefits if Suit Brought for Injuries. — Where a relief department is maintained by a railroad company for the benefit of its employees who are members thereof, funds for which are provided by contributions both from the members and the company, and are available to injured mem-

bers whether injury was received in such a way as to render the company liable for damages or not, a clause in the contract of membership by which a member agrees with the company that, in consideration of its contribution to the relief fund he will not, if he is injured, take the benefits thus provided and at the same time ask for damages because of the injury, and which thus leaves him his election between such benefits or a suit for damages, is not against public policy, nor contrary to the act rendering void contracts restricting the liability of railroad companies for the neglect or mismanagement of their employees. Donald *v.* Chicago, etc., R. Co., 93 Iowa 284.

Georgia — Employees' Negligence Criminal. — In *Georgia* the rule was formerly announced that a railroad employee might by special contract assume the risks incident to his position, including the risk of liability from the negligence of fellow servants, except that the company could not by such contract waive its liability for criminal negligence. Western, etc., R. Co. *v.* Bishop, 50 Ga. 465; Western, etc., R. Co. *v.* Strong, 52 Ga. 461; Hendricks *v.* Western, etc., R. Co., 52 Ga. 467; Galloway *v.* Western, etc., R. Co., 57 Ga. 512. But while this rule still subsists with respect to masters and servants generally (Fulton Bag, etc., Mills *v.* Wilson, 89 Ga. 318), railroads cannot stipulate against the negligence of their employees resulting in serious bodily injury, because such negligence is, by special statute, made criminal (Code 1895, vol. 3, § 115), and so brought within the exception. Cook *v.* Western, etc., R. Co., 72 Ga. 48.

Release of Liability. — A stipulation in a contract of employment that "the regular compensation paid for the services of employees shall cover all risks incurred and liability to accident from any cause whatever" will not avail to secure nonliability for an injury caused to an employee by the defendant's own negligence or misconduct in the cases specified in the statute. Hissong *v.* Richmond, etc., R. Co., 91 Ala. 514.

is fixed with negligence through the acts of its employees,¹ and the absence of contributory negligence on the part of the injured employee is a prerequisite to recovery.²

Not Retroactive. — An act declaring that the negligence of a fellow servant shall not be a defense in actions against railroad companies for death or injuries sustained by an employee is not retroactive.³

Right of Action Survives. — The right of action given by these statutes to an injured employee survives in accordance with the provisions of acts allowing a recovery for death by wrongful act.⁴

(b) **Constitutionality of Statutes.** — The constitutionality of statutes abrogating the fellow-servant rule with respect to railroad companies has been frequently contested on the ground that such statutes constitute special or class legislation. But these acts have been invariably upheld.⁵ It is authoritatively

1. Negligence of Company Must Be Proved. — Union Pac. R. Co. *v.* Mahaffy, 4 Kan. App. 88.

Ordinary Care Only Required of Company. — The duty of a railroad company towards its employees is measured by the standard of ordinary diligence. The company is not required to exercise extraordinary diligence except towards passengers. Hunt *v.* Chicago, etc., R. Co., 26 Iowa 363; Missouri Pac. R. Co. *v.* Haley, 25 Kan. 35; Atchison, etc., R. Co. *v.* Wagner, 33 Kan. 660.

2. Employee Must Be Free from Contributory Negligence — *Florida.* — Duval *v.* Hunt, 34 Fla. 85; Florida Cent., etc., R. Co. *v.* Mooney, (Fla. 1898) 24 So. Rep. 148.

Georgia. — East Tennessee, etc., R. Co. *v.* Duggan, 51 Ga. 212; McDade *v.* Georgia R. Co., 60 Ga. 119; Atlanta, etc., R. Co. *v.* Webb, 61 Ga. 586; Kenney *v.* Central R. Co., 61 Ga. 590; Central R. Co. *v.* Mitchell, 63 Ga. 173; Baker *v.* Western, etc., R. Co., 68 Ga. 699; Central R. Co. *v.* De Bray, 71 Ga. 406; Redding *v.* East Tennessee, etc., R. Co., 74 Ga. 385; Central R., etc., Co. *v.* Lanier, 83 Ga. 587; Roul *v.* East Tennessee, etc., R. Co., 85 Ga. 197; Georgia R., etc., Co. *v.* Hicks, 95 Ga. 301.

Iowa. — Hoben *v.* Burlington, etc., R. Co., 20 Iowa 562; Cooper *v.* Central R. Co., 44 Iowa 134; Murphy *v.* Chicago, etc., R. Co., 45 Iowa 661; Hawley *v.* Chicago, etc., R. Co., 71 Iowa 717.

Kansas. — Missouri Pac. R. Co. *v.* Haley, 25 Kan. 35; Atchison, etc., R. Co. *v.* Wagner, 33 Kan. 660.

Georgia — Where Employee Injured and Employee at Fault Not Fellow Servant. — Where injury is caused to an employee by coemployees who, under the different-department limitation as recognized in Georgia, are not fellow servants with the person injured, the right of the latter to recover damages is affected by the question of his negligence only as is the right of recovery of a person sustaining no relation to the railroad as employee. Atlanta, etc., R. Co. *v.* Ayers, 53 Ga. 12; Atlanta, etc., R. Co. *v.* Webb, 61 Ga. 586; Central R. Co. *v.* Henderson, 69 Ga. 715. See also the title COMPARATIVE NEGLIGENCE, vol. 6, p. 366.

Georgia — Burden of Proof of Contributory Negligence. — If the injured employee proves actual negligence on the part of his fellow servants, the railroad company must prove his contributory negligence as matter of defense. If, on the other hand, the injured servant

wishes to rest his *prima facie* case against the railroad on a presumption of negligence, the onus resting on him depends upon the circumstances of the case. If, when he received the injury, he was wholly disconnected with the business in the performance of which he was injured a presumption arises that he was without fault and that his fellow servants who worked at the thing that caused the injury were blamable; but when he himself shared directly in the act which resulted in his injury, a presumption of negligence will not arise against his fellow servants until he has shown that he himself was free from fault. Johnston *v.* Richmond, etc., R. Co., 95 Ga. 685; Metropolitan St. R. Co. *v.* Powell, 89 Ga. 601; Western, etc., R. Co. *v.* Vandiver, 85 Ga. 470; Central R., etc., Co. *v.* Small, 80 Ga. 519; Georgia R. Co. *v.* Bryans, 77 Ga. 429; Savannah, etc., R. Co. *v.* Barber, 71 Ga. 644; Gassaway *v.* Georgia Southern R. Co., 69 Ga. 347; Central R., etc., Co. *v.* Sears, 59 Ga. 436; Central R., etc., Co. *v.* Kelly, 58 Ga. 107 [citing and explaining Campbell *v.* Atlanta, etc., R. Co., 53 Ga. 488; Thompson *v.* Central R., etc., Co., 54 Ga. 509; Atlanta, etc., R. Co. *v.* Campbell, 56 Ga. 586; Central R., etc., Co. *v.* Kenney, 58 Ga. 485].

Wisconsin — Burden as to Contributory Negligence. — Under the Wisconsin Act of 1893, the contributory negligence of the employee injured need not be pleaded as a defense; nor is the burden of proving such negligence shifted by the provisions of the statute. Andrews *v.* Chicago, etc., R. Co., 96 Wis. 348.

3. Not Retroactive. — Rittenhouse *v.* Wilmington St. R. Co., 120 N. Car. 544; Wright *v.* Southern R. Co., 123 N. Car. 280.

4. Action Survives. — Philo *v.* Illinois Cent. R. Co., 33 Iowa 47; Gumz *v.* Chicago, etc., R. Co., 52 Wis. 672. The cases are numerous in which a recovery has been permitted under the circumstances without discussion.

5. The Georgia Statute is not a special law, and is not obnoxious to the provision of the state constitution which declares that "no general law affecting private rights shall be varied in any particular case by special legislation, except with the free consent in writing of all persons to be affected thereby." Georgia R. Co. *v.* Ivey, 73 Ga. 499.

The Iowa Statute is a general law and has a uniform operation within the meaning of the Iowa Constitution. McAunich *v.* Mississippi, etc., R. Co., 20 Iowa 338.

settled that such legislation is not obnoxious to the Fourteenth Amendment to the United States Constitution as depriving railroads of property without due process of law, or as denying to them the equal protection of the laws.¹ The courts of some states have held that these statutes are to be supported as against the claim that they constitute class legislation by regarding their scope, though they are expressed in general terms, as limited to employees exposed to the hazards peculiar to operating railroads.² But the courts differ as to what hazards may be brought within this rule,³ and in *Georgia* the statute is upheld without such a limitation to its terms.⁴

(c) **Upon What Corporations and Persons Liability Rests.** — The statutes rendering railroad companies liable for injuries inflicted upon employees are, under the construction placed upon them by the courts, different in scope as to the corporations or persons who are liable under them.⁵ It has been declared that such a statute, being in derogation of the common law, is to be construed strictly in this as in other particulars, and hence it will not be construed to include partnerships, construction companies or bridge companies engaged in the construction of railroads, nor the employees of such companies.⁶ In *Iowa* a construction company running special trains over a railroad for the purpose

1. Not in Conflict with Fourteenth Amendment.

— *Missouri Pac. R. Co. v. Mackey*, 127 U. S. 205, 33 Am. & Eng. R. Cas. 390, *affirming* 33 Kan. 298, 22 Am. & Eng. R. Cas. 306; *Augusta, etc., R. Co. v. Randall*, 79 Ga. 304; *Georgia R., etc., Co. v. Miller*, 90 Ga. 571; *Bucklew v. Central Iowa R. Co.*, 64 Iowa 603; *Pierce v. Central Iowa R. Co.*, 73 Iowa 140; *Missouri Pac. R. Co. v. Haley*, 25 Kan. 35; *Herrick v. Minneapolis, etc., R. Co.*, 31 Minn. 11, 47 Am. Rep. 771, 11 Am. & Eng. R. Cas. 256; *Ditberner v. Chicago, etc., R. Co.*, 47 Wis. 138. See also the title **CIVIL RIGHTS**, vol. 6, p. 78.

In *Chicago, etc., R. Co. v. Pontius*, 157 U. S. 209, the court, by Fuller, C. J., referring to the case of *Missouri Pac. R. Co. v. Mackey*, 127 U. S. 205, said: "As to the objection that the law deprived railroad companies of the equal protection of the laws, and so infringed the Fourteenth Amendment, this court held that legislation which was special in its character was not necessarily within the constitutional inhibition, if the same rule was applied under the same circumstances and conditions; that the hazardous character of the business of operating a railroad seemed to call for special legislation with respect to railroad corporations, having for its object the protection of their employees as well as the safety of the public; that the business of other corporations was not subject to similar dangers to their employees, and that such legislation could not be objected to on the ground of making an unjust discrimination, since it met a particular necessity and all railroad corporations were, without distinction, made subject to the same liabilities."

2. Scope of General Words Limited. — *Deppe v. Chicago, etc., R. Co.*, 36 Iowa 52; *Missouri, etc., R. Co. v. Medaris*, (Kan. 1899) 55 Pac. Rep. 875; *Lavallee v. St. Paul, etc., R. Co.*, 40 Minn. 249; *Johnson v. St. Paul, etc., R. Co.*, 43 Minn. 222; *Blomquist v. Great Northern R. Co.*, 65 Minn. 69. See also *Missouri Pac. R. Co. v. Haley*, 25 Kan. 35.

In *Deppe v. Chicago, etc., R. Co.*, 36 Iowa 52, the court, by Cole, J., said: "The mani-

fest purpose of the statute was to give its benefits to employees engaged in the hazardous business of operating railroads. When thus limited it is constitutional; when extended further it becomes unconstitutional."

3. See *Chicago, etc., R. Co. v. Stahley*, 27 U. S. App. 157, and the following paragraphs of this article.

4. *Georgia R., etc., Co. v. Miller*, 90 Ga. 571; *Georgia R. Co. v. Ivey*, 73 Ga. 499. And see the cases given below construing the *Georgia* statute.

5. Interstate Commerce. — The *Ohio* Statute of 1890 (Laws 1890, p. 149), is not applicable alone to railroads of that state engaged in the domestic commerce of the state. It is equally applicable to railroads doing business in Ohio and engaged in commerce among the states. *Peirce v. Van Dusen*, 78 Fed. Rep. 693.

Minnesota — Ownership of Road. — To bring a railroad within the provisions of the *Minnesota* act it is not necessary that it should own, but only that it should be "operating," a railroad in that state. *Moran v. Eastern R. Co.*, 48 Minn. 46. In this case the company operated a line composed of the lines or tracks of several different companies, and it was held to be within the law.

Iowa — Road Operated by Lessee Without Change of Name. — Where a railroad is leased and controlled by another company but is operated in the name of the lessor, the latter cannot under the statute escape liability to an injured employee. The statutory remedy given against the lessee is cumulative. *Bower v. Burlington, etc., R. Co.*, 42 Iowa 546.

6. Statute Not Applicable to Contractors and Construction Companies. — *Beeson v. Busenbark*, 44 Kan. 669, 44 Am. & Eng. R. Cas. 584.

Railroad Company Constructing Its Own Road. — Where the railroad corporation is apparently engaged in the construction of its road, the statute applies, and though in fact the contract for its construction is held by the president of the company as an individual, third persons dealing with him have a right to assume that he is acting for the company, and a laborer injured through the negligence of a

of constructing it is held to be operating a railroad within the meaning of the statute.¹

Company Having Incidental Power to Operate Tramways. — The corporations to which these acts apply are railroad companies, and the incidental power conferred on a lumber company to buy and operate engines on tramways and to build such roads in connection with its business does not bring it within the statute.²

Street Railroads have been held not within the terms of the statutes of *Minnesota* and *Texas*.³

Receivers — The statutes of *Georgia* and *Texas* have been held to be inapplicable to a receiver in charge of a railroad and operating it under orders of courts.⁴ The statutes of *Iowa*, *Kansas*, *Minnesota*, and *Ohio* have been held to apply in such a case.⁵ In *Georgia*, by a recent statute, receivers are made subject to the same liabilities as railroad corporations in that state.⁶

(d) **What Injuries Are Within Statutes** — *aa. GEORGIA STATUTE.* — Under the Georgia statute the answer to the question whether the railroad company is liable in a particular case does not depend upon the circumstances of the accident as connected with the operation of trains; but the company is liable for injuries inflicted upon an employee through the negligence of his fellow employees and without negligence on his part, whether the injuries were connected with the running of trains or not.⁷

coemployee may hold the company liable under the statute. *Solomon R. Co. v. Jones* 30 Kan. 601.

Minnesota — Exemption of New Road Not Open to Public Use. — The Minnesota statute contains a proviso exempting a railroad company where an injury occurs "in the construction of a new road, or any part thereof, not open to public travel or use." But this proviso has been held not to apply to work done in constructing a yard with tracks to be used in connection with a road already open. *Moran v. Eastern R. Co.*, 48 Minn. 46. Nor does it apply to the operation of a temporary track made to facilitate improvements in a yard of a company already in operation. *Schneider v. Chicago, etc., R. Co.*, 42 Minn. 68.

1. Construction Company Running Special Trains. — *McKnight v. Iowa, etc., R. Constr. Co.*, 43 Iowa 406.

2. Tramway Operated in Connection with Lumber Business. — *Ellington v. Beaver Dam Lumber Co.*, 93 Ga. 53. See also *White v. Kennon*, 83 Ga. 343.

3. Street Railroads — Minnesota. — *Lundquist v. Duluth St. R. Co.*, 65 Minn. 387; *Funk v. St. Paul City R. Co.*, 61 Minn. 435 (street railroad operated by cable).

Texas. — *Riley v. Galveston City R. Co.*, 13 Tex. Civ. App. 247. See also *Austin Rapid Transit R. Co. v. Grothe*, 88 Tex. 262.

4. Statutes Held Inapplicable to Receiver — Georgia. — *Henderson v. Walker*, 55 Ga. 481; *Thurman v. Cherokee R. Co.*, 56 Ga. 376; *Youngblood v. Comer*, 97 Ga. 152; *Brown v. Comer*, 97 Ga. 801; *Robinson v. Huidekoper*, 98 Ga. 306; *Clyde v. Richmond, etc., R. Co.*, 59 Fed. Rep. 394; *Central Trust Co. v. East Tennessee, etc., R. Co.*, 69 Fed. Rep. 353, 357; *Baltimore Trust, etc., Co. v. Atlanta Traction Co.*, 69 Fed. Rep. 358.

Texas. — *Campbell v. Cook*, 86 Tex. 630, 40 Am. St. Rep. 878; *San Antonio, etc., R. Co. v. Reynolds*, (Tex. Civ. App. 1895) 30 S. W. Rep. 846.

5. Statutes Which Include Receivers — Iowa. — *Sloan v. Central Iowa R. Co.*, 62 Iowa 728.

Kansas. — *Rouse v. Harry*, 55 Kan. 589; *Hornsby v. Eddy*, 56 Fed. Rep. 461, 12 U. S. App. 404; *Rouse v. Hornsby*, 67 Fed. Rep. 219, 32 U. S. App. 111.

Minnesota. — *Mikkelsen v. Truesdale*, 63 Minn. 137.

Ohio. — *Peirce v. Van Dusen*, 47 U. S. App. 339, 78 Fed. Rep. 693. See also *Hunter v. Kansas City, etc., R., etc., Co.*, 85 Fed. Rep. 383.

6. Georgia Statute Rendering Receivers Liable. — *Barry v. McGhee*, 100 Ga. 759.

7. Georgia — Injury Need Not Be Connected with Running of Trains. — *Thompson v. Central R., etc., Co.*, 54 Ga. 509; *Georgia R., etc., Co. v. Goldwire*, 56 Ga. 196; *Georgia R. Co. v. Ivey*, 73 Ga. 499; *Georgia R., etc., Co. v. Brown*, 86 Ga. 320; *Georgia R., etc., Co. v. Miller*, 90 Ga. 571; *Georgia R., etc., Co. v. Hicks*, 95 Ga. 301.

A Presumption of Negligence Against the Railroad Arises under the Georgia Statute (Code 1894, § 2321), in favor of an employee whenever it is affirmatively shown that he has been injured by the running of the locomotives, cars, or other machinery of the company, and that he himself was without blame; and whether this presumption has been removed is a question of fact for the jury, and not one of law to be determined by the court. *Savannah, etc., R. Co. v. Phillips*, 90 Ga. 829; *Central R. Co. v. Hubbard*, 86 Ga. 623.

As to when the employee will be presumed to have been free from negligence, see *supra*, this section.

Engine Used in Service of Contractor in Extending Road. — The presumption of negligence created by this section arises although at the time of injury the engine upon which the injured employee was employed was being used in the service of a contractor engaged in building an extension of the defendant's railroad, and not in the usual and ordinary business of

66. IOWA STATUTE. — To bring a case within the Iowa statute, there are two essentials: first, the injured employee must be engaged in work which exposes him to the hazards of moving trains, cars, engines, or machinery on the track; and second, the injury must be caused by the negligence of a coemployee in the actual movement thereof, or in some manner directly connected therewith.¹

Wrong Must Be by Negligence of Employees Engaged in Moving Engines, Etc. — The injury must be such as is caused by the negligent acts of employees engaged in the movement of engines, cars, or machinery on the track or directly connected therewith.² But while it is necessary that the negligence must be that of an employee engaged in moving or directing or aiding in the movement of a train or other machinery on a railroad,³ it is not necessary that such negligence should be the act or failure to act of an employee actually on the train,

the defendant as a common carrier. *Savannah, etc., R. Co. v. Phillips*, 90 Ga. 829.

Early Cases Construing the Statute are *Walker v. Spullock*, 23 Ga. 436; *Cannon v. Rowland*, 34 Ga. 422.

As to What Is a Sufficient Complaint see *Maloy v. Port Royal, etc., R. Co.*, 97 Ga. 295.

1. *Akeson v. Chicago, etc., R. Co.*, 106 Iowa 54; *Malone v. Burlington, etc., R. Co.*, 65 Iowa 417, 54 Am. Rep. 11.

2. *Akeson v. Chicago, etc., R. Co.*, 106 Iowa 54.

Injuries in Operation of Handcars are within the Statute. — *Frandsen v. Chicago, etc., R. Co.*, 36 Iowa 372; *Lombard v. Chicago, etc., R. Co.*, 47 Iowa 494; *Larson v. Illinois Cent. R. Co.*, 91 Iowa 81; *Chicago, etc., R. Co. v. Artery*, 137 U. S. 507. See also *Hamilton v. Chicago, etc., R. Co.*, 93 Iowa 46. In the *Larson* case it was said that all the Iowa cases agree that the use and operation of a railroad are not limited to the movement of what are commonly known as trains, and that the statute applies when the employment and the wrong are connected with the handling of railroad machinery moved upon railroad tracks.

Injuries Connected with Use and Operation. — In *Akeson v. Chicago, etc., R. Co.*, 106 Iowa 54, it was stated that in only two cases in Iowa had a recovery been permitted under the statute where the wrongful act causing the injury was not occasioned by the actual movement of trains, cars, or machinery on the tracks. These cases are *Deppe v. Chicago, etc., R. Co.*, 36 Iowa 52, and *Smith v. Humeston, etc., R. Co.*, 78 Iowa 583. In the earlier of these two cases a laborer employed in loading dirt on mud cars and sometimes accompanying the cars to help in unloading, at other times remaining to loosen fresh dirt with a pickaxe, was injured while shoveling dirt by the caving in of the bank under which he was at work. The court said: "The plaintiff was employed for the discharge of a duty which exposed him to the perils and hazards of the business of railroads; and although the injuries did not arise from such hazards, they cannot be separated from the employment. * * * The ground we rest our affirmation upon is that where the employment is entire, and a part of the continuous services relates to the perilous business of railroading, it brings the case within the statute and its constitutional limit." This decision was questioned in *Malone v. Burlington, etc., R. Co.*,

61 Iowa 326, 47 Am. Rep. 813, and the ground upon which the court rests it seems not in harmony with that of the cases cited to the last preceding paragraph of the text. The case has, however, been repeatedly referred to as authoritative. In *Akeson v. Chicago, etc., R. Co.*, 106 Iowa 54, attention was called to the fact that it was decided under the Act of 1862, which was much more general in its terms than the Act of 1873, the present act.

In *Smith v. Humeston, etc., R. Co.*, 78 Iowa 583, the person injured was employed to remove snow and ice from the railroad track, and rode in a caboose from point to point upon the road where his services were required. While he was so riding at night the caboose stopped upon a bridge. In removing tools piled in a closet in the car which he desired to use, he went upon the car platform, slipped upon ice thereon, fell to the ground under the bridge, and was injured. A verdict in his favor was sustained. The court said: "In this case plaintiff's duties required him to ride on the train, and at the time of receiving the injury he was on the train in the discharge of the duties of his employment. * * * The placing of tools in the water-closet, the stopping of the caboose on the bridge, the failure to notify the occupants of its position, and permitting ice and snow to accumulate on the platform, were matters connected with the use and operation of the train, and hence of the railway. We do not think the fact that the train was not in motion when plaintiff was injured ought to defeat his recovery."

3. Negligence of Persons Operating Trains or Connected Therewith. — The negligence to render the corporation liable under the Iowa statute must be that of an employee and affecting a coemployee who are in some manner performing work for the purpose of moving a train, as loading or unloading it, superintending, directing, or aiding its movement. The persons must be connected in some manner with the moving of a train. Work preparatory thereto which may be done away from a train is not connected with this moving. *Stroble v. Chicago, etc., R. Co.* 70 Iowa 555, 59 Am. Rep. 456.

A "Wiper" in charge of an engine attached to a train which is being made up is not a volunteer, and the railroad company is responsible for an injury due to his negligence, inflicted upon a brakeman engaged in coupling cars. *Whalen v. Chicago, etc., R. Co.*, 75 Iowa 563.

for a train may be controlled by signals given to those upon it by persons not themselves in that position.¹

Statute Protects Those Only Who Are Exposed to Railroad Hazards. — The rule has been repeatedly announced that the statute protects those only who from the nature of their employment are exposed to the dangers and hazards incident to the operation of a railroad.² But this does not limit the benefit of the statute to employees engaged in the operative department of the road.³ The actual hazard to which the employee was exposed in the course of his duty when injured is always looked to, and the general character of his work or what he may be required to do at other times is immaterial.⁴ But persons, although employees of a railroad company, whose duties are unconnected with the use and operation of the road — whose work, for instance, is preparatory to the moving of trains and is of a character which may be done away from a train — are not entitled under the statute to recover for injuries.⁵

1. Negligence Need Not Be That of Person on Train. — *Keatley v. Illinois Cent. R. Co.*, 103 Iowa 282, where it was held that a foreman of a gang of laborers at work upon the retaining wall of an abutment of a railroad bridge, which is being replaced by a new structure, is engaged in the operation of a railroad within the statute, so that an injury caused by his negligence in failing to signal trains approaching the bridge gives a right of action to his injured coemployee.

2. Injured Employee Must Be Exposed to Peculiar Hazards of Railroad. — *Deppe v. Chicago, etc., R. Co.*, 36 Iowa 52; *Handelun v. Burlington, etc., R. Co.*, 72 Iowa 709; *Butler v. Chicago, etc., R. Co.*, 87 Iowa 206; *Akeson v. Chicago, etc., R. Co.*, 106 Iowa 54. The same principle is announced in many other cases.

3. Employees who are by the nature of their employment exposed to the hazards incident to moving trains are within the statute even if they are not engaged in operating the trains. *Smith v. Humeston, etc., R. Co.*, 78 Iowa 583 [*citing* *Pyne v. Chicago, etc., R. Co.*, 54 Iowa 223; *Frandsen v. Chicago, etc., R. Co.*, 36 Iowa 372; *Pierce v. Central Iowa R. Co.*, 73 Iowa 142; *Nelson v. Chicago, etc., R. Co.*, 73 Iowa 576]

Persons Employed in Keeping Track in Condition. — A section foreman engaged in keeping a railroad track in repair for the present operation of trains is exposed to the hazards of railroading and is within the benefit of the statute. *Haden v. Sioux City, etc., R. Co.*, 92 Iowa 226. See also *Malone v. Burlington, etc., R. Co.*, 65 Iowa 417, 54 Am. Rep. 11.

Laborers employed to remove snow and ice from tracks, and who travel for that purpose from place to place on the road, *Smith v. Humeston, etc., R. Co.*, 78 Iowa 583, or who remove such obstructions from the tracks in a railroad yard within a city, *Crowley v. Burlington, etc., R. Co.*, 65 Iowa 658, are within the benefit of the statute.

The following persons have also been held within the protection of the act:

A laborer, employed to assist in loading and unloading gravel from a gravel train, who rides upon such train between the gravel pit and points on the track where the gravel was deposited. *Handelun v. Burlington, etc., R. Co.*, 72 Iowa 709. See also *McKnight v. Iowa, etc., R. Constr. Co.*, 43 Iowa 406.

A person engaged in operating a ditching

machine placed on a flat car, the machine being operated by the movement of the car along the track. *Nelson v. Chicago, etc., R. Co.*, 73 Iowa 576.

A person employed by a railroad to remove an old bridge, whose work required him to ride upon a train on the company's road. *Schroeder v. Chicago, etc., R. Co.*, 47 Iowa 375, 41 Iowa 344.

A laborer in a stone gang employed in the building of a retaining wall at the end of an abutment of a railroad bridge which was being replaced by a new structure, being exposed to the peculiar hazards of the railroad. *Keatley v. Illinois Cent. R. Co.*, 94 Iowa 685.

A Clinker Man, whose business was to remove ashes, cinders, and fire from locomotives, to supply them with water and sand, and to aid in moving and shifting engine tanks, who was injured while engaged in the latter occupation. *Butler v. Chicago, etc., R. Co.*, 87 Iowa 206.

4. Hazards at Time of Accident the Test. — *Canon v. Chicago, etc., R. Co.*, 101 Iowa 613; *Akeson v. Chicago, etc., R. Co.*, 106 Iowa 58.

A Car Inspector whose duty requires him to go in and between cars is exposed to the hazards peculiar to railroads. *Canon v. Chicago, etc., R. Co.*, 101 Iowa 613.

A Section Hand required to go on a train and unload it, *Rayburn v. Central Iowa R. Co.*, 74 Iowa 637, or walking on the track in the exercise of due care as a convenient way of discharging a duty imposed upon him, *Farley v. Chicago, etc., R. Co.*, 56 Iowa 337, is protected by the statute.

A Mechanic in a Railroad Shop who is injured while at work upon a ladder placed against the side of a train, by reason of the negligence of the trainmen, or foreman, in not warning him of a movement of the train, is injured by negligence connected with the use and operation of a railroad. *Pierce v. Central Iowa R. Co.*, 73 Iowa 140.

A Private Detective, employed by a railroad company, who while walking on the track in the performance of his duties was injured by the negligence of the engineer of a passing train, is entitled to recover under the statute. *Pyne v. Chicago, etc., R. Co.*, 54 Iowa 223.

5. Persons Held Not Connected with Use and Operation of Road. — *Stroble v. Chicago, etc., R. Co.*, 70 Iowa 555, 59 Am. Rep. 456.

The following persons have been held not to

cc. KANSAS STATUTE. — In order to recover under the Kansas statute, the employee must have been injured while engaged in services connected with the use and operation of a railroad.¹ But while the statute "embraces only those persons more or less exposed to the hazards of the business of railroading,"² the liability of a railroad company is not limited to cases where the injury is caused by the movement of trains.³

dd. MINNESOTA STATUTE. — The general language of the Minnesota statute is limited by the courts to save the constitutionality of the act to those employees of railroads who are exposed to the peculiar dangers attending the operation of railroads, or what may be termed "railroad dangers."⁴ The test is not whether the conditions are in some respects parallel to those to be found in some other kinds of business, or whether the appliances are in some respects similar to those used in some other kinds of business; but if there is any substantial hazard or condition of danger which contributed to the injury, and which is peculiar to railroading, the statute applies.⁵

be connected with the use and operation of a railroad so as to be entitled to recover under the statute:

Persons whose duty it is to place coal upon a platform within easy reach of locomotives. *Stroble v. Chicago, etc., R. Co.*, 70 Iowa 555, 59 Am. Rep. 456.

A section hand engaged in loading timbers on a car at a siding. *Smith v. Burlington, etc., R. Co.*, 59 Iowa 73.

A person engaged in a railroad coal house who is injured while hoisting coal for the purpose of filling a car. *Luce v. Chicago, etc., R. Co.*, 67 Iowa 75.

A sweeper in a roundhouse injured by falling into a hole negligently left open therein. *Manning v. Burlington, etc., R. Co.*, 64 Iowa 240.

An employee engaged to repair cars on the track and side tracks of a railroad, injured while employed in repairing a car on the side track in a railroad yard by the car escaping and rolling on his foot. *Foley v. Chicago, etc., R. Co.*, 64 Iowa 644.

A laborer in a railroad repair shop injured by being knocked down by a locomotive driving wheel which he and others were moving by hand. *Potter v. Chicago, etc., R. Co.*, 46 Iowa 399.

A machinist employed to repair engines in a roundhouse. *Hathaway v. Illinois Cent. R. Co.*, 92 Iowa 337.

A member of a construction gang whose duties required him to go upon the cars of a railroad company from point to point and to labor upon the company's tracks, who was injured while engaged in placing stones upon the end of cross-ties. *Matson v. Chicago, etc., R. Co.*, 68 Iowa 22.

A wiper, whose duties are to clean the engines, to open and shut the doors of the engine house, to keep the tracks leading thereto free from ice and snow, and to manage a turntable, who is injured by the falling of the doors of the engine house while they are being closed after admitting an engine, is not injured in any manner connected within the use and operation of a railroad. *Malone v. Burlington, etc., R. Co.*, 65 Iowa 477, 54 Am. Dec. 11, 61 Iowa 326.

1. **Injuries Must Occur in Use and Operation of Road.** — *Missouri, etc., R. Co. v. Medaris*, (Kan. 1899) 55 Pac. Rep. 875.

Collision of Handcars. — A section hand injured while returning on a handcar from work to the place appointed for storing tools and appliances for the night, whose injury results from a collision with another handcar caused by the negligence of employees thereon, is entitled to recover. *Union Trust Co. v. Thomson*, 25 Kan. 1. See also *Solomon R. Co. v. Jones*, 30 Kan. 601.

2. **Statutes Embrace Only Employees Exposed to Railroad Hazards.** — *Missouri Pac. R. Co. v. Haley*, 25 Kan. 53.

A stonemason employed by a railroad company in setting curbing around a depot and office building, who was injured by the falling of a curbstone left standing in an insecure position by a coemployee, is not within the protection of the statute. *Missouri, etc., R. Co. v. Medaris*, (Kan. 1899) 55 Pac. Rep. 875.

3. **Injuries Need Not Be Caused by Movement of Trains.** — *Chicago, etc., R. Co. v. Stahley*, 27 U. S. App. 157, 62 Fed. Rep. 363, opinion by Brewer, J.

Thus a recovery has been allowed in the cases of injuries inflicted on the following persons:

Laborers engaged in loading on a car or handcar or unloading therefrom ties or railroad iron for the purpose of transportation to points on the road, the injuries being caused by the falling of the rails or ties. *Atchison, etc., R. Co. v. Brassfield*, 51 Kan. 167; *Union Pac. R. Co. v. Harris*, 33 Kan. 416; *Atchison, etc., R. Co. v. Koehler*, 37 Kan. 463.

A section man carrying a railroad rail to be substituted for a defective one on the track. *Atchison, etc. R. Co. v. Vincent*, 56 Kan. 344.

A bridge carpenter employed by a railroad company who is injured while engaged, not in building a bridge, but in loading timbers on a car for transportation over the line of the company's road. *Chicago, etc., R. Co. v. Pontius*, 52 Kan. 264, affirmed 157 U. S. 209.

An employee in a roundhouse, engaged in putting an engine in order. *Chicago, etc., R. Co. v. Stahley*, 27 U. S. App. 157, 62 Fed. Rep. 363.

4. *Blomquist v. Great Northern R. Co.*, 65 Minn. 69. And see the cases following, wherein the same principle is recognized. See also *supra*, this subdivision, *Constitutionality of Statutes*.

5. **Test — Illustrations.** — *Mitchell, J.*, in Volume XII. —

cc. WISCONSIN STATUTE. — The Wisconsin Act of 1893 is specific. It renders a railroad company liable in damages to one of its employees who, while engaged in the course of his duties "in operating, running, riding upon, or switching passenger, freight, or other trains, engines, or cars," is, without contributory negligence, injured by the negligence of a coemployee.¹ An injured employee has a right of action under the statute if at the time of the injury he was engaged in one of the branches of railroad service covered by the act, whether such service was a mere incident of his general duties or was his principal employment.²

Blomquist v. Great Northern R. Co., 65 Minn. 69.

A wiper in a roundhouse of a railroad, who is injured by the negligence of his fellow servants while engaged in straightening a wire cable used to pull a plow in unloading gravel from flat cars in repairing the road (*Nichols v. Chicago, etc.*, R. Co., 60 Minn. 319), or who is injured while assisting in coaling an engine, by the negligence of a coemployee in moving the same (*Mikkelsen v. Truesdale*, 63 Minn. 137), is within the statute.

So also is a car cleaner engaged inside a passenger coach on a side track who is injured by another coach being kicked in at a dangerous and unusual speed against the coach being cleaned, through the negligence of the switching crew. *Mitchell v. Northern Pac. R. Co.*, 70 Fed. Rep. 15.

Likewise a railroad employee whose duty it is to step from a high platform on to stock cars as they come opposite the platform and pull bundles of hay from the platform to the top of the cars, and who is thrown to the ground and injured by stepping from the platform to the top of a car moving, without his knowledge, at an unsafe rate of speed, in obedience to the order of the conductor, is within the statute. *Leier v. Minnesota Belt Line R., etc.*, Co., 63 Minn. 203.

And the statute is applicable to the negligence of a locomotive engineer in operating his engine, resulting in injury to a section hand at work on the road. *Smith v. St. Paul, etc.*, R. Co., 44 Minn. 17.

A railroad section hand whose duty requires the use of a handcar and who is injured through the negligence of a fellow servant in operating it may recover under the statute. *Steffenson v. Chicago, etc.*, R. Co., 45 Minn. 355. To the same effect is *Slette v. Great Northern R. Co.*, 53 Minn. 341. See also *Northern Pac. R. Co. v. Behling*, 57 Fed. Rep. 1037.

In *Blomquist v. Great Northern R. Co.*, 65 Minn. 69, the plaintiff, with others, was employed as a section man in repairing the defendant's track by taking out rails, putting in new ties, and then replacing the rails. The work had to be done with extraordinary haste in order to avoid danger to approaching trains. While engaged in performing this work, with this degree of haste, and while he and another section man were carrying a heavy iron rail, the plaintiff was injured by his fellow servant negligently releasing his hold on the rail and letting it fall. It was held that this presented a case for the application of the statute.

But in *Pearson v. Chicago, etc.*, R. Co., 47 Minn. 9, where a crew of section men, of which the plaintiff was one, was engaged in lifting

railroad iron from the ground upon a flat car, when some of the crew negligently let one of the rails fall upon the plaintiff's arm, it was held that the circumstances did not bring the case within the statute and that the plaintiff could not recover for the injury sustained.

Again, where a crew of men, of which the plaintiff was one, was engaged in repairing a bridge on the defendant's road, and in performing the work it was necessary to leave the draw partly open, and through the negligence of one of the crew the draw was left unfastened and was blown shut by the wind, and the plaintiff was injured while at work between the stationary part of the bridge and the draw, the defendant was held not liable. *Johnson v. St. Paul, etc.*, R. Co., 43 Minn. 222, following *Lavallee v. St. Paul, etc.*, R. Co., 40 Minn. 249. In this latter case the decedent, who was employed as a boilermaker's helper in the defendant's shop, was directed by the boilermaker to pick up some rubbish lying near a "dead" locomotive then standing on the track which ran into the boiler shop. While so engaged the smokestack of the locomotive, which two men were engaged in removing, fell upon him, inflicting the injury of which he died. It was held that the statute did not apply to this state of facts.

1. Question of Assumption of Risks Not Excluded. — The Wisconsin Act of 1893, c. 220, was not intended to exclude all question as to the assumption by the employee of the risks or perils naturally and usually incident to his employment as a railroad operative. It was not designed to render the railroad an insurer. *Andrews v. Chicago, etc.*, R. Co., 96 Wis. 348.

2. Test — Employment at Time of Injury. — *Ean v. Chicago, etc.*, R. Co., 95 Wis. 69; *Smith v. Chicago, etc.*, R. Co., 91 Wis. 503. See also *Hartford v. Northern Pac. R. Co.*, 91 Wis. 374, decided under the Act of 1889.

A Car Repairer who receives injuries through the negligence of a yard switchman in causing a car to be kicked against the one in which such repairer was at work is not within the statute. *Smith v. Chicago, etc.*, R. Co., 91 Wis. 503.

A Person Employed by a Railroad Company as Warehouseman at a Station, one of whose duties is to seal the doors of freight cars before they leave the station, who is injured while in the performance of such duty by the negligence of the engineer of the train, cannot recover, not being at the time of his injury engaged in operating, running, riding upon, or switching a car. *Hibbard v. Chicago, etc.*, R. Co., 96 Wis. 443.

A Railroad Employee Who, While Riding upon a Handcar in the Course of His Duties, was injured by the negligence of other employees

(4) *Negligence of Person Having Charge or Control of Engine, Train, Switch, etc.*—Several statutes provide in effect that the master or employer shall be liable to a servant or employee for personal injuries received by reason of the negligence of any person in his service or employment who has charge or control¹

who were upon another car, has been held by the Supreme Court of *Minnesota* to be within the benefit of the *Wisconsin* Act of 1893. *Benson v. Chicago, etc., R. Co., (Minn. 1899) 77 N. W. Rep. 798.*

Decisions under Act of 1889.—The *Wisconsin* Act of 1889 gave to a railroad employee free from negligence a remedy for injuries "caused by the negligence of any train dispatcher, telegraph operator, superintendent, yardmaster, conductor, or engineer, or of any other employee who has charge or control of any stationary signal, target point, block, or switch." *Albrecht v. Milwaukee, etc., R. Co., 87 Wis. 105, 41 Am. St. Rep. 30.*

In order to bring a case within the act as due to the negligence of a "superintendent," it must be shown that the superintendent was acting as such at the time of the accident. *Hartford v. Northern Pac. R. Co., 91 Wis. 374.*

A brakeman coupling cars who is injured by the negligence of the engineer of the train, without contributory negligence on his own part, is within the statute. *Kruse v. Chicago, etc., R. Co., 82 Wis. 568.*

See also, construing the same statute, *Gumz v. Chicago, etc., R. Co., 52 Wis. 672; Ballou v. Chicago, etc., R. Co., 54 Wis. 257, 41 Am. Rep. 31; Promer v. Milwaukee, etc., R. Co., 90 Wis. 215, 48 Am. St. Rep. 905; Albrecht v. Milwaukee, etc., R. Co., 94 Wis. 397.*

1. What Is Meant by Charge or Control—*English Statute.*—A person "who has the charge or control" of a train does not necessarily cease to have charge of it within the *English Employers' Liability Act of 1880, § 1, subdiv. 5*, because some of the carriages are uncoupled from each other and from the engine in order that they may be separately dealt with. And those words do not necessarily point only to one person who is in charge of the whole train, but may include persons who have duties to perform in respect of parts of the train. *McCord v. Cammell, 65 L. J. Q. B. 202, (1896) App. 57, 73 L. T. N. S. 634.* See also *Gibbs v. Great Western R. Co., 12 Q. B. Div. 208.*

Massachusetts Statute.—By the words "any person * * * who has the charge or control," in the *Massachusetts* statute, is meant a person who, for the time being, at least, has immediate authority to direct the movements and management of the train as a whole, and of the men engaged upon it. Accordingly, it was held that brakemen whose duty it was to take care of the brakes on the cars, each at his own end of the train, and to stop it seasonably when it had cleared a switch in the freight yard where it was being shifted to a side track, after the engine and caboose had been detached, acting under the supervision and direction of the conductor, who was on the ground or in the caboose, and had at no time given up the direction or control, had not "the charge or control" of the train, as it went on to the side track. *Caron v. Boston,*

etc., R. Co., 164 Mass. 523. See also *Devine v. Boston, etc., R. Co., 159 Mass. 348.*

It is not necessary that the person in charge or control should be actually upon the train. It was so held where a brakeman was injured by reason of a defect in a car, and the conductor was temporarily absent performing duties connected with the general management of the train, but nothing was done in his absence contrary to his orders or which he would not naturally and reasonably have expected to be done. *Donahoe v. Old Colony R. Co., 153 Mass. 356.*

On the other hand, the mere fact that a laborer or brakeman is put in such a position that for the moment he physically controls and directs the movements of the train under the eye of his superior does not of itself constitute him a person in "the charge or control" of the train. *Caron v. Boston, etc., R. Co., 164 Mass. 523;* though there may be circumstances under which he would have such charge and control, *Steffe v. Old Colony R. Co., 156 Mass. 262; Caron v. Boston, etc., R. Co., 164 Mass. 523.*

Whether the foreman of a switch gang, whose sole duty is to direct on which track a train shall be put, and having no further connection with the train after giving such direction, where it is the conductor's duty to see that it is switched on to the track designated, can be said to have "the charge or control" of the train, *quære.* *Caron v. Boston, etc., R. Co., 164 Mass. 523.*

In cases of running down or collision, the engineer must be regarded as the person in charge so far as giving signals or slackening speed at the approach of danger is concerned. *Davis v. New York, etc., R. Co., 159 Mass. 532.*

The plaintiff's intestate, an employee of the defendant, was injured while attempting to get on a moving freight train, by coming in contact with a freight car on another track, which was left so near the track on which the train was moving as to leave a space of less than five inches between it and the passing car. No witness saw the car when it was put there, and the question was whether it was left there by a "person * * * who had the charge or control of any * * * locomotive engine or train" upon the railroad. The evidence tended to show that the yard was an extensive one, that cars came into it from all directions, and that two switching crews, each having a conductor and switching engine, one working by day and the other by night, were making up trains. The court held that the question was for the jury. *Dacey v. Old Colony R. Co., 153 Mass. 112.*

Alabama Statute.—A section foreman of a railroad is not a person in charge of a switch, within *Code 1886, subdiv. 5, § 2590*, in the sense that it is his duty to see that it is properly opened or closed; his duty is rather that of a superintendent under subdiv. 2 of this

of any signal,¹ locomotive engine, switch, car, or train² upon a rail-

section, to superintend and see that the ways, works, machinery, and plant are kept in order. Birmingham R., etc., Co. v. Baylor, 101 Ala. 488.

If no person has been especially appointed to the duty of opening and closing a railroad switch, and a spur track, connected with the main line of such switch, is in constant use in order that trains may pass each other, and engineers and conductors are provided with keys to the switch for that purpose, such persons, *pro hac vice*, are in charge of the switch. Birmingham R., etc., Co. v. Baylor, 101 Ala. 488.

An engineer, while running an engine and himself loading it with coal, has charge and control of the engine, but not superintendence of it. He does control and superintend the fireman in matters relating strictly to his duties as fireman. Culver v. Alabama Midland R. Co., 108 Ala. 330.

If it be shown to be the duty of the fireman to receive signals from a switchman and transmit them to the engineer — if, in other words, he is under a duty to keep a lookout for the purpose of acquainting the engineer with the situation, that the engine may be handled accordingly — he may be said to be, for that purpose, a person in charge of the engine, in that he is discharging a duty which primarily rests upon the engineer. Richmond, etc., R. Co. v. Jones, 92 Ala. 218; Brown v. Louisville, etc., R. Co., 111 Ala. 275.

Where the death of an employee was caused by his being thrown to the ground by a collision between the handcar on which he was riding and one in advance of it, due to the section boss causing the two cars to be run too close together across a bridge and directing the checking of the brake on the front car, jerking the handle from such employee, the railroad company is liable. Jones v. Alabama Mineral R. Co., 107 Ala. 400. See to the same effect Highland Ave., etc., R. Co. v. Dusenberry, 98 Ala. 239.

Where it appeared that the plaintiff, a wiper, was at work on a switch engine standing over an ashpit to be cleaned, that the engineer was on the ground packing a gland valve, that a hostler on the engine opened the throttle and the steam blew out in the plaintiff's face, and it did not appear that the hostler and engineer had any joint control of the engine, it was held error to refuse to charge the jury that both could not be in control at the same time, and that if the engineer was then in control the company was not liable. Louisville, etc., R. Co. v. Richardson, 100 Ala. 232.

The superintendence of the yardmaster of a railroad involves the movement of cars, and, of consequence, the control and direction of men and appliances necessary to place the cars in safe and proper positions. Kansas City, etc., R. Co. v. Burton, 97 Ala. 240.

Wisconsin Statute. — In Albrecht v. Milwaukee, etc., R. Co., 94 Wis. 397, it was held that a railroad employee whose duties were to couple and uncouple cars, set brakes, open and close switches, and to follow the switch engine from yard to yard, taking cars in and out of spur tracks, and who had keys to the

switches, had "charge or control" of a switch, within Laws Wis., 1889, c. 438 (Sanb. & B. Annot. Stat., § 1816a).

1. Brakeman Uncoupling Cars — Negligence of Engineer — Signalling. — In an action by a brakeman for injuries alleged to have been caused by the negligence of the engineer, where the evidence of the plaintiff was to the effect that just before going between the cars to uncouple them he signalled the engineer to stand still, and that at the time of the signal the engineer was looking at him, and that his fellow brakeman who, the engineer testified, signalled him soon after the plaintiff went between the cars, to give "slack," was in an opposite direction from the plaintiff, it was held that any signal to move the train which was not made or authorized by the plaintiff was improper, and the engineer, knowing the perilous position of the plaintiff, was negligent in obeying such signal. Louisville, etc., R. Co. v. Baker, 106 Ala. 624. See also Hisson v. Richmond, etc., R. Co., 91 Ala. 514.

2. What Constitutes a Train. — A locomotive with one or more cars attached to it, with or without passengers or freight, in motion upon a railroad from one point to another by means of power furnished by the locomotive, constitute a train. Dacey v. Old Colony R. Co., 153 Mass. 112. See also Caron v. Boston, etc., R. Co., 164 Mass. 527.

A number of cars coupled together, forming one connected whole and moving from one point to another upon a railroad, in the ordinary course of its traffic, under an impetus imparted to them by a locomotive which shortly before had been detached, constitute a train. Caron v. Boston, etc., R. Co., 164 Mass. 523.

The negligence of the conductor of a switch engine who has charge of making up freight trains in the yard is not the negligence of a person in charge or control of a "locomotive engine or train," within the statute. Thyng v. Fitchburg R. Co., 156 Mass. 13. Here the court said: "The statute, in referring to a 'signal, switch, locomotive engine, or train,' seems chiefly to contemplate the danger from a locomotive engine or train as a moving body, and to provide against the negligence of those who, either wholly or in part, control its movements. The charge or control is of that whose characteristic is rapid and forceful motion. It relates to the train or locomotive engine as a whole, and not to the individual parts which make up the train or engine."

Where, after the train had come in and the passengers had got out, the conductor took charge of it for the purpose of distributing the cars on to the different tracks, and in so doing he carelessly directed how the engine should operate against them, and they were sent with too much force against a bunting post, thereby injuring the plaintiff, who was cleaning one of the cars, it was held that the injury was caused by the negligence of a person in charge of a train, even though when the cars struck the post they were separated. Devine v. Boston, etc., R. Co., 159 Mass. 348.

Handcar. — If a car is adapted to the rails of a railroad, and is used in the business of rail-

road,¹ or of any part of the track of a railroad.²

Care in Selection of Servants. — Under the *Alabama* statute an employer is responsible for an injury to an employee resulting from the negligence of a coemployee, where such negligence is within the statute, without reference to the care and diligence used by the employer in selecting his servants.³

Gross or Wilful Negligence. — And it is not necessary to show either gross or wilful negligence on the part of the offending employee.⁴

Knowledge of Situation of Person Injured. — It has been held that where the engineer of a train, knowing that it is being moved for the purpose of being coupled to other cars, propels it with such force and violence against the cars as to endanger employees attempting to effectuate this purpose, he is guilty of negligence, though he may not have known that any employee was between the cars.⁵

The Repeal of the Texas Statute did not affect the question of liability for an injury occurring during the life of the statute.⁶

c. DEFECT IN CONDITION OF WAYS, WORKS, MACHINERY, ETC. — Some of the statutes render the employer liable when the injury is caused by reason of any defect in the condition of the ways, works, machinery, or plant connected with or used in the business of the employer.⁷

Negligence of Employer. — Under the *Massachusetts* statute evidence of negligence on the part of the employer is not essential to a right of action, as the statute is not so limited, but includes the negligence "of any person in the service of the employer and intrusted by him with the duty of seeing that the ways, works, or machinery were in proper condition."⁸

roads, it is none the less within the meaning of the word as used in the statute because it is made to be propelled by hand. *Kansas City, etc., R. Co. v. Crocker*, 95 Ala. 412.

1. Construction of Words "Upon a Railroad." — See *Cox v. Great Western R. Co.*, 9 Q. B. Div. 106.

An engine stalled in a roundhouse for repairs is not "upon a railroad" within the meaning of Stat. Mass., 1887, c. 270, § 1, cl. 3, providing against negligence of those who, either wholly or in part, control the movements of the locomotive, so as to allow recovery thereunder by a machinist making repairs injured by the engineer's "blowing down" the engine into the ashpit in which such machinist was. *Perry v. Old Colony R. Co.*, 164 Mass. 296.

Temporary Railroad. — In *Doughty v. Firbank*, 10 Q. B. Div. 358, it was held that the meaning of the term "railway" in this connection is not confined to railways belonging to railway companies such as are subject to the provisions of the Railway Regulation Acts, but extends to a temporary railway laid down by a contractor for the purposes of the construction of works.

2. Person in Charge or Control of Any Part of Track. — A section foreman who, with his force, did the track-repair work on a part of the defendant's road, was held to be "a person in the charge or control of any part of the track of a railway," within subdiv. 5 of the *Alabama* statute. *Alabama, etc., R. Co. v. Davis*, (Ala. 1898) 24 So. Rep. 862.

3. Care in Selecting Servants. — *Culver v. Alabama Midland R. Co.*, 108 Ala. 330.

4. Louisville, etc., R. Co. v. Graham, 98 Ky. 688.

5. Alabama Midland R. Co. v. McDonald, 112 Ala. 216.

6. Culpepper v. International, etc., R. Co., 90 Tex. 627. This was with reference to the repeal of the Act of March 10, 1891, by the Act of May 4, 1893.

7. Defect in Condition of Ways, Works, Machinery, etc. — See *Weblin v. Ballard*, 17 Q. B. Div. 122; *McGiffin v. Palmer's Shipbuilding, etc., Co.*, 10 Q. B. Div. 5; *Howe v. Finch*, 17 Q. B. Div. 187; *Walsh v. Whiteley*, 21 Q. B. Div. 371; *Paley v. Garnett*, 16 Q. B. Div. 52; *Cripps v. Judge*, 13 Q. B. Div. 583; *Heske v. Samuelson*, 12 Q. B. Div. 30; *Columbus, etc., R. Co. v. Bridges*, 86 Ala. 448, 11 Am. St. Rep. 58. See also the title MASTER AND SERVANT.

In *Georgia Pac. R. Co. v. Brooks*, 84 Ala. 138, a hammer used for driving spikes into cross-ties on a railroad was held not to be machinery within the *Alabama* Act.

8. Evidence of Negligence of Employer Not Essential. — *Lynch v. Allyn*, 160 Mass. 248.

The *Massachusetts* Act of 1887, c. 270, § 1, cl. 1, makes the employer liable for injuries occasioned "by reason of any defect in the condition of the ways, works, or machinery connected with or used in the business of the employer, which arose from or had not been discovered or remedied owing to the negligence of the employer or of any person in the service of the employer and intrusted by him with the duty of seeing that the ways, works, or machinery were in proper condition."

If a section master is intrusted by a railroad company with the performance of the duty, or a part of the duty, of supervision of the tracks which a reasonable regard for the safety of its employees required the corporation to perform, such company is liable for his negligence. *Babcock v. Old Colony R. Co.*, 150 Mass. 467.

Where the general superintendent employed by a contractor who was engaged in putting

Negligence of Employee in Handling Appliances. — But the statute does not give a right of action against the employer for the negligence of a fellow servant in handling, or using a machine, tool, or appliance which is itself in proper condition.¹

d. ACT OR OMISSION IN OBEDIENCE TO RULES OF EMPLOYER. — By the *English* statute and by the statutes of several of the *United States*, the employer is made responsible where the injury is the result "of the act or omission of any person in the service of the employer, done or made in obedience to the rules or by-laws of the employer, or in obedience to particular instructions given by any person delegated with the authority of the employer in that behalf." Under this provision, of course, an injury occasioned by reason of the disobedience of a fellow servant of a rule of the employer does not render the latter liable,² nor does an injury resulting from the act or omission of the person injured have that effect.³

4. Application of the Rule to Volunteers. — Unquestionably a person who voluntarily, and without any employment, undertakes to perform a service for another must be regarded as assuming the risks incident to the business, so that the fellow-servant rule will be applicable in an action by him against the master.⁴

up a building directed the masons to build a certain piece of wall, leaving them to construct their stagings, without instructions, and was not present while the stagings were building, it was held that these circumstances of themselves were not evidence of negligence on his part which would sustain an action against the contractor by masons' tenders who were injured by the falling of the stagings, which were improperly built by the masons, a part of whose duties was to build such stagings without specific orders. *Burns v. Washburn*, 160 Mass. 457.

If an employer furnishes a suitable room for a given machine and a particular kind of work and instructs his foreman to ventilate the room by opening the windows when the machine is in use, he is not liable for an accident to a workman caused by the foreman's failure on a particular occasion to open the windows, as it is the result of the negligence of a fellow servant. *McGuerty v. Hale*, 161 Mass. 51.

1. *Ashley v. Hart*, 147 Mass. 573.

2. *Laughran v. Brewer*, 113 Ala. 509; *Columbus, etc., R. Co. v. Bridges*, 86 Ala. 448, 11 Am. St. Rep. 58.

3. *Dixon v. Western Union Tel. Co.*, 68 Fed. Rep. 630, 71 Fed. Rep. 144, *construing* the *Indiana Act* of March 4, 1893.

4. **Volunteers — Application of the Rule To —** *England*. — *Potter v. Faulkner*, 1 B. & S. 800, 101 E. C. L. 800, 8 Jur. N. S. 259, 31 L. J. Q. B. 30.

Maine. — *Osborne v. Knox, etc.*, R. Co., 68 Me. 49, 28 Am. Rep. 16.

Mississippi. — *Millsaps v. Louisville, etc., R. Co.*, 69 Miss. 423.

Pennsylvania. — *Flower v. Pennsylvania R. Co.*, 69 Pa. St. 210, 3 Am. Rep. 251; *Wischam v. Rickards*, 136 Pa. St. 109, 20 Am. St. Rep. 900.

Texas. — *Texas, etc., R. Co. v. Skinner*, 4 Tex. Civ. App. 661; *Mayton v. Texas, etc., R. Co.*, 63 Tex. 77, 51 Am. Rep. 637.

And see *McDaniel v. Highland Ave. etc., R. Co.*, 90 Ala. 64; *Sparks v. East Tennessee, etc., R. Co.*, 82 Ga. 156; *Everhart v. Terre Haute, etc., R. Co.*, 78 Ind. 292, 41 Am. Rep.

567; *New Orleans, etc., R. Co. v. Harrison*, 48 Miss. 112, 12 Am. Rep. 356; *Honor v. Albrighton*, 93 Pa. St. 475.

Accordingly, where the servants of a railroad company were turning a truck on a turntable, and a person not in the employment of the company volunteered to assist them, and while so engaged other servants of the company negligently propelled a steam engine and thereby caused the death of the person who so volunteered, it was held that the company was not liable in an action by the personal representative of the deceased. *Degg v. Midland R. Co.*, 1 H. & N. 773, 26 L. J. Exch. 171.

But it has been held that where a boy of eleven years, in an emergency and at the request of the employees of a brig, gratuitously attempted to release the stern hawser while the brig was being towed out of a harbor he did not thereby become a fellow servant with such employees. *Geibel v. Elwell*, 19 N. Y. App. Div. 285.

And where the conductor of a train orders a boy standing by, and who was not in the employ of the railroad company, to uncouple the cars, and the boy refuses, but, on being threatened by the conductor, uncouples the cars and is injured, the two cannot be considered fellow servants. *New Orleans, etc., R. Co. v. Harrison*, 48 Miss. 112.

In an action for injuries to a child seven years of age, who was riding on an engine contrary to the rules of the company, and, while the engine was in motion, was told by the engineer to get off, and did so and was injured, it has been held improper to charge that if the plaintiff went on the engine to ring the bell by request of the engineer, and under the engineer's promise to pay him therefor, without the defendant's authority, and if the plaintiff was injured by the negligence of the engineer or fireman, the plaintiff, the engineer, and the fireman were coemployees and the company was not liable, the doctrine having no application to the case. *Chicago, etc., R. Co. v. West*, 125 Ill. 320, 8 Am. St. Rep. 380.

A passer by who is casually appealed to by a workman for information respecting a thing

5. Application of the Rule to Minors. — It has sometimes been maintained that, since the entire doctrine of coservice rests upon the contract between the employer and the employee, and since a minor is not bound by his contracts, the rule should not be applied to him. But this reasoning has been denied,¹ and it has been held that, as a general rule, the fellow-servant rule is applicable even though the injured servant is a minor.²

6. Compulsory Service. — Since the fellow-servant rule is founded upon the voluntary assumption by the servant of the perils incident to the employment, including the negligence of competent fellow servants, the rule is clearly inapplicable where the service of the injured servant is made compulsory by law.³

7. Extraordinary Risks Interposed by Master Without Warning. — For the same reason it has been held that the rule has no application to risks which are not contemplated by the injured servant when entering upon the service, and does not exempt the master from liability for an injury resulting from an extraordinary risk interposed by the master without warning.⁴

which the latter is doing in a public thoroughfare is not to be considered a volunteer assistant, so as to exonerate the workman's master from responsibility for an injury resulting to the former from the workman's negligent mode of doing the work. *Cleveland v. Spier*, 16 C. B. N. S. 399, 111 E. C. L. 399.

As to whether a servant of one master who voluntarily assists the servants of another and is injured through their negligence can recover see *infra*, this title, *Who Are Fellow Servants*.

1. Minors — Application of the Rule To. — In *Gartland v. Toledo, etc.*, R. Co., 67 Ill. 498, the *Illinois* Supreme Court said: "It is not denied that an express contract made with a minor is valid at his option. It is not void, but voidable only. The express contract by the minor, in this case, was to serve his employer on a railroad. So long as he did not avoid that contract, but remained in the employment of the railroad company, he was, of necessity, subject to all the hazards attending that kind of employment, one of which was the negligence of his fellow servants in the same line of duty. The minor, by so entering into this employment, came under the general rule, prevailing, not only in this court, but in almost all the courts of the several states and in *England*, and took upon himself the natural and ordinary risks and perils incident to the service in which he engaged, among which was the carelessness of his fellow servants."

2. Alabama. — *Lovell v. De Bardelaben Coal, etc.*, Co., 90 Ala. 13; *Harris v. McNamara*, 97 Ala. 181.

California. — *Fisk v. Central Pac. R. Co.*, 72 Cal. 38, 1 Am. St. Rep. 22.

Illinois. — *Gartland v. Toledo, etc.*, R. Co., 67 Ill. 498; *North Chicago Rolling Mill Co. v. Benson*, 18 Ill. App. 194.

Indiana. — *Ohio, etc.*, R. Co. *v. Hammersley*, 28 Ind. 371; *Pittsburgh, etc.*, R. Co. *v. Adams*, 105 Ind. 151, 23 Am. & Eng. R. Cas. 408.

Massachusetts. — *King v. Boston, etc.*, R. Corp., 9 Cush. (Mass.) 112; *Curran v. Merchants' Mfg. Co.*, 130 Mass. 374.

Michigan. — *Greenwald v. Marquette, etc.*, R. Co., 49 Mich. 197.

Missouri. — *Smillie v. St. Bernard Dollar Store*, 47 Mo. App. 402.

See *Fones v. Phillips*, 39 Ark. 17, 43 Am. Rep. 264; *Brown v. Maxwell*, 6 Hill (N. Y.) 592, 41 Am. Dec. 771.

But it has been held that the fellow-servant rule is inapplicable where the injured servant is incapable, by reason of his youth and inexperience, of apprehending and appreciating the dangers of the employment. *Evans v. American Iron, etc.*, Co., 42 Fed. Rep. 519; *Hinckley v. Horazdowsky*, 133 Ill. 359, 23 Am. St. Rep. 618; *Hamilton v. Galveston, etc.*, R. Co., 54 Tex. 556, 4 Am. & Eng. R. Cas. 528. See *Houston, etc.*, R. Co. *v. Miller*, 51 Tex. 274.

If, however, the minor has come to years of discretion, the rule is applicable. *Texas, etc.*, R. Co. *v. Carlton*, 60 Tex. 397, 15 Am. & Eng. R. Cas. 350.

3. Rule Inapplicable where Service of Injured Person Is Compulsory — Pilot Employed Under English Merchants' Shipping Act. — Thus, a pilot was engaged by the defendants, under the compulsory clauses of the English Merchants' Shipping Act, for a voyage in a vessel of which they were owners. While giving directions on board, before the voyage commenced, the pilot was killed by the fall of a boat in consequence of the neglect of the defendant's servants. In an action by the personal representatives of the deceased, it was held that there was no implied contract that the pilot should take upon himself the risk of injury by the shipowners' servants, and that the defendants were liable. *Smith v. Steele*, 32 L. T. N. S. 195.

Same — Convict Laborers. — The servitude of a convict being involuntary, the fellow-servant rule has no application where a convict laborer, while working for a person who obtains his services under a contract with the state, is injured by the negligence of another servant of such contractor. *Buckalew v. Tennessee, etc.*, R. Co., (Ala. 1896) 20 So. Rep. 606; *Boswell v. Barnhart*, 96 Ga. 521.

4. Liability of Master for Extraordinary Risks Created After Employment. — *Burke v. Anderson*, 69 Fed. Rep. 814; *Northwestern Fuel Co. v. Danielson*, 57 Fed. Rep. 915, 12 U. S. App. 688; *Libby v. Scherman*, 146 Ill. 553, 37 Am. St. Rep. 191; *Hagins v. Cape Fear, etc.*, R. Co., 106 N. Car. 537. See the title MASTER AND SERVANT.

But in *Cornelison v. Eastern R. Co.*, 50

8. Illegal Employment — Sunday Work. — Persons who are fellow servants of a railway company do not, in view of the rule which affects the liability of the company to one of them who may be injured by another one, cease to be such because the work on which they were employed at the time of the injury was being done on the Sabbath. The fact that the work was not of that character allowed by law to be done on the Sabbath does not affect the question.¹

9. Rule Applicable Only to Servants. — To make out a case for the application of the fellow-servant rule, the injured person must, of course, have been a servant of the defendant.²

VI. WHO ARE FELLOW SERVANTS — 1. In General. — While the general rule that a master is not liable to his servant for the negligence of a fellow servant is universally recognized, it is often difficult to determine from a given state of facts who are and who are not fellow servants. This question is controlled by a variety of considerations. Thus, it is generally recognized that in order that servants may be considered to be fellow servants they must be in the employ of the same master and the employment must be one having a common object.³ In addition to this, some courts hold that the negligent servant must not be the superior of the injured servant.⁴ And a yet more limited number of courts require that they be employed in the same department of the master's business.⁵

2. Definitions. — In consequence of this, the definitions of fellow servants which are to be found in the books are somewhat divergent.

Where the Superior-servant and Different-department Limitations Are Rejected. — In the jurisdictions where the courts have rejected both the superior-servant and the different-department limitations, fellow servants may be said to be persons who are engaged in a common employment in the service of the same master.⁶

Minn. 23, in which case the facts were that the plaintiff, a servant of a third person, was engaged under the direction of a servant of the defendant in blasting rock, the two men working together in this operation, pursuing a method of withdrawing an unexploded charge of powder from the rock which proved dangerous, it was held that the defendant was not responsible to the plaintiff for injury suffered by him, upon the ground that the act was dangerous.

1. Rule Applicable though Employment Is Illegal. — Houston, etc., R. Co. v. Rider, 62 Tex. 267.

2. Application of the Rule Limited to Defendant's Servants. — Ft. Worth, etc., R. Co. v. Bell, 5 Tex. Civ. App. 28.

Same — Injury to Wife of Defendant's Employee. — The fellow-servant rule does not prevent a recovery against a railroad company by a husband in its employ for injuries sustained by his wife through the negligence of his fellow servants. Campbell v. Harris, 4 Tex. Civ. App. 636.

Same — Injury to Barkeeper on Defendant's Boat. — In an action to recover for injuries received by reason of the negligence of the defendants' engineer, it appeared that the plaintiff was, at the time of the accident, keeping a bar upon a steamboat of the defendants, under an agreement whereby he was to pay them the sum of two hundred dollars per month for the privilege and use of the bar, and for a stateroom and meals. He received to his own use the profits of all sales of liquors, etc. It was held that this contract did not make the plaintiff in any sense the employee of the defendants, so as to relieve the defend-

ants from liability for the negligence of its servants. Yeomans v. Contra Costa Steam Nav. Co., 44 Cal. 71.

Same — Injury to Person Selling Popcorn on Defendant's Train. — A person who buys of a railroad company the right to sell popcorn on its trains is not a servant, so as to prevent a recovery against the company for his death. Com. v. Vermont, etc., R. Co., 108 Mass. 7, 11 Am. Rep. 301.

Same — Injury to Stockholder Riding Free. — A stockholder, riding free at the invitation of the president of a road, is a passenger and not a fellow servant of the train hands. Philadelphia, etc., R. Co. v. Derby, 14 How. (U. S.) 482.

3. Common Employment in Service of Same Master Necessary. — Parker v. Hannibal, etc., R. Co., 109 Mo. 362, 50 Am. & Eng. R. Cas. 521, 46 Alb. L. J. 286, 35 Cent. L. J. 187; Ewan v. Lippincott, 47 N. J. L. 192, 54 Am. Rep. 148; Hardy v. Delaware, etc., R. Co., 57 N. J. L. 505; Delaware, etc., R. Co. v. Hardy, 59 N. J. L. 35. See *infra*, this section, *Necessity of a Common Employment; Necessity of a Common Master*.

4. See *supra*, this title, *Extent and Limitations of the Rule; Superior Servants*.

5. See *supra*, this title, *Extent and Limitations of the Rule; Different-department Limitation*.

6. Definition — Where Superior-servant and Different-department Limitations Are Rejected. — Of the different definitions which have been attempted by text writers the following may be quoted as examples:

"Persons are fellow servants where they are engaged in the same common pursuit, under the same general control." Cooley on Torts

Where Superior-servant and Different-department Limitations Prevail. — But this definition, to define the term correctly as it is understood in the jurisdictions where either the superior-servant or different-department limitations prevail, must be modified accordingly.¹

3. Necessity of a Common Employment. — While the courts are agreed that employees must be engaged in a common employment in order to be fellow servants,² they are not agreed as to what constitutes such common employment.³ According to one line of cases, where persons are engaged in distinct departments of service, and have no such association in their work as to be able to observe and influence each other's conduct and report delinquencies to the master, they are not in a common employment so as to be fellow servants.⁴ But according to another line of cases, and what seems the better

544, note 1. See *Gravelle v. Minneapolis, etc., R. Co.*, 10 Fed. Rep. 711.

"All who serve the same master, work under the same control, derive authority and compensation from the same common source, and are engaged in the same general business, though it may be in different grades or departments of it, are fellow servants." Thompson on Negligence 1026, § 31. This definition was quoted with approval in *Adams v. Iron Cliffs Co.*, 78 Mich. 271, 18 Am. St. Rep. 441, 41 Am. & Eng. R. Cas. 414, and in *Mele v. Delaware, etc., Canal Co.*, 59 N. Y. Super. Ct. 367.

"The true test of fellow service is community in that which is the test of service, which is subjection to control and direction by the same common master, in the same common pursuit." 3 Wood on Railroads, § 388.

"All servants in the employ of the same master, subject to the same general control, paid from a common fund, and engaged in promoting or accomplishing the same common object, are to be held fellow servants in a common employment." Beach on Contributory Negligence, § 332.

It has, however, been said that all these rules are faulty and of little practical use, by reason of their being stated so broadly and in such general and comprehensive terms. *Justice v. Pennsylvania Co.*, 130 Ind. 321.

In *Pennsylvania* it has been said that employees are fellow servants "if they are in the employment of the same master, engaged in the same common work, and performing duties and services for the same general purposes." *Lehigh Valley Coal Co. v. Jones*, 86 Pa. St. 432. See also *Duffy v. Oliver*, 131 Pa. St. 203.

For other definitions quite similar to those quoted above, see the following cases: *Hatfield v. St. John Gas Light Co.*, 32 New Bruns. 100, affirmed in 23 Can. Sup. Ct. Rep. 164; *St. Louis, etc., R. Co. v. Triplett*, 54 Ark. 289; *Cincinnati, etc., R. Co. v. McMullen*, 117 Ind. 439.

1. Same — Where the Different-department Limitation Prevails. — It has been held in *Illinois*, where the different-department limitation prevails, that an instruction defining fellow servants as "servants employed by a common master, whose relations are such that each as to the other, by the exercise of ordinary caution, can either prevent or remedy the negligent acts of the other, or protect himself against their consequences," is not objectionable as leaving out the element of co-opera-

tion, where the definitions given in other instructions supply the omission. *Wenona Coal Co. v. Holmquist*, 152 Ill. 581, affirming 51 Ill. App. 507.

Same — Statutory Definition in Texas. — By the Texas Act of March 10, 1891, it is provided that "all persons who are engaged in the common service of * * * railway corporations and who, while so engaged, are working together at the same time and place to a common purpose, of same grade, neither of such persons being intrusted by such corporations with any superintendence or control over their fellow employees, are fellow servants with each other; provided, that nothing herein contained shall be so construed as to make employees of such corporation, in the service of such corporation, fellow servants with other employees of such corporation, engaged in any other department or service of such corporation. Employees who do not come within the provisions of this section shall not be considered fellow servants." Gen. Laws 1891, c. 24, § 2, p. 25. This provision, with slight changes of expression, has been incorporated in the Texas Revised Statutes of 1895, art. 4560g.

2. Common Employment Necessary. — *Hatfield v. St. John Gas Light Co.*, 32 New Bruns. 100, affirmed 23 Can. Sup. Ct. Rep. 164.

3. What Constitutes a Common Employment. — See *St. Louis, etc., R. Co. v. Triplett*, 54 Ark. 289.

4. See supra, this title, Extent and Limitations of the Rule — Different-Department Limitation.

In *Daniels v. Union Pac. R. Co.*, 6 Utah 357, it was said that in order to constitute servants of one master fellow servants, "they must be engaged in the same line of work, be under the control of the same foreman, be employed and discharged by the same head of the department in which they work; that they labor together in such personal relations that they can exercise an influence upon each other promotive of proper caution in respect of their mutual safety; that they shall be at the time of the injury directly co-operating with each other in the particular business in hand, or that their mutual duties shall bring them into habitual conassociation, as that they may exercise an influence upon each other promotive of proper caution, and to be so situated in their labor, to some extent, to supervise and watch the conduct of each other as to skill, diligence, and carefulness."

Under the Texas Act of March 10, 1891 (Gen.

view, common employment is service of such kind that, in the exercise of ordinary sagacity, all who engage in it may be able to foresee when accepting it that through the carelessness of fellow servants it may probably expose them to injury.¹ Within neither of these views, however, is it necessary that the servants be engaged in the same particular work.²

4. Necessity of a Common Master — *a. GENERAL RULE.* — It is a self-evident proposition that persons are not fellow servants, within the rule exempting a master from liability to one servant for the negligence of another, unless they are in the employ, or at least under the control, of the same master.³

Laws 1891, c. 24, § 2, p. 25), it has been held that a brakeman in the employ of a railroad company who, together with another brakeman and a conductor, had been ordered by the company to get on a train, which was afterwards wrecked, at one place and go to another, but who, though drawing regular pay, was not engaged in operating the train, was not a fellow servant with the engineer who was operating the train at the time of the accident. "They were doubtless of the same grade or rank; one had no control or superintendence over the other; but they were not at the time working together to a common purpose." *Galveston, etc., R. Co. v. Waldo*, (Tex. Civ. App. 1894 26 S. W. Rep. 1004.

And a brakeman who was struck by a passing switch engine, while inspecting the couplings of his train, was held not to be a fellow servant within the *Texas* statute (Rev. Stat. 1895, arts. 4560 *f*, 4560 *g*) with the employees on the switch engine, such engine not being engaged in any service or performing any act in reference to the brakeman's train. *Patterson v. Houston, etc., R. Co.*, (Tex. Civ. App. 1897) 40 S. W. Rep. 442.

1. *McAndrews v. Burns*, 39 N. J. L. 117; *Baird v. Pettit*, 70 Pa. St. 482. And see *St. Louis, etc., R. Co. v. Triplett*, 54 Ark. 289. See *supra*, this title, *Extent and Limitations of the Rule — Different-Department Limitation*.

By an equally divided court it was held in *Sell v. Charles Rietz, etc., Lumber Co.*, 70 Mich. 479, that the plaintiff, who worked in the sawmill of the company, was a fellow servant of the men in charge of the warehouse kept for the storage of salt. It appeared in that case that the sawmill and salt block were run in conjunction, but the business of one was really separate and distinct from the other. For that reason the court divided.

2. Employment on Same Piece of Work Not Necessary. — *Hatfield v. St. John Gas Light Co.*, 32 New Bruns. 100, *affirmed* 23 Can. Sup. Ct. Rep. 154; *Lehigh Valley Coal Co. v. Jones*, 86 Pa. St. 432.

3. Common Master Necessary — England. — *Warburton v. Great Western R. Co.*, L. R. 2 Exch. 30; *Swainson v. North-Eastern R. Co.*, 3 Exch. Div. 341; *Vose v. Lancashire, etc. R. Co.*, 2 H. & N. 728; *Abraham v. Reynolds*, 5 H. & N. 143.

Canada. — *Jennings v. Grand Trunk R. Co.*, 15 Ont. App. 477; *St. John Gas Light Co. v. Hatfield*, 23 Can. Sup. Ct. Rep. 164, *affirming* 32 New Bruns. 100.

United States. — *Gray v. Philadelphia, etc., R. Co.*, 24 Fed. Rep. 168, 22 Am. & Eng. R. Cas. 351; *Central R. Co. v. Stoermer*, 51 Fed. Rep. 518.

California. — *Yeomans v. Contra Costa Steam Nav. Co.*, 44 Cal. 71.

Connecticut. — *Burke v. Norwich, etc., R. Co.*, 34 Conn. 474; *Zeigler v. Danbury, etc., R. Co.*, 52 Conn. 543.

Georgia. — *Coggin v. Central R. Co.*, 62 Ga. 685; *Crusselle v. Pugh*, 67 Ga. 430, 44 Am. Rep. 724.

Illinois. — *Wabash, etc., R. Co. v. Peyton*, 106 Ill. 534, 46 Am. Rep. 705.

Maryland. — *Philadelphia, etc., R. Co. v. State*, 58 Md. 372, 10 Am. & Eng. R. Cas. 792.

Massachusetts. — *Snow v. Housatonic R. Co.*, 8 Allen (Mass.) 441, 85 Am. Dec. 720; *Curley v. Harris*, 11 Allen (Mass.) 113; *Goodfellow v. Boston, etc., R. Co.*, 106 Mass. 461; *Morgan v. Smith*, 159 Mass. 570.

Michigan. — *Lake Superior Iron Co. v. Erickson*, 39 Mich. 492, 33 Am. Rep. 423.

Minnesota. — *Carroll v. Minnesota Valley R. Co.*, 13 Minn. 30, 97 Am. Dec. 221; *Connolly v. Davidson*, 15 Minn. 519, 2 Am. Rep. 154.

Nebraska. — *Union Pac. R. Co. v. Billeter*, 28 Neb. 422, 41 Am. & Eng. R. Cas. 431.

New Jersey. — *Hardy v. Delaware, etc., R. Co.*, 57 N. J. L. 505.

New York. — *Kowalewska v. New York, etc., R. Co.*, 72 Hun (N. Y.) 611; *Kilroy v. Delaware, etc., Canal Co.*, 121 N. Y. 22; *Smith v. New York, etc., R. Co.*, 19 N. Y. 127, 75 Am. Dec. 305; *Svenson v. Atlantic Mail Steamship Co.*, 33 N. Y. Super. Ct. 277, 57 N. Y. 112; *Young v. New York Cent. R. Co.*, 30 Barb. (N. Y.) 229; *Devlin v. Smith*, 89 N. Y. 470, 42 Am. Rep. 311; *Sullivan v. Tioga R. Co.*, 112 N. Y. 643, 8 Am. St. Rep. 793; *Nary v. New York, etc., R. Co.* (Supreme Ct.) 9 N. Y. Supp. 153, *affirmed* without opinion 125 N. Y. 759; *Conlan v. New York Cent., etc., R. Co.*, 74 Hun (N. Y.) 115; *Krulder v. Woolverton*, 11 Misc. Rep. (N. Y. Super. Ct.) 537; *Kane v. Mitchell Transp. Co.*, 90 Hun (N. Y.) 65; *Murray v. Dwight*, 15 N. Y. App. Div. 241.

Ohio. — *Pennsylvania Co. v. Gallagher*, 40 Ohio St. 637, 48 Am. Rep. 689.

Pennsylvania. — *Catawissa R. Co. v. Armstrong*, 49 Pa. St. 186; *Hunt v. Pennsylvania R. Co.*, 51 Pa. St. 475; *Noll v. Philadelphia, etc., R. Co.*, 163 Pa. St. 504.

Wisconsin. — *Stetler v. Chicago, etc., R. Co.*, 46 Wis. 497.

In an action against a railroad company by an employee of an iron company whose work was to unload cars after they had been placed in the defendant's yard by its employees, it was held that the plaintiff was not a fellow servant with the employees of the railroad company who were engaged in shifting cars. "The plaintiff was not an employee of the defendant company or on the footing of one

b. REASONS FOR THE RULE. — The rule is clearly a just one. The exemption of the employer from liability to a servant for the negligence of a fellow servant rests upon the implied undertaking of the servant to assume the risks necessarily incident to the service in which he engages, including the risks of the negligence of his fellow servant in discharging duties which the employer cannot be expected to discharge personally. There is no reason why a third person, with whom there is no such implied undertaking, should be entitled to immunity from the results of the negligence of his servants, merely because the injured person is also an employee who in the course of his employment is compelled to come in contact with the servants of such third person.¹

c. EMPLOYEES OF DIFFERENT RAILROAD COMPANIES — *In General.* — Applying the above-stated general rule, the employees of different railroad companies cannot, generally speaking, be considered fellow servants.²

Effect of Agreement under Which One Road Uses Track or Station of the Other. — Arrangements are often made by different railroad companies, having lines which connect, to run trains over each other's tracks, but whatever may be the effect of such an agreement upon the parties thereto, it cannot ordinarily have the effect of making the employees of either of the contracting parties the fellow servants of the employees of the other.³ Accordingly, where a servant of a railroad company which runs its trains over the track of another is injured by reason of the negligence of the servants of the latter company, the fellow-servant rule does not prevent a recovery against either the company employing him⁴

under the Act of April 4, 1868." *Noll v. Philadelphia, etc., R. Co.*, 163 Pa. St. 504.

Railroad and Steamboat Company Operating as Joint Carriers. — In *Carroll v. Minnesota Valley R. Co.*, 13 Minn. 30, 97 Am. Dec. 221, the defendant and a steamboat company were operating under an arrangement by which the defendant was to carry passengers and freight between St. Paul and Belle Plain and the steamboat company was to carry them between Belle Plain and Mankato. Each sold tickets over the route of the other. It was held that the servants of one of the companies were not fellow servants with those of the other so as to prevent the servants of one recovering from the other for injuries by the negligence of its servants.

1. McKinney on Fellow Servants, § 14.

2. *Servants of Different Railroads.* — A somewhat pronounced illustration of this rule is to be found in the case of *Swainson v. North-Eastern R. Co.*, 3 Exch. Div. 341. It appeared that the stations of two railroad companies closely abutted. The plaintiff was a signalman, employed by but one of the companies, and in its uniform. He discharged his duties, however, in connection with the trains of both roads, and was injured by the negligence of the employees of the other company. He brought an action against said company, and it was strenuously argued that the negligence in question was that of a fellow servant. The court, however, decided the contrary, and the plaintiff recovered.

Employees of Different Roads Using Same Track in Common. — Where two railroads use the same track in common the employees of one of the roads are not fellow servants with the employees of the other. *Gross v. Pennsylvania, etc., R. Co.*, (Supreme Ct.) 16 N. Y. Supp. 616, 62 Hun (N. Y.) 619; *Noonan v. New York Cent., etc., R. Co.*, 62 Hun (N. Y.) 618, 16 N. Y. Supp. 678, affirmed without opin-

ion 131 N. Y. 594; *Galveston, etc., R. Co. v. Croskell*, 6 Tex. Civ. App. 160.

Employees of Different Roads Occupying the Same Station. — In *Vose v. Lancashire, etc., R. Co.*, 2 H. & N. 728, where a station was jointly occupied by two railroad companies, a servant of one, injured by the negligence of the servants of the other, was held entitled to recover damages from the company whose employees were in fault.

Employees of Connecting Carriers. — Where a railroad, instead of delivering goods to another at the point where the two roads meet, delivers them in the yard of the connecting company, the employees of the second company and the employees of the first company who are, for that purpose, engaged in operating its trains in the yard of the second company are not fellow servants. *Vannatta v. Central R. Co.*, 154 Pa. St. 262, 35 Am. St. Rep. 823.

Employees of Two Roads that Cross. — It has been held that where a fireman on a railroad train is injured by a collision at a crossing of two roads, brought about by the concurring negligence of the engineer on his train and of the employees of the other road, his right to recover damages for such injury from the other road will not be defeated by reason of the negligence of the engineer. *Gray v. Philadelphia, etc., R. Co.*, 24 Fed. Rep. 168, 22 Am. & Eng. R. Cas. 351.

3. *Servants of Different Roads Where One Uses Tracks or Station of the Other.* — *Martin v. Louisville, etc., R. Co.*, 95 Ky. 612; *Philadelphia, etc., R. Co. v. State*, 58 Md. 372, 10 Am. & Eng. R. Cas. 792; *Robertson v. Boston, etc., R. Co.*, 160 Mass. 191.

4. *Same* — *Actions by Servants of the Road Using Another's Track.* — In *Stetler v. Chicago, etc., R. Co.*, 46 Wis. 497, it was decided that a railroad company running its trains on the tracks of another company was liable to its

or the company which owns the road.¹ Nor does the fellow-servant rule prevent a recovery by a servant of the company which owns the road, who is injured through the negligence of the servants of the company which runs its trains over the road, against either the latter company² or his employer.³

Effect of a Partnership Agreement Between the Roads. — Where there is a partnership agreement, or other agreement of that nature, between the roads, the employees of the different roads which are parties to the agreement may become fellow servants so as to prevent a recovery for each other's negligence.⁴

d. EMPLOYEES OF PALACE-CAR COMPANY AND EMPLOYEES OF RAILROAD. — Where a palace car is run as part of a train under a contract between the palace-car company and the railroad company, the employees of the two companies are not, it has been held, fellow servants.⁵

employees for an injury occasioned by a defect in the track, and the doctrine of fellow servants was not mentioned, the court evidently considering it to have no application.

But in *Illinois* it has been held that where there is a lease between two companies under which the trains of the lessee are allowed to run over the track of the lessor, subject to its control, the employees of the two companies are to be regarded as the fellow servants of the lessor, that company being the common master, and an engine driver of the lessee company cannot recover against it for injuries received in a collision which was caused by the negligence of the servants of the lessor. *Clark v. Chicago, etc., R. Co.*, 92 Ill. 43, affirming 2 Ill. App. 596.

1. Same — Recovery Permitted Against Company Owning Road — Maryland. — *Philadelphia, etc., R. Co. v. State*, 53 Md. 372, 10 Am. & Eng. R. Cas. 792.

Massachusetts. — *Robertson v. Boston, etc., R. Co.*, 160 Mass. 191.

New York. — *Nary v. New York, etc., R. Co.*, (Supreme Ct.) 9 N. Y. Supp. 153, affirmed without opinion 125 N. Y. 759; *Tierney v. Syracuse, etc., R. Co.*, 85 Hun (N. Y.) 146, affirmed without opinion 155 N. Y. 642; *Strader v. New York, etc., R. Co.*, 86 Hun (N. Y.) 613, 33 N. Y. Supp. 761, affirmed without opinion 157 N. Y. 708.

Texas. — *Texas, etc., R. Co. v. Easton*, 2 Tex. Civ. App. 378.

Vermont. — *Sawyer v. Rutland, etc., R. Co.*, 27 Vt. 370; *Matter of Merrill*, 54 Vt. 200.

Wisconsin. — *Phillips v. Chicago, etc., R. Co.*, 64 Wis. 475, 23 Am. & Eng. R. Cas. 453.

The D. & N. and the S. railroads connected, forming a continuous line. By an arrangement between the two companies, a train owned and run by the S. company went over both roads to a certain point and back daily, the D. & N. company paying the S. company monthly an agreed price for the service upon its road. The train, when on the road of the D. & N. company, was under its general control and governed by its rules, and it had entire control of the hands upon it; but the S. company was at liberty to use what engine and employ what hands it pleased. The plaintiff was a brakeman on this train and was injured by a collision with a train of the D. & N. company on its own road, caused by the negligence of the conductor of that train. It was held that the plaintiff was not an employee of the D. & N. company, and that the

conductor of the other train was therefore not his fellow servant. *Zeigler v. Danbury, etc., R. Co.*, 52 Conn. 543.

Same — Servants of Terminal Association and a Member of the Association. — In an action against three railroad companies which had united in forming a terminal association, by the administrator of a car inspector in the employ of one of the companies, who had been killed through the negligence of a switchman in the employ of the association, it was held that the deceased and the switchman were not fellow servants. *Kastl v. Wabash R. Co.*, 114 Mich. 53.

2. Same — Actions by Servants of the Road Owning the Track or Station. — *Taylor v. Western Pac. R. Co.*, 45 Cal. 323; *Smith v. New York, etc., R. Co.*, 19 N. Y. 127, 75 Am. Dec. 305.

In *Warburton v. Great Western R. Co.*, L. R. 2 Exch. 30, the porter of a railroad company whose station was used by another company was allowed to recover damages for an injury occasioned by the negligence of its servants.

3. Same — Action by Servant Against Employer. — *Sullivan v. Tioga R. Co.*, 112 N. Y. 643, 8 Am. St. Rep. 793; *Catawissa R. Co. v. Armstrong*, 49 Pa. St. 186.

Same — Servants of Terminal Company and Railroad Using Its Tracks. — In an action by the car accountant of the defendant terminal company for injuries sustained by the negligence of trainmen in the employ of a railroad using the tracks of the defendant company, it was held that he and the trainmen were not fellow servants. *Northern Pac. R. Co. v. Craft*, 69 Fed. Rep. 124.

4. Employees of Roads Constituting a Partnership. — *Swainson v. North-Eastern R. Co.*, 3 Exch. Div. 341.

But an agreement between two roads to connect at their respective termini, and to sell through tickets and charge through rates, is not such an arrangement, at least where the fare and freight remain distinct on each line. In such case the servants of the respective companies are not to be considered as co-employees. *Carroll v. Minnesota Valley R. Co.*, 13 Minn. 30, 97 Am. Dec. 221.

5. Servants of Palace-car Company and Railroad Company Respectively. — It has been so held in an action against a railroad by the porter of a Pullman car who was injured through the negligence of employees of the railroad company. *Hughson v. Richmond, etc., R. Co.*, 2 App. Cas. (D. C.) 98, 22 Wash. L. Rep. 55;

e. EMPLOYEES OF RAILROAD AND EMPLOYEES OF EXPRESS COMPANY. — Whether the employees of an express company and the employees of a railroad company which is employed by the express company in carrying on its business are fellow servants must depend upon the relation between the two companies and the respective duties of the injured and negligent servants.¹

f. SERVANTS OF PRINCIPAL AND INDEPENDENT CONTRACTOR. — Servants of an independent contractor and servants of the principal by whom the contractor is employed are not fellow servants, although they may work side by side in a common employment, if they are not under the control of a common master.² But it has been held to be otherwise where the servants of the con-

Jones *v.* St. Louis Southwestern R. Co., 125 Mo. 666.

1. Servants of a Railroad Company and Express Company Respectively. — In the case of *Union Pac. R. Co. v. Kelley*, 4 Colo. App. 325, the administratrix of a railroad express messenger, in the employ of an express company, sued the railroad, which, pursuant to a contract agreement, carried the express packages and express messages of the express company over its lines, for injuries sustained by the deceased through the negligence of the defendant's brakeman. The deceased was in the employ of the express company as messenger. The express cars were furnished by the defendant. By virtue of an agreement between it and the express company, he acted as baggageman for the defendant, the railroad company furnishing the express company other service in exchange. He performed the baggage service under instructions from the express company, but his baggage duties were defined by the railroad company's baggage department, and as baggageman he was under its direction. He was, however, in the sole employ of the express company, which paid him his wages, and which alone could discharge him, either as messenger or baggage agent. If his baggage service was unsatisfactory to the railroad company, it could request his discharge, but the discharge came from the express company. It was held that he was not a fellow servant with the negligent brakeman.

And there are other cases which hold that an express messenger, carried on a railroad train under a contract with an express company, is not a fellow servant with the trainmen so as to preclude a recovery by him against the railroad company for their negligence. *Jennings v. Grand Trunk R. Co.*, 15 Ont. App. 477; *Blair v. Erie R. Co.*, 66 N. Y. 313, 23 Am. Rep. 55; *Pennsylvania Co. v. Woodworth*, 26 Ohio St. 585.

But in the case of *San Antonio, etc., R. Co. v. Taylor*, (Tex. Civ. App. 1896), 35 S. W. Rep. 855, a servant of a railroad company was held to be a fellow servant with an employee of an express company, notwithstanding their employment by different companies. This was an action by the porter of the railroad company against both the railroad company and the express company for injuries received, while assisting in the unloading of goods from an express car, through the negligence of an express messenger in the employ of the express company. The petition alleged, in effect, that there was a community of interest and common arrangement between the defendants for the handling and storing of express

matter and baggage by them at the station where the plaintiff was employed, and that the plaintiff was employed by the railroad company to assist in the unloading of the railroad company's baggage cars. The appellants demurred to the petition on the ground that it showed no cause of action against them. The demurrer was overruled, but on appeal this ruling was reversed on the ground that the petition showed that there was such a joint arrangement or agreement between the defendant companies as would render the servants of each of them, engaged in the joint business, the servants of both for that business, although separately employed and paid.

2. Servants of Principal and Servants of Independent Contractor — *England.* — *Union Steamship Co. v. Claridge*, (1894) App. 185; *Cameron v. Nystrom*, (1893) App. 308; *Abraham v. Reynolds*, 5 H. & N. 143; *Woodley v. Metropolitan Dist. R. Co.*, 2 Exch. Div. 384; *Turner v. Great Eastern R. Co.*, 33 L. T. N. S. 431.

Canada. — *Torpy v. Grand Trunk R. Co.*, 20 U. C. Q. B. 446. See also *Sheerman v. Toronto, etc., R. Co.*, 34 U. C. Q. B. 451.

United States. — *The Victoria*, 69 Fed. Rep. 160.

Connecticut. — *Burke v. Norwich, etc., R. Co.*, 34 Conn. 474.

Georgia. — *Coggin v. Central R. Co.*, 62 Ga. 685.

Louisiana. — *Riley v. State Line Steamship Co.*, 29 La. Ann. 791, 29 Am. Rep. 349.

Massachusetts. — *Goodfellow v. Boston, etc., R. Co.*, 106 Mass. 461; *Ward v. New England Fibre Co.*, 154 Mass. 419; *Reagan v. Casey*, 160 Mass. 374.

Michigan. — *Lake Superior Iron Co. v. Erickson*, 39 Mich. 492, 33 Am. Rep. 423.

Mississippi. — *Louisville, etc., R. Co. v. Conroy*, 63 Miss. 562, 56 Am. Rep. 835.

Nebraska. — *Union Pac. R. Co. v. Billeter*, 28 Neb. 422, 41 Am. & Eng. R. Cas. 431.

New York. — *Barrett v. Singer Mfg. Co.*, 1 Sweeny (N. Y.) 545; *Young v. New York Cent. R. Co.*, 30 Barb. (N. Y.) 229; *Smith v. New York, etc., R. Co.*, 19 N. Y. 127, 75 Am. Dec. 305; *Coughtry v. Globe Woolen Co.*, 56 N. Y. 124, 15 Am. Rep. 387; *Svenson v. Atlantic Mail Steamship Co.*, 57 N. Y. 108; *Devlin v. Smith*, 89 N. Y. 470, 42 Am. Rep. 211; *Sanford v. Standard Oil Co.*, 118 N. Y. 571, 16 Am. St. Rep. 787; *Johnson v. Netherlands American Steam Nav. Co.*, 132 N. Y. 576, *affirming* (Supreme Ct.) 10 N. Y. Supp. 927; *Murray v. Dwight*, 15 N. Y. App. Div. 241; *Anderson v. Boyer*, 13 N. Y. App. Div. 258.

Pennsylvania. — *Hass v. Philadelphia, etc., Steamship Co.*, 88 Pa. St. 269, 32 Am. Rep. 462.

tractor pass under the control of the principal.¹

g. SERVANTS OF INDEPENDENT CONTRACTORS. — Although the servants of different contractors, while engaged in working together on a building, are in a common employment, they are not fellow servants unless they are under the control of a common master.²

h. SERVANTS OF CONTRACTOR AND SUBCONTRACTOR. — And the same is true of the servants of a contractor and those of a subcontractor.³

i. SERVANT OF ONE MASTER UNDER CONTROL OF ANOTHER. — There is no doubt that the general servant of one person may become the servant of another by submitting himself to the control and direction of the other.⁴ In such a case the servant becomes the fellow servant of the servants of the person under whose control he comes; and neither his general master nor his special master is liable if he is injured by the negligence of one of the other servants.⁵ But to establish the fact that the servant of one person has thus

Texas. — Galveston, etc., R. Co. v. Gar-teiser, 9 Tex. Civ. App. 456; Cunningham v. International R. Co., 51 Tex. 503, 32 Am. Rep. 632.

The application of this rule is illustrated by the New York case of *Svenson v. Atlantic Mail Steamship Co.*, 57 N. Y. 108. A workman while employed upon a barge which was engaged in lightering a steamship, was injured through the negligence of one engaged upon the steamship in discharging her cargo. In an action to recover for the injury, the defendant's answer admitted that, at the time of the accident, the defendant owned and had the control and management of the steamer; the barge was not owned by the defendant, and the plaintiff was employed and paid by its master. The court held that the proof, together with the admission in the answer, was sufficient to authorize the jury to find that the man who caused the injury was a servant of the defendant and working for it at the time, and that he and the plaintiff were not fellow servants. In this case the court said: "There was no proof that the plaintiff and the man who caused the injury to him were fellow servants. The latter was in the employment of the defendant, engaged in unloading the cargo from the steamship upon the lighter. The former was in the service of the owners of the lighter, in receiving the cargo and transporting the same to the city of New York. They were not the servants of a common principal in any sense, and they were not strictly engaged in the same employment. The duties of the one were confined to the steamship and of the other to the lighter. Hence, this case does not fall within the rule that an employer is not responsible for an injury occasioned to one employee by another engaged in the same general services or undertaking."

In the case of *Abraham v. Reynolds*, 5 H. & N. 143, 6 Jur. N. S. 53, the facts were as follows: A sold to B some bales of cotton, which were in the upper story of a warehouse. B employed C to see it weighed, and lower it by means of a rope into a cart, which he contracted with D to provide for it, who sent his servant E for that purpose. In lowering one of the bales the rope broke, through the negligence of C, in consequence of which the bale fell on E and injured him. It was held that E might maintain an action against B.

Where the plaintiff's wife, who was cooking

for her husband on a work train of the defendant, and boarding its employees on the train, pursuant to an agreement under which the defendant deducted the board from the pay of the men and paid it to her husband, was injured through the negligence of the defendant's engineer, it was held that the wife and the engineer were not fellow servants. *Brown v. Sullivan*, 71 Tex. 470.

1. *Ewan v. Lippincott*, 47 N. J. L. 192, 54 Am. Rep. 148; *McCafferty v. Dock Co.*, 11 Ohio Cir. Ct. Rep. 457, 5 Ohio Cir. Dec. 262. See *infra*, this section, *Servants of One Master under Control of Another*.

2. *Servants of Independent Contractors.* — *Johnson v. Lindsay*, (1891) App. 371, reversing 23 Q. B. Div. 508; *Morgan v. Smith*, 159 Mass. 570; *Eckman v. Lauer*, 67 Minn. 221.

3. *Servants of Contractor and Subcontractor Respectively.* — *Murphey v. Caralli*, 3 H. & C. 462; *Murray v. Currie*, L. R. 6 C. P. 24; *Delong v. Burrell-Johnson Iron Co.*, 25 New Bruns. 140; *Burrill v. Eddy*, 160 Mass. 198.

4. *Anderson v. Boyer*, 156 N. Y. 93, reversing 13 N. Y. App. Div. 258. See the title MASTER AND SERVANT.

5. *Servant of One Employer under Control of Another.* — *Murray v. Currie*, L. R. 6 C. P. 24; *Rourke v. White Moss Colliery Co.*, 1 C. P. Div. 556, affirmed 2 C. P. Div. 205, 46 L. J. C. P. 283; *Donovan v. Laing*, etc., Constr. Syndicate, (1893) 1 Q. B. 629; *The Coleridge*, 72 Fed. Rep. 676; *Illinois Cent. R. Co. v. Cox*, 21 Ill. 20, 71 Am. Dec. 298; *Johnson v. Boston*, 118 Mass. 114; *Harkins v. Standard Sugar Refinery Co.*, 122 Mass. 400; *Killea v. Faxon*, 125 Mass. 485; *Hasty v. Sears*, 157 Mass. 123, 34 Am. St. Rep. 267; *Morgan v. Smith*, 159 Mass. 570; *Coughlan v. Cambridge*, 166 Mass. 268. See *Ward v. New England Fibre Co.*, 154 Mass. 419; *Reagan v. Casey*, 160 Mass. 374; *Delaware, etc., R. Co. v. Hardy*, 59 N. J. L. 35, 562, 4 Am. & Eng. R. Cas. N. S. 577; *Ewan v. Lippincott*, 47 N. J. L. 192, 54 Am. Rep. 148; *Cunningham v. Syracuse Imp. Co.*, 20 N. Y. App. Div. 171; *Rozelle v. Rose*, 3 N. Y. App. Div. 132; *McCafferty v. Dock Co.*, 11 Ohio Cir. Ct. Rep. 457, 5 Ohio Cir. Dec. 262.

In *Johnson v. Lindsay*, (1891) App. 371, the plaintiff was a workman employed by *Higgs & Hill*, but had made a contract with the architect of the owners of a parcel of land to erect a block of building upon it. By the

transferred his services to another, it must appear that he has assented, expressly or impliedly, to such transfer; the servant of one master who temporarily passes under the control of another without knowing of the change does not thereby become a fellow servant with the servants of the master into whose service he passes.¹ It must further appear that the servant has, in fact, entered upon the service and submitted himself to the direction and control of the new master.²

j. **SERVANTS OF ONE MASTER VOLUNTARILY ASSISTING SERVANTS OF ANOTHER.** — Where one who has no interest in the work to be performed voluntarily assists the servants of another, with or without the request of the servants, he does so at his own risk; but where a person has an interest in the work to be performed, and for his own convenience, or to facilitate or expedite his own work, assists the servants of another, at their request or with their consent, the rule is otherwise.³ When, therefore, the servant of one master, who has an interest in the work being done, voluntarily assists the servants of another, the question arises whether he thereby becomes their fellow-servant.

terms of the contract Higgs & Hill were to provide a certain sum to be paid to Lindsay & Co., or any other firm approved by the architect, for fireproof flats and floors. Before the contract was made with Higgs & Hill the architect had received an offer from the defendants for the fireproof flats and floors, and when the building was ready for the work, the architect directed the defendants to go on with it. There was no evidence that Higgs & Hill ever attempted to interfere with the defendant's work, or to assume control over their servants. In the course of the work the plaintiff was injured by the negligence of a servant of the defendants, and it was held, reversing the judgment of the Court of Appeal, 23 Q. B. Div. 508, that the plaintiff was entitled to recover. Lord Watson stated the rule and its limitations as follows: "I can well conceive that the general servant of A might, by working towards a common end along with the servants of B, and submitting himself to the control and orders of B, become *pro hac vice* B's servant, in such sense as not only to disable him from recovering from B for injuries sustained through the fault of B's proper servants, but to exclude the liability of A for injury occasioned, by his fault, to B's own workmen. In order to produce that result the circumstances must, in my opinion, be such as to show conclusively that the servant submitted himself to the control of another person than his proper master and either expressly or impliedly consented to accept that other person as his master, for the purposes of the common employment." This case is confirmed in *Cameron v. Nystrom*, (1893) App. 308.

The case of *Wiggett v. Fox*, 11 Exch. 832, should perhaps, be viewed as a case applying this rule. It was there held that the defendants, who were the general contractors for the building of the Crystal Palace, were not liable for the negligence of one of their servants resulting in the death of a servant of a subcontractor. The decision in this case has been understood to have been based on the ground that the subcontractor and his men, including the injured servants had submitted themselves to the control of the general contractors, and become their servants. The case was thus explained by Baron Channell, though Lord

Cockburn doubted whether the facts were correctly stated. *Abraham v. Reynolds*, 5 H. & N. 143; *Rourke v. White Moss Colliery Co.*, 2 C. P. Div. 205. And see *Delaware, etc., R. Co. v. Hardy*, 59 N. J. L. 35.

In the case of *Charles v. Taylor*, 3 C. P. Div. 492, 38 L. T. N. S. 773, the defendants were brewers, having a wharf upon the Thames, where coals were discharged to be used in their business. The plaintiff was hired by A to assist in unloading a barge at the wharf of the defendants. The plaintiff and A, with other men, formed a gang, the members of which were paid by the defendants, at the rate of one shilling and ninepence for every ton of coals discharged; one of the men was to receive from the defendant the money due for unloading the barge and to distribute payment among them; the defendants alone had power to dismiss the plaintiff. While the plaintiff was engaged in unloading the barge, a servant of the defendants, who was engaged in moving some barrels, negligently let one of them slip upon an upraised flap, which fell and caused injury to the plaintiff. The plaintiff had frequently been at the spot when the barrels were being moved. The court held that the defendants were not liable to compensate the plaintiff for the injury sustained by him; for A held the position of a foreman, and not of a contractor, and the plaintiff was a servant to the defendants, and was engaged in a common employment with the servant by whose negligence the injury happened, and there was no concealed danger.

Substitute of Servant on a Vacation. — Where a servant upon taking a vacation hires and agrees to pay a substitute for performing his duties, such substitute becomes the fellow servant of those who occupy that relation to the servant whose place he is filling. *Anderson v. Guineau*, 9 Wash. 304.

1. Servant's Want of Knowledge of Change of Masters. — *Morgan v. Smith*, 150 Mass. 570; *Delaware, etc., R. Co. v. Hardy*, 59 N. J. L. 35, 562.

2. Necessity of Actual Submission by Servant to the Control of Another than His Employer. — *Delaware, etc., R. Co. v. Hardy*, 59 N. J. L. 35, 562; *Murray v. Dwight*, 15 N. Y. App. Div. 247.

3. See the title MASTER AND SERVANT.

It is held that he does not.¹

5. Instances of Fellow Servants — a. IN GENERAL. — While various illustrations of who are and who are not coemployees within the meaning of the fellow-servant rule have necessarily been given in connection with the discussion of the extent and limitations of the rule,² to illustrate the application of the doctrine more fully some additional instances will be mentioned in this place.

b. RAILROAD EMPLOYEES — Trainmen on the Same Train. — Except in the states in which the superior-servant limitation is adopted, and the conductor and engineer, by reason of their superior authority, are deemed superior servants, each employee of a railroad company on one of its trains occupies to each of the other employees of the company on the same train the relation of a fellow servant.³

1. Where Servants of One Master Voluntarily Assist Servants of Another. — *Welch v. Maine Cent. R. Co.*, 86 Me. 552; *Lewis v. Western R. Corp.*, 11 Met. (Mass.) 509; *Conlan v. New York Cent., etc.*, R. Co., 74 Hun (N. Y.) 115; *Louisville, etc.*, R. Co. *v. Ward*, 98 Tenn. 123; *Eason v. Sabine, etc.*, R. Co., 65 Tex. 577, 57 Am. Rep. 606; *Bonner v. Bryant*, 1 Tex. Civ. App. 269.

In *Wright v. London, etc.*, R. Co., 1 Q. B. Div. 252, 45 L. J. Q. B. 570, a railway company contracted to carry a heifer by train to Penrith station on its line. The plaintiff traveled by the same train, and on arriving at Penrith, he, with the assent of the station master, assisted to shut the horse box, in which the heifer was, in order to hasten delivery, and while so doing was injured by the servants of the company. It was held that the company was liable.

2. See *supra*, this title, *Extent and Limitations of the Rule*.

3. Employees on the Same Train — England. — *Hutchinson v. York, etc.*, R. Co., 5 Exch. 343, 19 L. J. Exch. 296.

United States. — *New Jersey, etc.*, R. Co. *v. Young*, 1 U. S. App. 96, 49 Fed. Rep. 723; *Baltimore, etc.*, R. Co. *v. Baugh*, 149 U. S. 368, 29 Ohio L. J. 345, 47 Alb. L. J. 465, 48 Alb. L. J. 5, 54 Am. & Eng. R. Cas. 328; *Hudson v. Charleston, etc.*, R. Co., 55 Fed. Rep. 248; *Louisville, etc.*, R. Co. *v. Kelly*, 63 Fed. Rep. 407, 24 U. S. App. 103; *Northern Pac. R. Co. v. Hogan*, 63 Fed. Rep. 102, 27 U. S. App. 184; *Central Trust Co. v. East Tennessee, etc.*, R. Co., 69 Fed. Rep. 357.

Alabama. — *Bull v. Mobile, etc.*, R. Co., 67 Ala. 206.

California. — *Congrave v. Southern Pac. R. Co.*, 88 Cal. 360; *Stevens v. San Francisco, etc.*, R. Co., 100 Cal. 554.

Florida. — *Parrish v. Pensacola, etc.*, R. Co., 23 Fla. 251; *South Florida R. Co. v. Price*, 32 Fla. 46.

Illinois. — *Illinois Cent. R. Co. v. Hosler*, 45 Ill. App. 205; *Illinois Cent. R. Co. v. Meyer*, 65 Ill. App. 531; *Chicago, etc.*, R. Co. *v. Brandau*, 65 Ill. App. 150.

Indiana. — *Sheets v. Chicago, etc.*, Coal R. Co., 139 Ind. 682; *Louisville, etc.*, R. Co. *v. Southwick*, 16 Ind. App. 486.

Kentucky. — *Chesapeake, etc.*, R. Co. *v. McMichael*, (Ky. 1891) 15 S. W. Rep. 878.

Maine. — *Lasky v. Canadian Pac. R. Co.*, 83 Me. 461.

Michigan. — *La Pierre v. Chicago, etc.*, R.

Co., 99 Mich. 212; *Conger v. Flint, etc.*, R. Co., 86 Mich. 76; *Henry v. Lake Shore, etc.*, R. Co., 49 Mich. 495; *Jarman v. Chicago, etc.*, R. Co., 98 Mich. 135; *Stanley v. Chicago, etc.*, R. Co., 101 Mich. 202.

Montana. — *Mulligan v. Montana Union R. Co.*, 19 Mont. 135.

Nebraska. — *Chicago, etc.*, R. Co. *v. Howard*, 45 Neb. 570.

New York. — *Wooden v. Western New York, etc.*, R. Co., 147 N. Y. 508.

North Carolina. — *Hobbs v. Atlantic, etc.*, R. Co., 107 N. Car. 1, 44 Am. & Eng. R. Cas. 592.

Oklahoma. — *Chaddick v. Lindsay*, 5 Okla. 616.

Pennsylvania. — *Hoover v. Beech Creek R. Co.*, 154 Pa. St. 362.

South Carolina. — *Evans v. Chamberlain*, 40 S. Car. 104; *Boatwright v. Northeastern R. Co.*, 25 S. Car. 128.

Tennessee. — *Nashville, etc.*, R. Co. *v. Handman*, 13 Lea (Tenn.) 423; *East Tennessee, etc.*, R. Co. *v. Smith*, 89 Tenn. 114.

Texas. — *Campbell v. Cook*, 86 Tex. 630, 40 Am. St. Rep. 878; *Gulf, etc.*, R. Co. *v. Blohn*, 73 Tex. 637.

Utah. — *Brown v. Southern Pac. Co.*, 7 Utah 288.

Virginia. — *Norfolk, etc.*, R. Co. *v. Brown*, 91 Va. 668.

West Virginia. — *Young v. West Virginia, etc.*, R. Co., 42 W. Va. 112, 4 Am. & Eng. R. Cas. N. S. 134; *Ward v. Chesapeake, etc.*, R. Co., 39 W. Va. 46; *Jackson v. Norfolk, etc.*, R. Co., 43 W. Va. 380.

Brakeman on the Same Train. — If one brakeman in the performance of his ordinary duties is injured through the negligence of another brakeman on the same train, the current of authority is unbroken to the effect that they are fellow servants and the company is not liable.

Illinois. — *Chicago, etc.*, R. Co. *v. Rush*, 84 Ill. 570.

Iowa. — *Youll v. Sioux City, etc.*, R. Co., 66 Iowa 346, 21 Am. & Eng. R. Cas. 589.

Tennessee. — *Nashville, etc.*, R. Co. *v. Foster*, 10 Lea (Tenn.) 351, 11 Am. & Eng. R. Cas. 180.

Texas. — *Houston, etc.*, R. Co. *v. Gilmore*, 62 Tex. 391.

West Virginia. — *Young v. West Virginia, etc.*, R. Co., 42 W. Va. 112, 4 Am. & Eng. R. Cas. N. S. 134.

Fireman and Brakeman on Same Train. — A

Same — Engineer and Trainmen. — In some of the states in which the superior-servant rule has been adopted an engineer in charge of a railroad engine is not regarded as a fellow servant of the other employees on the train over whom he exercises control, but a superior servant for whose negligence the company is liable.¹ But to justify a recovery by a trainman for the negligence of the engineer it must appear that the engineer was invested with superintendence or control over the injured employee.² In some of these states, however, the courts, considering that the engineer cannot, under ordinary circumstances be considered a superior servant, have even laid down the broad rule that where a trainman is injured through the negligence of the engineer, they are fellow servants and there can be no recovery against the company.³ This is, of course, the rule which prevails in the jurisdictions where the superior-servant rule is rejected.⁴ Where the engineer is injured through the negligence

fireman is one of the subordinate employees engaged in operating a railroad company's train. He is associated with, and directly under the command of, the engineer; and the duties which he is called upon to perform do not include any of the personal duties which the company owes to its employees. It has accordingly been held that if a brakeman is injured through the negligence of the fireman no action will lie against the company. *Louisville, etc., R. Co. v. Kelly*, 63 Fed. Rep. 407; *Kersey v. Kansas City, etc., R. Co.*, 79 Mo. 362, 17 Am. & Eng. R. Cas. 638; *Greenwald v. Marquette, etc., R. Co.*, 49 Mich. 197, 8 Am. & Eng. R. Cas. 133; *Galveston, etc., R. Co. v. Faber*, 63 Tex. 344.

And if a brakeman negligently misplaces his switch and causes a collision, whereby the fireman is killed, there can be no recovery by the fireman against the company. *Galveston, etc., R. Co. v. Faber*, 77 Tex. 153.

Baggage-man and Trainman. — A baggage-man injured by a train being thrown from the track in consequence of the negligence of the train hands cannot recover for his injuries against the railroad company, in those jurisdictions, at least, where the different-department limitation is rejected. *Moseley v. Chamberlain*, 18 Wis. 700.

Express Messenger in Employ of Railroad and Train Hands. — Ordinarily, where a railroad company does its own express business, one who accepts service with the company as express messenger is to be considered a fellow servant of the engineer and other employees engaged in operating the trains of the company on which he is carried while performing his duty as an express messenger. *Baltimore, etc., R. Co. v. McKenzie*, 81 Va. 71, 24 Am. & Eng. R. Cas. 395.

Employees in Charge of Construction or Gravel Train. — The employees of a railroad company in charge of a construction train are fellow servants. *Prather v. Richmond, etc., R. Co.*, 80 Ga. 427, 12 Am. St. Rep. 263; *Casey v. Louisville, etc., R. Co.*, 84 Ky. 79.

Laborers on Gravel or Construction Train and Trainmen. — And the laborers on a gravel or construction train are fellow servants with the trainmen. *Parrish v. Pensacola, etc., R. Co.*, 28 Fla. 251; *Chicago, etc., R. Co. v. McDonald*, 21 Ill. App. 409; *Miller v. Ohio, etc., R. Co.*, 24 Ill. App. 326.

Where the Train Accidentally Parts. — Where two employees on a train, as, for example, the

conductor and engineer, are fellow servants, this relation is not changed by the accidental parting of the train, leaving the two employees on different sections. *Moore v. Jones*, 15 Tex. Civ. App. 391. See also *Newport News, etc., Co. v. Howe*, 52 Fed. Rep. 362; *Louisville, etc., R. Co. v. Martin*, 87 Tenn. 398.

1. Engineer and Trainman Injured through the Engineer's Negligence — Held Not to Be Fellow Servants — United States. — *Ragsdale v. Northern Pac. R. Co.*, 42 Fed. Rep. 383.

Kentucky. — *Louisville, etc., R. Co. v. Moore*, 83 Ky. 675; *Newport News, etc., R. Co. v. Eifort*, (Super. Ct. 1894) 15 Ky. L. Rep. 600, 49 Alb. L. J. 289; *Louisville, etc., R. Co. v. Brooks*, 83 Ky. 129; *Cincinnati, etc., R. Co. v. Palmer*, 98 Ky. 382.

North Carolina. — *Cowles v. Richmond, etc., R. Co.*, 84 N. Car. 309, 2 Am. & Eng. R. Cas. 90.

Tennessee. — *East Tennessee, etc., R. Co. v. Collins*, 85 Tenn. 227.

Texas. — See *San Antonio, etc., R. Co. v. Bowles*, (Tex. Civ. App. 1895) 30 S. W. Rep. 89, (Tex. Civ. App. 1895) 30 S. W. Rep. 727.

2. Same — Held to Be Fellow Servants. — *Kansas City, etc., R. Co. v. Becker*, 63 Ark. 477; *Gulf, etc., R. Co. v. Warner*, 89 Tex. 475; *International, etc., R. Co. v. Moore*, 16 Tex. Civ. App. 51.

It has been held that where the train is in charge of the conductor, the engineer is the fellow servant of a train hand who is injured through the engineer's negligence. *East Tennessee, etc., R. Co. v. Smith*, 89 Tenn. 114.

3. Illinois. — *Illinois Cent. R. Co. v. Swisher*, 61 Ill. App. 611.

Missouri. — *Warrington v. Atchison, etc., R. Co.*, 46 Mo. App. 159.

Ohio. — *Pittsburg, etc., R. Co. v. Devinney*, 17 Ohio St. 197; *Pittsburgh, etc., R. Co. v. Lewis*, 33 Ohio St. 196; *Pittsburgh, etc., R. Co. v. Ranney*, 37 Ohio St. 665, 5 Am. & Eng. R. Cas. 533.

Tennessee. — *Nashville, etc., R. Co. v. Wheelless*, 10 Lea (Tenn.) 741, 43 Am. Rep. 317, 15 Am. & Eng. R. Cas. 315; *East Tennessee, etc., R. Co. v. Rush*, 15 Lea (Tenn.) 145, 25 Am. & Eng. R. Cas. 502.

4. England. — *Hutchinson v. York, etc., R. Co.*, 5 Exch. 343; *Barton's Hill Coal Co. v. Reid*, 3 Macq. H. L. Cas. 266; *Barton's Hill Coal Co. v. Maguire*, 3 Macq. H. L. Cas. 300; *Wilson v. Merry*, L. R. 1 H. L. Sc. 326; *Morgan v. Vale of Neath R. Co.*, 5 B. & S. 570, 117 E.

of a train hand, the two employees will, under either of these views, be held to be fellow servants.

Same — Conductor and Members of His Crew. — In a number of the United States where the superior-servant limitation is recognized, the negligence of the con-

C. L. 570; *Tunney v. Midland R. Co.*, L. R. 1 C. P. 201; *Charles v. Taylor*, 3 C. P. Div. 492; *Conway v. Belfast, etc.*, R. Co., 9 Ir. 9 C. L. Rep. 498.

United States. — *Kielley v. Belcher Silver Min. Co.*, 3 Sawy. (U. S.) 500; *Jordan v. Wells*, 3 Woods (U. S.) 527; *Missouri Pac. R. Co. v. Texas, etc.*, R. Co., 31 Fed. Rep. 527; *Randall v. Baltimore, etc.*, R. Co., 109 U. S. 478, 15 Am. & Eng. R. Cas. 243.

Alabama. — *Mobile, etc.*, R. Co. *Smith*, 59 Ala. 245.

Colorado. — *Summerhays v. Kansas Pac. R. Co.*, 2 Colo. 484.

Illinois. — *Illinois Cent. R. Co. v. Keen*, 72 Ill. 512; *St. Louis, etc.*, R. Co. *v. Britz*, 72 Ill. 256.

Indiana. — *Wilson v. Madison, etc.*, R. Co., 18 Ind. 226.

Iowa. — *Jeffrey v. Keokuk, etc.*, R. Co., 56 Iowa 546, 5 Am. & Eng. R. Cas. 568; *Sloan v. Central Iowa R. Co.*, 62 Iowa 728, 11 Am. & Eng. R. Cas. 145.

Kansas. — *Kansas Pac. R. Co. v. Peavey*, 29 Kan. 169, 44 Am. Rep. 630, 11 Am. & Eng. R. Cas. 260.

Louisiana. — *Wallis v. Morgan's Louisiana, etc.*, R., etc., Co., 38 La. Ann. 156.

Maryland. — *State v. Western Maryland R. Co.*, 63 Md. 433, 21 Am. & Eng. R. Cas. 503.

Missouri. — *Connor v. Chicago, etc.*, R. Co., 59 Mo. 285.

New Jersey. — *McAndrews v. Burns*, 39 N. J. L. 117; *Smith v. Oxford Iron Co.*, 42 N. J. L. 467, 36 Am. Rep. 535.

New York. — *Moran v. New York Cent., etc.*, R. Co., 67 Barb. (N. Y.) 96; *Sherman v. Rochester, etc.*, R. Co., 17 N. Y. 153; *Mann v. Delaware, etc., Canal Co.*, 91 N. Y. 495, 12 Am. & Eng. R. Cas. 199; *Wright v. New York Cent. R. Co.*, 25 N. Y. 562.

North Carolina. — *Ponton v. Wilmington, etc.*, R. Co., 6 Jones L. (51 N. Car.) 245.

Ohio. — *Pittsburg, etc.*, R. Co. *v. Devinney*, 17 Ohio St. 198; *Pittsburgh, etc.*, R. Co. *v. Lewis*, 33 Ohio St. 196; *Pittsburgh, etc.*, R. Co. *v. Ranney*, 37 Ohio St. 665, 5 Am. & Eng. R. Cas. 533.

Pennsylvania. — *Lehigh Valley Coal Co. v. Jones*, 86 Pa. St. 432.

Tennessee. — *Nashville, etc.*, R. Co. *v. Wheelless*, 10 Lea (Tenn.) 741, 15 Am. & Eng. R. Cas. 315, 43 Am. Rep. 317; *East Tennessee, etc.*, R. Co. *v. Rush*, 15 Lea (Tenn.) 145, 25 Am. & Eng. R. Cas. 502.

Texas. — *Hamilton v. Galveston, etc.*, R. Co., 54 Tex. 556; *Houston, etc.*, R. Co. *v. Willie*, 53 Tex. 318; *Houston, etc.*, R. Co. *v. Myers*, 55 Tex. 110, 8 Am. & Eng. R. Cas. 114; *Houston, etc.*, R. Co. *v. Gilmore*, 62 Tex. 391.

Engineer and Fireman Who Is Injured Through Engineer's Negligence. — The fireman on a train is the fellow servant of the engineer so as to preclude a recovery for the latter's negligence resulting in an injury to the fireman.

United States. — *Baltimore, etc.*, R. Co. *v. Baugh*, 149 U. S. 368, 29 Ohio L. J. 345, 47 Alb. L. J. 465, 48 Alb. L. J. 5, 54 Am. & Eng.

R. Cas. 328; *New Jersey, etc.*, R. Co. *v. Young*, 49 Fed. Rep. 723; *Jordan v. Wells*, 3 Woods (U. S.) 527.

Alabama. — *Bull v. Mobile, etc.*, R. Co., 67 Ala. 206; *Alabama, etc.*, R. Co. *v. Waller*, 48 Ala. 459.

Illinois. — *Illinois Cent. R. Co. v. Hosler*, 45 Ill. App. 205.

Michigan. — *Henry v. Lake Shore, etc.*, R. Co., 49 Mich. 495.

Montana. — *Mulligan v. Montana Union R. Co.*, 19 Mont. 135.

New Jersey. — *Paulmier v. Erie R. Co.*, 34 N. J. L. 151.

North Carolina. — *Hobbs v. Atlantic, etc.*, R. Co., 107 N. Car. 1, 44 Am. & Eng. R. Cas. 592.

South Carolina. — *Murray v. South Carolina R. Co.*, 1 McMull. L. (S. Car.) 385, 36 Am. Dec. 268.

Tennessee. — *Nashville, etc.*, R. Co. *v. Handman*, 13 Lea (Tenn.) 423.

Texas. — *Gulf, etc.*, R. Co. *v. Blohn*, 73 Tex. 637.

See *Stevens v. San Francisco, etc.*, R. Co., 100 Cal. 554.

Fireman on First Section and Engineer on Second Section of Freight Train. — A fireman on the first section of a freight train is a fellow servant with the engineer on the second section of the same train, and cannot recover against the company for the latter's negligence. *Terre Haute, etc.*, R. Co. *v. Leeper*, 60 Ill. App. 194.

Engineer and Laborer on Construction or Gravel Train. — Laborers on a construction or gravel train are not entitled to recover of the company if they are injured through the engineer's negligence.

Arkansas. — *St. Louis, etc.*, R. Co. *v. Shackelford*, 42 Ark. 417.

Florida. — *Parrish v. Pensacola, etc.*, R. Co., 28 Fla. 251.

Illinois. — *Chicago, etc.*, R. Co. *v. McDonald*, 21 Ill. App. 409; *Miller v. Ohio, etc.*, R. Co., 24 Ill. App. 326.

Indiana. — *Ohio, etc.*, R. Co. *v. Tindall*, 13 Ind. 366, 74 Am. Dec. 259; *Evansville, etc.*, R. Co. *v. Henderson*, 134 Ind. 636.

Kansas. — *Missouri Pac. R. Co. v. Haley*, 25 Kan. 35, 5 Am. & Eng. R. Cas. 594.

Missouri. — *Higgins v. Missouri Pac. R. Co.*, 104 Mo. 413.

In *Chicago, etc.*, R. Co. *v. Keefe*, 47 Ill. 108, a laborer upon a construction train, at work under the orders of the conductor in charge of the train, was injured in consequence of the moving of the train by the engineer, also in pursuance of the order of the conductor, but without giving the preliminary signal as required by the rules. It was held that the laborer could not recover against the company.

The engineers and shovelers employed on a construction train are coservants, engaged in the same branch of service. *St. Louis, etc.*, R. Co. *v. Britz*, 72 Ill. 256; *Chicago, etc.*, R. Co. *v. McDonald*, 21 Ill. App. 409.

Engineer and Brakeman Who Is Injured Through Engineer's Negligence. — Where a

ductor of a train causing an injury to another train hand has been held to be the negligence of the railroad company, which is liable for the injury,¹ but this view is contrary to the decisions not only of those states in which the courts have rejected the superior-servant limitation, but also in some of the states where the limitation is favored. According to the vast preponderance of authority, a conductor, though perhaps vested with a little more authority than the other train hands, is their fellow servant, and there can be no recovery for his negligence resulting in injury to the other employees of the train.²

brakeman is injured through the negligence of the engineer, they are fellow servants and there can be no recovery against the company.

England. — *Barton's Hill Coal Co. v. Reid*, 3 Macq. H. L. Cas. 266; *Bartonshill Coal Co. v. McGuire*, 3 Macq. H. L. Cas. 300; *Wilson v. Merry*, L. R. 1 H. L. Sc. 326; *Morgan v. Vale of Neath R. Co.*, 5 B. & S. 570, 117 E. C. L. 570; *Tunney v. Midland R. Co.*, L. R. 1 C. P. 291; *Charles v. Taylor*, 3 C. P. Div. 492; *Conway v. Belfast, etc.*, R. Co., 9 Ir. C. L. Rep. 498; *Hutchinson v. York, etc.*, R. Co., 5 Exch. 343.

United States. — *Central Trust Co. v. East Tennessee, etc.*, R. Co., 69 Fed. Rep. 357; *Missouri Pac. R. Co. v. Texas, etc.*, R. Co., 31 Fed. Rep. 527; *Randall v. Baltimore, etc.*, R. Co., 109 U. S. 478, 15 Am. & Eng. R. Cas. 243.

Alabama. — *Mobile, etc.*, R. Co. v. *Smith*, 59 Ala. 245.

Colorado. — *Summerhays v. Kansas Pac. R. Co.*, 2 Colo. 484.

Florida. — *South Florida R. Co. v. Price*, 32 Fla. 46.

Indiana. — *Wilson v. Madison, etc.*, R. Co., 18 Ind. 226.

Iowa. — *Jeffrey v. Keokuk, etc.*, R. Co., 56 Iowa 546, 5 Am. & Eng. R. Cas. 568; *Sloan v. Central Iowa R. Co.*, 62 Iowa 728, 11 Am. & Eng. R. Cas. 145.

Louisiana. — *Wallis v. Morgan's Louisiana, etc.*, R., etc., Co., 38 La. Ann. 156.

Maryland. — *State v. Western Maryland R. Co.*, 63 Md. 433, 21 Am. & Eng. R. Cas. 503.

New Jersey. — *McAndrews v. Burns*, 39 N. J. L. 117; *Smith v. Oxford Iron Co.*, 42 N. J. L. 467, 36 Am. Rep. 535.

New York. — *Wright v. New York Cent. R. Co.*, 25 N. Y. 562; *Sherman v. Rochester, etc.*, R. Co., 17 N. Y. 153; *Mann v. Delaware, etc.*, Canal Co., 91 N. Y. 495, 12 Am. & Eng. R. Cas. 199; *Moran v. New York Cent., etc.*, R. Co., 67 Barb. (N. Y.) 96.

Oklahoma. — *Chaddick v. Lindsay*, 5 Okla. 616.

Pennsylvania. — *Lehigh Valley Coal Co. v. Jones*, 86 Pa. St. 432; *Hoover v. Beach Creek R. Co.*, 154 Pa. St. 362.

South Carolina. — *Boatwright v. Northeastern R. Co.*, 25 S. Car. 128; *Evans v. Chamberlain*, 40 S. Car. 104.

Virginia. — *Norfolk, etc.*, R. Co. v. *Brown*, 91 Va. 668.

See also *Brown v. Southern Pac. R. Co.*, 7 Utah 288.

1. **Conductor and Train Hand Injured through Conductor's Negligence — Held Not to Be Fellow Servants.** — *Kentucky.* — *Louisville, etc.*, R. Co. v. *Brooks*, 83 Ky. 129; *Louisville, etc.*, R. Co. v. *Moore*, 83 Ky. 675, 24 Am. & Eng. R. Cas. 443.

Ohio. — *Cleveland, etc.*, R. Co. v. *Keary*, 3 Ohio St. 201; *Manville v. Cleveland, etc.*, R. Co., 11 Ohio St. 417; *Little Miami R. Co. v.*

Stevens, 20 Ohio 415; *Lake Shore, etc.*, R. Co. v. *Spangler*, 44 Ohio St. 471.

South Carolina. — *Boatwright v. North Eastern R. Co.*, 25 S. Car. 128.

Virginia. — *Moon v. Richmond, etc.*, R. Co., 78 Va. 745, 49 Am. Rep. 401, 17 Am. & Eng. R. Cas. 531; *Johnson v. Richmond, etc.*, R. Co., 84 Va. 713; *Ayers v. Richmond, etc.*, R. Co., 84 Va. 679; *Richmond, etc.*, R. Co. v. *Williams*, 86 Va. 165, 19 Am. St. Rep. 876.

Washington. — *Northern Pac. R. Co. v. O'Brien*, 1 Wash. 599.

West Virginia. — *Madden v. Chesapeake, etc.*, R. Co., 28 W. Va. 610, 57 Am. Rep. 695.

Compare *Pittsburg, etc.*, R. Co. v. *Devinney*, 17 Ohio St. 107; *Campbell v. Cook*, 86 Tex. 630, 40 Am. St. Rep. 878; *International, etc.*, R. Co. v. *Culpepper*, (Tex. Civ. App. 1897) 38 S. W. Rep. 818.

Thus, by the application of the superior-servant limitation, the conductor of a gravel or construction train has been held not to be a fellow servant with the other employees on the train. In *North Carolina* it has been held that where a laborer was employed by a railroad company in digging gravel under the direction of one who was engineer, superintendent, and conductor and master of the gravel and material train of the defendant, and who had entire charge of that branch of the business on a section of the railroad, with power to employ and discharge hands, the laborer and such conductor and superintendent were not fellow servants, and the laborer might recover of the company for an injury received through the negligence of his superior. *Dobbin v. Richmond, etc.*, R. Co., 81 N. Car. 446, 31 Am. Rep. 512.

In *Nebraska*, also, it is held that laborers employed in construction, under the orders of the conductor of a construction train, and such conductor are not fellow servants but that the conductor is as to such men the vice-principal of the railroad company. *Chicago, etc.*, R. Co. v. *Lundstrom*, 16 Neb. 254, 49 Am. Rep. 718, 21 Am. & Eng. R. Cas. 528; *Burlington, etc.*, R. Co. v. *Crockett*, 19 Neb. 138, 24 Am. & Eng. R. Cas. 390.

Same — Federal Cases. — Following the case of *Chicago, etc.*, R. Co. v. *Ross*, 112 U. S. 377, 17 Am. & Eng. R. Cas. 501, the federal courts have frequently held railroad companies liable for injuries resulting to train hands through the negligence of the conductor. *Au v. New York, etc.*, R. Co., 29 Fed. Rep. 72; *Crew v. St. Louis, etc.*, R. Co., 20 Fed. Rep. 87; *Northern Pac. R. Co. v. Cavanaugh*, 51 Fed. Rep. 517.

2. **Same — Held to Be Fellow Servants — Eng.** — *Morgan v. Vale of Neath R. Co.*, L. R. 1 Q. B. 149; *Tunney v. Midland R. Co.*, L. R. 1 C. P. 291.

And where the conductor is injured through the negligence of a trainman there can be no question but that he will, under either view, be deemed a fellow servant with the negligent employee.¹

Indiana. — *Wilson v. Madison, etc.*, R. Co., 18 Ind. 226; *Thayer v. St. Louis, etc.*, R. Co. 22 Ind. 26, 85 Am. Dec. 409.

Illinois. — *Chicago, etc.*, R. Co. *v. McDonald*, 21 Ill. App. 409; *Illinois Cent. R. Co. v. Cox*, 21 Ill. 20, 71 Am. Dec. 298.

Iowa. — *Jeffrey v. Keokuk, etc.*, R. Co., 51 Iowa 439; *Dunlavy v. Chicago, etc.*, R. Co., 66 Iowa 435, 21 Am. & Eng. R. Cas. 542.

Kansas. — *Dow v. Kansas Pac. R. Co.*, 8 Kan. 642; *Atchison, etc.*, R. Co. *v. Moore*, 29 Kan. 632, 11 Am. & Eng. R. Cas. 243.

Maine. — *Cassidy v. Maine Cent. R. Co.*, 76 Me. 488, 17 Am. & Eng. R. Cas. 519.

Massachusetts. — *Hayes v. Western R. Corp.*, 3 Cush. (Mass.) 270; *Gillshannon v. Stony Brook R. Corp.*, 10 Cush. (Mass.) 228; *Lawless v. Connecticut River R. Co.*, 136 Mass. 1, 18 Am. & Eng. R. Cas. 96.

Michigan. — *Michigan Cent. R. Co. v. Dolan*, 32 Mich. 510, *Smith v. Potter*, 46 Mich. 258, 2 Am. & Eng. R. Cas. 140; *Rodman v. Michigan Cent. R. Co.*, 55 Mich. 57, 54 Am. Rep. 348, 17 Am. & Eng. R. Cas. 521.

Mississippi. — *Chicago, etc.*, R. Co. *v. Doyle*, 60 Miss. 977, 8 Am. & Eng. R. Cas. 171.

Missouri. — *Connor v. Chicago, etc.*, R. Co., 59 Mo. 285; *McGowan v. St. Louis, etc.*, R. Co., 61 Mo. 528.

New York. — *Sherman v. Rochester, etc.*, R. Co., 17 N. Y. 153; *Slater v. Jewett*, 85 N. Y. 61, 39 Am. Rep. 627, 5 Am. & Eng. R. Cas. 515.

Pennsylvania. — *Ryan v. Cumberland Valley R. Co.*, 23 Pa. St. 384; *Frazier v. Pennsylvania R. Co.*, 38 Pa. St. 104, 80 Am. Dec. 467.

Tennessee. — *Ragsdale v. Memphis, etc.*, R. Co., 3 Baxt. (Tenn.) 426.

Texas. — *Pilkinton v. Gulf, etc.*, R. Co., 70 Tex. 226; *Robinson v. Houston, etc.*, R. Co., 46 Tex. 540.

West Virginia. — *Madden v. Chesapeake, etc.*, R. Co., 28 W. Va. 610, 57 Am. Rep. 695.

Wisconsin. — *Howland v. Milwaukee, etc.*, R. Co., 54 Wis. 226, 5 Am. & Eng. R. Cas. 578; *Whitwam v. Wisconsin, etc.*, R. Co., 58 Wis. 408, 12 Am. & Eng. R. Cas. 214; *Pease v. Chicago, et* R. Co., 61 Wis. 163, 17 Am. & Eng. R. Cas. 527.

The rule is not changed by the fact that the conductor is acting as engineer. *Rodman v. Michigan Cent. R. Co.*, 55 Mich. 57, 54 Am. Rep. 348, 17 Am. & Eng. R. Cas. 521.

In *Illinois Cent. R. Co. v. Meyer*, 65 Ill. App. 531, it was held that a conductor who has no greater power than that of an ordinary conductor of a train is a fellow servant with the other trainmen.

In *Newport News, etc.*, Co. *v. Howe*, 52 Fed. Rep. 362, where the conductor of a train which by the rules of the company was under control of the engineer sent a brakeman forward to signal the forward portion, it was held that the brakeman and conductor were fellow servants and that the brakeman could not recover against the company for injuries sustained through the conductor's negligence.

In *Louisville, etc.*, R. Co. *v. Martin*, 87

Tenn. 398, it was held that although the rules of a company provided that where a train parts the command of the forward portion devolves upon the engineer, nevertheless where the engineer has not availed himself of the right to take charge of the train, he and the brakeman who was injured through his negligence were fellow servants.

Conductor and Brakeman Who Is Injured through Conductor's Negligence. — On the ground that the conductor and engineer are fellow servants, it has been held that a brakeman who is injured through the negligence of the conductor cannot recover against the company. *Northern Pac. R. Co. v. Hogan*, 63 Fed. Rep. 102; *Congrave v. Southern Pac. R. Co.*, 88 Cal. 360; *Louisville, etc.*, R. Co. *v. Southwick*, 16 Ind. App. 486; *Lasky v. Canadian Pac. R. Co.*, 83 Me. 461; *La Pierre v. Chicago, etc.*, R. Co., 99 Mich. 212; *Wooden v. Western New York, etc.*, R. Co., 147 N. Y. 508; *Hoover v. Beech Creek R. Co.*, 154 Pa. St. 362; *Jackson v. Norfolk, etc.*, R. Co., 43 W. Va. 380.

Conductor and Fireman Injured through Conductor's Negligence. — And it has been held that a fireman who is injured through the conductor's negligence cannot recover against the company. *Illinois Cent. R. Co. v. Meyer*, 65 Ill. App. 531; *Jarman v. Chicago, etc.*, R. Co., 98 Mich. 135.

Conductor and Laborer on Construction or Gravel Train. — A laborer on a construction or gravel train has been held to be a fellow servant with the conductor and cannot recover against the company for the conductor's negligence.

Illinois. — *Chicago, etc.*, R. Co. *v. McDonald*, 21 Ill. App. 409; *Miller v. Ohio, etc.*, R. Co., 24 Ill. App. 326.

Texas. — *Corona v. Galveston, etc.*, R. Co., (Tex. 1891) 17 S. W. Rep. 384.

Contra. — *Coleman v. Wilmington, etc.*, R. Co., 25 S. Car. 446, 60 Am. Rep. 516.

1. Conductor and Engineer Where the Conductor Is Injured Through the Engineer's Negligence. — A railroad company is not liable for injuries received by a conductor through the negligence of an engineer while working under his orders. *Ragsdale v. Memphis, etc.*, R. Co., 3 Baxt. (Tenn.) 426. And see *Manville v. Cleveland, etc.*, R. Co., 11 Ohio St. 417.

Conductor and Brakeman Where the Conductor Is Injured through the Brakeman's Negligence. — Being directly associated with the conductor of his train, and his subordinate in certain respects, a brakeman is universally held to be the fellow servant of the conductor in cases where the brakeman's negligence causes injury to his conductor.

Indiana. — *Wilson v. Madison, etc.*, R. Co., 18 Ind. 226; *Thayer v. St. Louis, etc.*, R. Co. 22 Ind. 26, 85 Am. Dec. 409.

Kansas. — *Dow v. Kansas Pac. R. Co.*, 8 Kan. 642; *Atchison, etc.*, R. Co. *v. Moore*, 29 Kan. 632, 11 Am. & Eng. R. Cas. 243.

Massachusetts. — *Hayes v. Western R. Corp.*, 3 Cush. (Mass.) 270.

Michigan. — *Smith v. Potter*, 46 Mich. 258, 2

Same — Trainmen and Other Employees Riding on the Train. — Where a person in the employ of a railroad company travels upon the cars of the company back and forth from his home to the place where his services are rendered, or from one place to another in the performance of his duties, and his transportation free of charge constitutes part of the contract of service, he is, while so travelling, an employee and not a passenger of the company, and, on the ground that he is a fellow servant with the trainmen, the company will not be liable for an injury received by him through their negligence.¹ While this is the prevail-

Am. & Eng. R. Cas. 140; *Rodman v. Michigan Cent. R. Co.*, 55 Mich. 57, 54 Am. Rep. 348, 17 Am. & Eng. R. Cas. 521.

Mississippi. — *Chicago, etc., R. Co. v. Doyle*, 60 Miss. 977, 8 Am. & Eng. R. Cas. 171.

Missouri. — *Connor v. Chicago, etc., R. Co.*, 59 Mo. 285.

New York. — *Sherman v. Rochester, etc., R. Co.*, 17 N. Y. 153, 15 Barb. (N. Y.) 574.

Ohio. — *Pittsburg, etc., R. Co. v. Devinney*, 17 Ohio St. 197.

Pennsylvania. — *Frazier v. Pennsylvania R. Co.*, 38 Pa. St. 104, 80 Am. Dec. 467.

Texas. — *Robinson v. Houston, etc., R. Co.*, 46 Tex. 540; *Pilkinton v. Gulf, etc., R. Co.*, 70 Tex. 226.

Wisconsin. — *Pease v. Chicago, etc., R. Co.*, 61 Wis. 163, 17 Am. & Eng. R. Cas. 527.

1. Trainmen and Other Employees of the Company Riding on the Train — Held to be Fellow Servants — England. — *Tunney v. Midland R. Co.*, L. R. 1 C. P. 291.

Canada. — *Carney v. Caraquet R. Co.*, 29 New Bruns. 425.

Arizona. — *McGill v. Southern Pac. Co.*, (Arizona 1893) 33 Pac. Rep. 821, (Arizona 1896) 44 Pac. Rep. 302.

Illinois. — *Abend v. Terre Haute, etc., R. Co.*, 111 Ill. 202, 53 Am. Rep. 616, 17 Am. & Eng. R. Cas. 614.

Indiana. — *Ohio, etc., R. Co. v. Tindall*, 13 Ind. 366, 74 Am. Dec. 259; *Capper v. Louisville, etc., R. Co.*, 103 Ind. 305, 21 Am. & Eng. R. Cas. 525.

Kansas. — *Kansas Pac. R. Co. v. Salmon*, 11 Kan. 83.

Massachusetts. — *Gillshannon v. Stony Brook R. Corp.*, 10 Cush. (Mass.) 228; *Seaver v. Boston, etc., R. Co.*, 14 Gray (Mass.) 466.

New York. — *Russell v. Hudson River R. Co.*, 17 N. Y. 134, reversing 5 Duer (N. Y.) 39; *Ross v. New York Cent., etc., R. Co.*, 74 N. Y. 617; *Vick v. New York Cent., etc., R. Co.*, 95 N. Y. 267, 47 Am. Rep. 36, 17 Am. & Eng. R. Cas. 609. But see *Pendergast v. Union R. Co.*, 10 N. Y. App. Div. 207; *West v. New York Cent., etc., R. Co.*, 17 N. Y. App. Div. 116.

Ohio. — *Manville v. Cleveland, etc., R. Co.*, 11 Ohio St. 417.

Oregon. — *Knahtla v. Oregon Short-line, etc., R. Co.*, 21 Oregon 136.

Texas. — *Dallas v. Gulf, etc., R. Co.*, 61 Tex. 196; *Austin, etc., R. Co. v. Beatty*, 6 Tex. Civ. App. 650.

Wisconsin. — *Howland v. Milwaukee, etc., R. Co.*, 54 Wis. 226, 5 Am. & Eng. R. Cas. 578.

Thus it has been held in a *Massachusetts* case that where a common laborer on a railroad, while riding on a gravel train to his place of work, was injured by a collision

caused by the negligence of the conductor in charge of the train, no action would lie against the company. *Gillshannon v. Stony Brook R. Corp.*, 10 Cush. (Mass.) 228, followed in *McGuirk v. Shattuck*, 160 Mass. 45, 39 Am. St. Rep. 454.

In an *Indiana* case a workman employed by a railroad company to work in a tunnel was ordered by the superintendent of the work, under threat of dismissal, to get on a freight train for transportation to another tunnel, and in doing so he was violently cast on the ground and injured by the negligence of the engineer in starting the train. The court held that the company was not liable. *Capper v. Louisville, etc., R. Co.*, 103 Ind. 305, 21 Am. & Eng. R. Cas. 525.

In *Howland v. Milwaukee, etc., R. Co.*, 54 Wis. 226, 5 Am. & Eng. R. Cas. 578, the plaintiff, while going as a shoveler of snow for the defendant company upon a train engaged in the business of removing snow from the track, was injured by the overturning of the car in which he rode, by reason of an unsuccessful attempt of the conductor to remove a snow-bank from the track by means of the snow plow alone, aided by the momentum of the train. It was held that a recovery by the plaintiff was precluded by the facts that such overturning of his car was one of the perils of the business which he assumed, and that the conductor and others, whose negligence was alleged, were fellow servants in the same employment. Compare *O'Donnell v. Allegheny Valley R. Co.*, 59 Pa. St. 239, 98 Am. Dec. 336.

In a *Maryland* case, however, it appeared that the plaintiff's intestate was hired from day to day as a brakeman, running between X and Y every day except Sunday, for which day he was not paid unless employed. He was, however, expected to remain at X from Saturday night till Monday morning, but, his family residing in Y, he received permission one Sunday to visit them, and while traveling thither under a conductor's pass he was killed by the negligence of the company's employees. It was held that he was not a coemployee. See also *State v. Western Maryland R. Co.*, 63 Md. 433; *O'Donnell v. Allegheny Valley R. Co.*, 59 Pa. St. 239, 98 Am. Dec. 336; *Baltimore, etc., R. Co. v. State*, 33 Md. 542; *Hutchinson v. York, etc., R. Co.*, 5 Exch. 343.

Conductor and Laborers Riding on the Train. — A conductor has been held to occupy the position of a fellow servant with laborers riding on his train. *Tunney v. Midland R. Co.*, L. R. 1 C. P. 291; *Morgan v. Vale of Neath R. Co.*, L. R. 1 Q. B. 149; *Fagundes v. Central Pac. R. Co.*, 79 Cal. 97; *Chicago, etc., R. Co. v. McDonald*, 21 Ill. App. 409; *Jeffrey v. Keokuk, etc., R. Co.*, 56 Iowa 546, 5 Am. & Eng.

ing view, the courts in some of the states where the different-department limitation is favored have, by applying that doctrine, held that such employees are not fellow servants with the trainmen who operate the train.¹

Employees on Different Trains.—In the jurisdictions, at least, where the different-department limitation has not been recognized, the employees of a railroad company on one train are fellow servants with the employees on another.²

R. Cas. 568; *Cassidy v. Maine Cent. R. Co.*, 76 Me. 488, 17 Am. & Eng. R. Cas. 519; *Gill-shannon v. Stony Brook R. Corp.*, 10 Cush. (Mass.) 228; *McGuirk v. Shattuck*, 160 Mass. 45, 39 Am. St. Rep. 454; *McGowan v. St. Louis, etc., R. Co.*, 61 Mo. 528; *Manville v. Cleveland, etc., R. Co.*, 11 Ohio St. 417; *Ryan v. Cumberland Valley R. Co.*, 23 Pa. St. 384.

Conductor or Engineer and Roadmaster Riding on the Train.—A roadmaster is a fellow servant with the engineer and conductor of a train upon which he rides in the performance of his duties, and cannot recover against the company for their negligence. *Gulf, etc., R. Co. v. Ryan*, 69 Tex. 665.

Conductor and Surveyor Riding on Train.—A surveyor riding on a train and injured through the negligence of the conductor cannot recover from the company. *Ross v. New York Cent., etc., R. Co.*, 74 N. Y. 617.

Engineer and Foreman of Wrecking Crew Riding on Train.—The foreman of a crew of wreckers who board a train on the road where the wreck has occurred is the fellow servant of the engineer of the train and a colliding train, although not in the service at the time, but only on his way to work. *Abend v. Terre Haute, etc., R. Co.*, 111 Ill. 202, 53 Am. Rep. 616, 17 Am. & Eng. R. Cas. 614.

Engineer and Track Repairer Riding on Train.—A track repairer riding on a train is a fellow servant of the engineer of such train through whose negligence he is injured. *White v. Kennon*, 83 Ga. 343.

1. Same.—Held not to be Fellow Servants.—*Louisville, etc., R. Co. v. Hawthorn*, 147 Ill. 226, affirming 45 Ill. App. 636; *Galveston, etc., R. Co. v. Norris*, (Tex. Civ. App. 1894) 29 S. W. Rep. 950; *Galveston, etc., R. Co. v. Leonard*, (Tex. Civ. App. 1894) 29 S. W. Rep. 955; *Galveston, etc., R. Co. v. Crawford*, 9 Tex. Civ. App. 245; *Haney v. Pittsburgh, etc., R. Co.*, 38 W. Va. 570. But compare *Ellington v. Beaver Dam Lumber Co.*, 93 Ga. 53.

In *Central Trust Co. v. Wabash, etc., R. Co.*, 34 Fed. Rep. 616, it was held that an expressman and baggage-man, killed in a collision while in the discharge of his duty on the defendant's passenger train, through the negligence of the employees on the defendant's freight train, was not a fellow servant of such employees, following the *Illinois* doctrine of consociation, and the case of *Chicago, etc., R. Co. v. Ross*, 112 U. S. 377, 17 Am. & Eng. R. Cas. 501. See also *Northern Pac. R. Co. v. Beaton*, 64 Fed. Rep. 563.

2. Rule Where Different-department Limitation Is Not Recognized.—*United States*.—*Van Avery v. Union Pac. R. Co.*, 35 Fed. Rep. 40; *Mealman v. Union Pac. R. Co.*, 37 Fed. Rep. 189; *Kerlin v. Chicago, etc., R. Co.*, 50 Fed. Rep. 185; *Becker v. Baltimore, etc., R. Co.*, 57 Fed. Rep. 188; *Baltimore, etc., R. Co. v. Andrews*,

27 Ohio L. J. 396, 50 Fed. Rep. 728; *Thom v. Pittard*, 8 U. S. App. 597, 62 Fed. Rep. 232; *Northern Pac. R. Co. v. Mase*, 63 Fed. Rep. 114, 27 U. S. App. 238; *Baltimore Trust, etc., Co. v. Atlanta Traction Co.*, 69 Fed. Rep. 358; *Wright v. Southern R. Co.*, 80 Fed. Rep. 260; *St. Louis, etc., R. Co. v. Needham*, 63 Fed. Rep. 107, 27 U. S. App. 227; *Northern Pac. R. Co. v. Charles*, 162 U. S. 359, reversing 51 Fed. Rep. 562; *Oakes v. Mase*, 165 U. S. 363; *Martin v. Atchison, etc., R. Co.*, 166 U. S. 399; *Northern Pac. R. Co. v. Poirier*, 167 U. S. 48.

Colorado.—*Denver, etc., R. Co. v. Sipes*, 23 Colo. 226.

Delaware.—*Wheatley v. Philadelphia, etc., R. Co.*, 1 Marv. (Del.) 305.

Indiana.—*Evansville, etc., R. Co. v. Tohill*, 143 Ind. 49.

Massachusetts.—*Peaslee v. Fitchburg R. Co.*, 152 Mass. 155.

Michigan.—*Enright v. Toledo, etc., R. Co.*, 93 Mich. 409; *Jarman v. Chicago, etc., R. Co.*, 98 Mich. 135.

New Mexico.—*Atchison, etc., R. Co. v. Martin*, 7 N. Mex. 158.

New York.—*Herrington v. Lake Shore, etc., R. Co.*, 83 Hun (N. Y.) 365; *Simpson v. Central Vermont R. Co.*, 5 N. Y. App. Div. 614; *Carr v. North River Constr. Co.*, 48 Hun (N. Y.) 266.

Oregon.—*Miller v. Southern Pac. Co.*, 20 Oregon 285; *Guthrie v. Southern Pac. R. Co.*, (Oregon 1891) 26 Pac. Rep. 76.

Pennsylvania.—*Cole v. Northern Cent. R. Co.*, 12 Pa. Co. Ct. Rep. 573.

Rhode Island.—*Healy v. New York, etc., R. Co.*, (R. I. 1897) 37 Atl. Rep. 676.

South Carolina.—*Jenkins v. Richmond, etc., R. Co.*, 39 S. Car. 507, 39 Am. St. Rep. 750.

Texas.—*Corona v. Galveston, etc., R. Co.*, (Tex. 1891) 17 S. W. Rep. 384.

Virginia.—*Norfolk, etc., R. Co. v. Linda-mood*, (Va. 1892) 14 S. E. Rep. 694; *Norfolk, etc., R. Co. v. Donnelly*, 88 Va. 853; *Norfolk, etc., R. Co. v. Houchins*, 95 Va. 398.

But see *Northern Pac. R. Co. v. O'Brien*, 1 Wash. 599.

Brakeman and Engineer on Different Trains.—A brakeman working a switch for his train on one track in a railroad yard is a fellow servant with the engineman of another train of the same corporation upon an adjacent track, and cannot maintain an action against the corporation for an injury caused by the negligence of the engineman in driving his engine too fast, and not giving due notice of its approach, without proving negligence of the corporation in employing an unfit engineman. *Randall v. Baltimore, etc., R. Co.*, 109 U. S. 478, 15 Am. & Eng. R. Cas. 243.

Engineers on Different Trains.—A railroad company is not liable to an engineer of one train for the negligence of the engineer of another train. *Chicago, etc., R. Co. v. Doyle*,

And it has been so held even in those jurisdictions where the limitation is favored,¹ though there are cases to the contrary.²

Trainmen and Trackmen. — In the jurisdictions where the different-department rule does not prevail, the employees of a railroad who operate its trains are fellow servants with its track employees.³ But in some of the states where

60 Miss. 977, 8 Am. & Eng. R. Cas. 171; *Van-Avery v. Union Pac. R. Co.*, 35 Fed. Rep. 40.

Fireman and Engineer on Different Trains. — A fireman on a passenger train and an engineer in charge of an engine not connected with such train, but belonging to the same railroad company, are fellow servants, and where the fireman is killed by a collision between the engine and the train, caused by the negligence of the engineer, the company will not be liable. *Howard v. Denver, etc., R. Co.*, 26 Fed. Rep. 837, 24 Am. & Eng. R. Cas. 448.

1. Rule Where Different-department Limitation Is Favored — Employees on Different Trains Held to Be Fellow Servants — *Illinois*. — *Ohio, etc., R. Co. v. Robb*, 36 Ill. App. 627; *Chicago, etc., R. Co. v. Fitzgerald*, 40 Ill. App. 476; *O'Leary v. Wabash R. Co.*, 52 Ill. App. 641; *Elgin, etc., R. Co. v. Malaney*, 59 Ill. App. 114; *Terre Haute, etc., R. Co. v. Leeper*, 60 Ill. App. 194; *Klees v. Chicago, etc., R. Co.*, 68 Ill. App. 244.

Mississippi. — *McMaster v. Illinois Cent. R. Co.*, 65 Miss. 264, 7 Am. St. Rep. 653.

Missouri. — *Schaub v. Hannibal, etc., R. Co.*, 106 Mo. 74; *Relyea v. Kansas City, etc., R. Co.*, 112 Mo. 86, 53 Am. & Eng. R. Cas. 578; *Relyea v. Kansas City, etc., R. Co.*, (Mo. 1892) 19 S. W. Rep. 1116.

Texas. — *Texas, etc., R. Co. v. Tatman*, 10 Tex. Civ. App. 434.

West Virginia. — *Madden v. Chesapeake, etc., R. Co.*, 28 W. Va. 610, 57 Am. Rep. 695; *Hanney v. Pittsburgh, etc., R. Co.*, 38 W. Va. 570.

2. Same — Employees on Different Trains Held Not to Be Fellow Servants — *Georgia*. — *Cooper v. Mullins*, 30 Ga. 146, 76 Am. Dec. 638.

Kentucky. — *Louisville, etc., R. Co. v. Rains*, 15 Ky. L. Rep. 423, (Ky. 1893) 23 S. W. Rep. 505; *Kentucky Cent. R. Co. v. Ackley*, 87 Ky. 278, 12 Am. St. Rep. 480, 10 Ky. L. Rep. 170.

Texas. — *San Antonio, etc., R. Co. v. Harding*, 11 Tex. Civ. App. 497, 3 Am. & Eng. R. Cas. N. S. 389; *Southern Pac. Co. v. Ryan*, (Tex. Civ. App. 1895) 29 S. W. Rep. 527; *Galveston, etc., R. Co. v. Worthy*, (Tex. Civ. App. 1895) 32 S. W. Rep. 557.

See also *Ragsdale v. Northern Pac. R. Co.*, 42 Fed. Rep. 383.

3. Trackmen and Trainmen Held to Be Fellow Servants — *United States*. — *Northern Pac. R. Co. v. Hamby*, 154 U. S. 349. But see *Howard v. Delaware, etc., Canal Co.*, 40 Fed. Rep. 195; *Pike v. Chicago, etc., R. Co.*, 41 Fed. Rep. 95.

Arkansas. — *St. Louis, etc., R. Co. v. Shackelford*, 42 Ark. 417.

California. — *Fagundes v. Central Pac. R. Co.*, 79 Cal. 97.

Indiana. — *Gormley v. Ohio, etc., R. Co.*, 72 Ind. 31.

Iowa. — *Sullivan v. Mississippi, etc., R. Co.*, 11 Iowa 421.

Maine. — *Blake v. Maine Cent. R. Co.*, 70 Me. 60, 35 Am. Rep. 297.

Maryland. — *Pennsylvania R. Co. v. Wachter*, 60 Md. 395.

Massachusetts. — *Farwell v. Boston, etc., R. Corp.*, 4 Met. (Mass.) 49, 38 Am. Dec. 339; *Clifford v. Old Colony R. Co.*, 141 Mass. 564.

Michigan. — *Quincy Min. Co. v. Kitts*, 42 Mich. 34; *Schaible v. Lake Shore, etc., R. Co.*, 97 Mich. 318.

Minnesota. — *Collins v. St. Paul, etc., R. Co.*, 30 Minn. 31.

Mississippi. — *New Orleans, etc., R. Co. v. Hughes*, 49 Miss. 258.

New York. — *Mele v. Delaware, etc. Canal Co.*, 59 N. Y. Super. Ct. 367.

North Carolina. — *Rittenhouse v. Wilmington St. R. Co.*, 120 N. Car. 544; *Kirk v. Atlanta, etc., Air-Line R. Co.*, 94 N. Car. 625, 55 Am. Rep. 621.

Pennsylvania. — *Ryan v. Cumberland Valley R. Co.*, 23 Pa. St. 384; *Keystone Bridge Co. v. Newberry*, 96 Pa. St. 246, 42 Am. Rep. 543.

Rhode Island. — *Brodeur v. Valley Falls Co.*, 16 R. I. 448.

Texas. — *Houston, etc., R. Co. v. Rider*, 62 Tex. 267.

Wisconsin. — *Fowler v. Chicago, etc. R. Co.*, 61 Wis. 159.

Canada. — *Plant v. Grand Trunk R. Co.*, 27 U. C. Q. B. 78.

But see *Northern Pac. R. Co. v. O'Brien*, 1 Wash. 599.

Trainmen and Sectionmen. — Thus it has been held that trainmen and sectionmen occupy to each other the relation of fellow servants.

United States. — *Northern Pac. R. Co. v. Hamby*, 154 U. S. 349; *Northern Pac. R. Co. v. Charles*, 162 U. S. 359; *Martin v. Atchison, etc., R. Co.*, 166 U. S. 399; *McPeck v. Central Vermont R. Co.*, 79 Fed. Rep. 590; *Wright v. Southern R. Co.*, 80 Fed. Rep. 260; *Cincinnati, etc., R. Co. v. Mealer*, 50 Fed. Rep. 725.

Arizona. — *Southern Pac. Co. v. McGill*, (Arizona 1896) 44 Pac. Rep. 302.

Dakota. — *Elliot v. Chicago, etc., R. Co.*, 5 Dakota 523.

Minnesota. — *Lundquist v. Duluth St. R. Co.*, 65 Minn. 387, 4 Am. & Eng. R. Cas. N. S. 506; *Connelly v. Minneapolis Eastern R. Co.*, 38 Minn. 80.

North Carolina. — *Rittenhouse v. Wilmington St. R. Co.*, 120 N. Car. 544.

In *Heine v. Chicago, etc., R. Co.*, 58 Wis. 525, the plaintiff, with a large number of other men, was at work for the respondent, "surfacing track;" that is, filling the dirt and gravel between the ties, and dressing up the surface. The gravel used was brought by a train of flat cars in charge of a conductor and the usual train hands. It was the duty of the men engaged in "surfacing" to get upon the cars, when the gravel train came up, and shovel off the gravel. The men engaged in "surfacing" were not otherwise connected with the train. It was held that the conductor of the train of flat cars was a fellow servant of the plaintiff,

the different-department limitation is favored the courts have held either that such employees are not fellow servants¹ or that the question as to their

and that, consequently, the plaintiff could not recover against the company for an injury resulting from the negligence of the conductor.

A section foreman and a train conductor are coemployees within the purview of Civ. Code *Dakota*, § 1130, exempting an employer from liability to one of his servants for the negligence of another servant "engaged in the same general business." *Elliot v. Chicago*, etc., R. Co., 5 *Dakota* 523.

Engineer and Section Hands and Track Repairers.—Section hands and track repairers are fellow servants with the engineer on a train so that they cannot recover against the company for the engineer's negligence.

United States.—*Van Wickle v. Manhattan R. Co.*, 32 Fed. Rep. 278.

Arkansas.—*St. Louis*, etc., R. Co. *v. Shackelford*, 42 *Ark.* 417.

Indiana.—*Gormley v. Ohio*, etc., R. Co., 72 *Ind.* 31, 5 *Am. & Eng. R. Cas.* 582; *Ohio*, etc., R. Co. *v. Collarn*, 73 *Ind.* 261, 38 *Am. Rep.* 134; *Ohio*, etc., R. Co. *v. Tindall*, 13 *Ind.* 366, 74 *Am. Dec.* 259.

Iowa.—*Sullivan v. Mississippi*, etc., R. Co., 11 *Iowa* 421.

Maine.—*Blake v. Maine Cent. R. Co.*, 70 *Me.* 60, 35 *Am. Rep.* 297.

Maryland.—*O'Connell v. Baltimore*, etc., R. Co., 20 *Md.* 212, 83 *Am. Dec.* 549; *Baltimore*, etc., R. Co. *v. State*, 41 *Md.* 277; *Pennsylvania R. Co. v. Wachter*, 60 *Md.* 395, 15 *Am. & Eng. R. Cas.* 187.

Massachusetts.—*Clifford v. Old Colony R. Co.*, 141 *Mass.* 564.

Minnesota.—*Connelly v. Minneapolis Eastern R. Co.*, 38 *Minn.* 80; *Collins v. St. Paul*, etc., R. Co., 30 *Minn.* 31, 8 *Am. & Eng. R. Cas.* 150.

New York.—*Coon v. Syracuse*, etc., R. Co., 5 *N. Y.* 492.

Ohio.—*Whaalan v. Mad River*, etc., R. Co., 8 *Ohio St.* 249.

Pennsylvania.—*Ryan v. Cumberland Valley R. Co.*, 23 *Pa. St.* 384.

Texas.—*Houston*, etc., R. Co. *v. Rider*, 62 *Tex.* 267.

Engineer and Teamster Hauling Ties in Construction of the Road.—In the territory of *Arizona* it has been held that a teamster who hauls ties in the construction of a railroad is not associated with the engineer of a train on which the workmen ride to dinner, so as to defeat his recovery against the common master for injuries caused by negligence of said engineer. *Hobson v. New Mexico*, etc., R. Co., (*Arizona* 1886) 28 *Am. & Eng. R. Cas.* 360.

Fireman on Train and Trackwalker.—And in a *Wisconsin* case a railroad trackwalker sued the company for personal injuries by the fall of a lump of coal from a tender, on which it was carelessly piled up. The court held that he could not recover, for the reason that the fireman whose negligence in piling up the coal caused the injury was the fellow servant of the trackman. *Schultz v. Chicago*, etc., R. Co., 67 *Wis.* 616, 58 *Am. Rep.* 881.

Fireman on Train and Roadmaster.—A roadmaster has been held to be a fellow servant with a fireman on a train through whose neg-

ligence in delivering a message the roadmaster was injured. *Card v. Eddy*, (*Mo.* 1894) 28 *S. W. Rep.* 753.

Engineer and Employee in Charge of Danger Signal.—An engineer on a train is a fellow servant with an employee who is employed to put danger signals on the track, so that such employee cannot recover against the company for the engineer's negligence. *East Tennessee*, etc., R. Co. *v. Rush*, 15 *Lea. (Tenn.)* 145.

Engineer and Flagman.—Where a flagman was killed through the negligence of the engineer on a train, in running without a headlight, it was held that the flagman and engineer were fellow servants and that there could be no recovery against the company. *McDonald v. New York Cent.*, etc., R. Co., 63 *Hun (N. Y.)* 587.

Foreman of a Bridge Gang and Trainmen.—The foreman of a bridge gang has been held to be a fellow servant with the men operating a train whose negligence caused his injury. *St. Louis*, etc., R. Co. *v. Henson*, 61 *Ark.* 302; *St. Louis*, etc., R. Co. *v. Welch*, 72 *Tex.* 298.

Watchman at Street Curve and Gripman.—A watchman at a street curve, in the employ of a street railroad, and charged with the duty of signalling to approaching cars whether they shall approach the curve or stop, has been held to be a fellow servant with a gripman on one of the cars. *Murray v. St. Louis Cable*, etc., R. Co., 98 *Mo.* 573, 14 *Am. St. Rep.* 661, 41 *Am. & Eng. R. Cas.* 446.

Engineer and Employee Having Charge of Track of Tramroad.—An engineer and a person having charge of the track of a tramroad have been held to be fellow servants. *White v. Kennon*, 83 *Ga.* 343.

Motorman of Electric Car and Trackman.—The motorman of an electric car and an employee put in charge of the track have been held to be fellow servants. *Rittenhouse v. Wilmington St. R. Co.*, 120 *N. Car.* 544.

Engineer, Fireman, and Laborer Moving Cars from Spur Track.—An engineer and a fireman are fellow servants with a common laborer engaged with them in moving cars from a spur track, and the laborer cannot recover against the company for their negligence. *Watts v. Hart*, 7 *Wash.* 178.

Section Master, Trackmen, and Trainman Engaged in Removing Obstructions from Road.—It has been held that a section master and a trackman are fellow servants with a trainman where they are all engaged in the common employment of removing obstructions from the road. *Wellman v. Oregon Short Line*, etc., R. Co., 21 *Oregon* 530. See *Thom v. Pittard*, 62 *Fed. Rep.* 232.

1. **Trackmen and Trainmen Held Not to Be Fellow Servants—Kansas.**—*St. Louis*, etc., R. Co. *v. Weaver*, 35 *Kan.* 412, 57 *Am. Rep.* 176.

Missouri.—*Miller v. Missouri Pac. R. Co.*, 109 *Mo.* 350, 32 *Am. St. Rep.* 673; *Parker v. Hannibal*, etc., R. Co., 109 *Mo.* 362; *Schlereth v. Missouri Pac. R. Co.*, (*Mo.* 1892) 19 *S. W. Rep.* 1134, 115 *Mo.* 87; *Swadley v. Missouri Pac. R. Co.*, 118 *Mo.* 268, 40 *Am. St. Rep.* 366; *McKenna v. Missouri Pac. R. Co.*, 54 *Mo. App.* 161; *Sullivan v. Missouri Pac. R. Co.*,

coservice depends in each case upon the extent of their consociation.¹

Trainmen and Switchmen. — Ordinarily, trainmen and switchmen are fellow servants; the co-operation of the switchman is necessary to the successful management of the train, and employees upon the train, in the common service, assume the risk of the negligent discharge of his duty.²

Telegraph Operator and Trainmen — Prevailing Rule. — As has been said in an earlier part of this article, a telegraph operator whose only connection with the train hands is as transmitter of the train dispatcher's or superintendent's orders is properly a fellow servant with them. He does not occupy the position of a train dispatcher merely because he transmits or delivers the orders for the movement of the trains, and his negligence cannot be said to be the negligence of the company.³

Same — Where Different-department Rule Prevails. — In a couple of the United States, however, where the different-department rule prevails it is held otherwise, and a railroad company has been held liable to trainmen for the negligence of a telegraph operator.⁴

97 Mo. 113; *Barry v. Hannibal, etc., R. Co.*, 98 Mo. 62, 14 Am. St. Rep. 610.

Nebraska. — *Union Pac. R. Co. v. Erickson*, 41 Neb. 1.

South Carolina. — *Calvo v. Charlotte, etc., R. Co.*, 23 S. Car. 526, 55 Am. Rep. 28.

Tennessee. — *Nashville, etc., R. Co. v. Carroll*, 6 Heisk. (Tenn.) 347.

Texas. — *Southern Pac. Co. v. Ryan*, (Tex. Civ. App. 1895) 29 S. W. Rep. 527.

Compare Moon v. Richmond, etc., R. Co., 78 Va. 745, 49 Am. Rep. 401, explained in *Norfolk, etc., R. Co. v. Nuckols*, 91 Va. 193; *Casey v. Louisville, etc., R. Co.*, 84 Ky. 79.

1. Fellow Service of Trackmen and Trainmen Dependent on Extent of Consociation. — This seems to be the view taken by the *Illinois* courts. *Louisville, etc., R. Co. v. Hawthorn*, 147 Ill. 226, 45 Ill. App. 635; *Peoria, etc., R. Co. v. Rice*, 144 Ill. 227.

In *Chicago, etc., R. Co. v. Kelly*, 28 Ill. App. 655, affirmed 127 Ill. 637, it was held that a section hand is not a fellow servant with the employees in charge of a construction train, unless they are co-operating in furthering a particular business of the master.

But in *West Chicago St. R. Co. v. Dwyer*, 57 Ill. App. 440, affirmed 162 Ill. 482, it was held that the members of a wrecking crew in the employ of a cable street railway company were not fellow servants with a gripman injured through their negligence.

Conductor and Blacksmith Working at Removal of Wreck. — It has been held that where a conductor and a brakeman are temporarily engaged in the common work of removing a wreck and are on the way to the place of the wreck, they are fellow servants. *Abend v. Terre Haute, etc., R. Co.*, 111 Ill. 202, 53 Am. Rep. 616.

2. Trainmen and Switchmen Held to Be Fellow Servants. — *United States.* — *Smith v. Memphis, etc., R. Co.*, 18 Fed. Rep. 304; *Naylor v. New York Cent., etc., R. Co.*, 33 Fed. Rep. 801.

California. — *Brown v. Central Pac. R. Co.*, 68 Cal. 171.

Illinois. — *Columbus, etc., R. Co. v. Troesch*, 68 Ill. 545; *Chicago, etc., R. Co. v. Henry*, 7 Ill. App. 322.

Indiana. — *Slattery v. Toledo, etc., R. Co.*, 23 Ind. 81; *Robertson v. Terre Haute, etc., R. Co.*, 78 Ind. 79, 8 Am. & Eng. R. Cas. 175.

Louisiana. — *Satterly v. Morgan*, 35 La. Ann. 1166.

Massachusetts. — *Farwell v. Boston, etc., R. Corp.*, 4 Met. (Mass.) 49, 38 Am. Dec. 339; *Gilman v. Eastern R. Corp.*, 10 Allen (Mass.) 233, 87 Am. Dec. 635.

Minnesota. — *Roberts v. Chicago, etc., R. Co.*, 33 Minn. 218.

New York. — *Tinney v. Boston, etc., R. Co.*, 52 N. Y. 632, 62 Barb. (N. Y.) 218; *Harvey v. New York Cent., etc., R. Co.*, 88 N. Y. 481; *Gibson v. Northern Cent. R. Co.*, 22 Hun (N. Y.) 289.

Oregon. — *Miller v. Southern Pac. Co.*, 20 Oregon 285.

Tennessee. — *East Tennessee, etc., R. Co. v. Gurley*, 12 Lea (Tenn.) 46, 17 Am. & Eng. R. Cas. 568.

Wisconsin. — *Fowler v. Chicago, etc., R. Co.*, 61 Wis. 159, 17 Am. & Eng. R. Cas. 536.

Canada. — *Barton's Hill Coal, etc., Co. v. Reid*, 3 Macq. H. L. Cas. 266; *Deverill v. Grand Trunk R. Co.*, 25 U. C. Q. B. 517.

Contra. — *Louisville, etc., R. Co. v. Sheets*, (Ky. 1890) 13 S. W. Rep. 248.

3. Telegraph Operator and Trainmen Held to Be Fellow Servants. — An engineer injured through the negligence of a telegraph operator is his fellow servant. *Dana v. New York Cent., etc., R. Co.*, 23 Hun (N. Y.) 473. And so is a fireman. *Slater v. Jewett*, 85 N. Y. 61, 5 Am. & Eng. R. Cas. 515. See also *Monaghan v. New York Cent., etc., R. Co.*, 45 Hun (N. Y.) 113. *Compare Sheehan v. New York Cent., etc., R. Co.*, 91 N. Y. 332. Where, however, a telegraph operator was negligent in failing to report defects in tracts and bridges, as required by a rule of the company, it has been properly held that he was not the fellow servant of a brakeman injured thereby, but a representative of the company, for whose negligence it was responsible. *Hall v. Galveston, etc., R. Co.*, 39 Fed. Rep. 18. See *supra*, this title, *Extent and Limitations of the Rule — Vice-principals*.

4. Telegraph Operator and Trainmen Held Not to Be Fellow Servants. — *East Tennessee, etc., R. Co. v. De Armond*, 86 Tenn. 73, 6 Am. St. Rep. 816; *Madden v. Chesapeake, etc., R. Co.*, 28 W. Va. 610, 57 Am. Rep. 605. See *supra*, this title, *Extent and Limitations of the Rule — Different-department Limitation*.

Yardmaster and Yard Hand. — A yardmaster through whose negligence an injury occurs to his assistant is, at least in the jurisdictions where the superior-servant limitation is rejected, the fellow servant of the assistant, as to all acts within the range of their common employment, except such as are done in the performance of some duty which the company owes to its servants.¹ But in the jurisdictions where the superior-servant limitation prevails a railroad company will possibly be held liable for the negligence of a yardmaster resulting in the injury of his subordinate employees.²

Inspectors or Repairers and Other Employees. — Whether an employee of a railroad who is charged with the inspection or repair of the appliances or track is a fellow servant with an employee of the company who is injured through his negligence has been discussed in a former part of this article.³ All that need be said at this place is that where the injury is to an inspector or repairer, the fact that he is himself a vice-principal cannot have any bearing upon the question whether he is the fellow servant of the negligent servant so as to preclude a recovery against the railroad.⁴

1. Yardmaster and Assistant. — Thus, in a *New York* case it appeared that McC. was employed in the yard of the defendant to assist the yardmaster, L.; he was hired by L. and was under his control and supervision. While McC. was engaged, by the direction of L., in attaching a damaged car standing on a track in the yard, to another car, L. negligently signaled to an engineer, whose train stood on the track, to back the train, which he did, without signal or warning, and in consequence McC. was crushed between the cars, receiving injuries causing his death. In an action to recover damages it was held that the yardmaster was a fellow servant of the deceased. *McCosker v. Long Island R. Co.*, 84 N. Y. 77, 5 Am. & Eng. R. Cas. 565.

Yardmaster and Car Repairer Injured Through Yardmaster's Negligence. — A yardmaster employed in moving cars back and forth in the company's yard for the purpose of their being repaired is also a fellow servant of the car repairer, and if he is injured through the yardmaster's negligence he has no right to recover. *Besel v. New York Cent., etc.*, R. Co., 70 N. Y. 171.

In *Kirk v. Atlanta, etc., Air-Line R. Co.*, 94 N. Car. 625, 55 Am. Rep. 621, 25 Am. & Eng. R. Cas. 507, it appeared that a yardmaster had the general management of making up, switching, and receiving trains. It was held that a car repairer was his fellow servant, and the company was not liable for an injury resulting from his negligence.

In *Ritt v. Louisville, etc., R. Co.*, (Ky. 1887) 31 Am. & Eng. R. Cas. 289, it appeared that after a train on the defendant road had arrived at Nashville, and while, according to the evidence, it was doubtful whether it was under the control of the conductor or the yardmaster, the conductor ordered the foreman of the car repairers to go under a car and repair a brake, and while he was so engaged, and this was known to the conductor, the train started, and the car repairer was run over and killed. It was held that, as it was doubtful who had charge of the train, and if it was the yardmaster the company was not liable, he being a fellow servant of the deceased, it was error for the court to order a verdict for the defendant on the ground that the train was in charge of the yardmaster.

2. Yardmaster Held Not to Be a Fellow Servant with Subordinate Employees. — In *Hardy v. Minneapolis, etc., R. Co.*, 36 Fed. Rep. 657, however, it appeared that M., the defendant's yardmaster, mounted the switch engine, and, while acting as engineer, gave to the deceased, a call boy employed in the yard, directions to assist in uncoupling cars. The boy, while so employed, was run over and killed. It was held that the court properly refused an instruction that while M. was acting as engineer, he was a fellow servant of the deceased, and the defendant would not be liable for his acts. Though actually engaged as an engineer, he was none the less yardmaster, and entitled to be obeyed in the work of making up trains. And see *Baldwin v. St. Louis, etc., R. Co.*, 75 Iowa 297.

3. See supra, this title, *Extent and Limitations of the Rule — Vice-principals.*

4. Inspectors or Repairers Injured through Negligence of Other Employees — *United States.* — *Van Wickle v. Manhattan R. Co.*, 32 Fed. Rep. 278.

Alabama. — *Dantzler v. De Bardeleben Coal, etc., Co.*, 101 Ala. 309.

Arkansas — *St. Louis, etc., R. Co. v. Rice*, 51 Ark. 467; *St. Louis Southwestern R. Co. v. Henson*, 61 Ark. 302; *St. Louis, etc., R. Co. v. Triplett*, 54 Ark. 289.

Indiana. — *Gormley v. Ohio, etc., R. Co.*, 72 Ind. 31.

Maine. — *Blake v. Maine Cent. R. Co.*, 70 Me. 60, 35 Am. Rep. 297.

Massachusetts. — *Whitmore v. Boston, etc., R. Co.*, 150 Mass. 477.

Minnesota. — *Lundquist v. Duluth St. R. Co.*, 65 Minn. 387; *Collins v. St. Paul, etc., R. Co.*, 30 Minn. 31, 8 Am. & Eng. R. Cas. 150.

New York. — *Corcoran v. Delaware, etc., R. Co.*, 126 N. Y. 673, 38 N. Y. St. Rep. 251; *Potter v. New York Cent., etc., R. Co.*, 136 N. Y. 77; *Besel v. New York Cent., etc., R. Co.*, 70 N. Y. 171.

Texas. — *San Antonio, etc., R. Co. v. Reynolds*, (Tex. Civ. App. 1895) 30 S. W. Rep. 846.

Virginia. — *Norfolk, etc., R. Co. v. Nuckols*, 91 Va. 193.

West Virginia. — *Unfried v. Baltimore, etc., R. Co.*, 34 W. Va. 260.

Car Repairers. — Two car repairers, one of whom is injured through the negligence of an-

Other Employees — In General. — As further illustrating the fellow-service relation between employees of railroad companies, a number of additional instances of a miscellaneous character may be found in the notes.¹

other, are ordinarily fellow servants. *Fordyce v. Briney*, 58 Ark. 206.

Boiler Repairers. — Workmen engaged in the repair of an engine boiler are, of course, fellow servants, and one of them cannot recover for the negligence of the other. *Murphy v. Boston, etc., R. Co.*, 88 N. Y. 146, 8 Am. & Eng. R. Cas. 510.

Car Repairer and Car Inspector. — And a car repairer has been held to be a fellow servant with a car inspector who directs his labor as a mere foreman. *Fordyce v. Briney*, 58 Ark. 206.

Car Repairer Injured through Negligence of Brakeman or Switchman. — If the negligence of a brakeman or switchman causes injury to a car repairer who is at work at the performance of his duty under 'a car standing on a repair track, the company is ordinarily not liable, both being fellow servants. *Slattery v. New York, etc., R. Co.*, (Supreme Ct.) 4 N. Y. Supp. 910; *Besel v. New York Cent., etc., R. Co.*, 70 N. Y. 171; *Potter v. New York Cent., etc., R. Co.*, 136 N. Y. 77; *Campbell v. Pennsylvania R. Co.*, (Pa. 1886) 24 Am. & Eng. R. Cas. 427; *Smith v. Chicago, etc., R. Co.*, 91 Wis. 503.

Engineer and Track Repairers. — The engineer on a train and laborers repairing the track are fellow servants, and the latter cannot recover of the company for the former's negligence. *Pennsylvania R. Co. v. Wachter*, 60 Md. 395, 15 Am. & Eng. R. Cas. 188; *Mele v. Delaware, etc., Canal Co.*, 59 N. Y. Super. Ct. 367.

Car Inspector or Repairer Injured through Negligence of Engineer. — A car inspector or repairer who is injured while inspecting or repairing a car by the negligence of an engineer is a fellow servant with the engineer, and the company is not liable. *Chicago, etc., R. Co. v. Murphy*, 53 Ill. 336, 5 Am. Rep. 48; *Valtez v. Ohio, etc., R. Co.*, 85 Ill. 500; *Cone v. Delaware, etc., R. Co.*, 81 N. Y. 207, 37 Am. Rep. 497, 2 Am. & Eng. R. Cas. 57; *Texas, etc., R. Co. v. Cumpston*, 4 Tex. Civ. App. 25; *Texas, etc., R. Co. v. Harrington*, 62 Tex. 597, 21 Am. & Eng. R. Cas. 571. But see *Louisville, etc., R. Co. v. Davis*, 91 Ala. 487.

But in a *Virginia* case it was decided that an "overhauler" of cars, who was injured through the negligence of the engineer of a shifting engine, being engaged in a different department from the engineer, was not his fellow workman in the sense which would relieve the employer from liability. *Richmond, etc., R. Co. v. Norment*, 84 Va. 167, 10 Am. St. Rep. 827.

And this is substantially the position taken in the *Illinois* case of *Chicago, etc., R. Co. v. Hoyt*, 122 Ill. 369, 31 Am. & Eng. R. Cas. 309, in which a railroad company was held liable for the negligence of an engineer resulting in an injury to a car inspector. But compare *Valtez v. Ohio, etc., R. Co.*, 85 Ill. 500; *Chicago, etc., R. Co. v. Murphy*, 53 Ill. 336, 5 Am. Rep. 48.

Conductor and Track Repairer. — A conductor

of a train has been held to be a fellow servant with a laborer repairing the track, where the latter was injured through the conductor's negligence. *Cumberland Coal, etc., Co. v. Scally*, 27 Md. 589.

Car Repairer and Yard Foreman. — A car repairer has been held to be a fellow servant of the foreman of the yard in which he was working when injured through the foreman's negligence. *San Antonio, etc., R. Co. v. Reynolds*, (Tex. Civ. App. 1895) 30 S. W. Rep. 846.

Track Repairer and Employees Working Handcar. — It has been held that a railroad company is not liable to a track repairer who is injured, while attempting to board a train, through the negligence of employees working a handcar. *O'Brien v. Boston, etc., R. Co.*, 138 Mass. 387, 52 Am. Rep. 270.

Where the Different-department Rule Prevails. — Where the different-department rule prevails, and the car repairer who is injured and the negligent servant work in different departments, the fellow-servant rule does not prevent a recovery against the company. *Chicago, etc., R. Co. v. Shannon*, 43 Ill. App. 540; *Parker v. Hannibal, etc., R. Co.*, 109 Mo. 362; *Schlereth v. Missouri Pac. R. Co.*, (Mo. 1892) 19 S. W. Rep. 1134; *San Antonio, etc., R. Co. v. Keller*, 11 Tex. Civ. App. 569.

Thus, where a car repairer was injured through the negligence of a hostler, who worked in a separate yard, it was held that they were not fellow servants. *San Antonio, etc., R. Co. v. Keller*, 11 Tex. Civ. App. 569.

1. Miscellaneous Railroad Employees. — If an employee negligently puts up a gas pipe over a railroad track, and another employee, in passing under it, is struck and injured, it has been held in *Pennsylvania* that there can be no recovery. *New York, etc., R. Co. v. Bell*, 112 Pa. St. 400.

But in *Illinois* it has been held that the negligence of a person whose duty it is to see that a mail catcher is not placed too near the track is the negligence of the railroad company, and a fireman injured thereby is entitled to recover. *Chicago, etc., R. Co. v. Gregory*, 53 Ill. 272.

Night Watcher in Same Yard with Foreman of Night Switching Crew. — In *Chicago, etc., R. Co. v. Geary*, 110 Ill. 383, 17 Am. & Eng. R. Cas. 606, it was held that where it was to some extent the duty of a servant of a railway company, as a night watcher, to note and report to his superior upon the conduct of the foreman of a night crew, whose duty it was to make up trains, etc., and the night watcher could in no event perform his duty without constantly watching the engine and cars of the night crew while at or upon a crossing of a public street, the night watcher and the foreman of the night crew were fellow servants, within the legal meaning of that term, and the common master was not liable to the night watcher for an injury received in consequence of the negligence of the foreman of the night crew in the discharge of his duties in switching cars on one of the tracks over the crossing.

Same - Flagman and Other Employees. — A flagman performs no duties which properly devolve upon the company, and therefore there ordinarily can be no recovery for his negligence in the discharge of his duties resulting in the injury of a brakeman,¹ car repairer,² or carpenter in a repair shop.³

Same — Laborers Loading or Unloading Cars, and Other Employees. — On the ground that the injured and the negligent employees were fellow servants, it has been held that a trainman cannot recover against the company for injuries sustained in consequence of the negligent loading of cars by employees intrusted with that work.⁴ And for the same reason it has been held that an employee engaged in the work of loading or unloading cars cannot recover for the negligence of other employees of the company employed to place the cars in position.⁵

Employees in and About Roundhouse. — As a general rule, the employees of a railroad company in and about its roundhouse are all fellow servants.⁶

Roundhouse and Other Employees. — And employees in the roundhouse of a railroad company have in some cases been held to be fellow servants with other employees who are not employed in the roundhouse.⁷ But under the differ-

Laborer Ballasting Road and Laborer Laying Tram-plates. — It has been held that a laborer employed to do ballasting for a railway company is a fellow servant of one employed to lay tram-plates and cannot recover for an injury received through his negligence while they were so employed. *Lovegrove v. London, etc., R. Co.*, 16 C. B. N. S. 669, 111 E. C. L. 669, 33 L. J. C. P. 329.

Blacksmith in Car Shops and Assistant. — A blacksmith and his assistant working together in the company's shops are fellow servants. *Melville v. Missouri River, etc., R. Co.*, 4 McCrary (U. S.) 194.

Trackwalker and Coal Heaver. — And a trackwalker who is injured by the fall of a lump of coal from a tender, on which it was carelessly piled by a coal heaver, has been held to have no right of action against the railroad. *Schultz v. Chicago, etc., R. Co.*, 67 Wis. 616, 58 Am. Rep. 881.

Brakeman and Workmen Setting up and Using Derrick. — It has been held that a railroad company is not liable to a brakeman on one of its trains for injuries suffered from the negligent setting up and use of a derrick by workmen employed in widening its road. *Holden v. Fitchburg R. Co.*, 129 Mass. 268, 37 Am. Rep. 343, 2 Am. & Eng. R. Cas. 94.

Trackmen and Workmen Unloading Cars. — In *Foster v. Missouri Pac. R. Co.*, 115 Mo. 165, it was held that the workmen on a car, pitching ties therefrom, were fellow servants with the plaintiff, who was one of a gang engaged in track work, distributing railroad ties.

Wreckmaster and Bridge Carpenter. — In *Missouri* a wreckmaster who negligently ordered a car to be coupled with a rope instead of a chain has been held not to be the fellow servant of a bridge carpenter who was injured in an accident caused by such negligence. *Tabler v. Hannibal, etc., R. Co.*, 93 Mo. 79, 31 Am. & Eng. R. Cas. 185.

1. **Brakeman and Flagman.** — *Cooper v. Milwaukee, etc., R. Co.*, 23 Wis. 668.

2. **Car Repairer and Flagman.** — *Gilman v. Eastern R. Co.*, 13 Allen (Mass.) 433.

3. **Carpenter in Repair Shop and Flagman.** — *Gilman v. Eastern R. Co.*, 13 Allen (Mass.) 433.

4. **Trainmen and Employees Loading Cars.** — *Byrnes v. New York, etc., R. Co.*, 113 N.

Y. 251; *Sweeney v. Page*, 64 Hun (N. Y.) 172.

Switchman and Employees Who Load Cars. — And it has been held that a switchman cannot recover against the railroad company for injuries received in consequence of the careless loading of cars by other employees of the company. *Indianapolis, etc., R. Co. v. Johnson*, 102 Ind. 352; *Ford v. Lake Shore, etc., R. Co.*, (Ct. App.) 27 N. Y. St. Rep. 246, 41 Am. & Eng. R. Cas. 369.

5. **Employees Loading or Unloading Cars and Employees Placing Cars in Position.** — *Neutz v. Jackson Hill Coal, etc., Co.*, 139 Ind. 411; *Rehm v. Pennsylvania R. Co.*, 164 Pa. St. 91. But compare *Wenona Coal Co. v. Holmquist*, 51 Ill. App. 507.

Brakeman On, and Laborer Loading, a Train. — A laborer who, while engaged in loading dirt upon a train, is injured through the negligence of a brakeman in failing to set the brakes cannot recover against the company. *Henry v. Staten Island R. Co.*, 81 N. Y. 373, 2 Am. & Eng. R. Cas. 60. See also *St. Louis, etc., R. Co. v. Britz*, 72 Ill. 256; *McGowan v. St. Louis, etc., R. Co.*, 61 Mo. 528.

6. **Roundhouse Employees.** — *Spencer v. Ohio, etc., R. Co.*, 130 Ind. 181.

Hostler and Helper. — A hostler and a helper in the employ of a railroad company, who are charged with the duty of taking care of engines at a roundhouse, are fellow servants. *Chicago, etc., R. Co. v. Massig*, 50 Ill. App. 666; *Clay v. Chicago, etc., R. Co.*, 56 Ill. App. 235.

Hostler and Wiper. — It has been held that an employee of a railroad company who was injured, while engaged in cleaning an engine, through the negligence of a hostler, cannot recover against the company. *Louisville, etc., R. Co. v. Richardson*, 100 Ala. 232.

Hostler and Boiler Washer. — A hostler whose duty it is to take engines in and out of the roundhouse, and a boiler washer whose duty it is to clean the boilers of engines, have been held to be fellow servants under the *Texas* General Laws of 1891, c. 24, § 2, defining fellow servants. *Missouri, etc., R. Co. v. Whitaker*, 11 Tex. Civ. App. 668.

7. **Engineer and Roundhouse Employees.** — An employee in a roundhouse who was required to clean an engine and the engineer in charge

ent-department rule, such employees will usually not be fellow servants.¹

c. EMPLOYEES ON AND ABOUT VESSELS — In General. — In the application of the fellow-servant rule no distinction is made in favor of this class of employees. The same principles apply whether the offending or injured employee is a seaman or a landsman.²

Seamen or Other Employees on Same Vessel. — There can, of course, be no question but that any seaman on a vessel is the fellow servant of every other seaman on the same vessel.³ And this is also true, generally speaking, of the other employees on the vessel.⁴

Mates and Members of Crew. — Either the first or second mate of a vessel and a common sailor or deck hand are regarded as fellow servants in all jurisdictions save those in which the negligence of almost any servant having authority to command is held to be the negligence of a superior servant for which the master is liable.⁵

Master of Vessel and Members of Crew. — While it has been held by excellent authority that the master of a vessel is a fellow servant with the members of

of the engine have been held to be fellow servants. *Spencer v. Ohio, etc., R. Co.*, 130 Ind. 181.

Brakeman and Sandman. — It has been held that a brakeman is a fellow servant with, and cannot recover for the negligence of, an employee whose duty it was to fill the sand box, but who failed to do so. *Louisville, etc., R. Co. v. Petty*, 67 Miss. 255, 19 Am. St. Rep. 304, 41 Am. & Eng. R. Cas. 444.

Engine Wiper and Trainmen. — In *Ewald v. Chicago, etc., R. Co.*, 70 Wis. 420, 5 Am. St. Rep. 178, 33 Am. & Eng. R. Cas. 326, it was held that an engine wiper, employed in the company's roundhouse, is a fellow servant of the men operating a train, and cannot recover for any injury he may receive, while walking through the yards, through their negligence.

1. Locomotive Engineer and Hostler. — Thus it has been held in *Texas* that a locomotive engineer and a hostler are not fellow servants under the Act of March 10, 1891. *Texas, etc., R. Co. v. Lighty*, (Tex. Civ. App. 1895) 32 S. W. Rep. 799.

Yard and Roundhouse Employees. — A person who was employed by the foreman of the roundhouse to shovel coal from the coal cars to the engines, and men employed by the yard-master who were charged with the duty of placing the coal cars in proximity to the engines, have been held not to be fellow servants. *Houston, etc., R. Co. v. Talley*, 15 Tex. Civ. App. 115.

2. Benson v. Goodwin, 147 Mass. 237.

3. Seamen on Same Vessel. — *The Sachem*, 42 Fed. Rep. 66.

4. Chief Engineer and Seaman. — A chief engineer has been held to be in a common employment with one of the ordinary seamen employed by the same company. *Searle v. Lindsay*, 11 C. B. N. S. 429, 103 E. C. L. 429, 31 L. J. C. P. 196.

Chief Engineer and Third Engineer on Same Vessel. — And a chief engineer and a third engineer on a steamer are fellow servants. *Searle v. Lindsay*, 11 C. B. N. S. 429, 103 E. C. L. 429.

Porter or Carpenter and Stewardess of Steamship. — The stewardess of a steamship has been held to be a fellow servant with the porter and

carpenter. *Quebec Steamship Co. v. Merchant*, 133 U. S. 375.

Engineer and Cook on Steam Tug. — A cook on a steam tug is a fellow servant with the engineer, and there can be no recovery against the shipowner for the death of the cook in consequence of the engineer's negligence. *Grimsley v. Hankins*, 46 Fed. Rep. 400.

Coal Trimmer and Engineer on Vessel. — The negligence of the engineer of a steamship resulting in the injury of a coal trimmer is the negligence of a fellow servant. *Mellen v. Wilson*, 159 Mass. 88.

Engineer and Oiler on Ferryboat. — An engineer on a ferryboat and an oiler of the machinery are fellow servants, so that there can be no recovery for the death of the oiler in consequence of the engineer's negligence in starting the machinery without warning. *Stevens v. San Francisco, etc., R. Co.*, 100 Cal. 554.

5. Mate and Members of Crew. — *Halverson v. Nisen*, 3 Sawy (U. S.) 562; *The City of Alexandria*, 17 Fed. Rep. 390; *Malone v. Western Transp. Co.*, 5 Biss. (U. S.) 315; *Benson v. Goodwin*, 147 Mass. 237; *Kalleck v. Deering*, 161 Mass. 469, 42 Am. St. Rep. 421; *Geoghegan v. Atlas Steamship Co.*, 3 Misc. Rep. (N. Y. C. Pl.) 224; *Mathews v. Case*, 61 Wis. 491, 50 Am. Rep. 151.

If, however, the mate is charged with the performance of the owner's duty to his servants, he is not, while discharging that duty, a fellow servant with the seamen, so as to prevent a recovery against the owner by one of the seamen who is injured through the mate's negligence. *The Frank and Willie*, 45 Fed. Rep. 494.

Mate and Servant in Steward's Department. — On the ground that the mate of a vessel is a fellow servant with one who is employed in the steward's department, and whose principal duties are to serve as a waiter at the officers' table, it has been held that such employee cannot recover against the master for the negligence of the mate. *Livingston v. Kodiak Packing Co.*, 103 Cal. 258.

Second Mate and Seaman Turning Hawser Reel. — A second mate superintending the work of reeling in a hawser is a fellow servant with a seaman turning the reel on board ship. *The Egyptian Monarch*, 36 Fed. Rep. 773.

his crew, and one of the latter cannot recover against the owners for injuries received through the master's negligence,¹ there is good authority to the contrary.² And it seems that the contrary view must prevail at least in the jurisdictions in which the superior-servant limitation has been adopted,³ and possibly in the jurisdictions where the employer is held liable for the negligence of a servant in charge of the employer's entire business or a separate and distinct department of the business.⁴

Masters and Crews of Different Vessels of Owner. — The masters and crews of two different vessels belonging to the same owners are not in a common employment.⁵

Workmen Loading and Unloading Vessels. — The relation of fellow service exists between all members of a gang of workmen engaged in the common employment of loading or unloading a vessel.⁶

1. Master of Vessel and Mate Held to Be Fellow Servants. — It has accordingly been held that if the mate of a vessel is injured through the negligence of the captain or master there can be no recovery, the master and mate being fellow servants. *Caniff v. Blanchard Nav. Co.*, 66 Mich. 638, *Matthews v. Case*, 61 Wis. 491, 50 Am. Rep. 151.

Master of Vessel and Seamen Held to Be Fellow Servants. — And it has been held that the master of a ship and the seamen on board are fellow servants so that the owner of the vessel is not liable for injury caused to a seaman through the master's negligence. *Hedley v. Pinkney, etc., Steamship Co.*, (1894) App. 222; *Geoghegan v. Atlas Steamship Co.*, 6 Misc. Rep. (N. Y. C. Pl.) 127.

In a *New York* case it appeared that injury resulted to a hand employed on a state boat, through the negligence of Wells, the captain, who at the time was engaged, with several hands employed on the boat (including the claimant), in digging clay from a bank and loading the boat. The negligence consisted in setting the claimant to work under the bank after Wells had loosened the overhanging earth, so that it fell upon and injured the plaintiff. It was held that Wells, though captain of the boat, with power to direct those under him, was, nevertheless, a coservant within the rule. The court said: "The manner of proceeding with the work was committed to Wells. It involved the exercise of such discretion and judgment only as is committed to a foreman. It is not claimed that Wells was incompetent for his position, and no question as to the suitability of appliances furnished by the state arises. It is the ordinary case of mismanagement by a coemployee of superior grade as to the manner of prosecuting an ordinary work in which he and other employees acting under him were at the time engaged. This was a risk incident to the employment which the claimant assumed, and the injury not being one for which the master, if an individual, would be liable, it is not, therefore, one for which the state is liable." *Loughlin v. State*, 105 N. Y. 159.

In *Baltimore Elevator Co. v. Neal*, 65 Md. 438, it was held that a laborer shoveling grain for an elevator company and the captain of a tug owned by the company, engaged in bringing a vessel to the elevator, are fellow servants.

Same — Master of Lighter and Crew. — The

master of a lighter has been held to be a fellow servant with the men in his crew. *Johnson v. Boston Tow-Boat Co.*, 135 Mass. 209, 46 Am. Rep. 458.

Master and Fireman on Steam Tug. — As to whether a fireman and master of a steam tug are fellow servants, see *The Clatsop Chief*, 7 Sawy. (U. S.) 274.

2. Master of Vessel and Seamen Held Not to Be Fellow Servants. — The Supreme Court of *Wisconsin* has held that an action by an ordinary seaman will lie for an injury caused by the negligence or unskillfulness of the captain. Thus, in *Thompson v. Hermann*, 47 Wis. 602, 32 Am. Rep. 784, it appeared that the master, who was also part owner, ordered the plaintiff, a seaman, to adjust the rigging in a dangerous manner, though the plaintiff protested and suggested a safe way of adjusting it. But the master refused to adopt the safe course, and imperatively ordered the work to be done in a dangerous manner. The plaintiff, while in the careful discharge of his duty, obeying the master's order, fell and was injured. It was held that the plaintiff might recover. "The decision is placed mainly on the peculiar character of the employment, and the relations existing between the master and a common seaman of a merchant vessel outside of port." *Mathews v. Case*, 61 Wis. 491, 50 Am. Rep. 151.

Same — Pilot and Deck Hand. — Treating the pilot as the master of a vessel, he is responsible for its management and navigation, and it has been held by the United States Circuit Court for the Southern District of New York that he is not a fellow servant of a deck hand who is injured through his negligence. *The Titan*, 23 Fed. Rep. 413.

Same — Master of Steamboat and Engineer. — In *The Transfer No. 4*, 61 Fed. Rep. 364, it was held that the master of a steamboat is not the fellow servant of the engineer, but that there can be a recovery for the engineer's death caused by the negligence of the master.

3. See *supra*, this title, *Extent and Limitations of the Rule — Superior Servants*.

4. See *supra*, this title, *Extent and Limitations of the Rule — Vice-principals*.

5. *The Petrel*, (1893) Prob. 320, 1 Reports 651, 62 L. J. P. 92, 70 L. T. N. S. 417, 7 Asp. M. Cas. 434.

6. *Members of Gang Loading and Unloading a Vessel.* — *The Servia*, 44 Fed. Rep. 943; *The Bolivia*, 59 Fed. Rep. 626; *The Louisiana*, 74

d. EMPLOYEES IN AND ABOUT MINES. — Ordinary miners are held to be fellow servants with "roadmen,"¹ "pickers,"² blasters,³ "fillers,"⁴ and the engineer in charge of the hoist engine.⁵ They have also been held to be fellow servants with the ordinary mining boss⁶ and other employees.⁷ But

Fed. Rep. 748; *The Peninsular*, 79 Fed. Rep. 972; *Burns v. Sennett*, (Cal. 1896) 44 Pac. Rep. 1068; *Ocean Steamship Co. v. Cheeney*, 86 Ga. 278; *McCampbell v. Cunard Steamship Co.*, (C. Pl.) 13 N. Y. Supp. 288; *Flynn v. Maine Steamship Co.*, 14 Misc. Rep. (N. Y. City Ct.) 446; *Hogan v. Smith*, 125 N. Y. 774. See *supra*, this section, *Necessity of a Common Master*.

Stevadore and Watcher at Hatchway of Vessel. — A watcher placed at the hatchway of a vessel, while it is being loaded, to give warning to the workmen below, is a fellow servant with the latter, and one of them who is injured through the watcher's negligence cannot recover against the owner. *Ocean Steamship Co. v. Cheeney*, 86 Ga. 278.

Fall Tender, Selected from Crew, and Member of Crew. — The negligence of a fall tender, selected from the crew, resulting in injury to a man in the crew, has been held to be the negligence of a fellow servant of the injured servant for which the latter cannot recover against the owner of the vessel. *Red River Line v. Cheatham*, 60 Fed. Rep. 517.

1. Miners and "Roadmen." — *Troughear v. Lower Vein Coal Co.*, 62 Iowa 576.

2. Miners and "Pickers." — *Kielley v. Belcher Silver Min. Co.*, 3 Sawy. (U. S.) 500.

3. Miners and Blasters. — *Kielley v. Belcher Silver Min. Co.*, 3 Sawy. (U. S.) 500.

4. Miners and "Fillers." — A "filler" in a coal mine whose duty it is to post and prop the roof of the mine is a fellow servant of the miners. *Consolidated Coal, etc., Co. v. Clay*, 51 Ohio St. 542.

5. Miners or Other Employees and Engineer in Charge of Hoist Engine — *England*, — *Barton's Hill Coal Co. v. Reid*, 3 Macq. H. L. Cas. 266. *United States*. — *Buckley v. Gould, etc.*, *Silver Min. Co.*, 14 Fed. Rep. 833.

California. — *Trewatha v. Buchanan Gold Min., etc., Co.*, 96 Cal. 494.

Illinois — *Niantic Coal, etc., Co. v. Leonard*, 25 Ill. App. 95, *affirmed* 126 Ill. 216; *Starne v. Schlothane*, 21 Ill. App. 97.

Pennsylvania. — *Bradbury v. Kingston Coal Co.*, 157 Pa. St. 231, 33 W. N. C. (Pa.) 94; *Mulhern v. Lehigh Valley Coal Co.*, 161 Pa. St. 270.

6. Miners and Ordinary Mining Boss — *New Jersey*. — *Gilmore v. Oxford Iron, etc., Co.*, 55 N. J. L. 39.

New York. — *Voshefskey v. Hillside Coal, etc., Co.*, 21 N. Y. App. Div. 168.

Virginia. — *Russell Creek Coal Co. v. Wells*, (Va. 1898) 31 S. E. Rep. 614.

It has been held that a mine employee who is injured by rocks falling upon him while he is by the direction of the foreman engaged in investigating the result of a recent blast is a fellow servant of the foreman. *Stephens v. Doe*, 73 Cal. 26. See also *Wilson v. Merry*, L. R. 1 H. L. Sc. 326.

Mining Boss Employed Pursuant to Statute and Other Employees. — A mine boss employed in compliance with a statute compelling his em-

ployment is ordinarily held to be a fellow servant with the miners and other employees in the mine. *Colorado Coal, etc., Co. v. Lamb*, 6 Colo. App. 255; *Waddell v. Simoson*, 112 Pa. St. 567; *Lineoski v. Susquehanna Coal Co.*, 157 Pa. St. 153, 33 W. N. C. (Pa.) 204; *Lehigh Valley Coal Co. v. Jones*, 86 Pa. St. 432; *Delaware, etc., Canal Co. v. Carroll*, 89 Pa. St. 374; *Reese v. Biddle*, 112 Pa. St. 72; *Redstone Coke Co. v. Roby*, 115 Pa. St. 364; *Haley v. Keim*, 151 Pa. St. 117.

The owners of a colliery within the Coal Mines Regulation Act, 1872 (35 & 36 Vict., c. 76), appointed a certificated manager as required by section 26. A miner employed in the colliery was killed by an explosion of fire-damp, the death being caused by the negligence of the manager. It was held that the fact that the manager was appointed pursuant to the act did not put him in any different position from that which he would have held had he been simply appointed manager; that he was a fellow servant with the deceased; and that the owners were, therefore, not liable to his representatives for his death. *Howells v. Landore Siemens Steel Co.*, L. R. 10 Q. B. 62, 44 L. J. Q. B. 25.

"Driver Boss" and Mining Boss. — And a "driver boss" and a mining boss have been held to be fellow servants. *Lehigh Valley Coal Co. v. Jones*, 86 Pa. St. 432.

Mine-roof Superintendent and Miner. — It has been held that the negligence of a mine-roof superintendent, whereby a miner was injured, was not the negligence of the company but of a fellow servant. *Troughear v. Lower Vein Coal Co.*, 62 Iowa 576.

In *Hall v. Johnson*, 3 H. & C. 589, the defendants were held not liable for the neglect of the "underlookers" in their mine for not properly securing or propping the roof, the plaintiff being injured by its fall.

Timber Boss and Miner. — A timber boss superintending the repair of a stairway beside the track on which the lifting cars run has been held to be a fellow servant of a miner assisting in the work. *Jenkins v. Mahopac Iron-Ore Co.*, (Supreme Ct.) 10 N. Y. Supp. 484.

Shift Boss and Trammer. — A shift boss and a trammer are fellow servants. *Petaja v. Aurora Iron Min. Co.*, 106 Mich. 463.

7. Miscellaneous Instances of Fellow Service Between Mine Employees. — See *Hughes v. Oregon Imp. Co.*, (Wash. 1898) 55 Pac. Rep. 110.

If the owner of a mine has negligently allowed firedamp to accumulate, and it is ignited by a servant who goes into it with a lighted lamp instead of a safety lamp, contrary to the owner's orders, and another servant is injured by an explosion, the latter has no remedy against the owner. *Berns v. Gaston Gas Coal Co.*, 27 W. Va. 285, 55 Am. Rep. 304.

In *Coal Creek Min. Co. v. Davis*, 90 Tenn. 711, it was held that a coal miner whose duties consist of ventilating the mine, attending an inside furnace, and guarding a wooden build-

an employee who is charged with the performance of the mine owner's positive duties to his servants is not, while performing those duties, the fellow servant of the latter; he is vice-principal of the master, who will be liable for his negligence.¹

c. EMPLOYEES IN MILLS, FACTORIES, ETC. — As a general rule, employees of the same master in and about a mill or factory, working together for the accomplishment of a common object, are fellow servants.² Of course, if such

ing at the entrance containing the engine and machinery is a fellow servant with the engineer.

Workmen Engaged in Blasting and Teamster Hauling Rock. — One who is engaged in hauling rock by means of a team and those who are engaged in blasting such rock, all employed by a common master, are fellow servants, and such facts being shown by a complaint to recover for an injury to the teamster, an averment that the injured servant "had no connection whatever with any of the employees of said defendant who were engaged in blasting rock" is a mere conclusion, and the facts will control. *Bogard v. Louisville, etc., R. Co.*, 100 Ind. 491.

Miner and Blacksmith Who Sharpens Mining Tools. — It has been held that a blacksmith employed outside of the mine in sharpening the mining tools is a fellow servant with the miners employed in the mine, and that one of the latter cannot recover against the mining company for injuries sustained through the negligence of the blacksmith while descending the shaft with the tools. *Snyder v. Viola Min. Co.*, 2 Idaho 771.

Common Workman Employed About Mine and Miner. — But in *Michigan* it is held that a common workman employed about a mine, but not himself a miner, is not a fellow employee of the miners in any such sense that he cannot recover for an injury caused him by the mining operations. And his employer is bound to see that the premises where he works are reasonably safe. *James v. Emmet Min. Co.*, 55 Mich. 335. See also *Evans v. Carbon Hill Coal Co.*, 47 Fed. Rep. 437.

Contractor with and Superintendent of Mining Company. — One who contracts with a mining company to break down rock and ore for a certain distance, to disclose the vein, at a stipulated price per foot, the company to furnish a steam drill and to keep the drift clear of rock as the contractor breaks it down, is to be regarded as a contractor with, and not a servant of, the company. He is not a fellow servant with the superintendent of the company, under whose direction the work is performed. *Mayhew v. Sullivan Min. Co.*, 76 Me. 100.

1. See *supra*, this title, *Extent and Limitations of the Rule — Vice-principals*.

Mine Employees Held to Be Vice-principals. — In *Gowen v. Bush*, 76 Fed. Rep. 349, it was held that an employee who was charged with the duty of inspecting the mine to see that it was free from gas was not, while thus engaged, a fellow servant of the miners.

Mining Captain, Having Entire Management of Mine and of Labor Employed Therein. — A mining captain who has the entire management of a mine, without direction or interference by the owner, occupies the owner's place, and is not a mere fellow servant of a laborer employed

in the mine, even though he was not appointed directly by the owner, but only by the owner's agent; and the owner is liable for his negligence. *Ryan v. Bagaley*, 50 Mich. 179, 45 Am. Rep. 35. The report of this case does not show in what the negligence of the mining captain consisted. The laborer was killed by the fall of a water pipe which was being hoisted from below. We may infer, therefore, that some appliance was defective. See also *Quincy Min. Co. v. Kitts*, 42 Mich. 34; *Beeson v. Green Mountain Gold Min. Co.*, 57 Cal. 20. In *Reddon v. Union Pac. R. Co.*, 5 Utah 344, it was held that a foreman having entire supervision of a mine and all its workings, employing and discharging laborers, and prescribing their duties, is not a coemployee within the rule which exempts the master from responsibility. But see *supra*, this title, *Extent and Limitations of the Rule — Vice-principals — Employee in Charge of Entire Business or Distinct Department*.

2. Mill and Factory Employees — Dakota. — *Schmidt v. Leistikow*, 6 Dakota 386.

Georgia. — *White v. Kennon*, 83 Ga. 343, 39 Am. & Eng. R. Cas. 330.

Maryland. — *Yates v. McCullough Iron Co.*, 69 Md. 370, 19 Md. L. J. 837.

Massachusetts. — *Jones v. Granite Mills*, 126 Mass. 84, 30 Am. Rep. 661.

New York. — *Crispin v. Babbitt*, 81 N. Y. 516, 37 Am. Rep. 521; *Anthony v. Leeret*, 105 N. Y. 591.

Pennsylvania. — *National Tube Works Co. v. Bedell*, 96 Pa. St. 176; *Reading Iron Works v. Devine*, 109 Pa. St. 248.

Rhode Island. — *Brodeur v. Valley Falls Co.*, 16 R. I. 448.

See *McBride v. Union Pac. R. Co.*, 3 Wyoming 247.

One who works at odd jobs around the mill-yard of a corporation operating a sawmill and saltblock, and occasionally loads salt on a barge for market, is the fellow servant of men in the salt warehouse handling barrels, and cannot recover for injuries received from a descending elevator, through their negligence. *Sell v. Rietz, etc., Lumber Co.*, 70 Mich. 479.

In *Osborne v. Morgan*, 130 Mass. 102, 39 Am. Rep. 437, the plaintiff was at work as a carpenter in the establishment of a manufacturing corporation putting up certain partitions. A superintendent of the corporation negligently placed a tackle block and chains upon an iron rail suspended from the ceiling of the room in such a manner and so unprotected that they fell and injured the plaintiff. The court held that the plaintiff and superintendent were fellow servants.

"Helper" in Foundry and Driver of Truck. — It has been held that a helper in a foundry and the driver of a truck are fellow servants. *Hogan v. Central Pac. R. Co.*, 49 Cal. 128.

an employee is charged with the performance of one of the master's positive duties to his servants, he is, with respect to the performance of that duty, the vice-principal of the master, and not a fellow servant with the other employees.¹

f. BUILDERS, CARPENTERS, MASONS, ETC. — In General. — As a general rule, employees of a common master who are engaged in the common employment of erecting the same structure are all fellow servants.²

Head Carpenter and Mill Hand. — It has been held that although the head carpenter at a mill was engaged close by the mill in repairing his employer's vessel, he was nevertheless a fellow servant with a mill hand at least while engaged in sawing lumber to be used in repairing the vessel. *Sayward v. Carlson*, 1 Wash. 29.

Engineer and Other Employees in a Sawmill. — The engineer and other employees in a sawmill have been held to be fellow servants. *Bergstrom v. Staples*, 82 Mich. 654.

The engineer is the fellow servant of an oiler, and the latter cannot recover for injuries received in consequence of the engineer setting the machinery in motion while he is oiling a machine. *Henshaw v. Pond's Extract Co.*, 66 Hun (N. Y.) 632, 21 N. Y. Supp. 177.

An engineer who has charge of an engine which operates a machine for sawing is a fellow servant with the employee who operates the saw. *Theleman v. Moeller*, 73 Iowa 108, 5 Am. St. Rep. 663.

In *Ewan v. Lippincott*, 47 N. J. L. 192, 54 Am. Rep. 148, it appeared that the defendant owned a sawmill, and gave an order to D. & W., master machinists, to make some alterations in the gearing of the waterwheel of his mill. D. & W. sent the plaintiff and another workman to do the work. It was understood between these workmen and the defendant that the mill would run at such times as they were not actually at work upon the wheel. While they were at work upon the wheel the engineer of the defendant negligently started the wheel, injuring the plaintiff. It was held that the plaintiff was a servant of the defendant, engaged in a common employment with the engineer.

Chemist and Laborer in Paper Mill. — A chemist employed in a paper mill has been held to be a fellow servant with a laborer employed in constructing an addition to the mill. *Wilson v. Hudson River Water Power, etc., Co.*, 71 Hun (N. Y.) 292.

Employee Charged with Care of Slubber Machine and Repairer. — In *Massachusetts* it has been held that a servant employed on a slubber machine in a cotton mill, whose duty it was to see that the machine was kept running, to take off the full bobbins and put on others, to notify the overseer if she knew that there was anything wrong about the machine, and to see that it was kept clean was a fellow servant with the person whose business it was to keep the machine in repair. *Rice v. King Philip Mills*, 144 Mass. 229, 49 Am. Rep. 80.

Loom Fixer and Operator of Loom. — But it has been held that a person employed as a loom fixer is not a fellow servant with the operator of the loom. *Jaques v. Great Falls Mfg. Co.*, 66 N. H. 482.

Yard Laborer and Teamster of Mill Corporation. — In a *Massachusetts* case it appeared that a laborer employed by a mill corporation in its yard, a part of his duty being to assist its

teamster, undertook with the teamster and another to lift on to a low truck some steps which were too heavy for three men to handle, for the purpose of moving them from one part of the premises to another; and the steps fell and injured him. There were at hand seven or eight other men, upon whom the teamster might have called for assistance, and all the tools and appliances necessary to move great weights. In an action against the corporation to recover for the injuries, it was held that the negligence, if any, which caused the injuries was that of the plaintiff and fellow servants. *Dunlap v. Barney Manuf'g. Co.*, 148 Mass. 51.

1. *Mitchell v. Robinson*, 80 Ind. 281, 41 Am. Rep. 812; *Foster v. Pusey*, 8 Houst. (Del.) 168. See *supra*, this title, *Extent and Limitations of the Rule — Vice-principals*.

Employees Held to Be Vice-principals. — A manufacturing corporation employed a superintendent who had charge of all its machinery and works in several mills. Under him and appointed by him were overseers of the several rooms, whose duty it was to keep watch of the machinery and oversee the work in their respective rooms. These overseers appointed second hands, whose duty it was to act as overseers of the rooms in their absence. There was also an overseer of repairs, whose duty it was to make repairs on notice from the superintendent or overseer of a room that repairs were needed. Some new machinery having been procured, the person setting it up notified the superintendent that collars were needed on certain counter-shafts before they were used, and the superintendent notified the overseer of repairs to put them on, but through negligence he failed to do so, and by reason of the want of collars a counter-shaft fell and injured the plaintiff, an employee in the room. The Supreme Court of *Connecticut* held that the negligence was that of the corporation, and that it was liable for the injury. *Wilson v. Willimantic Linen Co.*, 50 Conn. 433, 47 Am. Rep. 653.

In *Atlanta Cotton Factory Co. v. Speer*, 69 Ga. 137, 47 Am. Rep. 750, the plaintiff, a girl fifteen years old, was employed in the defendant's factory and was kept at work until three o'clock Sunday mornings, and was then, by order of the superintendent, allowed to remain in the factory until daylight, but only in a basement room. On the occasion in question the night overseer of the factory, finding the basement room damp, put the plaintiff, with other children operatives, in a second-story lighted room, there being an unguarded elevator hole in the adjoining unlighted passageway. The children played at hide-and-seek, and the plaintiff, running into the passageway, fell through the hole and was injured. The court held that the defendant was properly held liable.

2. **Workmen Employed On or About the Same Structure.** — *Blazinski v. Perkins*, 77 Wis. 9.

Builder's Laborer and Foreman. — The foreman of the workmen engaged in the erection of a building is a fellow servant of the men under him, except in some of the jurisdictions in which the superior-servant limitation has been recognized.¹

Person Superintending Erection of Building and Employee Working Thereon. — It is possible that it will be held, in the jurisdictions where a master is held liable for the negligence of an employee to whom he has intrusted the management and control of his entire business, or a separate and distinct department of the business,² that a person who is employed to superintend the erection of a building is not a fellow servant with the workmen thereon, but is a representative of the master.³

g. OTHER EMPLOYEES — In General. — There are a number of miscellaneous instances of fellow service which, because of the difficulty of classifying them in any other way, will be gathered together at this place.⁴

In *Somer v. Harrison*, (Pa. 1887) 8 Atl. Rep. 799, it was held that a person employed in a building in process of construction to drill holes in an iron girder on the fourth floor is a fellow servant of persons engaged in clearing up rubbish on the eighth floor and dumping it through the open floors into the cellar.

A person building a structure of brick and wood is not responsible for the fall of the masonry upon a carpenter, whereby he was killed, when guilty of no negligence, and the mason being competent, although his judgment in the particular case was at fault. *Keith v. Walker Iron, etc., Coal Co.*, 81 Ga. 49, 12 Am. St. Rep. 296.

But in *Baird v. Pettit*, 70 Pa. St. 477, it was held that a draftsman engaged on certain works and a carpenter employed in jobbing about the premises are not servants engaged in a common employment; when the former leaves the building at the end of his day's work he occupies the same relation to his principal as any other citizen.

Plumber and Carpenter Working on Same Building. — A plumber and a carpenter working together on the same building have been held to be fellow servants. *Killea v. Faxon*, 125 Mass. 485.

Millwright and Carpenter. — In *Pennsylvania* a millwright and a carpenter have been held to be fellow servants. *National Tube Works Co. v. Bedell*, 96 Pa. St. 175.

Carpenter and Employee Working about Building. — A laborer working about a building and a carpenter have been held to be fellow servants. *Malone v. Hathaway*, 64 N. Y. 5, 21 Am. Rep. 573.

A driver of a cart removing rubbish from a building under construction has been held to be a fellow servant of a carpenter on a ladder the foot of which was near a door where the cart had to pass. *Byrnes v. Brooklyn Heights R. Co.*, 36 N. Y. App. Div. 355.

In the case of *Morgan v. Vale of Neath R. Co.*, L. R. 1 Q. B. 149, a person was in the employment of a railway company as a carpenter to do any carpenter's work for the general purposes of the company. He was standing on a scaffolding at work on a shed close to the line of a railway, and some porters in the service of the company carelessly shifted an engine on a turntable so that it struck a ladder supporting the scaffold, by means of which he was thrown down and injured. It was held

that the company was not liable. Compare *Mulchey v. Methodist Religious Soc.*, 125 Mass. 487.

Stonemason and Carpenter on Same Bridge. — It has been held that a mason and a carpenter working on the same bridge, though under different foremen, are fellow servants. *Bier v. Jeffersonville, etc., R. Co.*, 132 Ind. 78.

Mason and Hod Carrier. — A mason and a hod carrier, where both are employed by the same master and are working together on the same building, are fellow servants. *Bannon v. Sanden*, 68 Ill. App. 164; *Kennedy v. Spring*, 160 Mass. 203; *Maher v. McGrath*, 58 N. J. L. 469; *Blazinski v. Perkins*, 77 Wis. 9.

Engineer Operating Hoisting Machinery and Laborer on Bridge or Building. — An engineer operating the hoisting machinery and a laborer working on a bridge or building, both being employed under the same foreman in the work of construction, have been held to be *prima facie* fellow servants. *Sheehan v. Prosser*, 55 Mo. App. 569; *Ryan v. McCully*, 123 Mo. 636.

1. Foreman and Laborers of Builder Held to Be Fellow Servants. — *Wigmore v. Jay*, 5 Exch. 354, 19 L. J. Exch. 300.

Hod Carrier and His Foreman. — Thus, a hod carrier and his foreman are fellow servants. *Green v. Banta*, 48 N. Y. Super. Ct. 156.

Carpenter and His Foreman. — So are a carpenter and his foreman. *Yager v. Atlantic, etc., R. Co.*, 4 Hughes (U. S.) 192; *Neubauer v. New York, etc., R. Co.*, 101 N. Y. 607; *Louisville, etc., R. Co. v. Lahr*, 86 Tenn. 335.

2. See *supra*, this title, *Extent and Limitations of the Rule — Vice-principals*.

3. Superintendent of Construction of Building Held to Be a Vice-principal. — It was so held in *Slater v. Chapman*, 67 Mich. 523, 11 Am. St. Rep. 593, where a workman engaged in the erection of a building, injured through the negligence of one having the full control of the erection and the men, was held entitled to recover of the master. See also *Haworth v. Seevers Mfg. Co.*, 87 Iowa 765.

4. Porters Employed in a Store are fellow servants, and one of them cannot recover against the employer for injuries received through the negligence of another. *Beyer v. Victor*, 2 Misc. Rep. (N. Y. Super. Ct.) 496.

Operator of Elevator and Other Employees. — A servant of the proprietor of an elevator was injured by the falling of an elevator used to

Foreman and Workmen under His Control. — Except in some of the jurisdictions in

hoist grain into a storage building. The accident was occasioned by the negligence of the engineer in charge, in allowing the elevator to be carried too high, thereby breaking the rope by which it was raised. The general term of the *New York* Supreme Court held that the defendant was not liable for such neglect of a coemployee of the plaintiff. *Stringham v. Stewart*, 27 Hun (N. Y.) 562.

Where an elevator is used to carry employees to and from their work, an engineer who has control of its motive power, the elevator boy, and one of the employees who is being carried to his work are fellow servants, for whose negligence the master is not liable. *Wolcott v. Studebaker*, 34 Fed. Rep. 8.

And the operator of an elevator in a hotel is a fellow servant with a chambermaid who rides on the elevator in the discharge of her duties. *Oriental Invest. Co. v. Sline*, 17 Tex. Civ. App. 692.

It has been held that a carpenter repairing an elevator is a fellow servant with the elevator boy, and cannot recover against the common master for an injury received through the boy's carelessness. *Hasty v. Sears*, 157 Mass. 123.

And a carpenter working on the elevator shaft in a building which is in the course of construction cannot recover for the negligence of the elevator boy. *Hughes v. Fagin*, 46 Mo. App. 37.

But in *Leiter v. Kinnare*, 68 Ill. App. 558, it was held that the operator of an elevator in a building in the course of construction is not the fellow servant of a gang of carpenters one of whom was killed while at work by being struck by the counter weight of the elevator.

Lighterman and Other Employees of Warehouse Keeper. — In *Lovell v. Howell*, 1 C. P. Div. 161, 45 L. J. C. P. Div. 387, the plaintiff, a licensed waterman and lighterman, was in the employ, at weekly wages, of the defendant a corn merchant and warehouse keeper; his ordinary duty was to attend at the waterside of the premises every tide for about an hour and a half before and after high water, for the purpose of bringing barges to and from the wharf and there mooring and unmooring them. It was no part of his duty to load or unload the barges or to assist in any way in the work of the warehouse; but it was his habit to go to the office on the land side of the warehouse for orders, or when sent for by the defendant's manager. There were two ways of going there, viz., by landing from his boat at stairs at the end of the street next adjoining the warehouse, or by stepping from the barges into and going through the warehouse and out by a door to the street. He usually went by this latter way. Being on the barges at a time when his actual duty did not require him to be there, he was sent for at the office, and was proceeding thither by his accustomed route, when, in passing out from the warehouse door to the street, he was knocked down and injured by a sack of grain which another of the defendant's men was in a negligent manner hoisting by means of a crane from a wagon. It was held that this was an injury caused by the negligence of a fellow workman, and consequently that the master was not liable.

Employees of Traveling Show Company. — A watchman at the gates of the show grounds of a traveling show company and another employee of the company whose chief duty was to keep order among the employees have been held to be fellow servants. *McKay v. Buffalo Bill's Wild West Co.*, 17 Misc. Rep. (N. Y. Supreme Ct.) 601.

Fireman and Municipal Street Officials. — A member of a city fire department who receives an injury by reason of a defective street is not precluded from recovering by the fact that a member of the street department was negligent in performing his duties. *Turner v. Indianapolis*, 96 Ind. 51; *Coots v. Detroit*, 75 Mich. 628.

Workmen Piling Lumber and Scaler. — Workmen employed in a millyard to pile lumber and another employee in the same yard whose duty it was to assort and scale lumber have been held to be fellow servants. *Fraser v. Red River Lumber Co.*, 45 Minn. 235.

Engineer Repairing Machinery on Coal Wharf and Laborer Repairing Connecting Chute. — On the ground that the two employees were fellow servants, it has been held that a laborer, who was injured while at work repairing a chute which connected with a coal wharf, through the negligence of an engineer engaged in repairing the machinery upon the wharf, could not recover against the master. *Porter v. Silver Creek, etc., Coal Co.*, 84 Wis. 418.

Engineer of Power House and Teamster Supplying It with Coal. — It has been held that a teamster in the employ of a tramway company to haul coal to its power house is a fellow servant with an employee in charge of the boilers at the power house, so that he cannot recover of the company for injuries sustained through the negligence of the latter employee. *Denver Tramway Co. v. O'Brien*, 8 Colo. App. 74.

Quarryman and Workman in Charge of Hoisting Apparatus. — A quarryman and an employee who has charge of an apparatus for raising and moving stones out of the quarry are fellow servants. *Chapman v. Reynolds*, 77 Fed. Rep. 274.

Workmen Engaged in Construction of Vessel. — It has been held that a riveter and carpenters engaged, under the same superintendence, in the construction of a vessel are fellow servants. *Beesley v. Wheeler*, 103 Mich. 196.

And workmen employed to fix sheets of metal on the hull of a vessel have been held to be fellow servants with workmen employed to calk the seams. *Butler v. Townsend*, 126 N. Y. 105, *reversing* (Supreme Ct.) 10 N. Y. Supp. 809.

Engraver or Printer and Engineer in Same Establishment. — On the ground that they were fellow servants with the engineer in the establishment in which they were employed, it has been held that an engraver and a printer could not recover against their common employer for injuries sustained by falling through a trap door carelessly left unfastened by the engineer. *Pawling v. Hoskins*, 132 Pa. St. 617, 19 Am. St. Rep. 617, 25 W. N. C. (Pa.) 443.

Engineer of Steam Roller and Flagman. — An engineer of a steam roller used in repairing

which the superior-servant limitation has been adopted, a foreman is ordinarily a fellow servant with the employees under his control.¹

VII. CONFLICT OF LAWS. — The general rule is that an action for personal torts, being transitory, may be brought wherever the wrongdoer may be found and jurisdiction of his person obtained.² Thus, it has been held that when a right of action for an injury due to the negligence of a coemployee, has vested under the common law as understood and administered in the state where the injury occurred, such right of action may be enforced in any other state, if the enforcement thereof is not opposed to the policy of the laws of the state of the forum; and this although no remedy could be had if the injury had occurred in the latter state.³ The rule which controls rights of action arising at common law has been held inapplicable to those which arise under the statute law of the *locus delicti*. In such a case, according to some authorities, the right of action must be one recognized not only by the *lex loci delicti*, but also by the *lex fori*, so that if the right of action for an injury caused by the act of a fellow servant arises under a statute in one state, that right cannot be enforced in another state where no similar statute exists.⁴ The weight of later authorities, however, does not recognize this distinction, and such a right of action, arising under a statute in one state, may be enforced in another state although no similar statute exists there, provided its enforcement is not opposed to the fundamental policy of the laws of the latter state.⁵ Some authorities, without going so far, hold merely that a recovery can be had

the streets of a city, and a flagman also employed by the city have been held to be fellow servants. *Hanna v. Granger*, 18 R. I. 507.

Laborers Digging Trenches and Other Employees. — A laborer excavating a trench in a city street has been held to be a fellow servant with other laborers putting in wooden curbing. *Bergquist v. Minneapolis*, 42 Minn. 471. But it has been held that such laborer is not a fellow servant with the driver of a wagon hired by the city to cart away the dirt, who is not subject to the control and direction of the same foreman. *Reagan v. Casey*, 160 Mass. 374.

1. Laborer Digging Trench and Superintendent. — Where the superior-servant limitation is rejected, a person employed to superintend the digging of a trench is a fellow servant with a laborer employed in the work of digging the trench, when the superintendent and the laborer are employed by the same master. *Flynn v. Salem*, 134 Mass. 351.

Foreman in Charge of Derrick and Other Servants. — It has been adjudged that a laborer and a foreman using a derrick are fellow servants. *Duffy v. Upton*, 113 Mass. 544. And it has also been held that a foreman in charge of a derrick is a fellow servant with a laborer engaged in moving a stone on a truck, both being in the employ of the same master. *Scott v. Sweeney*, 34 Hun (N. Y.) 292.

2. Actions for Personal Torts Transitory. — *Northern Pac. R. Co. v. Babcock*, 154 U. S. 190; *Boston, etc., R. Co. v. McDuffey*, 51 U. S. App. 111, 79 Fed. Rep. 934; *Herrick v. Minneapolis, etc., R. Co.*, 31 Minn. 11, 47 Am. Rep. 771. See generally the title PRIVATE INTERNATIONAL LAW.

3. Action Given by Common Law of Locus Delicti Enforced. — *Walsh v. New York, etc., R. Co.*, 160 Mass. 571, 39 Am. St. Rep. 514; *Eingartner v. Illinois Steel Co.*, 94 Wis. 70.

4. Action Given by Statute in State of Locus

Held Not Enforceable. — *Anderson v. Milwaukee, etc., R. Co.*, 37 Wis. 321.

This decision was *disapproved* in *Herrick v. Minneapolis, etc., R. Co.*, 31 Minn. 11, 47 Am. Rep. 771, where it was said: "With due deference to that court [the Supreme Court of Wisconsin], and especially to the eminent jurist who delivered the opinion in that case, we think they entirely failed to distinguish between the right of action, which was created by the statute of *Iowa*, and must be governed by it, and the form of the remedy, which is always governed by the law of the forum, whether the action be *ex contractu* or *ex delicto*. It is elementary that the remedy is governed by the law of the forum, and this is all that is held by any case cited by the court in support of their opinion."

The case first cited in this note is *distinguished* by the Supreme Court of *Wisconsin* in the later case of *Eingartner v. Illinois Steel Co.*, 94 Wis. 70.

5. Action Arising under Statute Enforceable Elsewhere. — *Herrick v. Minneapolis, etc., R. Co.*, 31 Minn. 11, 47 Am. Rep. 771; *Chicago, etc., R. Co. v. Doyle*, 60 Miss. 977, 8 Am. & Eng. R. Cas. 171. See also the leading case of *Dennick v. Central R. Co.*, 103 U. S. 11.

Existence of a Similar Statute in the State of the Forum is evidence that the policy of the latter state is favorable to such a right of action. *Chicago, etc., R. Co. v. Doyle*, 60 Miss. 977, 8 Am. & Eng. R. Cas. 171.

When Public Policy Forbids Enforcement. — In *Herrick v. Minneapolis, etc., R. Co.*, 31 Minn. 11, 47 Am. Rep. 771, it was said: "To justify a court in refusing to enforce a right of action which accrued under the law of another state, because against the policy of our laws, it must appear that it is against good morals or natural justice, or that for some other such reason the enforcement of it would be prejudicial to the general interests of our own citizens."

where the statutes of the two states are not in substance inconsistent, or are not substantially dissimilar.¹

As to Matters Wherein the Laws of the Two States Differ, the familiar rule is that the *lex loci delicti* governs as to the right of action, while all that pertains merely to the remedy is controlled by the *lex fori*.²

The Federal Courts regard the right of the plaintiff to enforce such a cause of action in a state other than that in which it arose as one of general law not controlled by the decisions of the state of the forum,³ in the absence of statutory regulations in the latter state.⁴ The question whether the relation of employees is such as to constitute them fellow servants is regarded by the federal courts as a question of general law to be determined by a reference to all the authorities and a consideration of the principles underlying the relation of master and servant, not as a question of local law to be settled by the decisions of the courts of the state in which the cause of action arose.⁵ A local statute is, however, controlling upon the federal courts.⁶

VIII. QUESTIONS OF LAW AND FACT — 1. Whether Employees Are Fellow Servants — Generally a Question of Fact. — The determination of the relation of two employees to each other is a mixed question of law and fact; that is, it is for the court to define the relation of fellow servants and for the jury to decide whether the facts established by this evidence as to the duties of the employees and the connection between such duties bring the case within the definition.⁷

1. When Statutes Not Substantially Dissimilar. — Boston, etc., R. Co. v. McDuffey, 51 U. S. App. 111, 79 Fed. Rep. 934.

2. Lex Loci Controls Right of Action. — Northern Pac. R. Co. v. Babcock, 154 U. S. 190; Boston, etc., R. Co. v. McDuffey, 51 U. S. App. 111, 79 Fed. Rep. 934; Herrick v. Minneapolis, etc., R. Co., 31 Minn. 11, 47 Am. Rep. 771.

In Northern Pac. R. Co. v. Babcock, 154 U. S. 190, it was held that the right to recover and the amount of the damages to be assessed are governed by the *lex loci* and not by the *lex fori*. But see Wooden v. Western New York, etc., R. Co., 126 N. Y. 10, 22 Am. St. Rep. 803. See also the title DEATH BY WRONGFUL ACT, vol. 8, pp. 878, 885.

Whether One Employee Stands to Another in the Relation of a Fellow Servant is to be determined by the *lex loci*. McMaster v. Illinois Cent. R. Co., 65 Miss. 264, 41 Am. & Eng. R. Cas. 486, 7 Am. St. Rep. 653.

For a General Treatment of This Subject see the title PRIVATE INTERNATIONAL LAW.

3. Right of Action in Another State a Question of General Law. — See Texas, etc., R. Co. v. Cox, 145 U. S. 593; Northern Pac. R. Co. v. Babcock, 154 U. S. 190; Dennick v. Central R. Co., 103 U. S. 11.

4. Gardner v. Michigan Cent. R. Co., 150 U. S. 349.

5. Baltimore, etc., R. Co. v. Baugh, 149 U. S. 368; Harley v. Louisville, etc., R. Co., 57 Fed. Rep. 144. In the Baugh case the court cited Wabash R. Co. v. McDaniels, 107 U. S. 454; Randall v. Baltimore, etc., R. Co., 109 U. S. 478; and Chicago, etc., R. Co. v. Ross, 112 U. S. 377, and declared that "in all the various cases in this court affecting the relations of railroad companies to their employees it has either been directly affirmed that the question presented was one of general law, or else the discussion has proceeded upon the assumption that such was the fact."

6. State Statute Administered in Federal Court. — The fact that the negligence complained of is the negligence of a fellow servant constitutes no defense to a suit for an injury sustained, brought in a federal court in the state of Minnesota. Northern Pac. R. Co. v. Behling, 12 U. S. App. 662, 57 Fed. Rep. 1037.

7. Whether Employees Are Fellow Servants Generally a Question for Jury — United States. — Alaska Treadwell Gold Min. Co. v. Whelan, 29 U. S. App. 1, 64 Fed. Rep. 462, reversed on another point 168 U. S. 86.

Illinois. — Indianapolis R. Co. v. Morgenstern, 106 Ill. 216; Chicago, etc., R. Co. v. Moranda, 108 Ill. 576; Chicago, etc., R. Co. v. Kelly, 127 Ill. 637, affirming 25 Ill. App. 17; Lake Erie, etc., R. Co. v. Middleton, 142 Ill. 550; Pullman Palace Car Co. v. Laack, 143 Ill. 242; Mobile, etc., R. Co. v. Massey, 152 Ill. 144; Wenona Coal Co. v. Holmquist, 152 Ill. 581; Chicago, etc., R. Co. v. O'Brien, 155 Ill. 630, affirming 53 Ill. App. 198; West Chicago St. R. Co. v. Dwyer, 162 Ill. 482, affirming 57 Ill. App. 440; St. Louis Consol. Coal Co. v. Scheiber, 167 Ill. 539, affirming 65 Ill. App. 304; Springside Coal Min. Co. v. Grogan, 169 Ill. 50; Chicago, etc., R. Co. v. Swan, 176 Ill. 424; Illinois Steel Co. v. Bauman, 178 Ill. 351, affirming 78 Ill. App. 73; Helton v. Daly, 4 Ill. App. 25; Shedd v. Moran, 10 Ill. App. 618; Chicago, etc., R. Co. v. O'Bryan, 15 Ill. App. 134; Chicago, etc., R. Co. v. Hoyt, 16 Ill. App. 237; Joliet Steel Co. v. Shields, 32 Ill. App. 598; Chicago, etc., R. Co. v. Tuile, 44 Ill. App. 535; Kimel v. Chicago, etc., R. Co., 55 Ill. App. 244; Alford v. Dannenberg, 76 Ill. App. 376; American Express Co. v. Risley, 77 Ill. App. 476.

Iowa. — Potter v. Chicago, etc., R. Co., 40 Iowa 399.

Minnesota. — Abel v. Butler-Ryan Co., 60 Minn. 16.

Missouri. — McGowan v. St. Louis, etc., R. Co., 61 Mo. 528.

When the Facts Are Undisputed. — When the facts are undisputed, the question whether one employee sustains toward another employee of the same master the relation of a fellow servant or occupies the position of a vice-principal is one of law.¹

Employee Acting in Dual Capacity. — When the fact that an employee has done a particular act within the scope of his employment is established, and the scope of his employment includes both duties personal to the master and duties assignable by him, the character of the act done determines as a matter of law the capacity in which the employee was acting in respect to that act.² But where an employee fills two distinct positions, the question whether a particular act done by him falls within the scope of the duties of one or the other of these positions is a question of fact for the jury.³

2. Incompetency of Fellow Servant. — The incompetency of a fellow servant and the master's negligence in employing or retaining an incompetent servant

New York. — Devine v. Tarrytown, etc., Gaslight Co., 22 Hun (N. Y.) 26.

Pennsylvania. — Mullan v. Philadelphia, etc., Steamship Co., 78 Pa. St. 25, 21 Am. Rep. 2.

Texas. — Mexican Nat. R. Co. v. Finch, 8 Tex. Civ. App. 409.

Utah. — Dryburg v. Mercur Gold Min., etc., Co., (Utah 1898) 55 Pac. Rep. 367.

Virginia. — Baltimore, etc., R. Co. v. McKenzie, 81 Va. 71.

A Question of Fact Not Reviewable. — Being a question of fact, the question whether or not employees are fellow servants is not open to review in the Supreme Court of *Illinois*, unless the evidence wholly fails. *Chicago, etc., R. Co. v. O'Brien*, 155 Ill. 630.

Whether Vice-principal. — Whether an employee of the defendant occupied the position of a vice-principal is a question of fact to be determined by the jury under proper instructions from the court as to what is necessary to constitute a vice-principal. *Kansas City, etc., R. Co. v. Hammond*, 58 Ark. 324; *Wust v. Erie City Iron Works*, 149 Pa. St. 263.

Common Employment a Question for Jury. — In *St. John Gas Light Co. v. Hatfield*, 23 Can. Sup. Ct. Rep. 164, where a plumber, at the request of a company engaged in laying a gas main, furnished a workman to make connections between certain pipes, it was held to be a question for the jury whether such workman and the servants of the company were engaged in a common employment.

Whether a stevedore engaged in unloading a vessel and a sailor on board the vessel are engaged in a common employment as fellow servants has been held to be a question for the jury. *Union Steamship Co. v. Claridge*, (1894) App. 185; *Hass v. Philadelphia, etc., Steamship Co.*, 88 Pa. St. 269, 32 Am. Rep. 462; *Mullan v. Philadelphia, etc., Steamship Co.*, 78 Pa. St. 25, 21 Am. Rep. 2.

1. When Facts Undisputed a Question of Law. — *Yates v. McCullough Iron Co.*, 69 Md. 370; *Norfolk, etc., R. Co. v. Hoover*, 79 Md. 253, 47 Am. St. Rep. 392.

When from all the evidence in the case it clearly appears that the injury was inflicted by the negligence of a fellow servant, so that a verdict negating the relation of fellow servants between the injured and the negligent employees, could not be supported, a

verdict for the defendant may be directed. *Miller v. Ohio, etc., R. Co.*, 24 Ill. App. 326; *O'Leary v. Wabash R. Co.*, 52 Ill. App. 641; *Abend v. Terre Haute, etc., R. Co.*, 111 Ill. 202, 53 Am. Rep. 616.

If no aspect of the evidence justifies the conclusion that the employees were fellow servants, the jury need not be instructed as to the doctrine of fellow servants. *Joliet Steel Co. v. Shields*, 45 Ill. App. 453, *affirmed* 146 Ill. 603.

2. When Employee's Duties Are Partly Personal to Master and Partly Assignable. — *Callan v. Bull*, 113 Cal. 593; *Johnson v. Boston Tow-Boat Co.*, 135 Mass. 209, 46 Am. Rep. 458; *McGinty v. Athol Reservoir Co.*, 155 Mass. 183. See also *Malcolm v. Fuller*, 152 Mass. 160; *Gardner v. New England Telephone, etc., Co.*, 170 Mass. 156.

Massachusetts Statute — Question of Principal Employment. — When an employee exercises duties of superintendence and also is engaged in work as a fellow servant it is ordinarily a question for the jury to determine whether his "principal duty" is superintendence under the *Massachusetts* act. *Geloneck v. Dean Steam Pump Co.*, 165 Mass. 202; *Reynolds v. Barnard*, 168 Mass. 226.

But the word "principal" in this act is not to be understood as referring to the superior importance of superintendence over manual labor; and where the uncontradicted evidence shows that manual labor occupies most of an employee's time, a jury is not warranted in finding that superintendence is his principal duty. *O'Neil v. O'Leary*, 164 Mass. 387. See also *Cunningham v. Lynn, etc., St. R. Co.*, 170 Mass. 298.

3. Employee Filling Two Distinct Positions. — In *Illinois* in cases where the negligence through which the injury occurred was that of an employee acting as conductor of a construction train, and also as foreman of the laborers thereon, and as foreman the employee's position as vice-principal was undisputed, while it was claimed that as conductor he was a fellow servant with the laborers, it was held that it was a question for the jury to determine whether he was acting as foreman or conductor in reference to the act in which his negligence occurred. *Mobile, etc., R. Co. v. Massey*, 152 Ill. 144; *Mobile, etc., R. Co. v. Godfrey*, 155 Ill. 78.

are questions of fact for the jury.¹

IX. EVIDENCE — 1. Burden of Proof — a. EXISTENCE OF RELATION OF FELLOW SERVANTS. — It has been held that the burden of proof is on the defendant to show that the plaintiff in an action for injuries received was a fellow servant with the person through whose negligence or fault the injury was done, and not upon the plaintiff to show that he was not such fellow servant.²

Burden on Plaintiff to Show Difference in Rank Between Servants. — But in jurisdictions where servants occupying positions of different grades are not regarded as fellow servants, it has been held that where it appears that two persons are in the common service of the defendant, working together for a common purpose, the presumption is that they are fellow servants, and it devolves upon the plaintiff to show that they are not, as that there are several degrees of supremacy or subordination existing between them.³ Thus, it has been held that, *prima facie*, servants of a common master employed in running, operating, and rendering service with a train of cars are fellow servants, and if there are facts which show that this relation does not really exist between them, the burden of showing such fact is on him who seeks to avail himself of the absence or nonexistence of such relation.⁴

b. FACT OF INJURY. — In order that a servant may recover in an action against a master for an injury alleged to have been occasioned by the act of a coemployee, it is necessary for him to prove affirmatively the fact of the injury.⁵

c. NEGLIGENCE OF FELLOW SERVANT AS CAUSE OF INJURY. — In addition to this, the burden of proof will be upon the servant to show that the injury

1. Incompetency of Fellow Servant — Master's Knowledge — England. — *Tarrant v. Webb*, 18 C. B. 797, 86 E. C. L. 797; *Ormond v. Holland*, El. Bl. & El. 102, 96 E. C. L. 102; *Wilson v. Merry*, L. R. 1 H. L. Sc. 326.

Dakota. — *Mares v. Northern Pac. R. Co.*, 3 Dakota 336, 17 Am. & Eng. R. Cas. 620.

Illinois. — *Western Stone Co. v. Whalen*, 151 Ill. 472, 42 Am. St. Rep. 244.

Indiana. — *Indianapolis, etc., R. Co. v. Love*, 10 Ind. 554; *Evansville, etc., R. Co. v. Guyton*, 115 Ind. 450, 7 Am. St. Rep. 458, 33 Am. & Eng. R. Cas. 311.

Kansas. — *Kansas Pac. R. Co. v. Peavey*, 34 Kan. 472.

Maryland. — *Campbell, etc., Co. v. Roediger*, 78 Md. 601.

Massachusetts. — *Gilman v. Eastern R. Corp.*, 10 Allen (Mass.) 233, 87 Am. Dec. 635; *Olsen v. Andrews*, 168 Mass. 261.

Michigan. — *Michigan Cent. R. Co. v. Gilman*, 46 Mich. 176, 2 Am. & Eng. R. Cas. 230; *Hilts v. Chicago, etc., R. Co.*, 55 Mich. 437, 17 Am. & Eng. R. Cas. 623; *Catlin v. Michigan Cent. R. Co.*, 66 Mich. 358.

New York. — *Mann v. Delaware, etc., Canal Co.*, 91 N. Y. 495, 12 Am. & Eng. R. Cas. 199.

Ohio. — *Columbus, etc., R. Co. v. Webb*, 12 Ohio St. 475.

Vermont. — *Hard v. Vermont, etc., R. Co.*, 32 Vt. 473.

Competency of Minor. — The competency of a telegraph operator employed by a railroad company should not be submitted to a jury when the only suggestion of his incompetency is founded on the fact that he is only seventeen years of age, when he is shown to have been a "first-class operator" with experience and to have discharged his duties satisfactorily

for more than three months before the accident. *Sutherland v. Troy, etc., R. Co.*, 125 N. Y. 737, 35 N. Y. St. Rep. 853, *reversing* (Supreme Ct.) 8 N. Y. Supp. 83.

The Wisdom of the Policy of a Railroad Company in Filling Vacancies by Promotion from lower positions has been held to be a question of fact for the jury. *Evansville, etc., R. Co. v. Guyton*, 115 Ind. 450, 7 Am. St. Rep. 458, 33 Am. & Eng. R. Cas. 311.

Appearance and Conduct of Witness. — In *Massachusetts* it has been held that the jury may judge from the appearance and conduct of a witness whether he is competent to perform the duties of a car inspector. *Keith v. New Haven, etc., R. Co.*, 140 Mass. 175, 23 Am. & Eng. R. Cas. 421.

But in *Maine* it has been decided that the jury is not authorized to decide that a person is unfit to be employed as a brakeman on a railroad on account of what the jurors saw, or supposed they saw, or could read in his face and manner, while testifying before them as a witness, and to determine from that alone that a railroad company was negligent in employing such a person. *Corson v. Maine Cent. R. Co.*, 76 Me. 244, 17 Am. & Eng. R. Cas. 634.

2. Burden on Defendant to Prove Person Causing Injury to Be a Fellow Servant. — *Chicago, etc., R. Co. v. Oyster*, (Neb. 1891) 78 N. W. Rep. 359; *Patterson v. Houston, etc., R. Co.*, (Tex. Civ. App. 1897) 40 S. W. Rep. 442. See also *Chicago, etc., R. Co. v. House*, 172 Ill. 601.

3. Kansas City, etc., R. Co. v. Becker, 63 Ark. 477.

4. McGowan v. St. Louis, etc., R. Co., 61 Mo. 528.

5. Burden of Proof as to Fact of Injury. — *Balton v. War*, 77 Md. 597.

received by him was caused by the negligence or unskilful act of the fellow servant; negligence or unskilfulness cannot be inferred from the simple fact of the happening of the injury.¹

d. NEGLIGENCE OF MASTER. — The law presumes that the master has exercised proper care in the selection or retention of his servants; and hence, in an action by a servant for an injury alleged to have been caused by the act of a coemployee, the burden of proof is upon the plaintiff who asserts negligence on the part of the master in the discharge of this duty.² Accordingly, it is incumbent upon the plaintiff in such action to show affirmatively not only that the servant was incompetent,³ but that his incompetency was known to the master, or, by the exercise of due care on the master's part, would have been known to him.⁴

c. KNOWLEDGE BY SERVANT OF FELLOW SERVANT'S INCOMPETENCY. — In *Indiana* the rule obtains that, in order to sustain an action for injury resulting from the negligence or incompetency of a coemployee, the plaintiff must prove that, at the time when the injury occurred, he had no knowledge of the incompetency or negligence of the fellow servant, or facts from which the want of such knowledge might be inferred.⁵ But the prevailing rule seems to

1. **Burden of Proof to Establish Negligence of Fellow Servant as Cause of Injury.** — *Fraser v. Schroeder*, 163 Ill. 459; *Ohio, etc., R. Co. v. Dunn*, 138 Ind. 21; *Baltimore Elevator Co. v. Neal*, 65 Md. 456; *Baltimore v. War*, 77 Md. 597.

2. **Presumption of Exercise of Care by Master in Selection of Servant** — *Alabama*. — *Mobile, etc., R. Co. v. Thomas*, 42 Ala. 672; *Mobile, etc., R. Co. v. Smith*, 59 Ala. 245; *Conrad v. Gray*, 109 Ala. 130.

Colorado. — *Summerhays v. Kansas Pac. R. Co.*, 2 Colo. 484; *Kindel v. Hall*, 8 Colo. App. 63.

Connecticut. — *Hayden v. Smithville Mfg. Co.*, 29 Conn. 557.

Illinois. — *St. Louis Pressed Brick Co. v. Kenyon*, 57 Ill. App. 640; *Columbus, etc., R. Co. v. Troesch*, 68 Ill. 545, 18 Am. Rep. 578; *Stafford v. Chicago, etc., R. Co.*, 114 Ill. 244; *Chicago, etc., R. Co. v. Geary*, 110 Ill. 383.

Indiana. — *Ohio, etc., R. Co. v. Dunn*, 138 Ind. 18; *Indianapolis, etc., R. Co. v. Love*, 10 Ind. 554.

Maryland. — *Wonder v. Baltimore, etc., R. Co.*, 32 Md. 411, 3 Am. Rep. 143; *Baltimore v. War*, 77 Md. 597.

Michigan. — *Davis v. Detroit, etc., R. Co.*, 20 Mich. 122, 4 Am. Rep. 364; *Catlin v. Michigan Cent. R. Co.*, 66 Mich. 358; *Hilts v. Chicago, etc., R. Co.*, 55 Mich. 437, 17 Am. & Eng. R. Cas. 628.

Missouri. — *Moss v. Pacific R. Co.*, 49 Mo. 167, 8 Am. Rep. 126; *Murphy v. St. Louis, etc., R. Co.*, 71 Mo. 202, 2 Am. & Eng. R. Cas. 83; *McDermott v. Hannibal, etc., R. Co.*, 87 Mo. 285, 28 Am. & Eng. R. Cas. 528.

New York. — *Faulkner v. Erie R. Co.*, 49 Barb. (N. Y.) 324; *McMillan v. Saratoga, etc., R. Co.*, 20 Barb. (N. Y.) 449; *Baulec v. New York, etc., R. Co.*, 59 N. Y. 356, 17 Am. Rep. 325.

Ohio. — *Mad River, etc., R. Co. v. Barber*, 5 Ohio St. 541, 67 Am. Dec. 312.

Texas. — *Southern Cotton Oil Co. v. Devond*, (Tex. Civ. App. 1894) 25 S. W. Rep. 43.

3. *Summerhays v. Kansas Pac. R. Co.*, 2 Colo. 487; *Ohio, etc., R. Co. v. Dunn*, 138 Ind. 18; *Davis v. Detroit, etc., R. Co.*, 20 Mich. 122, 4 Am. Rep. 364.

Contra. — In *Wisconsin* a different rule has been laid down, and it has been held that the fact that a servant is competent is a defensive fact, and that the burden of proving it is upon the defendant. *Haley v. Western Transit Co.*, 76 Wis. 344.

4. *Conrad v. Gray*, 109 Ala. 130; *Summerhays v. Kansas Pac. R. Co.*, 2 Colo. 484; *Ohio, etc., R. Co. v. Dunn*, 138 Ind. 21; *Baltimore v. War*, 77 Md. 597; *Huffman v. Chicago, etc., R. Co.*, 78 Mo. 54.

Proof of Incompetency at Time of Employment Alone Insufficient. — In *Roblin v. Kansas City, etc., R. Co.*, 119 Mo. 476, it was held that the law will presume, in the absence of evidence to the contrary, that the master performed his duty in exercising proper care in the employment of a servant, and the burden of proof will be upon the plaintiff to show negligence in this respect, and the mere fact that the servant was incompetent at the time of employment will not place the burden on the master to show that he exercised the proper care.

But in *Lee v. Michigan Cent. R. Co.*, 87 Mich. 574, it was held that, in the absence of any evidence as to the exercise of care in the selection of a servant, proof that a servant who has been in the master's service for two or three weeks was incompetent when employed need not be supplemented by proof of the company's knowledge of the incompetency, since in such a case the presumption that the master had done his duty is overcome by proof that the servant was incompetent when employed.

5. *Toledo, etc., R. Co. v. Trimble*, 8 Ind. App. 333; *Lake Shore, etc., R. Co. v. Stupak*, 108 Ind. 1; *Indiana, etc., R. Co. v. Dailey*, 110 Ind. 75; *Spencer v. Ohio, etc., R. Co.*, 130 Ind. 181. Compare *Pennsylvania R. Co. v. Roney*, 89 Ind. 453, 46 Am. Rep. 173. See also *Ohio, etc., R. Co. v. Dunn*, 138 Ind. 21.

be that the burden is on the master to show such knowledge on the part of the plaintiff.¹

2. Admissibility — a. INCOMPETENCY OF FELLOW SERVANT — (1) In General. — In an action by an employee against the master to recover damages for an injury sustained while in his service, under an allegation of negligence on the part of the master in the employment of colaborers, it has been held that evidence of the incompetency of such colaborers is admissible as a link in the chain of evidence, and as such cannot be objected to at the time when offered, even though it afterwards appears that the injury did not result from such incompetency.²

(2) Admissions of Master. — The admissions and declarations of an employer, or of his duly authorized agent, acting within the scope of his authority, are admissible in evidence for the purpose of showing the incompetency of an employee.³

1. Burden on Master to Show Knowledge by Servant of Incompetency of Fellow Servant. — Texas, etc., R. Co. v. Johnson, 89 Tex. 519; Williams v. Missouri Pac. R. Co., 109 Mo. 475.

2. Admissibility of Evidence as to Incompetency of Fellow Servants in General. — Altee v. South Carolina R. Co., 21 S. Car. 550.

Direct Evidence — Competency of Witness. — In an action against a mining company for the wrongful death of a servant caused by a fellow servant, a witness for the plaintiff testified that he had been engaged in mining two and a half years; that he was familiar with the kind of work in which the fellow servant and the intestate were engaged; that he had known such fellow servant four and a half years and had seen his work often; that the fellow servant's duties were, together with his colaborers, to take down from the roof of the entry, and load, slate or rock in the mine; that at the time of the injury the fellow servant's crew consisted of himself as boss, two other laborers, and the deceased. It was held that the witness was competent to testify to the competency of the fellow servant through whose negligence the injury was alleged to have been sustained. Buckalew v. Tennessee Coal, etc., R. Co., 112 Ala. 146.

Also it has been held that an old brakeman who had worked upon a train operated by an engineer by whose negligence an injury to a fellow servant was sustained was qualified to testify as to the competency of an engineer, at least as to all matters which did not involve technical knowledge of the machinery of the engine. Houston, etc., R. Co. v. Patton, (Tex. 1888) 9 S. W. Rep. 175.

Testimony of Defendant's Officer Having Charge of Employment of Servants. — In Couch v. Wat-
Coal Co., 46 Iowa 17, it was held that the officer of a company to whom was intrusted the business of employing engineers and other servants was competent to testify as to the competency of an engineer, regardless of the fact whether or not he was an expert. See also Frazier v. Pennsylvania R. Co., 38 Pa. St. 104, 80 Am. Dec. 467.

Evidence of Character of Work as Showing Competency Required. — In an action against a railroad company for the wrongful death of an engineer in a collision caused by the negligence of the railroad company's yardmaster in sending a switch engine and train of cars upon the main track when an express train was past

due, evidence as to the number of engines ordinarily employed in switching, the average number of freight trains in the yard, and questions of similar import are relevant and proper, as tending to show the character and importance of the work in charge of which the yardmaster was placed, and that from its extent, the character of the employment, and the dangers incident to it a man of corresponding ability and experience should be in charge of it. Michigan Cent. R. Co. v. Gilbert, 46 Mich. 176.

Declaration of Fellow Servant at Time of Accident. — In an action for damages for personal injuries brought by a brakeman against a railroad company, in which unskilfulness and incompetency of the engineer were charged as the cause of the injury, it was held that the declarations of the engineer to the plaintiff just before the accident, to the effect that he would as soon run over him as any one, were admissible in evidence for the purpose of proving the recklessness of the engineer. Houston, etc., R. Co. v. Willie, 53 Tex. 318, 37 Am. Rep. 756.

3. Admission of Master as Evidence of Incompetency of Fellow Servant. — Thus, in Chapman v. Erie R. Co., 55 N. Y. 579, it was held proper for a superintendent of a railroad to testify that he had at one time told A., the employee through whose negligence the injury complained of was alleged to have been sustained, that he had heard that he had been off on a spree, drinking, that A. did not deny it, and that the witness reprimanded him for it; and this on the ground that the transaction was within the agency of the superintendent, and the declaration accompanied an act in the discharge of his duty. In this case the court said: "He had the power of employment, discharge, and supervision of Allison, as one of the employees of the defendant, and upon being informed of his delinquency and its cause it was his duty to investigate the matter and apply such remedy as the circumstances demanded, and what he did and said in discharging that duty were competent." But in McDermott v. Hannibal, etc., R. Co., 87 Mo. 285, it was held that the declaration of a roadmaster, who had authority to employ and discharge a section foreman, that the latter was not a good railroad man was not admissible to prove the fact that the section foreman was incompetent, because the declarations were

(3) *Specific Acts of Negligence.* — It seems to be the prevailing rule that, in an action against a master for an injury sustained by an employee, resulting from the negligence or unskilfulness of a coemployee, prior acts of negligence on the part of such coemployee are admissible to show his incompetency, the object of such evidence being to prove want of care on the part of the employer, either in employing or retaining in his service such employee.¹ But it seems that unless such acts are brought home to the knowledge of the master, they are inadmissible.² In a few jurisdictions, however, it has been held that specific acts of negligence cannot be introduced to show the incompetency of a servant.³ The reason given for this rule is that such evidence may present a multiplicity of issues that cannot properly be tried together.⁴ But in a jurisdiction maintaining this view it has been held that when the conduct of a fellow servant, tending to show his qualification or his mental or physical fitness or unfitness for his work, is properly before a jury upon one of the issues of the cause, the jury is not forbidden to consider it on the question of his competency.⁵

not made in the transaction of the business of the railroad.

1. Specific Acts of Negligence as Evidence of Incompetency — Prevailing Rule. — *Wabash Western R. Co. v. Brow*, 65 Fed. Rep. 941; *Gier v. Los Angeles Consol. Electric R. Co.*, 108 Cal. 134; *Pittsburgh, etc., R. Co. v. Ruby*, 38 Ind. 294, 10 Am. Rep. 111; *Couch v. Watson Coal Co.*, 46 Iowa 22; *Grube v. Missouri Pac. R. Co.*, 98 Mo. 330, 14 Am. St. Rep. 645; *Baulec v. New York, etc., R. Co.*, 59 N. Y. 356, 17 Am. Rep. 325. See also *Davis v. Detroit, etc., R. Co.*, 20 Mich. 124, 4 Am. Rep. 364.

In *Baltimore, etc., R. Co. v. Camp*, 65 Fed. Rep. 958, the fact that a telegraph operator, eighteen years of age, by whose negligence the injury complained of was caused, had gone to sleep while on night duty, only a few months before, and had thereby stopped a train which it was his duty to allow to pass, and was suspended indefinitely therefor, was held to be "most significant evidence upon the issue whether the company had been careless or not in his re-employment."

Books of Accidents. — In *O'Hare v. Chicago, etc., R. Co.*, 95 Mo. 662, it was held in an action against a railroad company for an injury caused by a fellow servant, that where a witness testified that he was the agent of the defendant, and in charge of certain of the defendant's freight offices; that he kept a book containing letter-press copies of reports of accidents to persons and property, and that these reports were then sent to the division superintendent, it was competent for the witness to read certain copied reports of a prior accident caused by the negligence of the fellow servant, and for which he was discharged, for the purpose of showing his incapacity and notice to the company, where no objection was made to the evidence on the ground that the original report instead of a copy should be produced.

Necessity of Proof of Specific Acts of Negligence. — It is not necessary to show any special acts of negligence in order to establish the incompetency of a servant, for he may exercise extreme care within the limitations of his knowledge, and yet for lack of specific knowledge may be unfit and incompetent for his position. *Nofsinger v. Goldman*, 122 Cal. 609.

2. Notice to Master of Specific Acts Essential. — *Baltimore Elevator Co. v. Neal*, 65 Md. 452; *Norfolk, etc., R. Co. v. Hoover*, 79 Md. 253, 47 Am. St. Rep. 392. See also *Baulec v. New York, etc., R. Co.*, 59 N. Y. 360, 17 Am. Rep. 325.

In *Michigan Cent. R. Co. v. Gilbert*, 46 Mich. 176, it was held improper to allow a switchman and helper at the yard to testify that there had been previous occasions upon which he had refused upon the yardmaster's directions to let his switch engine go out upon the main track after the time when an express train was due, for the purpose of showing the yardmaster's incompetency, unless such evidence was brought home to the knowledge of the officers of the road.

Specific Acts at Time of Injury. — In *Couch v. Watson Coal Co.*, 46 Iowa 17, it was held that evidence of specific acts of negligence on the part of an employee should not be admitted unless it be shown that they occurred before the injury complained of, since otherwise the master could not have notice thereof. See also *Pittsburgh, etc., R. Co. v. Ruby*, 38 Ind. 294, 10 Am. Rep. 111; *Ransier v. Minneapolis, etc., R. Co.*, 30 Minn. 215.

3. Jurisdiction Disallowing Specific Acts to Show Incompetency. — *Hatt v. Nay*, 144 Mass. 186; *Kennedy v. Spring*, 160 Mass. 203; *Connors v. Morton*, 160 Mass. 333; *Driscoll v. Fall River*, 163 Mass. 105; *Olsen v. Andrews*, 168 Mass. 265; *Frazier v. Pennsylvania R. Co.*, 38 Pa. St. 110, 80 Am. Dec. 467; *Galveston, etc., R. Co. v. Davis*, (Tex. 1898) 48 S. W. Rep. 570.

In an action against the master for the wrongful death of a servant caused by a fellow servant, it has been held improper for the plaintiff to prove that other parties had been injured while working under such fellow servant. *Buckalew v. Tennessee Coal, etc., R. Co.*, 112 Ala. 146.

4. *Olsen v. Andrews*, 168 Mass. 265.

5. *Olsen v. Andrews*, 168 Mass. 261; *Peaslee v. Fitchburg R. Co.*, 152 Mass. 155.

In the case first cited the court said: "Of course it is not competent on the question whether his employer was negligent in hiring him or retaining him in his service without independent proof that the employer ought to have discovered his incompetency."

(4) *Habitual Acts of Negligence.* — Acts of carelessness extending over such a period of time as to render them habitual have been held to be admissible even in a jurisdiction where single acts have been excluded, for the purpose of showing a careless or reckless character on the part of a servant,¹ and this though the acts occurred during a period which extended from a time prior to the injury complained of to a time subsequent thereto.²

(5) *General Reputation.* — It seems that the general reputation is inadmissible to show the fact of a servant's incompetency.³

b. NOTICE TO MASTER — (1) *Admissions of Master.* — Admissions or declarations of the employer or his duly authorized agent are admissible for the purpose of showing the employer's knowledge of the incompetency of the employee.⁴ And it has even been held that declarations of an agent are admissible to show knowledge by him, and hence knowledge by his principal, of incompetency on the part of the employee, if the fact of incompetency is otherwise established, or there is evidence tending to establish it, although the declarations themselves are inadmissible for the purpose of proving the fact of incompetency, within the general rule that the declarations of an agent will not bind his principal unless made at the time of doing some act within the scope of his agency.⁵

(2) *General Reputation* — (a) *In General.* — Where an injury has occurred to a servant through the incompetency, recklessness, or unskilfulness of a fellow servant who is generally known to be unfit, reckless, or unskilful, evidence of the fact that he is generally so reputed is competent as tending to show that the master, by the exercise of that ordinary and reasonable care required in the employment and retention of servants, should have known of the servant's incompetency; and proof of actual knowledge is in such case unnecessary.⁶

1. *Habitual Acts of Carelessness as Evidence of Incompetency.* — *Houston, etc., R. Co. v. Patton*, (Tex. 1888) 9 S. W. Rep. 175.

In *Galveston, etc., R. Co. v. Davis*, (Tex. 1898) 48 S. W. Rep. 570, it was held proper to permit a witness to testify as follows, in regard to an engineer in charge of a train before the accident in which an injury to a fellow servant occurred: "I knew Thomas Henry when he was employed on the road as a fireman, and afterwards when he ran an engine. He pulled my train very often. * * * He differed in a good many respects from an ordinary competent engineer. He had no more idea of speed than a three-year-old boy. He would pull a train down hill just as fast as he could turn a wheel. I know that he would do this because he did it every time he pulled my train."

Habits of Intemperance. — It has been held that evidence of habits of intemperance on the part of an employee is admissible where there is other evidence tending to show that the master had his attention called to the fact. *Michigan Cent. R. Co. v. Gilbert*, 46 Mich. 176. In *Galveston, etc., R. Co. v. Davis*, (Tex. 1898) 48 S. W. Rep. 570, it was held that evidence that an employee was in the habit of getting drunk would not be admissible as to his incompetency where it did not appear that he was drunk at the time when the injury to the fellow servant was sustained, and this was held to be true, notwithstanding a rule of the master provided that "the use of intoxicating liquors is strictly forbidden" and declared that "total abstinence is necessary to safety in operating the road." But in *Cosgrove v. Pitman*, 103 Cal. 268, it was intimated that if

the fact of a habit of intemperance on the part of an employee was shown, it would throw upon the master the burden of showing that the employee was not drunk at the time when the injury complained of was received by the coemployee.

2. *Houston, etc., R. Co. v. Patton*, (Tex. 1888) 9 S. W. Rep. 176.

3. *General Reputation Inadmissible to Show Incompetency.* — *Gier v. Los Angeles Consol. Electric R. Co.*, 108 Cal. 134; *Cosgrove v. Pitman*, 103 Cal. 268. See also *Baird v. New York Cent., etc., R. Co.*, 16 N. Y. App. Div. 490.

4. *Admissions of Master as Evidence of Notice to Master.* — *Baltimore Elevator Co. v. Neal*, 65 Md. 454.

Declaration of Copartner. — In *Kindel v. Hall*, 8 Colo. App. 63, it was held that knowledge of one member of a firm that one of the firm's employees is negligent and unfit for the discharge of his duties fixes the responsibility on the copartners for retaining such employee, and the declaration of such member made after an accident occasioned by such employee's negligence, tending to show such knowledge, is admissible in evidence for that purpose.

5. *McDermott v. Hannibal, etc., R. Co.*, 87 Mo. 300; *Chapman v. Erie R. Co.*, 55 N. Y. 579.

6. *General Reputation Admissible to Show Notice.* — *Gier v. Los Angeles Consol. Electric R. Co.*, 108 Cal. 134; *Acme Coal Min. Co. v. McIver*, 5 Colo. App. 267; *Western Stone Co. v. Whalen*, 151 Ill. 484, 42 Am. St. Rep. 244, citing 7 AM. AND ENG. ENCYC. OF LAW 852; *Lake Shore, etc., R. Co. v. Stupak*, 123 Ind.

Reputation Among Limited Number of Persons. — But it has been held that the reputation of a foreman among a few workmen employed under him is not a general reputation which will be admissible for the purpose of showing notice.¹

Remote Reputation. — Also, it has been held that evidence of the reputation of an employee ten or fifteen years before the accident in which the injury of a coemployee occurred, while the employee was attending school, and before his employment by the defendant, is inadmissible as being too remote.²

Establishment of Fact of Incompetency as Prerequisite to Admissibility. — And it seems that evidence of reputation to show notice is admissible in any case only in connection with evidence that the employee is in truth an unfit person.³

(b) **General Reputation for Drunkenness.** — The general reputation of an employee for habitual intemperance is competent for the purpose of showing that the master must have known that the employee was intemperate, and therefore an unsuitable servant to be employed by him.⁴ In the decisions sustaining this proposition it appears that the evidence of general reputation for drunken-

210; *Hatt v. Nay*, 144 Mass. 186; *Driscoll v. Fall River*, 163 Mass. 107; *Davis v. Detroit*, etc., R. Co., 20 Mich. 105, 4 Am. Rep. 364; *Grube v. Missouri Pac. R. Co.*, 98 Mo. 330, 14 Am. St. Rep. 645; *Park v. New York Cent.*, etc., R. Co., 85 Hun (N. Y.) 184; *Galveston*, etc., R. Co. v. *Henning*, (Tex. Civ. App. 1897) 39 S. W. Rep. 305; *Texas*, etc., R. Co. v. *Johnson*, 89 Tex. 519.

In *Gier v. Los Angeles Consol. Electric R. Co.*, 108 Cal. 129, the court said: "Where the plaintiff has established that the employee was in fact unfit and incompetent, and has been able to show by direct proof that the employer knew this fact, the case so far is made out, and there is no need of or utility in evidence of reputation. But as such proof is difficult and frequently impossible to make, the law permits the employer to be charged after proof of the fact of unfitness, if it can be shown that the culpable servant's reputation for the particular matter in question was so generally and notoriously bad that it ought to have been, and therefore presumably was, known to him. For then, with knowledge of this reputation imputed to him, if the employer had acted with reasonable prudence upon this information, he would have discovered that the reputation was well founded, that the facts justified and supported it — in short, that he had in his employ an unreliable man."

Reputation as to Infirmary of Fellow Servant. — Thus it has been held competent to show that a fellow servant was generally reputed to be infirm in the senses of sight and hearing, and in physical strength, for the purpose of proving that the defendant knew of the infirmities, or by the exercise of reasonable care would have known of them. *Monahan v. Worcester*, 150 Mass. 439, 15 Am. St. Rep. 226.

Remarks of Crowd upon Occasion of Injury. — Where the evidence in a case tended to show only that, at the time of an accident in which a servant was injured by the negligence of a fellow servant, remarks were made that the fellow servant was careless, it was held that such remarks would not show such a reputation for unfitness as to impute knowledge of the servant's incompetency to the master. *Davis v. Detroit*, etc., R. Co., 20 Mich. 123, 4 Am. Rep. 364.

Nickname as Showing Notice. — It has been held that evidence that an engineer was

known by the nickname of "Crazy Pete" and the "Wild Irishman" is inadmissible to show the incompetency or negligence of the engineer, or to show knowledge on the part of the master. *St. Louis*, etc., R. Co. v. *Corgan*, 49 Ill. App. 229. But in *Park v. New York Cent.*, etc., R. Co., 85 Hun (N. Y.) 184, it was held that evidence of general reputation that a brakeman was "a little off" and that among railroad men he was called "Crazy Brown" was admissible on the question of notice. Compare *Baird v. New York Cent.*, etc., R. Co., 16 N. Y. App. Div. 490.

Actual Knowledge of General Reputation. — In *Mexican Nat. R. Co. v. Musette*, 7 Tex. Civ. App. 169, it was held that evidence to show that the defendant had actual knowledge of the general reputation of a fellow servant is admissible.

General Reputation as Notice of Competency. — A general reputation for competency and care at the time and place of employment, of such character as to impute the information to the employer, is admissible as tending to disprove the alleged negligence in employing him. *Illinois Cent. R. Co. v. Morrissey*, 45 Ill. App. 135.

1. Admissibility of Reputation Among Limited Number of Persons. — *Driscoll v. Fall River*, 163 Mass. 105. See also *Acme Coal Min. Co. v. McIver*, 5 Colo. App. 267; *Western Stone Co. v. Whalen*, 151 Ill. 488, 42 Am. St. Rep. 244. Compare *Texas*, etc., R. Co. v. *Johnson*, 89 Tex. 519.

In *Driscoll v. Fall River*, 163 Mass. 105, the court said: "It is merely the opinion of a small number of men, of which there is no sufficient reason to suppose the master may be cognizant, or which he may be bound to heed."

2. Admissibility of Remote Reputation. — *Baird v. New York Cent.*, etc., R. Co., 16 N. Y. App. Div. 490.

3. Evidence of Reputation to Be Accompanied by Evidence of Fact of Incompetency. — *Gier v. Los Angeles Consol. Electric R. Co.*, 108 Cal. 134; *Cosgrove v. Pitman*, 103 Cal. 268; *Baird v. New York Cent.*, etc., R. Co., 16 N. Y. App. Div. 490. See also *Galveston*, etc., R. Co. v. *Davis*, (Tex. 1898) 48 S. W. Rep. 570.

4. General Reputation for Drunkenness as Notice to Master. — *Baltimore*, etc., R. Co. v. *Henthorne*, 73 Fed. Rep. 638; *Hilts v. Chi-*

ness was accompanied by evidence that the servant was drunk or had been drinking upon the occasion when the injury was sustained by the fellow servant.¹ Moreover, it has been held that evidence of general reputation as to drunkenness will be excluded unless it appears from other evidence that the employee producing the injury was in a drunken condition at the time of the happening of the injury, or was in the habit of drinking at or about that time.²

(3) *Specific Acts of Negligence.* — In a jurisdiction where the rule obtains that the competency or incompetency of an employee cannot be proved by specific acts of carelessness, it has been intimated that where such acts have been brought to the notice of the master, they can be proved to establish that knowledge on the part of the master.³

(4) *Habitual Acts of Negligence.* — Also it has been held that acts of carelessness extending over such a period of time as to show habitual carelessness are admissible upon the question of notice.⁴ But it has been held that when it is sought to affect the master with notice by showing habitual acts of carelessness or recklessness on the part of the servant, occurring during a period which extended from a time prior to the injury complained of to a time subsequent thereto, the jurors ought to be instructed, in determining that question, that they should not look to acts occurring after the injury.⁵

c. *NOTICE TO INJURED EMPLOYEE — General Reputation.* — General reputation may be admitted in order to show knowledge on the part of the injured employee of a fellow servant's incompetency, but to establish the fact of knowledge it must be shown that the injured employee actually knew of the reputation, or that he had been placed in such circumstances in relation thereto that a jury could conclude that he did know the fact.⁶

d. *PRIOR ACTS AS EVIDENCE OF NEGLIGENCE AT TIME OF INJURY.* — When the question is whether or not a servant was guilty of negligence or unskilfulness in causing the injury to a coemployee, evidence is not admissible to show that he has been guilty of prior similar acts of negligence or unskilfulness;⁷ and this, it has been held, though the prior acts are shown to be habitual.⁸

3. Sufficiency — Negligence of Master — a. *IN GENERAL.* — The negligence of a master may be proved like any other fact, either by direct evidence or by proof of circumstances from which its existence may, as a conclusion of fact, be fairly and reasonably inferred.⁹

cago, etc., R. Co., 55 Mich. 445; Gilman v. Eastern R. Co., 13 Allen (Mass.) 433; Norfolk, etc., R. Co. v. Hoover, 79 Md. 263, 47 Am. St. Rep. 392.

1. See cases cited in preceding note.

2. Cosgrove v. Pitman, 103 Cal. 268.

3. *Specific Acts of Negligence to Show Notice.* — Galveston, etc., R. Co. v. Davis, 4 Tex. Civ. App. 468, (Tex. 1898) 48 S. W. Rep. 570.

4. *Habitual Acts of Negligence to Show Notice.* — Houston, etc., R. Co. v. Patton, (Tex. 1888) 9 S. W. Rep. 175.

Past Record of Employee. — In an action by a railway employee against the railroad company for an injury occasioned by the negligence of a telegraph operator, it has been held competent for the plaintiff to show the entire past record of the telegraph operator in the service of the defendant railroad and of other roads, for the purpose of charging the defendant with notice of the telegraph operator's incompetency, whether or not the facts were actually known to the defendant company. Baltimore, etc., R. Co. v. Camp, 65 Fed. Rep. 952.

5. Houston, etc., R. Co. v. Patton, (Tex. 1888) 9 S. W. Rep. 175.

6. *General Reputation as Notice to Injured*

Employee. — Texas, etc., R. Co. v. Johnson, 89 Tex. 519. See Western Stone Co. v. Whalen, 151 Ill. 486, 42 Am. St. Rep. 244.

7. *Prior Acts as Evidence of Negligence at Time of Injury.* — Pittsburgh, etc., R. Co. v. Ruby, 38 Ind. 312, 10 Am. Rep. 111; Baltimore Elevator Co. v. Neal, 65 Md. 453; Baltimore v. War, 77 Md. 598; Michigan Cent. R. Co. v. Gilbert, 46 Mich. 176, 2 Am. & Eng. R. Cas. 230; Baulee v. New York, etc., R. Co., 59 N. Y. 360, 17 Am. Rep. 325; Missouri, etc., R. Co. v. Johnson, (Tex. 1898) 48 S. W. Rep. 568.

In Baulee v. New York, etc., R. Co., 59 N. Y. 356, 17 Am. Rep. 325, the court said: "The cases in which evidence of other acts of misconduct or neglect of servants or employees, whose acts and omissions of duty are the subject of investigation, has been held incompetent have been those in which it has been sought to prove a culpable neglect of duty on a particular occasion, by showing similar acts of negligence on other occasions."

8. Missouri, etc., R. Co. v. Johnson, (Tex. 1898) 48 S. W. Rep. 568.

9. *Sufficiency of Evidence to Establish Negligence of Master.* — Norfolk, etc., R. Co. v. Hoover, 79 Md. 253, 47 Am. St. Rep. 392. See

b. KNOWLEDGE OF SPECIFIC ACTS OF NEGLIGENCE. — In those jurisdictions in which prior acts of negligence are admitted in evidence for the purpose of showing the incompetency of a fellow servant, the question whether or not an act of negligence will conclusively establish incompetency, and therefore fix the liability of the master having knowledge of such act, depends upon the character of the act itself and the surrounding circumstances.¹ Thus, a single act of negligence may, under some circumstances, show a fellow servant to be an improper and unfit person for the particular service, as when such act is intentional and done wantonly, regardless of consequences, or maliciously.² Or the manner in which a specific act is performed may conclusively show the utter incompetency of the fellow servant.³ But, as a general rule, a single act of casual neglect does not *per se* establish incompetency on the part of a fellow servant.⁴

also Texas, etc., *R. Co. v. Berry*, 67 Tex. 238; Ohio, etc., *R. Co. v. Dunn*, 138 Ind. 18.

In an action by a servant to recover for an injury alleged to have been caused by the negligence of a fellow servant, the facts that the latter had been employed only a few hours prior to the injury, and that he had been secured from the same branch of the service in another company without inquiry as to his fitness, are not in themselves sufficient to charge the defendant company with negligence. Ohio, etc., *R. Co. v. Dunn*, 138 Ind. 18.

The fact that a fireman who has occasionally served as engineer in a switch yard is placed in charge of an engine to do switching is not sufficient in itself to charge the railroad company with negligence in an action by a fellow servant to recover for an injury alleged to have been sustained by reason of the incompetency of such person. Ohio, etc., *R. Co. v. Dunn*, 138 Ind. 18.

But where it appeared that a servant, through whose blunder an injury to a fellow servant was caused, was employed for the first time on the day of the injury, and that the master made no inquiries about him and knew nothing of his fitness, it was held that the liability of the master was sufficiently established. *Fines v. Sillery*, 73 Hun (N. Y.) 549.

Also where the plaintiff proved by a fellow brakeman that an engineer was careless in handling his engine, and especially in backing up to make couplings, and that he had reported him for this to the conductor, and it appeared from the testimony of another engineer that the engineer to whom carelessness was imputed had habitually brought his engine into the shop out of repair, and that the defects were such as would not have occurred if he had exercised proper care, the court refused to set aside a verdict charging the defendant railway company with notice. *Houston, etc., R. Co. v. Patton*, (Tex. 1888) 9 S. W. Rep. 176.

Negligence Inferred from Notoriety of Servant's Intemperate Habits. — In *Hilts v. Chicago, etc., R. Co.*, 55 Mich. 437, it was held that where it was shown that an injury occurred to a servant through the negligent act of a fellow servant, who was in an intoxicated condition at the time, and it was further shown that the fellow servant was in the habit of drinking intoxicating liquors to excess, and such habits had extended over a period of nine months while in

the defendant's employ, and no actual knowledge or notice ever reached the master, the jury was justified in concluding from the evidence that the master was negligent in failing to learn of such habits and in retaining the fellow servant in its employment. The court said: "If the engineer was addicted to the habitual use of intoxicating liquors to such excess that his intoxicated condition was observed and known by the employees and others coming in contact with him, for a period covering several months of time, and if by inquiry or observation the officers of the company during that time would have discovered his unfitness for the position of engineer by reason of his habits of becoming intoxicated, the omission to make inquiry or to observe his condition is negligence fully as culpable as if they had employed a notoriously incompetent engineer without inquiry." See also *Norfolk, etc., R. Co. v. Hoover*, 79 Md. 253, 47 Am. St. Rep. 392; *Zumwalt v. Chicago, etc., R. Co.*, 35 Mo. App. 666; *Chicago, etc., R. Co. v. Sullivan*, 63 Ill. 297.

Testimony of Plaintiff as to Giving Notice to Master. — A servant cannot recover from his master for an injury caused by a boiler explosion, on the ground that the master had knowledge of the incompetency of the engineer through whose negligence the accident was alleged to have been caused, where the only evidence of such knowledge consisted of declarations of the plaintiff that he told the chief engineer that the engineer was incompetent, without any statement as to how or why he was incompetent, and without any proof of actual incompetency, and such declarations are denied by the chief engineer. *Snodgrass v. Carnegie Steel Co.*, 173 Pa. St. 228.

1. *McDermott v. Hannibal, etc., R. Co.*, 87 Mo. 285. See also *Huffman v. Chicago, etc., R. Co.*, 78 Mo. 50; *Mulhern v. Lehigh Valley Coal Co.*, 161 Pa. St. 270.

2. *Baulec v. New York, etc., R. Co.*, 59 N. Y. 363, 17 Am. Rep. 325; *Holland v. Southern Pac. R. Co.*, 100 Cal. 244; *McDermott v. Hannibal, etc., R. Co.*, 87 Mo. 295; *Baltimore v. War*, 77 Md. 598. See also *East Line, etc., R. Co. v. Scott*, (Tex. 1888) 10 S. W. Rep. 298.

3. *Baulec v. New York, etc., R. Co.*, 59 N. Y. 363, 17 Am. Rep. 325; *Holland v. Southern Pac. R. Co.*, 100 Cal. 244.

4. **Incompetency Not Established by Single Act of Negligence as a General Rule.** — *Conrad v. Gray*, 109 Ala. 130; *Holland v. Southern Pac.*

Negligent Acts at Time of Injury.—And this rule is especially true where the negligent act in question was committed on the occasion when the injury complained of was sustained, and not on some prior occasion.¹

FELON. (See also FELONIOUS; FELONY, *post.*)—See note 2.

FELONIOUS—FELONIOUSLY. (See also the titles CRIMINAL LAW, vol. 8, p. 274; INTENT; MALICE; MISDEMEANORS; and see CRIME, vol. 8, p. 248; FELONY, *post.* As to the necessity of the word "feloniously" in an indictment for felony, see ENCYC. OF PL. AND PR., vol. 10, p. 492, title INDICTMENTS, INFORMATIONS, AND COMPLAINTS.)—"Felonious" is defined to be malignant, malicious, villainous, traitorous, perfidious.³

R. Co., 100 Cal. 240; *Cosgrove v. Pitman*, 103 Cal. 268; *Kindel v. Hall*, 8 Colo. App. 63; *Baulec v. New York, etc.*, R. Co., 59 N. Y. 363, 17 Am. Rep. 325; *Baltimore Elevator Co. v. Neal*, 65 Md. 454; *Baltimore v. War*, 77 Md. 598.

In *Baulec v. New York, etc.*, R. Co., 59 N. Y. 356, 17 Am. Rep. 325, the court said: "An individual who, by years of faithful service, has shown himself trustworthy, vigilant, and competent is not disqualified for further employment and proved either incompetent or careless and not trustworthy by a single mistake or act of forgetfulness and omission to exercise the highest degree of caution and presence of mind. The fact would only show what must be true of every human being, that the individual was capable of an act of negligence, forgetfulness, or error of judgment. This must be the case as to all employees of corporations until a race of servants can be found free from the defects and infirmities of humanity."

The mere fact that a yardmaster had sent an engine on the track when a coming train was overdue does not conclusively show that the company was negligent in keeping him in its service, since he might have had information showing that the train would not arrive for some time. *Michigan Cent. R. Co. v. Gilbert*, 46 Mich. 176, 2 Am. & Eng. R. Cas. 230.

Numerous Specific Acts.—In *Evansville, etc.*, R. Co. v. *Tohill*, 143 Ind. 49, the finding of the jury that a train dispatcher had issued forty orders for trains to run ahead of schedule time, and to depart from stations before schedule time, and that his office was in the same building as that of the president of the road, was held to be evidentiary merely, and not the equivalent of a finding of the ultimate fact as to the incompetency of such dispatcher, especially where the rules of the company permitted him to make such orders.

1. Incompetency Not Established by Negligence of Servant at Time of Injury.—*Hathaway v. Illinois Cent. R. Co.*, 92 Iowa 340; *Curran v. Merchants Mfg. Co.*, 130 Mass. 374, 39 Am. Rep. 457; *Lee v. Detroit Bridge, etc.*, Co., 62 Mo. 565; *Cooper v. Milwaukee, etc.*, R. Co., 23 Wis. 668. See also *Harvey v. New York Cent., etc.*, R. Co., 88 N. Y. 481, 8 Am. & Eng. R. Cas. 515; *Burke v. Syracuse, etc.*, R. Co., 60 Hun (N. Y.) 21. But compare *Evansville, etc.*, R. Co. v. *Guyton*, 115 Ind. 452, 7 Am. St. Rep. 458.

2. Libel and Slander—Convicted Felon.—The plaintiff in a libel suit had been convicted of selling spirituous liquors in violation of the

license laws. The alleged libel for which he brought suit was that he was a convicted *felon*. Upon the question whether these words were libelous, the court said: "The defendant has offered evidence that the plaintiff has been convicted of selling spirituous liquors in violation of the license law, and contends that it is as a convicted offender under the license law that the terms 'convicted *felon*' are applied to him. At common law the term 'felony' comprehends a large class of high crimes, as well as those of a less atrocious character. A felony at common law always drew after it a forfeiture of goods and chattels. A violation of the license law is a misdemeanor. If the jury think the term 'convicted *felon*' in the publication, taken in connection with the context and with the evidence in the cause, would be understood by the public to mean only an offender against the license law, then the plaintiff has no cause of action for this part of the publication." *Perry v. Man*, 1 R. I. 265.

Editor of Newspaper—Libel and Slander. (See generally the title LIBEL AND SLANDER.)—In an action by the editor of a newspaper for libel by printing of him in another newspaper that he was a convicted *felon*, also a *felon* editor, the defendants justified by alleging that the plaintiff had been convicted of felony and sentenced to twelve months' hard labor. The plaintiff replied that he had endured the punishment and was therefore in the same situation as if a pardon had been granted him. The trial judge held that the alleged libel merely meant that the plaintiff had been convicted of a felony. In the Court of Appeals, *Bramwell, L. J.*, said that the words "*felon* editor" implied that the plaintiff had been guilty of felony, and as the justification did not allege that he had actually committed felony, though he might be a convicted *felon*, yet it was too wide and formed no defense. *Brett, L. J.*, and *Cotton, L. J.*, held that the question as to the meaning of the alleged libel should have been submitted to a jury, and that a person convicted of felony is no longer a *felon* after enduring the punishment. *Leyman v. Latimer*, 3 Exch. Div. 352.

3. Criminal.—*Webster's Dict.*, followed in *People v. Moore*, 37 Hun (N. Y.) 93. It was further said in that case that the words "*felonious* intent," where used in penal statutes, mean criminal intent, and criminal intent is intent to deprive or defraud the true owner of his property. See also the title INTENT.

In *State v. Bush*, 47 Kan. 207, it was said: "In *Webster's International Dictionary* it is said that the word *felonious* means 'having

FELONY. (See also FELONIOUS — FELONIOUSLY, *ante*; and see the titles BAIL AND RECOGNIZANCE, vol. 3, p. 667; COMPOUNDING OFFENSES, vol. 6, p. 399; CRIMINAL LAW, vol. 8, pp. 274, 280, and the references there given;

the quality of a felony; malignant; malicious; villainous; perfidious; in a legal sense, done with intent to commit a crime." The Encyclopædic Dictionary says that the word *felonious* means, in law, 'of the nature of a felony; done with deliberate purpose to commit a crime;' and the word *feloniously* means, in law, 'in a *felonious* manner; with deliberate intention to commit a crime.' See also the Imperial Dictionary and the Century Dictionary, substantially to the same effect."

Feloniously in a legal sense means done with an intent to commit crime. *Felonious* intent is unlawful and wicked intent. State *v.* Douglas, 53 Kan. 670; State *v.* Fisher, 8 Kan. 208; State *v.* White, 14 Kan. 538.

In State *v.* Hogard, 12 Minn. 203, it was held that the word *feloniously* meant "criminally," and an indictment for petty larceny was held not objectionable because it charged that the defendant did *feloniously* steal, etc.

Webster defines *felonious* as follows: "Having the quality of felony; malignant, malicious, villainous, traitorous, perfidious; indicating or proceeding from a depraved heart or evil purpose; as, *felonious* homicide, *felonious* thief." Whitman *v.* State, 17 Neb. 226.

Feloniously Means Wickedly and Against the Admonition of the Law. — State *v.* Williams, 141 Mo. 316; State *v.* Schaefer, 116 Mo. 96.

Feloniously Means Wrongfully and Wickedly, and Also Refers to the Punishment Imposed by Law. — State *v.* Duestrow, 137 Mo. 44.

Feloniously Means with a Deliberate Intent to Do a Wrongful Act. — In U. S. *v.* Greve, 65 Fed. Rep. 489, the court said: "It is true, the indictment here charges that the embezzlement was done with 'the intent then and there to injure,' etc., but this does not express precisely the same meaning as *feloniously*, because in the latter the element of deliberation is embraced."

Wrongfully. — Upon an indictment for murder the trial court defined the word *feloniously* to mean "wrongfully, without just cause or excuse, not accidentally." The appellate court said: "The definition of the word is certainly incorrect, but there was no necessity for defining it. It is employed to classify offenses, but is not a distinct element of a crime. If the facts proved establish a felony, then the crime was committed *feloniously*; if they establish a misdemeanor, the offense was not *feloniously* committed. A correct definition of the word could not have aided the jury in their deliberations, nor could the incorrect definition, in this instance, possibly have prejudiced the defendant's case, or been an obstacle in the way of the jury to a proper verdict on the law and the facts." State *v.* Snell, 78 Mo. 240.

Feloniously and Unlawfully. — In Weinzorpflin *v.* State, 7 Blackf. (Ind.) 195, it was said that "*feloniously* is substituted for it [the word 'unlawfully'] in this indictment, and is not only tantamount to it, but is a word of far more extensive and criminal meaning. The act complained of could not have been *feloniously* and not unlawfully done."

In Com. *v.* Adams, 127 Mass. 17, it was said: "But the allegation that the defendant maliciously and *feloniously* incited and procured the principal to commit the felony, *ex vi termini* imports that she acted with an unlawful intent."

Feloniously and Purposely. — In Carder *v.* State, 17 Ind. 307, it is said that the word *feloniously*, in the connection in which it was used in an indictment, was identical in its import with the word "purposely."

Wilfully and Maliciously. — The word *feloniously* in an indictment includes "wilfully." State *v.* McDaniel, 45 La. Ann. 686.

But in State *v.* Watson, 41 La. Ann. 598, the headnote is as follows: "The word *feloniously* is not equivalent in meaning to 'wilfully and maliciously.' It has no well-defined meaning in American law, but is used in this state to describe more particularly offenses which were felonies at common law, or of offenses of gravity which are declared felonies by statute law."

Perjury. — In Com. *v.* Taylor, 96 Ky. 394, it was held that in an indictment for perjury the words "did unlawfully and *feloniously* and falsely" swear, were not equivalent to the statutory words "wilfully and knowingly swear" falsely. The court said: "The word 'unlawfully' has no place in the statute, and does not in any sense have the meaning of either the word 'wilfully' or 'knowingly,' independent of or as used in the statute. The word *feloniously* does not have the legal significance of either the word 'wilfully' or 'knowingly,' or of both. Neither of these words is necessary to be used in the indictment. The offense charged is not a common-law but a statutory one. It is wholly unnecessary, in an indictment charging false swearing, under the foregoing section of the statute, to charge that it was 'unlawfully' or *feloniously* done. The use of either of the words would be surplusage. Shorn of this surplusage, the indictment simply charges the defendant did 'falsely swear,' etc. This averment is not sufficient." See also ENCYC. OF PL. AND PR., title PERJURY.

Necessity of Instruction — Burglary. (See also 3 ENCYC. OF PL. AND PR. 772.) — Upon a trial for burglary, the defendant objected to the use of the technical word *feloniously* in the charge of the court without explanation of its meaning. The appellate court said: "The word *felonious* is descriptive of the grade of the offense, rather than the criminal act which constitutes the offense, and ordinarily has no place in an instruction. When used it is most frequently but a repetition of what is expressed in other and simpler words. In such case it is hardly possible that the accused could be prejudiced by the use of the word. So, in the instruction complained of here, the word *feloniously* scarcely has a definable meaning, as used, and could have been altogether omitted without affecting in the least the correctness and sufficiency of the instruction." State *v.* Scott, 109 Mo. 232. See also State *v.* Snell, 78 Mo. 240; State *v.* Barton, 142 Mo. 450.

MISDEMEANORS; STATUTES; WITNESSES.) — At the common law the term "felony" had a well-known and definitive meaning. It was any offense which occasioned a total forfeiture of lands or goods, or both, to which capital or

Misdemeanor. — In *Com. v. Barlow*, 4 Mass. 439, it was said: "But, in this statute, the word *feloniously* may be applied to the disposition of the mind of the offender, as aggravating a misdemeanor, and not as descriptive of the offense." This case was an assault with intent to murder, and it was held not a felony.

The term *feloniously* has been held applicable to a misdemeanor. *State v. Hogard*, 12 Minn. 293.

Rape — Force. — It has been held that the term *feloniously* in an indictment for rape includes the word "forcible." *O'Connell v. State*, 6 Minn. 279. See generally the title RAPE.

Larceny. (See also the title LARCENY; and see 12 ENCYC. OF PL. AND PR. 974.) — Larceny has been defined to be a *felonious* taking, etc., and *felonious* is said to mean that the person taking the property had no color of right or excuse for the act. *People v. Parsons*, 105 Mich. 177. See also *Republic v. Ah Cheon*, 10 Hawaiian 472; *State v. South*, 28 N. J. L. 29; *Reg. v. Holloway*, 2 C. & K. 943, 61 E. C. L. 943.

A *felonious* intent means to deprive the owner, not temporarily but permanently, of his own property without color of right or excuse for the act, and to convert it to the taker's use without consent of the owner. *Matter of Mutchler*, 55 Kan. 167.

In *State v. Rechnitz*, 20 Mont. 488, it is said: "The word *feloniously* is descriptive of the act charged. It means that the act was done with a mind bent on doing that which is wrong, or, 'as it has been sometimes said, with a guilty mind.' *Hawkins, J., in Reg. v. Tolson*, 23 Q. B. Div. 184. And after fully considering the statute of this state defining larceny we have found ourselves unable to construe it without importing into its meaning the qualification ordinarily imported in the construction of criminal statutes, namely, that there must be a guilty mind, as well as a guilty act, to constitute a crime."

Assault. — "It will be observed that each of these indictments charges that the assault was *feloniously* made with intent to 'feloniously kill.' A *felonious* act is one which is 'criminal, cruel, malignant, malicious.' A *felonious* assault, therefore, is a criminal, malicious assault. An act, an assault, *feloniously* committed is one which is committed 'in a *felonious* manner.' " *U. S. v. Angney*, 6 Mackey (D. C.) 78.

Accessory. (See also 1 ENCYC. OF PL. AND PR. 66.) — In *State v. Felch*, 58 N. H. 2, it was held that the word *feloniously* was not necessary in an indictment upon a statute by which any person accessory in New Hampshire to a felony committed in another state was punished as if the felony were committed in New Hampshire. The court said: "The crime intended to be charged in this case, being a state prison offense, is a felony; and the ancient rule was that the word *feloniously* is necessary in all indictments for felony, whether common-law or statutory. What would *feloniously*

mean in this indictment? Would it inform the defendant that, in England, felony was formerly punished by forfeiture, and generally by death? An indictment is an accusation, and not historical instruction. Would it inform him that New Hampshire punishes his crime either by death or state prison? That would be a statement of law, deficient in certainty; and an indictment is a statement, not of law, but of fact. 1 Bishop Cr. Pro., §§ 52, 53, 274, 275. Would it charge him with knowledge of the burglary or an intent to assist the burglar in escaping punishment? That knowledge and that intent are fully and plainly, substantially and formally, charged in other and appropriate words. Would it signify that his knowledge, his intent, or his act, was *felonious*? That would be a hint concerning the penalty; and the penalty, being matter of law, need not be suggested. Would it signify that his knowledge, his intent, or his act was criminal? That would be an unnecessary averment of law. Would it be a memorial of the general confederacy among English prosecutors, witnesses, juries, judges, and ministers of the crown, in favor of life, to prevent the enforcement of a code of two hundred capital crimes? 2 Paterson, *Liberty of the Subject* 309, 310. It is not necessary that the grand jury should thus remind the accused or the court that there is no legal or moral ground on which such a confederacy can survive the reason and object of its existence. *Darling v. Westmoreland*, 52 N. H. 401."

In *Com. v. Adams*, 127 Mass. 15, it was held that the words "*feloniously*" and "maliciously," in an indictment against a person as an accessory to a *felony*, implied unlawful intent. The court said: "But the allegation that the defendant maliciously and *feloniously* incited and procured the principal to commit the *felony*, *ex vi termini* imports that she acted with an unlawful intent."

Receiving Stolen Goods. — An indictment for receiving stolen goods alleged that the defendant *feloniously* bought stolen property, knowing it to be stolen, but failed to allege intent not to restore the property. This was held insufficient. The court said: "The term *feloniously*, as employed in the indictment, is merely the statement of the legal result of the facts, including the intent, prescribed by the statute. In such case the statement of a legal result is insufficient. Under a statute which contained the following description of the offense: 'Who shall buy, conceal, or receive any stolen goods and chattels, knowing the same to be stolen, with intent to defraud the owner,' it was held that an indictment which omitted to state that the defendant received the goods with the intent to defraud the owner was defective, though it alleged he had *feloniously* received them, knowing them to be stolen. *Pelts v. State*, 3 Blackf. (Ind.) 28. The use of the term *feloniously* does not supply the omission to allege 'not having the intent to restore the property to the owner.' *U. S. v. Forrest*, 3 Cranch (C. C.) 56; *State v.*

other punishment might be superadded.¹ By statute the term "felony" now usually includes every offense punishable by death or imprisonment in a state prison.²

Comfort, 5 Mo. 357." *Holt v. State*, 86 Ala. 599. See generally the title RECEIVING STOLEN GOODS.

1. **Common Law.** — *Fassett v. Smith*, 23 N. Y. 257. To the same effect see *People v. Lyon*, 33 Hun (N. Y.) 635, 99 N. Y. 218; 4 Bl. Com. 95.

In *Mitchell v. State*, 42 Ohio St. 386, it was said: "There being no common-law crimes or punishment in Ohio, nor any such thing as 'corruption of blood or forfeiture of estate' (Const., art. 1, § 12), *felony* and 'feloniously' are with us words without meaning, except as their import is fixed by statute." The term *felony*, said Bartley, J., in *Matthews v. State*, 4 Ohio St. 539, 542, "has no distinct and well defined meaning applicable to our system of criminal jurisprudence. In England it has a well-known and extensive signification, and comprises every species of crime which, at common law, worked a forfeiture of goods and lands. But under our Criminal Code, the word "felonious," although occasionally used, expresses a signification no less vague and indefinite than the word "criminal." And see *Hess v. State*, 5 Ohio 6, 13."

In *State v. Scott*, 24 Vt. 130, it was said: "*Felony*, as existing at common law, is not known under the laws of this state, as crimes do not work a forfeiture of the estate. But offenses are distinguishable into what may be termed crimes and misdemeanors; the former punishable capitally, or by confinement in the state prison, and the latter by fine, or imprisonment in the county jail."

Origin of Term. — In *Les Termes de la Ley* it is said of serious crimes: "It seems that they are called *felonies* * * * of the ancient English word *fell* or *fierce*, because that they are intended to be done with cruel, bitter, fell, fierce, or malicious mind."

But in *Drennan v. People*, 10 Mich. 182, it was said: "The term *felony* originally imported an offense for which the offender forfeited his fief, his lands and tenements, goods and chattels. 4 Black. Com. 94. Such forfeitures have long been abolished, and the term has really no signification in our law." And in *Abbott's Law Dict.*, title *Felony*, it is said that *felony* seems to be derived from words connected with feudal law signifying the loss of one's fief.

Same — Indefiniteness of Term. — See *Lynch v. Com.*, 88 Pa. St. 192; *U. S. v. Coppersmith*, 2 Flipp. (U. S.) 551. See also *U. S. v. Staats*, 8 How. (U. S.) 41.

2. **Statutes — Alabama.** — *Ex p. McAnally*, 53 Ala. 497.

Arkansas. — *State v. Waller*, 43 Ark. 381.

California. — *People v. War*, 20 Cal. 120; *People v. Rodrigo*, 69 Cal. 605.

Colorado. — *In re Pratt*, 19 Colo. 138.

Florida. — *State v. Butt*, 25 Fla. 264.

Georgia. — *Miller v. State*, 58 Ga. 200.

Indiana. — *State v. Smith*, 8 Blackf. (Ind.) 489.

Kansas. — *Burlington v. Stockwell*, 1 Kan. App. 414; *Matter of Stevens*, 52 Kan. 56;

State v. Warner, (Kan. 1898) 55 Pac. Rep. 344; *State v. Allphin*, 2 Kan. App. 28.

Kentucky. — *Tharp v. Com.*, 3 Metc. (Ky.) 411; *Munford v. Taylor*, 2 Metc. (Ky.) 604; *Buford v. Com.*, 14 B. Mon. (Ky.) 20.

Maine. — *Smith v. State*, 33 Me. 48, 54 Am. Dec. 607.

Michigan. — *Firestone v. Rice*, 71 Mich. 381.

Minnesota. — *State v. Hogard*, 12 Minn. 293.

Missouri. — *Johnston v. State*, 7 Mo. 183; *Nathan v. State*, 8 Mo. 631; *State v. Clayton*, 100 Mo. 516; *Ingram v. State*, 7 Mo. 293; *State v. Lehr*, 16 Mo. App. 491; *State v. Nicholson*, 56 Mo. App. 414.

New Hampshire. — *State v. Felch*, 58 N. H. 1.

New York. — *People v. Park*, 41 N. Y. 24; *People v. Lyon*, 99 N. Y. 218; *People v. Johnson*, 110 N. Y. 141; *People v. Hughes*, 137 N. Y. 33; *People v. Van Steenburgh*, 1 Park. Cr. Rep. (Del. Oyer & T. Ct.) 39.

Ohio. — *State v. Rouch*, 47 Ohio St. 481; *Griffin v. State*, 34 Ohio St. 300; *Mitchell v. State*, 42 Ohio St. 386.

Oregon. — *State v. Conally*, 3 Oregon 72.

South Dakota. — *In re Kirby*, 10 S. Dak. 322.

Tennessee. — *Rafferty v. State*, 91 Tenn. 655.

Texas. — *Welsh v. State*, 3 Tex. App. 114.

Virginia. — *Barker v. Com.*, 2 Va. Cas. 122; *Benton v. Com.*, 89 Va. 570; *Canada v. Com.*, 22 Gratt. (Va.) 899.

West Virginia. — *State v. Harr*, 38 W. Va. 58.

Wisconsin. — *Wilson v. State*, 1 Wis. 188; *Nichols v. State*, 35 Wis. 310; *Vosburgh v. State*, 82 Wis. 170; *State v. Hammond*, 35 Wis. 318.

Alternative Punishment. — Where the punishment is in the alternative, either state prison or county jail, the crime has been held not to be a *felony*. *Fassett v. Smith*, 23 N. Y. 252. Compare *People v. Lyon*, 99 N. Y. 210.

But in *Ingram v. State*, 7 Mo. 293, it was said: "A *felony* under our statute is an offense for which one may be imprisoned in the penitentiary." And in *Johnston v. State*, 7 Mo. 183, it was held that a *felony* was an offense for which a party on conviction might be imprisoned in the penitentiary, and not where on conviction he must be so imprisoned. See also *State v. Hogard*, 12 Minn. 295; *State v. McCormick*, 84 Me. 569; *State v. Smith*, 32 Me. 369; *Smith v. State*, 33 Me. 48; *State v. Mayberry*, 48 Me. 218; *State v. Fenlason*, 78 Me. 495.

Extortion. — In *People v. Hughes*, 137 N. Y. 33, extortion was held a *felony*. See also the title EXTORTION, *ante*.

Perjury — Common Law. — In *Hooper v. State*, 5 Yerg. (Tenn.) 425, it was said: "But I will directly meet the point; is perjury a *felony* at common law? And first, what is *felony*? If we test it by the English rule, 'that crime which works a forfeiture,' in this country, where forfeitures are done away, we should be at a loss for a definition. But we are informed by the books that at common law perjury was punished with death, after-

wards loss of the tongue, forfeiture of goods, becoming infamous, and the like. 4 Black. Com. 138. So that perjury, in England, once was *felony*; and being such, though subsequent legislation has lessened the punishment without taking away the right of challenge, can it be pretended that the right does not exist?"

Same — Petit Larceny. (See also FELONIOUS — FELONIOUSLY, *ante.*) — In *State v. Setter*, 57 Conn. 466, it was said: "In Swift's System, published in the year 1796 (vol. 2, pages 384 and 385), the learned author says: '*Felony*, according to the English law, signifies some crime the punishment of which is a forfeiture of estate; but in common consideration it is a capital crime. In this state, in the title of two statutes, the word *felonies* is used. * * * The word is never introduced into the body of any statute, and is applied to the description of crimes not capital and for which there is no forfeiture of estate. It is, therefore, apparent that this word cannot be used in the same sense and for the same crimes as in England; nor does it with precision comprehend any class or description of crimes. A word of such uncertain meaning ought to be banished from a code of laws, for nothing produces greater confusion and perplexity than the use of terms to which no precise and clear idea can be affixed. * * * The word '*feloniously*' is used in indictments for all capital crimes and for many not capital, as for theft; but as '*felonious*' in an indictment can mean nothing more than '*criminal*,' and does not designate the nature or the class of the crime, it may be deemed unnecessary and immaterial and ought to be exploded by our courts.' Since the time when Judge Swift wrote, the word *felony* has disappeared from the statute, although the word '*feloniously*' is still used in indictments and informations. And while it is still true that this word does not with precision comprehend any class or description of crimes in Connecticut law, it may be pretty safely asserted that petty larceny is not a *felony* in this state."

In *State v. Weldon*, 70 Mo. 574, it was held that larceny was a *felony*. The court said: "It is not the designation of any offense which, with us, constitutes it a *felony* or a misdemeanor, but the punishment which is affixed to such offense. While it is a seeming contradiction in terms to denominate petty larceny as a *felony*, yet this apparent incongruity will be found to result rather from an association of ideas than from any inherent inconsistency."

Under the *New York Criminal Code*, which declares that "the term *felony*, when used in this act, or in any other statute, shall be construed to mean an offense for which the offender, on conviction, shall be liable by law to be punished by death or by imprisonment in a state prison," it has been held that *felony* did not include petit larceny. *Shay v. People*, 22 N. Y. 318. See also *Andrew v. Dieterich*, 14 Wend. (N. Y.) 36; *Carpenter v. Nixon*, 5 Hill (N. Y.) 262; *Park v. People*, 1 Lans. (N. Y.) 264. Compare *Ward v. People*, 3 Hill (N. Y.) 395, *affirmed* 6 Hill (N. Y.) 144.

Same — Forgery. — In *State v. Murphy*, 17 R. I. 701, it was held that at common law for-

gery was merely a misdemeanor. See also the title FORGERY.

Personal Exemption. — The fact that the defendant is personally exempt does not affect the statutory definition of *felony*. *People v. Park*, 41 N. Y. 21.

Injuring Dam. — In *Firestone v. Rice*, 71 Mich. 381, the court said: "Under the statute and the previous decisions of this court, we think that whenever a statute punishes an offense by imprisonment in the state prison, unless it is expressly declared by the statute to be a misdemeanor, such offense must be considered and treated as a *felony*, as regards the right of an officer to arrest without process. See How. Stat., § 9430; *People v. Brigham*, 2 Mich. 550; *Shannon v. People*, 5 Mich. 71; *People v. Bristol*, 23 Mich. 118; *People v. Sweeney*, 55 Mich. 589; *Drennan v. People*, 10 Mich. 169; *People v. Donald*, 48 Mich. 493." It was held in that case that the statutory offense of wilfully and maliciously breaking down, injuring, removing, or destroying any dam, reservoir, canal, etc., was a *felony*.

Infamous Crimes. — In *Bannon v. U. S.*, 156 U. S. 467, it was said: "Neither does it necessarily follow that because the punishment affixed to an offense is infamous, the offense itself is thereby raised to the grade of *felony*. The word *felony* was used at common law to denote offenses which occasioned a forfeiture of the lands or goods of the offender, to which capital or other punishment might be superadded, according to the degree of guilt."

Sale of Liquor to Indian. (See also the titles INDIANS; INTOXICATING LIQUORS.) — In holding that the sale of liquor to an Indian was not a *felony* by the United States Revised Statutes, in *Bruguier v. U. S.*, 1 Dakota 5, the court said: "Originally the word *felony* had a meaning well defined, but it has become vague and undefined, being controlled entirely by the statutes of different states. Acts of Parliament and statutes of states, by their peculiar phraseology, make certain offenses *felonies* which were not so by the common law. In America, statutes define the distinction, and as it seems to us clear that the statute herein quoted does not make the offense alleged in the indictment a *felony*, the court properly refused to arrest the judgment."

United States. — In *In re Kirby*, 84 Fed. Rep. 607, it was said: "There is no statutory definition of *felonies* in the legislation of the United States. *Reagan v. U. S.*, 157 U. S. 303. The Supreme Court has held, however, in *Ex p. Wilson*, 114 U. S. 417, and in *Mackin v. U. S.*, 117 U. S. 350, that a crime which may be punished by imprisonment, with or without hard labor, in a state prison or penitentiary, is an infamous crime. It seems that the crime of receiving stolen property, knowing the same to have been stolen, was not a *felony* at common law. Neither has it been made such by any legislation of Congress; and the Supreme Court, in the case of *Bannon v. U. S.*, 156 U. S. 464, said: 'Neither does it necessarily follow that, because the punishment affixed to an offense is infamous, the offense itself is thereby raised to the grade of *felony*.' But it is immaterial, for the purpose of this proceeding, whether the offense of which the

FEMALE. (See also the titles RAPE; WOMEN.) — See note 1.

FEMALE SUFFRAGE. — See the title ELECTIONS, vol. 10, p. 578.

FEME COVERT. — See the title HUSBAND AND WIFE.

FEME SOLE. — See the titles HUSBAND AND WIFE; SEPARATE PROPERTY (OF MARRIED WOMEN).

FENCED. — See note 2.

respondent was convicted is a *felony* or not."

Same — Smuggling. (See also the titles REV. ENUE LAWS; SMUGGLING.) — In *Reagan v. U. S.*, 157 U. S. 302, in holding that, under Rev. Stat. U. S., § 3082, the offense of smuggling goods was not a *felony*, the court said: "It may be conceded that the present common understanding of the word departs largely from the technical meaning it had at the old common law. This departure is owing to the fact that the punishments other than death, to wit, forfeiture of the lands or goods of the offender, which formerly constituted the test of a *felony*, are no longer inflicted, at least in this country, and to the further fact that in many of the states offenses are by statute divided into two classes, *felonies* and misdemeanors, the former including all offenses punishable by death or imprisonment in a penitentiary, and the latter those punishable only by fine or imprisonment in a county jail; and in other states, in which no statutory classification is prescribed, many offenses punishable by imprisonment in a penitentiary are in terms declared to be *felonies*. These matters have thrown about the meaning of the word, as ordinarily used, no little uncertainty. Indeed, in Webster's Dictionary, after the common-law definition of the term, there are quoted from John Stuart Mill these pertinent observations: 'There is not a lawyer who would undertake to tell what a *felony* is, otherwise than by enumerating the various kinds of offenses which are so called. Originally the word *felony* had a meaning; it denoted all offenses the penalty of which included forfeiture of goods; but subsequent Acts of Parliament have declared various offenses to be *felonies* without enjoining that penalty, and have taken away the penalty from others, which continue, nevertheless, to be called *felonies*, inasmuch that the acts so called have now no property whatever in common, save that of being unlawful and punishable.' 1 Mill's Logic 40."

Same — Other than Capital Offense. — Rev. Stat. U. S., § 819, provided that "when the offense charged is treason or a capital offense, the defendant shall be entitled to twenty and the United States to five peremptory challenges. On the trial of any other *felony*, the defendant shall be entitled to ten and the United States to three peremptory challenges." In construing this section in *U. S. v. Copper-smith*, 2 Flipp. (U. S.) 547, the court said: "It is apparent that it was here intended to designate by the term 'any other *felony*,' other offenses than capital offenses, for they are otherwise specially provided for by this section." See generally the title JURY AND JURY TRIAL.

1. Female. — In *Myers v. State*, 84 Ala. 11, it was held that the term "female," as it was used in an indictment for rape, meant the same thing as the word "woman."

In *State v. Hemm*, 82 Iowa 610, it was held that an indictment charging one with having seduced an unmarried *female* of previous chaste character sufficiently describes the offense described in the statute punishing the seduction of an unmarried woman. The court said: "It is true that, comprehensively considered, the term *female* is generic, and includes a variety of species, while the word 'woman' has a more limited signification, being of the human race. The two words, therefore, may have the same signification, depending on the subject considered and their relation thereto. 'Seduction,' in its criminal sense, relates to persons. It has no other known application. The term *female*, in an indictment charging the crime of seduction as having been committed against her, would unmistakably indicate a woman. That would be its common application." See generally the title SEDUCTION.

Female Child. — In *Com. v. Bennet*, 2 Va. Cas. 237, it was said: "The second error alleged is that the person on whom the offense is charged to have been committed is not stated to be a woman child. Those are the terms in the third section of the act aforesaid, upon which the second count was supposed to have been framed. The charge in the indictment is that the offense was committed upon Nancy Geer, a *female* child, and the court is at a loss to conceive how a distinction can possibly be taken between the two terms. But if there be an error in not keeping close to the words of the act in this respect, we are all of opinion that it is cured by the statute of jeofails, since 'the offense is plainly, and in substance, set forth with convenient certainty.'"

2. Fenced Off. — A *Pennsylvania* statute provided that all machinery where boys worked should be properly *fenced off*. It was held that "*fenced off*" meant properly protected. The court said: "In providing that the machinery in and about the mines and coal breakers shall be properly *fenced off*, it evidently intended merely proper protection. Then, to protect the opening into which the plaintiff fell, a fence, in its literal sense, would not have been as efficient protection as the board used to cover the opening. In providing this cover the employer did his whole duty under the act. If that cover was unnecessarily removed without his fault or knowledge, through the negligence of one of the employees, no other servant could recover, according to well-settled principles." *Honor v. Albrighton*, 93 Pa. St. 478.

FENCES.

BY FRED HARPER.

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CROSS-REFERENCES.

For matters of *PROCEDURE*, see the title *BOUNDARIES AND FENCES*, *ENCYCLOPEDIA OF PLEADING AND PRACTICE*, vol. 3, p. 672.

For *Fences as an Element of Damages in Eminent Domain Proceedings*, see in this work the title *EMINENT DOMAIN*, vol. 10, p. 1171.

For other matters of *SUBSTANTIVE LAW and EVIDENCE*, see the titles *ANIMALS*, vol. 2, p. 341; *BOUNDARIES*, vol. 4, p. 756; *EMINENT DOMAIN*, vol. 10, p. 1043; *INJURIES TO ANIMALS*; *NUISANCES*; *PARTY WALLS*; *RAILROADS*; *TRESPASS*.

I. DEFINITION. — A Fence is defined to be an artificial inclosure designed to exclude trespassers;¹ "a visible or tangible obstruction, which may be a hedge, ditch, wall, or a frame of wood, or any line of obstacle interposed between two portions of land so as to part off and shut in the land, and set it off as private property."²

Purpose of Fences. — Primarily the purpose of fences is to restrain animals so as to keep them from intruding upon lands of others, or to prevent the intrusion of the animals of others upon one's lands, according to whether the law of the place forbids or permits animals to run at large.³ Incidentally fences serve the purpose of marking the boundaries of the lands they inclose or divide.⁴

II. MANNER OF BUILDING — 1. **Material.** — In the absence of a statute prescribing a certain kind of fence, or where such a provision in a statute does not preclude other kinds of fences, a fence may consist of any material that will give the obstruction necessary to the purpose for which it is required.⁵

1. **Definition.** — Hunt on Boundaries (3d ed.)

i. See also INCLOSURE.

"A fence is nothing more than a line of obstacle, and may be composed of any material which will present a sufficient obstruction." Breese, J., in *Allen v. Tobias*, 77 Ill. 169.

2. Keith, P., in *Kimball v. Carter*, 95 Va. 85.

A fence is "an inclosure about a field or other space, or about any object, especially an inclosing structure of wood, iron, or other material, intended to prevent intrusion from without or straying from within." Webster's Dict., quoted in *Kimball v. Carter*, 95 Va. 84. See also *Mackie v. Central R. Co.*, 54 Iowa 540.

"A line of obstacle, as a frame of wood, a wall, hedge, or ditch, interposed between two portions of land for the purpose of preventing cattle from going astray, or for protecting a field or property from unlawful encroachment." Worcester's Dict., quoted in *Kimball v. Carter*, 95 Va. 84. See also *Tyler on Boundaries* 341.

"The word 'fence' is properly applicable to the inclosure of lands by walls, drains, or hedges, for the purpose of agricultural improvement or of preventing trespass." 1 Furlong's Landlord and Tenant 696, quoted in *Hunt on Boundaries* (3d ed.) i.

Fence Includes Gate. — Where fences are required to be built, a gate erected in the line of the fence is a part of the fence. *Chicago, etc., R. Co. v. O'Brien*, 34 Ill. App. 155; *Estes v. Atlantic, etc., R. Co.*, 63 Me. 308.

3. **Purpose of Fences Generally.** — "Fences, although they have been occasionally used as boundaries for the division of property, are nevertheless treated for the most part as guards against intrusion." Woolrych on Party Walls and Fences 281.

To Keep Cattle In. — The purpose of fences under the common-law rule is to keep cattle in, and not to keep cattle of others out. *Tonawanda R. Co. v. Munger*, 5 Den. (N. Y.) 255, 49 Am. Dec. 239; *Webber v. Closson*, 35 Me. 26; *Jackson v. Rutland, etc., R. Co.*, 25 Vt. 150, 60 Am. Dec. 246. See also *infra*, this title, *Fences Inclosing Lands — Obligation to Maintain* — At Common Law.

To Keep Cattle Out. — Where the law of the place permits cattle to go at large, the purpose of fences is to keep cattle out and prevent them from trespassing upon one's land. *Beaumont v. Danner*, 1 Strobb. L. (S. Car.) 176. See

infra, this title, *Fences Inclosing Lands — Obligation to Maintain* — In the United States.

4. See *infra*, this title, *Fences Inclosing Lands — Fences as Boundaries*.

5. **Material Required for Fences — Generally.** — A fence may consist of almost any kind of division or inclosure, but a hedge, ditch, or a wall will be most commonly found to answer that term. Woolrych on Party Walls and Fences 281; *Tyler on Boundaries* 341. See also *supra*, this title, *Definition*, and note thereto.

Hilliard v. Chicago, etc., R. Co., 37 Iowa 442, was decided under a statute prescribing what should be considered a lawful fence, and adding: "Such other construction or fence as may, in the opinion of the fence viewers, be of equal strength and security to the inclosure shall in like manner be considered lawful." The court said: "We see no good reason why a bluff, a hedge, a trench, a wall, a trestle, or the like may not be of equal security with the statutory defined lawful fence, and if so found in fact, it would, under the statute, be a lawful fence." See also *Durgin v. Kennett*, (N. H. 1893) 29 Atl. Rep. 474.

The *Texas* statute, fixing the kind of fence to be built where a fence is required, has been construed to prescribe merely such a fence as would enable landowners to enforce certain remedies against the owners of trespassing animals, and not to prohibit any other kind of fence. *Davis v. Davis*, 70 Tex. 123; *Worthington v. Wade*, 82 Tex. 26; *Finley v. Bradley*, (Tex. Civ. App. 1893) 21 S. W. Rep. 609; *Galveston Land, etc., Co. v. Levy*, 10 Tex. Civ. App. 104.

Brick Wall. — *Allen v. Tobias*, 77 Ill. 169; *Western Granite, etc., Co. v. Knickerbocker*, 103 Cal. 111.

Hedge. — In *Campbell v. Feyerabend*, 53 Ill. App. 225, a hedge was treated as a fence without question or comment. And so in *Selover v. Osgood*, 52 Ill. App. 260; *Darst v. Enlow*, 116 Ill. 475.

The *Iowa* Code of 1873 recognized a hedge fence as lawful, and provided for the cultivation by allowing the owner on one side to enter upon his neighbor's land for this purpose. *Kinney v. Kinney*, 104 Iowa 703.

Ditch. — *Ellis v. Arnison*, 1 B. & C. 73, 8 E. C. L. 32; *Newell v. Hill*, 2 Met. (Mass.) 182; *Warner v. Southworth*, 6 Conn. 471.

Navigable Water. — By statute in some of the

2. Sufficiency of Fences — a. IN GENERAL. — The sufficiency of a fence is to be determined by its capacity to prevent the breaking through of ordinary animals, or animals not breachy.¹

b. UNDER STATUTE. — But where the statute or other source of the obligation by which a fence is required defines what shall be a sufficient fence, it must be of such a character as is prescribed, or at least the equivalent of the prescribed fence in its capacity to restrain animals.²

states a deep navigable stream is declared to be equivalent to a fence. *Frapp v. Hasell*, 1 Strobh. L. (S. Car.) 173; *Jones v. Witherspoon*, 7 Jones L. (52 N. Car.) 555, 78 Am. Dec. 263; *Mathis v. Jones*, 84 Ga. 804; *Lamb v. Hicks*, 11 Met. (Mass.) 502; *State v. Lamb*, 8 Ired. L. (30 N. Car.) 229.

1. Sufficient Fence — At Common Law. — Fences are always good enough at common law if they answer their end of keeping one's own cattle inclosed, and always insufficient if they fail to answer that purpose. *Jackson v. Rutland*, etc., R. Co., 25 Vt. 150, 60 Am. Dec. 246.

Fence Sufficient to Turn Ordinary Stock Satisfies Requirements. — *Morris v. Fraker*, 5 Colo. 425; *Headen v. Rust*, 39 Ill. 186; *Misner v. Light-hall*, 13 Ill. 609; *Leggett v. Illinois Cent. R. Co.*, 72 Ill. App. 577; *Heath v. Coltenback*, 5 Iowa 490; *Frazier v. Nortinus*, 34 Iowa 82; *Gould v. Bangor*, etc., R. Co., 82 Me. 122. See also *Hine v. Wooding*, 37 Conn. 123.

Stock Not Extraordinarily Breachy. — In *Albright v. Bruner*, 14 Ill. App. 319, it was held that an instruction that "all he [the plaintiff] is required to prove is that his fence then and there was sufficient to turn ordinary stock" fairly expressed the law, and that judgment based on such instruction would not be reversed, but that the term "not extraordinarily breachy" is preferable, in point of clearness, to the term "ordinary." And in *Chicago*, etc., R. Co. v. *Utey*, 38 Ill. 410, the court said that a fence, to be sufficient, "must be not merely one which will turn ordinary stock, for a slight barrier might do that, but one that will turn stock even though to some extent unruly." See also *Selover v. Osgood*, 52 Ill. App. 260; *Scott v. Wirshing*, 64 Ill. 102; *Headen v. Rust*, 39 Ill. 186; *Leggett v. Illinois Cent. R. Co.*, 72 Ill. App. 577.

Cattle Not Peculiarly Vicious. — The fence must be sufficient to exclude animals of ordinary disposition, such as are not peculiarly vicious or prone to break fences. *Clarendon Land Invest. Agency Co. v. McClelland*, 86 Tex. 179. And see *Finley v. Bradley*, (Tex. Civ. App. 1893) 21 S. W. Rep. 609.

A Fence Such as Good Husbandmen Generally Keep is the statutory definition of a lawful fence in *Indiana*. *Myers v. Dodd*, 9 Ind. 290, 68 Am. Dec. 624; *Hinshaw v. Gilpin*, 64 Ind. 116; *Lisk v. Crump*, 112 Ind. 504, 2 Am. St. Rep. 213; *Blizzard v. Walker*, 32 Ind. 437; *Byers v. Davis*, 3 Ind. App. 387; *Enders v. McDonald*, 5 Ind. App. 297.

Insufficient Fence. — Where a gate constitutes a part of a fence, and is in such a condition that it tumbles down when used for the purpose for which it was built, it does not constitute a "legal and sufficient fence." *Estes v. Atlantic*, etc., R. Co., 63 Me. 308.

Where the law requires the maintenance of fences against cattle, and a landowner main-

tains insufficient fences, his rights and liabilities are the same as if he maintained none at all. *Jones v. Witherspoon*, 7 Jones L. (52 N. Car.) 555, 78 Am. Dec. 263; *Runyan v. Patterson*, 87 N. Car. 343.

2. Sufficient Fence Defined by Statute — Alabama. — *Hurd v. Lacy*, 93 Ala. 427, 30 Am. St. Rep. 61.

Arkansas. — *Thomas v. State*, 30 Ark. 433.

California. — *Comerford v. Dupuy*, 17 Cal. 308.

Georgia. — *Macon*, etc., R. Co. v. *Lester*, 30 Ga. 911; *Georgia R.*, etc., Co. v. *Neely*, 56 Ga. 540.

Indiana. — *Enders v. McDonald*, 5 Ind. App. 297.

Kansas. — *Union Pac. R. Co. v. Rollins*, 5 Kan. 168; *Caulkins v. Mathews*, 5 Kan. 191.

Massachusetts. — *Rust v. Low*, 6 Mass. 90.

Mississippi. — *Dickson v. Parker*, 3 How. (Miss.) 219, 34 Am. Dec. 78; *Vicksburg*, etc., R. Co. v. *Patton*, 31 Miss. 156, 66 Am. Dec. 552.

Missouri. — *Mann v. Williamson*, 70 Mo. 661.

New Hampshire. — *Durgin v. Kennett*, (N. H. 1893) 29 Atl. Rep. 414.

North Carolina. — *Runyan v. Patterson*, 87 N. Car. 343.

Tennessee. — *State v. Council*, 1 Overt. (Tenn.) 305.

Texas. — *Fennell v. Seguin St. R. Co.*, 70 Tex. 670.

Statutory Requirements Must Be Strictly Followed. — In *Runyan v. Patterson*, 87 N. Car. 343, it was held that the plaintiff, whose fence was not five feet high as required by statute, though a "good ordinary fence, such as others had in the neighborhood," was not entitled to recover damages of the defendant for injury done by the latter's cow breaking into the farmer's inclosure, even though the cow was of a vicious disposition and such fact was known to the defendant. And see *Mann v. Williamson*, 70 Mo. 661.

Under the statute in *New Hampshire* regulating division fences it was held that, though the statute specifically prescribed what shall be accounted a legal and sufficient fence, yet any fence that answers the purpose of preventing the escape of domestic animals from the land of one to the land of the adjoining owner is, within the meaning of the statute, sufficient. *Durgin v. Kennett*, (N. H. 1893) 29 Atl. Rep. 414.

Meaning of "Sufficient Fence" in Agreement Between Private Persons. — Where a statute prescribes what shall be deemed a sufficient fence, an agreement requiring a sufficient fence between adjoining landowners, without a more particular agreement, will be held to refer to and adopt the standard prescribed by statute. *Albright v. Bruner*, 14 Ill. App. 319.

In *Panther v. Trauman*, 89 Iowa 101, two adjoining owners agreed to maintain a division

3. Negligence in Building and Maintaining — *a. GENERALLY.* — The law obliges one who builds and maintains a fence to do so in a manner not unreasonably dangerous to persons and animals that may rightfully approach it and come in contact with it.¹

b. BARBED-WIRE FENCES — **Construction of Not Negligence.** — The construction and maintenance of a barbed-wire fence is not in itself negligence, and no obligation is incurred merely by building and maintaining such a fence.²

Liability for Negligently Building. — If, however, such a fence is so negligently made or maintained as to become an unnecessary source of danger, the owner is liable for all injuries proximately resulting from his negligence.³

III. FENCES INCLOSING LANDS — **1. Obligation to Maintain** — *a. GENERAL DOCTRINE* — (1) *At Common Law* — (a) **General Rule.** — By the general rule of the common law of England the owner of land is under no obligation to fence against the cattle of his neighbor or cattle on the highway, but every man, at his peril, is bound to keep his cattle on his own close and prevent them from going on that of his neighbor.⁴

fence in certain proportion, but without agreement as to the kind of fence to be built. For sixteen years each maintained a "hog-tight" fence, and at the end of that time, the plaintiff's portion of the fence needing repair, he repaired by changing it to a barbed-wire fence, which is a lawful fence under the statute, but not "hog-tight." The defendant's pigs having, under these circumstances, escaped into the plaintiff's land, and there done damage, it was held that the plaintiff could recover.

Statutory Requirements Waived by Agreement. — The statutory requirement as to the height of a partition fence may be waived by agreement between the adjoining landowners, in which case the agreement will control as to its sufficiency. *Albright v. Bruner*, 14 Ill. App. 319. See *infra*, this title, *Fences Inclosing Lands* — *Partition Fences* — *By Agreement or Covenant*.

1. Negligence in Building — **Generally.** — *Rooth v. Wilson*, 1 B. & Ald. 59; *Hurd v. Lacy*, 93 Ala. 427, 30 Am. St. Rep. 61; *Rowland v. Baird*, 18 Abb. N. Cas. (N. Y. County Ct.) 256; *Durgin v. Kennett*, (N. H. 1893) 29 Atl. Rep. 414.

2. Building a Barbed-wire Fence Is Not Per Se Negligence. — In the absence of any other evidence besides the fact that the fence is of barbed wire, tending to show that the structure is a nuisance, its owner will not be liable in an action for damages for an injury to stock occasioned solely by its construction and maintenance. *Mason City v. Barngrover*, 26 Ill. App. 296; *Sisk v. Crump*, 112 Ind. 504, 2 Am. St. Rep. 213; *Caraskaddon v. Mills*, 5 Ind. App. 22; *McFarland v. Swihart*, 11 Ind. App. 175, 54 Am. St. Rep. 499; *Lowe v. Guard*, 11 Ind. App. 472; *Panther v. Trauman*, 89 Iowa 101; *Gould v. Bangor*, etc., R. Co., 82 Me. 122; *Worthington v. Wade*, 82 Tex. 26; *Presnall v. Raley*, (Tex. Civ. App. 1894) 27 S. W. Rep. 200; *Robertson v. Wooley*, 5 Tex. Civ. App. 237; *Hester v. Windham*, (Tex. Civ. App. 1894) 27 S. W. Rep. 1078; *Hillyard v. Grand Trunk R. Co.*, 8 Ont. Rep. 583.

3. Negligence in Construction of Barbed-wire Fence. — Where a barbed-wire fence is so negligently built as to be a trap to passing animals, the owner of such fence is liable for injuries proximately resulting from his negli-

gence. So, where a landowner built a fence consisting of a single barbed wire supported by posts thirty or forty feet apart, the wire being about four feet from the ground, and sagging from eight to twelve inches between the posts, he was held liable for injuries inflicted upon an animal thereby. *Hurd v. Lacy*, 93 Ala. 427, 30 Am. St. Rep. 61; *Rowland v. Baird*, 18 Abb. N. Cas. (N. Y. County Ct.) 256. See also *Firth v. Bowling Iron Co.*, 3 C. P. Div. 254; *Loveland v. Gardner*, 79 Cal. 317; *Atlanta*, etc., R. Co. v. *Hudson*, 62 Ga. 680; *Louisville*, etc., R. Co. v. *Upton*, 18 Ill. App. 605; *Caraskaddon v. Mills*, 5 Ind. App. 22; *Morrow v. Sweeney*, 10 Ind. App. 626; *McFarland v. Swihart*, 11 Ind. App. 175, 54 Am. St. Rep. 499; *Gould v. Bangor*, etc., R. Co., 82 Me. 122; *Durgin v. Kennett*, (N. H. 1893) 29 Atl. Rep. 414; *Roney v. Aldrich*, 44 Hun (N. Y.) 320; *Williams v. Mudgett*, 2 Tex. L. Rev. 337, 29 Alb. L. J. 23; *Woodward v. Griffith*, 2 Tex. App. Civ. Cas., § 361; *Cook v. Horstman*, 2 Tex. App. Civ. Cas., § 771.

Contributory Negligence. — In building a division fence between his own property and that of the plaintiff, the defendant placed a barbed wire on the plaintiff's side of the fence, fastening it to the fence posts about twenty inches from the ground. It was held that the plaintiff's act in turning a horse into the field to pasture, with knowledge of the position of the wire on the fence, was not contributory negligence. He had the right to pasture his own stock in his own premises, and could not be deprived thereof by the defendant's wrongdoing. *Gooch v. Bowyer*, 62 Mo. App. 206.

4. Owner's Common-law Obligation to Keep Cattle from Trespassing. — *Dovaston v. Payne*, 2 H. Bl. 527; *Tenant v. Goldwin*, 6 Mod. 314; *Star v. Rookesby*, 1 Salk. 335; *Hilton v. Ankeson*, 27 L. T. N. S. 519; *Lawrence v. Jenkins*, 42 L. J. Q. B. 147; *Boyle v. Tanlyn*, 6 B. & C. 329, 13 E. C. L. 191; *Barber v. Whiteley*, 11 Jur. N. S. 822; *Binks v. South Yorkshire R.*, etc., Co., 3 B. & S. 244, 113 E. C. L. 244; *Erskine v. Adeane*, L. R. 8 Ch. 756; *Churchill v. Evans*, 1 Taunt. 529; *Fletcher v. Rylands*, L. R. 1 Exch. 265; *Ellis v. Loftus Iron Co.*, L. R. 10 C. P. 10; *Ricketts v. East*, etc., India Docks, etc., R. Co., 12 C. B. 160, 74 E. C. L. 160, 12 Eng. L. & Eq. 520; *Pomfret v. Ricroft*,

Liability for Trespass by Cattle. — If, therefore, cattle enter upon the land of another, the entry is a trespass, and the owner of the cattle is liable therefor,¹ and no degree of care or prudence on his part will excuse the trespass.²

(b) **Modification as to Cattle on the Highway.** — The common-law rule is so far modified as to hold the owner not liable for the trespass of his cattle which, passing along the highway and being properly managed therein, with ordinary care and prudence, casually wander upon the unfenced lots bounding on the highway, provided he removes them with reasonable promptness.³

(c) **Agreement or Prescription to Fence.** — The obligation to build and maintain a fence in order to recover for the trespasses of another's cattle may exist at common law by force of agreement or covenant or by prescription.⁴

(2) *In the United States* — (a) **Common-law Rule Adopted.** — In many of the states the common-law rule is held to prevail in the absence of any statute abrogating it.⁵

1 Saund. 322a, note; 3 Black. Com. 211. See also cases cited *infra*, this section, *In the United States — Common-law Rule Adopted*. And see the title ANIMALS, vol. 2, p. 354.

Not Bound to Maintain Fence. — The tenant of a close is not, however, bound at common law to maintain any fence around his close, but may adopt any method he sees fit to keep his cattle from straying. *Little v. Lathrop*, 5 Me. 356; *Rust v. Low*, 6 Mass. 90; *Clark v. Brown*, 18 Wend. (N. Y.) 213.

1. **Liability for Trespass by Cattle.** — Every unwarrantable entry by a person or his cattle on the land of another is a trespass, and a person is equally answerable for the trespasses of his cattle as of himself. *Wells v. Howell*, 19 Johns. (N. Y.) 385; *Holladay v. Marsh*, 3 Wend. (N. Y.) 143, 20 Am. Dec. 678; *Noyes v. Colby*, 30 N. H. 143; *Sturtevant v. Merrill*, 33 Me. 62.

2. **No Degree of Care Excuses Escape of Cattle.** — *Ellis v. Loftus Iron Co.*, L. R. 10 C. P. 10; *Rust v. Low*, 6 Mass. 90; *Noyes v. Colby*, 30 N. H. 143; *Tonawanda R. Co. v. Munger*, 5 Den. (N. Y.) 255, 49 Am. Dec. 239; *Holladay v. Marsh*, 3 Wend. (N. Y.) 143, 20 Am. Dec. 678; *Munger v. Tonawanda R. Co.*, 4 N. Y. 349, 53 Am. Dec. 384.

Act of Stranger. — Where the defendant's cow was turned out of the pasture by a stranger, and driven in the direction of the plaintiff's close, and, being left alone, strayed upon it, and committed the trespass complained of, it was held that the owner of the cow was liable in damages for the trespass. *Noyes v. Colby*, 30 N. H. 143.

3. **Modification of the Rule as to Cattle on the Highway** — *England*. — *Dovaston v. Payne*, 2 H. Bl. 527; *Manchester, etc., R. Co. v. Wallis*, 25 Eng. L. & Eq. 373, *Goodwyn v. Cheveley*, 4 H. & N. 631.

Maine. — *Little v. Lathrop*, 5 Me. 356; *Lord v. Wormwood*, 29 Me. 282, 50 Am. Dec. 586.

Massachusetts. — *Lyman v. Gipson*, 18 Pick. (Mass.) 422; *Stackpole v. Healy*, 16 Mass. 33, 8 Am. Dec. 121; *Hartford v. Brady*, 114 Mass. 466, 19 Am. Rep. 377; *McDonnell v. Pittsfield, etc., R. Corp.*, 115 Mass. 564; *Amstein v. Gardner*, 132 Mass. 28, 42 Am. Rep. 421.

New Hampshire. — *Mills v. Stark*, 4 N. H. 512, 17 Am. Dec. 444.

New Jersey. — *Chambers v. Matthews*, 18 N. J. L. 368.

New York. — *Bush v. Brainard*, 1 Cow. (N.

Y.) 78, 13 Am. Dec. 513; *Tonawanda R. Co. v. Munger*, 5 Den. (N. Y.) 255, 49 Am. Dec. 239.

Wisconsin. — *Harrison v. Brown*, 5 Wis. 27. See also the title ANIMALS, vol. 2, p. 362, and note.

4. **Agreement, Covenant, or Prescription as to Duty to Fence.** — *Nowel v. Smith*, Cro. Eliz. 709; *Star v. Rookesby*, 1 Salk. 335; *Boyle v. Tamlyn*, 6 B. & C. 329, 13 E. C. L. 191; *Lawrence v. Jenkins*, L. R. 8 Q. B. 275; *Little v. Lathrop*, 5 Me. 360; *Rust v. Low*, 6 Mass. 90.

5. **States that Adopt the Common-law Rule.** — The common-law rule prevails in the following states except so far as altered by statute:

Delaware. — *Vandegrift v. Delaware R. Co.*, 2 Houst. (Del.) 297; *Richardson v. Carr*, 1 Harr. (Del.) 142, 25 Am. Dec. 65; *Haines v. Wise*, 4 Harr. (Del.) 243.

Indiana. — *Williams v. New Albany, etc., R. Co.*, 5 Ind. 111; *Lafayette, etc., R. Co. v. Shriner*, 6 Ind. 141; *Page v. Hollingsworth*, 7 Ind. 317; *Indianapolis, etc., R. Co. v. Kinney*, 8 Ind. 402; *Myers v. Dodd*, 9 Ind. 290, 68 Am. Dec. 624; *Brady v. Ball*, 14 Ind. 317; *Indianapolis, etc., R. Co. v. McClure*, 26 Ind. 370, 89 Am. Dec. 467; *Michigan Southern, etc., R. Co. v. Fisher*, 27 Ind. 96; *Indianapolis, etc., R. Co. v. Harter*, 38 Ind. 557; *Jeffersonville, etc., R. Co. v. Huber*, 42 Ind. 173; *Pittsburgh, etc., R. Co. v. Stuart*, 71 Ind. 500; *Clark v. Stipp*, 75 Ind. 114; *Stone v. Kopka*, 100 Ind. 458; *Sisk v. Crump*, 112 Ind. 504, 2 Am. St. Rep. 213; *Lowe v. Guard*, 11 Ind. App. 472.

In *Durham v. Musselman*, 2 Blackf. (Ind.) 96, 18 Am. Dec. 133, and *Michigan Southern, etc., R. Co. v. Fisher*, 27 Ind. 96, it was held that the contrary rule prevailed during the early settlement of the state.

Statutes. — As early as 1824 outside fences were required in order to recover for injury done by trespassing animals. *Myers v. Dodd*, 9 Ind. 290, 68 Am. Dec. 624; *Brady v. Ball*, 14 Ind. 317; *Blizzard v. Walker*, 32 Ind. 437; *Cook v. Morea*, 33 Ind. 497; *Page v. Hollingsworth*, 7 Ind. 317.

Another statute existing at the same time provided that the county commissioners in each county should direct what kind of animals should be permitted to run at large upon lands not enclosed as required. *Myers v. Dodd*, 9 Ind. 290, 68 Am. Dec. 624; *Lafayette, etc., R. Co. v. Shriner*, 6 Ind. 141; *Michigan Southern, etc., R. Co. v. Fisher*, 27 Ind. 96;

(b) **Common-law Rule Not Adopted** — *aa. GENERALLY.* — The Supreme Court of the United States has held as regards cattle grazing on the public lands of the United States, and the courts of many states hold, that the common-law

Indianapolis, etc., *R. Co. v. Harter*, 38 Ind. 557.

By Act of 1877 the common law was restored as the general rule, subject to alteration by the boards of county commissioners, who are empowered to permit domestic animals to run at large in their respective townships, and when such alteration is made the owner of land is required to have a lawful fence to entitle him to recover for injuries from trespassing animals. *Clark v. Stipp*, 75 Ind. 114; *Pittsburgh, etc., R. Co. v. Stuart*, 71 Ind. 500; *Stone v. Kopka*, 100 Ind. 458; *Anderson v. Worley*, 104 Ind. 165.

Kansas. — *Union Pac. R. Co. v. Rollins*, 5 Kan. 176; *Caulkins v. Mathews*, 5 Kan. 191; *Baker v. Robbins*, 9 Kan. 303; *Wells v. Beal*, 9 Kan. 597; *Osborne v. Kimball*, 41 Kan. 187.

Statutes. — The fence laws of Kansas impliedly authorize cattle to run at large, and no action lies for trespass by them unless the land trespassed upon is inclosed by a lawful fence. See *Larkin v. Taylor*, 5 Kan. 433; *Fillmore v. Booth*, 29 Kan. 134, and the cases cited in preceding paragraph of this note.

The Herd Law of 1872 prohibits cattle going at large as the general law of the state, subject to alteration by county commissioners within the limits of their respective counties. *St. Louis, etc., R. Co. v. Mossman*, 30 Kan. 341; *St. Louis, etc., R. Co. v. Dugdon*, 28 Kan. 283; *Noffziger v. McAllister*, 12 Kan. 315; *Osborne v. Kimball*, 41 Kan. 187.

Maine. — *Heath v. Ricker*, 2 Me. 408; *Little v. Lathrop*, 5 Me. 356; *Lord v. Wormwood*, 29 Me. 282, 50 Am. Dec. 586; *Webber v. Closson*, 35 Me. 26; *Sturtevant v. Merrill*, 33 Me. 62.

Statutes. — The statutes of 1821, c. 128, § 6, affirmed the common law. *Little v. Lathrop*, 5 Me. 356.

By statute in 1834 the common law was changed, so that no action of trespass could be maintained against the owner of cattle breaking into an inclosure through an insufficient fence, where the cattle were lawfully in the position from which they broke in. *Gooch v. Stephenson*, 13 Me. 371; *Eastman v. Rice*, 14 Me. 419. This statute was subsequently repealed, restoring the common law, except as to provisions touching the maintenance of division fences as contained in the repealing statute. *Webber v. Closson*, 35 Me. 26.

Maryland. — *Richardson v. Milburn*, 11 Md. 340; *Baltimore, etc., R. Co. v. Lamborn*, 12 Md. 257.

Massachusetts. — *Rust v. Low*, 6 Mass. 90; *Thayer v. Arnold*, 4 Met. (Mass.) 590; *Minor v. Deland*, 18 Pick. (Mass.) 266; *Eames v. Salem, etc., R. Co.*, 98 Mass. 560, 96 Am. Dec. 676; *Lyons v. Merrick*, 105 Mass. 71; *Bronson v. Coffin*, 108 Mass. 175, 11 Am. Rep. 335; *Maynard v. Boston, etc., R. Co.*, 115 Mass. 458, 15 Am. Rep. 110; *Amstein v. Gardner*, 132 Mass. 28, 42 Am. Rep. 421.

Statutes. — The statute of 1834 affirms the common law as to outside fences. *Minor v. Deland*, 18 Pick. (Mass.) 266.

Michigan. — The common-law rule is recog-

nized as existing except as it is altered by statute. The statute (Sess. Laws 1847) permits cattle to go at large, and requires a fence of a prescribed character in order to recover for damages done by them on lands, but confers upon the inhabitants of townships the power of determining the time and manner in which animals shall be restrained from going at large in the public highways within their respective limits. *Williams v. Michigan Cent. R. Co.*, 2 Mich. 260, 55 Am. Dec. 59; *Johnson v. Wing*, 3 Mich. 163; *Wood v. La Rue*, 9 Mich. 158.

Minnesota. — The common-law rule governs in the absence of action by towns as provided for in Gen. Stat., c. 10. *Locke v. First Div. St. Paul, etc., R. Co.*, 15 Minn. 350.

New Hampshire. — The common-law rule is adopted and exists except so far as it may be altered by statute. The statute as to outside fences requires land to be protected by a sufficient fence in order to recover for trespass by cattle lawfully on the highway. *Avery v. Maxwell*, 4 N. H. 36; *Mills v. Stark*, 4 N. H. 512, 17 Am. Dec. 444; *Tewksbury v. Bucklin*, 7 N. H. 518; *Noyes v. Colby*, 30 N. H. 143; *Glidden v. Towle*, 31 N. H. 147; *Lawrence v. Combs*, 37 N. H. 331, 72 Am. Dec. 332; *Page v. Olcott*, 13 N. H. 399; *Drew v. Spaulding*, 45 N. H. 472; *Cornwall v. Sullivan R. Co.*, 28 N. H. 161.

New Jersey. — *Chambers v. Matthews*, 18 N. J. L. 368; *Coxe v. Robbins*, 9 N. J. L. 384; *Vandegrift v. Rediker*, 22 N. J. L. 185, 51 Am. Dec. 262; *Castner v. Riegel*, 54 N. J. L. 498.

New York. — *Wells v. Howell*, 19 Johns. (N. Y.) 385; *Bush v. Brainard*, 1 Cow. (N. Y.) 78, 13 Am. Dec. 513; *Holladay v. Marsh*, 3 Wend. (N. Y.) 142, 20 Am. Dec. 678; *Shepherd v. Hees*, 12 Johns. (N. Y.) 433; *Tonawanda R. Co. v. Munger*, 5 Den. (N. Y.) 255, 49 Am. Dec. 239, *affirmed* 4 N. Y. 349; *Taylor v. Porter*, 4 Hill (N. Y.) 140, 40 Am. Dec. 274; *Stafford v. Ingersoll*, 3 Hill (N. Y.) 38; *Clark v. Brown*, 18 Wend. (N. Y.) 213; *Cowles v. Balzer*, 47 Barb. (N. Y.) 562; *Crandall v. Eldridge*, 46 Hun (N. Y.) 411; *Roney v. Aldrich*, 44 Hun (N. Y.) 320; *Taber v. Cruthers*, (Supreme Ct.) 38 N. Y. St. Rep. 331; *Angell v. Hill*, (Supreme Ct.) 45 N. Y. St. Rep. 83, *citing* 7 AM. AND ENG. ENCYC. OF LAW (1st ed.) 805; *Van Slyck v. Snell*, 6 Lans. (N. Y.) 302; *Ryan v. Rochester, etc., R. Co.*, 9 How. Pr. (N. Y. Supreme Ct.) 453; *Phillips v. Covell*, 79 Hun (N. Y.) 210; *Terry v. New York Cent. R. Co.*, 22 Barb. (N. Y.) 574; *Bowman v. Troy, etc., R. Co.*, 37 Barb. (N. Y.) 516; *Corwin v. New York, etc., R. Co.*, 13 N. Y. 42; *Bronk v. Becker*, 17 Wend. (N. Y.) 320.

Statutes. — By the statute of 1835 the electors of towns are empowered to regulate the time and manner in which animals may go at large in their respective towns, the sufficiency of fences, etc. When the electors have made such regulations, lands must be protected by a sufficient fence such as is prescribed by the regulation, in order to recover for trespass by animals lawfully at large on the highway. *Wells v. Howell*, 19 Johns. (N. Y.) 385; *Bush*

rule has never been in force within their respective jurisdictions, and that the owners of cattle are under no obligation to keep them from going upon the uninclosed lands of another, but if the landowner would have a remedy for their trespass he must inclose his land with a sufficient fence.¹

7. *Brainard*, 1 Cow. (N. Y.) 78, 13 Am. Dec. 513; *Shepherd v. Hees*, 12 Johns. (N. Y.) 433; *White v. Scott*, 4 Barb. (N. Y.) 56; *Tonawanda R. Co. v. Munger*, 5 Den. (N. Y.) 255, 49 Am. Dec. 239.

The statute gives no authority to permit cattle to graze on the highway. *Tonawanda R. Co. v. Munger*, 5 Den. (N. Y.) 255, 49 Am. Dec. 239.

North Dakota.—*Bostwick v. Minneapolis*, etc., R. Co., 2 N. Dak. 440.

Oregon.—*French v. Cresswell*, 13 Oregon 422; *Strickland v. Geide*, 31 Oregon 373; *Bileu v. Paisley*, 18 Oregon 47. But see *Campbell v. Bridwell*, 5 Oregon 311, in which the question is left in doubt. And in *Moses v. Southern Pac. R. Co.*, 18 Oregon 385, it was held that the common-law rule had never existed in Oregon. In *Strickland v. Geide*, 31 Oregon 373, the court, holding that the common-law rule prevails in the absence of statute, said: "While if this * * * question was a matter of first impression our decision might be different, we feel constrained to treat it now as *stare decisis*."

Statutes.—*Campbell v. Bridwell*, 5 Oregon 311, and *Bileu v. Paisley*, 18 Oregon 47, were decided under a statute requiring outside fences except as to certain counties.

Pennsylvania.—*Arthurs v. Chatfield*, 9 Pa. Co. Ct. Rep. 34; *Thompson v. Kyler*, 9 Pa. Co. Ct. Rep. 205; *Greenlee v. Eisenbrown*, 10 Pa. Co. Ct. Rep. 483; *Milligan v. Wehinger*, 68 Pa. St. 235; *Gregg v. Gregg*, 55 Pa. St. 227; *Dolph v. Ferris*, 7 W. & S. (Pa.) 367, 42 Am. Dec. 246.

In *Knight v. Abert*, 6 Pa. St. 472, 47 Am. Dec. 478, it was held that an owner of cattle is not liable for their entry upon the uninclosed woodland of another, though their entry is in strictness a trespass, which, for its insignificance, is not noticed by the law. And in *New York*, etc., R. Co. v. *Skinner*, 19 Pa. St. 298, the court, approving this doctrine, said: "But if such intrusion would occasion substantial damage the English rule would be applicable." See also *North Pennsylvania R. Co. v. Rehman*, 49 Pa. St. 106.

Statutes.—The obligation to fence improved lands in order to recover for trespass by animals existed by statute from 1700 until 1889. *Adams v. McKinney*, Add. (Pa.) 258; *New York*, etc., R. Co. v. *Skinner*, 19 Pa. St. 298; *Gregg v. Gregg*, 55 Pa. St. 227; *Race v. Snyder*, 10 Phila. (Pa.) 533, 30 Leg. Int. (Pa.) 361; *Mitchell v. Wolf*, 46 Pa. St. 147; *Milligan v. Wehinger*, 68 Pa. St. 235.

The repeal of the Act of 1700 by the legislature of 1889 left the state of Pennsylvania without a general fence law, so that the common law prevails in that state, and landowners are not required to fence, except as to division fences. *Arthurs v. Chatfield*, 9 Pa. Co. Ct. Rep. 34; *Thompson v. Kyler*, 9 Pa. Co. Ct. Rep. 205; *Greenlee v. Eisenbrown*, 10 Pa. Co. Ct. Rep. 483.

Rhode Island.—*Tower v. Providence*, etc., R. Co., 2 R. I. 404.

Vermont.—*Jackson v. Rutland*, etc., R. Co., 25 Vt. 150, 60 Am. Dec. 245; *Saxton v. Bacon*, 31 Vt. 540; *Hurd v. Rutland*, etc., R. Co., 25 Vt. 116; *Holden v. Shattuck*, 34 Vt. 336, 80 Am. Dec. 684; *Wilder v. Wilder*, 38 Vt. 678; *Hooper v. Kittredge*, 16 Vt. 677; *Carpenter v. Cook*, 67 Vt. 102; *Wolcott v. Whitcomb*, 40 Vt. 40; *Keenan v. Cavanaugh*, 44 Vt. 276.

Statutes.—By the statute of 1842 outside fences were required, as well as division fences. Subsequently this statute was re-enacted, and the requisition to fence excepted outside fences, in terms thus affirming the common law. See cases *supra*.

Wisconsin.—*Stone v. Donaldson*, 1 Pin. (Wis.) 393; *Harrison v. Brown*, 5 Wis. 27; *McCall v. Chamberlain*, 13 Wis. 637; *Curry v. Chicago*, etc., R. Co., 43 Wis. 682.

Statutes.—The statute of 1841 conferred upon electors in towns the power to regulate the time and manner of cattle going at large, and the sufficiency of the fences; and in the absence of actions by them common-law rights and liabilities prevail. *Stone v. Donaldson*, 1 Pin. (Wis.) 393; *Harrison v. Brown*, 5 Wis. 27.

See also the title ANIMALS, vol. 2, p. 354.

1. Public Lands of the United States—Rule.—Where portions of the public lands of the United States are acquired by individuals, the owner of cattle grazing on the lands of the United States is under no obligation to prevent them from straying upon the uninclosed land of the individual. *Buford v. Houtz*, 133 U. S. 320.

States that Do Not Adopt the Common-law Rule.—In the following states the law, in the absence of statute, requires lands to be fenced in order to recover for a trespass thereon by animals. Where the cases disclose that statutes upon the subject exist, it is so stated.

Alabama.—*Joiner v. Winston*, 68 Ala. 129; *Wilhite v. Speakman*, 79 Ala. 400; *Hurd v. Lacy*, 93 Ala. 427, 30 Am. St. Rep. 61; *Nashville*, etc., R. Co. v. *Peacock*, 25 Ala. 229; *Alabama G. S. R. Co. v. Jones*, 71 Ala. 487; *Lee County v. Yarbrough*, 85 Ala. 590.

Statute.—Lands are required to be fenced. *Mobile*, etc., R. Co. v. *Williams*, 53 Ala. 595; *Wilhite v. Speakman*, 79 Ala. 400; *Hurd v. Lacy*, 93 Ala. 427, 30 Am. St. Rep. 61; *Woodward v. Purdy*, 20 Ala. 379; *Smith v. Causey*, 22 Ala. 568; *Tankersley v. Wedgeworth*, 22 Ala. 677; *Pruitt v. Ellington*, 59 Ala. 454; *Moore v. Levert*, 24 Ala. 310.

Arkansas.—*Little Rock*, etc., R. Co. v. *Finley*, 37 Ark. 562; *Jones v. Nichols*, 46 Ark. 207, 55 Am. Rep. 575.

Statute.—All fields and grounds kept for inclosures are required to be fenced. *Thomas v. State*, 30 Ark. 433.

California.—*Waters v. Moss*, 12 Cal. 535, 73 Am. Dec. 561; *Logan v. Gedney*, 38 Cal. 579; *Merritt v. Hill*, 104 Cal. 184.

Statute.—To recover for trespass by cattle upon inclosed land it must be protected by a

bb. REASON FOR NOT ADOPTING THE RULE. — The reason for not adopting the common-law rule is based on its inapplicability to the nature and conditions

sufficient fence. *Comerford v. Dupuy*, 17 Cal. 308.

Colorado. — *Morris v. Fraker*, 5 Colo. 425; *Nuckolls v. Gaut*, 12 Colo. 361; *Willard v. Mathesus*, 7 Colo. 76.

Statute. — Towns incorporated under Gen. Stat. Colo., p. 958, have the power to regulate, restrain, and prohibit the running at large of animals within their respective corporate limits. *Brophy v. Hyatt*, 10 Colo. 223.

Connecticut. — *Studwell v. Ritch*, 14 Conn. 293.

Statute. — A sufficient fence inclosing land is necessary to recovery for trespass thereupon by cattle lawfully at large. *Studwell v. Ritch*, 14 Conn. 292; *Barnum v. Vandusen*, 16 Conn. 200; *Hine v. Wooding*, 37 Conn. 123; *Wright v. Wright*, 21 Conn. 329.

Georgia. — *Macon, etc., R. Co. v. Lester*, 30 Ga. 914; *Georgia R., etc., Co. v. Neely*, 56 Ga. 540.

Statute. — The general fence law of Georgia (Acts 1872, p. 34; Code 1882, § 1449 *et seq.*) declares the boundary lines of lands to be fences and imposes upon the owners of cattle the obligation to restrain them from trespassing on the lands of another, the adoption of the law to be optional, however, with the voters of each county and militia district in the state. *Mathis v. Jones*, 84 Ga. 804; *Camp v. Tompkins*, 84 Ga. 812; *Bonner v. De Loach*, 78 Ga. 50. But in counties that do not adopt the law, damage done by cattle, in order to give a right of action, must be done upon lands inclosed by a lawful fence. *Bonner v. De Loach*, 78 Ga. 50.

Militia districts that adopt the law are required to have sufficient fences erected around and inclosing them. But the law when adopted goes into effect though no fence be built, the building of the fence not being construed to be a condition precedent to the operation of the law. *Dover v. State*, 80 Ga. 781; *Holleman v. Kingery*, 81 Ga. 624; *Drummond v. Lowery*, 88 Ga. 716.

When the lines of a militia district are legally changed the territory added becomes subject to the system as to fences or stock law which prevails in that district. *Hackney v. Leake*, 91 Ga. 141; *Drummond v. Lowery*, 88 Ga. 716.

As to Elections under the provisions of the law, see *Steward v. Peyton*, 77 Ga. 668; *Mize v. Speight*, 82 Ga. 397; *Meadows v. Taylor*, 82 Ga. 738.

Illinois. — *Seeley v. Peters*, 10 Ill. 146; *Misner v. Lighthall*, 13 Ill. 609; *Westgate v. Carr*, 43 Ill. 450; *Scott v. Wirshing*, 64 Ill. 102; *Oil v. Rowley*, 69 Ill. 469; *Illinois Cent. R. Co. v. Arnold*, 47 Ill. 173.

But the rule applies to outside fences alone, and as to division fences the common-law rule governs except as altered by statute. *McCormick v. Tate*, 20 Ill. 334; *Headen v. Rust*, 39 Ill. 186; *Stoner v. Shugart*, 45 Ill. 76; *Birket v. Williams*, 30 Ill. App. 451; *Buckmaster v. Cool*, 12 Ill. 76. See *infra*, this section, *Partition Fences*.

Statutes. — The general rule as held in the

above cases was subject to alteration by counties that adopted the township organization. *Westgate v. Carr*, 43 Ill. 450.

The statutes of 1872 and 1874 prohibit cattle running at large, and no fence is required to exclude them from lands; and this is the general rule in Illinois, subject to be altered by townships by vote within their respective limits. *Frederick v. White*, 73 Ill. 590; *Vogt v. Dunley*, 97 Ill. 424; *Selover v. Osgood*, 52 Ill. App. 260; *Bulpit v. Matthews*, 145 Ill. 345; *Lee v. Burk*, 15 Ill. App. 651; *Birket v. Williams*, 30 Ill. App. 451; *McKowan v. Harmon*, 56 Ill. App. 368; *McNeer v. Boone*, 52 Ill. App. 181.

Iowa. — *Wagner v. Bissell*, 3 Iowa 396; *Heath v. Coltenback*, 5 Iowa 490; *Alger v. Mississippi, etc., R. Co.*, 10 Iowa 268; *Herold v. Meyers*, 20 Iowa 378; *Frazier v. Nordinus*, 34 Iowa 82; *Hewit v. Jewell*, 59 Iowa 37; *Harrison v. Adamson*, 76 Iowa 337.

Statutes. — Cattle are permitted to go at large by statute. See *Syford v. Shriver*, 61 Iowa 155, and cases last cited.

Mississippi. — *Vicksburg, etc., R. Co. v. Patton*, 31 Miss. 156, 66 Am. Dec. 552; *New Orleans, etc., R. Co. v. Field*, 46 Miss. 573; *Anderson v. Locke*, 64 Miss. 283; *Raiford v. Mississippi Cent. R. Co.*, 43 Miss. 239; *Mobile, etc., R. Co. v. Hudson*, 50 Miss. 573.

Statutes. — Code Miss., 1892, § 2061, provides for a stock law to be adopted by counties, under which the people in the counties adopting it may cultivate their lands without fences. *Leflore County v. State*, 70 Miss. 769; *Montgomery County v. State*, 71 Miss. 153.

Missouri. — *McPheeters v. Hannibal, etc., R. Co.*, 45 Mo. 22; *Gorman v. Pacific R. Co.*, 26 Mo. 441, 72 Am. Dec. 220; *Tarwater v. Hannibal, etc., R. Co.*, 42 Mo. 193; *Hannibal, etc., R. Co. v. Kenney*, 41 Mo. 271; *Kaes v. Missouri Pac. R. Co.*, 6 Mo. App. 401; *Heald v. Grier*, 12 Mo. App. 556; *Kertz v. Dolde*, 7 Mo. App. 564; *Hughes v. Hannibal, etc., R. Co.*, 66 Mo. 327.

Owners of animals *feræ naturæ* are under the same obligation to restrain them as at common law. *Canefox v. Crenshaw*, 24 Mo. 199, 69 Am. Dec. 427.

Statutes. — The owner of land must show that he maintained such a fence as the statute requires in order to recover for trespass by cattle. See cases just cited. See also *Fenton v. Montgomery*, 19 Mo. App. 156; *Moore v. White*, 45 Mo. 206; *Demetz v. Benton*, 35 Mo. App. 559; *Mann v. Williamson*, 70 Mo. 661; *Bradford v. Floyd*, 80 Mo. 207.

Nebraska. — *Delancy v. Errickson*, 10 Neb. 492.

North Carolina. — *Jones v. Witherspoon*, 7 Jones L. (52 N. Car.) 555, 78 Am. Dec. 263; *Burgwyn v. Whitfield*, 81 N. Car. 261; *Laws v. North Carolina R. Co.*, 7 Jones L. (52 N. Car.) 468; *Morrison v. Cornelius*, 63 N. Car. 346; *Runyan v. Patterson*, 87 N. Car. 343; *State v. Godfrey*, 97 N. Car. 507.

Statutes. — Fences of prescribed character have been required about cultivated fields since 1777. See cases last cited.

of the country at the time of its early settlement, by reason of the great value of lands for pasturage, and the scarcity of materials for fencing.¹

cc. EXCEPTION AS TO DANGEROUS ANIMALS. — An exception to this latter rule is made in the case of animals known to be dangerous by reason of their vicious or unruly habits or disease. The owner of such animals is bound at his peril to keep them from going where they may inflict injury, and the obligation to fence does not extend to them.²

(3) *Operation of Law Requiring a Fence* — (a) *Generally.* — A general fence law, unless it is a law regulating partition fences, imposes no obligation upon the owner of land to inclose it with a fence, nor does it grant any right to any individual to trespass upon uninclosed lands. It merely takes away the remedy for injuries done by animals upon lands not fenced as required by the law, such animals being lawfully on the adjoining soil.³

The Act of 1873 provides for a fence law to be adopted by certain townships by election. *Simpson v. Mecklenburg County*, 84 N. Car. 158. A similar act was passed in 1881. *Newsom v. Earnheart*, 86 N. Car. 391; *Cain v. Davie County*, 86 N. Car. 8. See also *Coor v. Rogers*, 97 N. Car. 143; *State v. Wayne County*, 97 N. Car. 388.

Ohio. — *Kerwhacker v. Cleveland, etc.*, R. Co., 3 Ohio St. 172, 62 Am. Dec. 246; *Cincinnati, etc.*, R. Co. v. *Waterson*, 4 Ohio St. 425; *Cleveland, etc.*, R. Co. v. *Elliott*, 4 Ohio St. 474; *Marietta, etc.*, R. Co. v. *Stephenson*, 24 Ohio St. 48.

Statute. — The owner of cattle running at large is made liable for any injury they may do upon uninclosed lands, unless they are at large without the knowledge or fault of their owner. The statute is construed not to take away the right of owners to permit their cattle to run at large, but only imposes upon them the liability for any injury they may do. The statute authorizes county commissioners to grant permission for cattle to run at large within the limits of their county, and, where such permission is not granted, to township trustees to issue special permits to individuals. *Marietta, etc.*, R. Co. v. *Stephenson*, 24 Ohio St. 48.

South Carolina. — *Beaufort v. Danner*, 1 Strobb. L. (S. Car.) 176.

Statutes. — Since Acts of 1694 the law of South Carolina has required cattle to be fenced out, not fenced in. *Murray v. South Carolina R. Co.*, 10 Rich. L. (S. Car.) 227, 70 Am. Dec. 219.

Texas. — *Pace v. Potter*, 85 Tex. 473; *St. Louis Cattle Co. v. Vaught*, 1 Tex. Civ. App. 388; *Woodward v. Griffith*, 2 Tex. App. Civ. Cas., § 360; *Clarendon Land Invest. Agency Co. v. McClelland*, 86 Tex. 179; *Finley v. Bradley*, (Tex. Civ. App. 1893) 21 S. W. Rep. 609; *Fennell v. Seguin St. R. Co.*, 70 Tex. 670.

Statutes. — Rev. Stat. Texas, art. 2431, requires a sufficient fence about "cleared land in cultivation," in order to recover for trespass thereupon by cattle. *Fennell v. Seguin St. R. Co.*, 70 Tex. 670.

West Virginia. — *Blaine v. Chesapeake, etc.*, R. Co., 9 W. Va. 253; *Baylor v. Baltimore, etc.*, R. Co., 9 W. Va. 270.

Sheep in Colorado. — In applying the rule in Colorado a distinction is made in the case of sheep running at large, on account of "the difference in intelligence and instinct, in dis-

position and physical characteristics, between sheep and cattle," as well as on account of the well-established custom of "close-herding" sheep. The landowner may recover, then, for injury to his crop by sheep, even though there be no fence or an insufficient one, unless the herder uses "reasonable or ordinary care" to prevent the trespass, and provided, where there is no fence, the crop injured is "of such a nature as to be readily recognized." *Willard v. Matheson*, 7 Colo. 76.

1. *Reason for Not Adopting.* — "It has never been understood that in those regions and in this country, in the progress of its settlement, the principle prevailed that a man was bound to keep his cattle confined within his own grounds or else would be liable for their trespasses upon the uninclosed grounds of his neighbors. Such a principle was ill adapted to the nature and conditions of the country at that time. Owing to the scarcity of means for inclosing lands and the great value of the use of the public domain for pasturage, it was never adopted or recognized as the law of the country, except as it might refer to animals known to be dangerous and permitted to go where their dangerous character might produce evil results." *Buford v. Houtz*, 133 U. S. 320. See the title *COMMON LAW*, vol. 6, p. 286.

2. *Exception.* — See *infra*, this section, subdiv. 1, *c. Animals to be Fenced Against*. See also the title *ANIMALS*, vol. 2, p. 352.

3. *Operation of Laws Requiring a Fence.* — *Moore v. Levert*, 24 Ala. 310; *Westgate v. Carr*, 43 Ill. 450; *Cook v. Morea*, 33 Ind. 497; *Clark v. Stipp*, 75 Ind. 114; *Herold v. Meyers*, 20 Iowa 378; *Williams v. Michigan Cent. R. Co.*, 2 Mich. 260, 55 Am. Dec. 59; *Wood v. La Rue*, 9 Mich. 158; *Kerwhacker v. Cleveland, etc.*, R. Co., 3 Ohio St. 172, 62 Am. Dec. 246; *Bileu v. Paisley*, 18 Oregon 47; *Clark v. Adams*, 18 Vt. 425, 46 Am. Dec. 161. See also *infra*, this section, *Partition Fences*.

Statute Applies Only to Civil Remedies. — In *Thomas v. State*, 30 Ark. 433, it was held that under a statute requiring all fields and grounds kept for inclosures to be inclosed with a sufficient fence, which fence should be at least five feet high, it does not follow that there can be in contemplation of law no inclosure unless the fence is five feet high; that the legislature intended only a civil remedy for injuries to stock breaking into inclosures not inclosed as required, and imposed a fine. So where the inclosure was surrounded by a fence less than

(b) **Cattle Driven upon Lands.** — A person has no right to turn or drive his cattle upon uninclosed or insufficiently fenced lands of another, and if he does so it is a trespass for which the owner of the land may recover.¹

(c) **Right to Drive Off Trespassing Animals.** — If animals enter upon land, whether fenced or not fenced, the owner of the land, though he may not recover unless his land is fenced as required, may turn them into the place whence they came.² And in driving them from his land he may use any of the

five feet high, and a breachy horse entered the inclosure and was shot by the landowner, it was held that the landowner was not subject to an indictment for malicious mischief.

Applies Only to Lands in the Country. — The *Tennessee* statute regulating division fences and fences generally has been held to apply only to lands in the country. As to lands in towns and cities it was said that the question "is controlled by private agreement, municipal regulations, and principles applicable to servitudes and easements not necessary to be here stated or discussed." *Lightfoot v. Grove*, 5 Heisk. (Tenn.) 473. See also *Staub v. Fantz*, 11 Heisk. (Tenn.) 766.

Outside Fence Not for Benefit of Adjoining Owner. — Though a landowner is bound by statute to maintain a lawful outside fence in order to recover for injury done by trespassing animals, yet he is not liable for injury done to his neighbor by reason of cattle entering upon his land, and thence, for the want of a division fence which he is not bound to maintain, upon the lands of his neighbor. The effect of the statute regarding outside fences is only to deprive the landowner of his remedy in case he has not a lawful fence, and imposes no obligation to fence. *Cook v. Morea*, 33 Ind. 497.

Common-law Remedy where Fence Is Insufficient. — "The act regulating fences gives a new and summary remedy for trespasses on lands inclosed with fences of the description therein mentioned, but takes not away any remedy which existed before and at the time of the passing of that act. The person injured, whose fences are of that description, may proceed under that act or at common law. And if the fences are not of that description the person injured, though he can have no remedy under that act, may have a remedy at common law. If fences, though not what are called lawful, be what are called neighborly and sufficient to keep out cattle not breachy, I hold that trespass will lie; for the owners of mischievous cattle ought to keep them from doing injury." *Adams v. McKinney*, Add. (Pa.) 258.

Whether Fence Must Conform to Statute Throughout Its Entire Length. — It is not incumbent upon the plaintiff in an action for damages by trespassing cattle to prove that his whole fence was a lawful fence, but it will be sufficient if he prove that it was a lawful fence where the cattle broke through. *Crane v. Ellis*, 31 Iowa 510; *Rice v. Nagle*, 14 Kan. 498; *Hine v. Wooding*, 37 Conn. 123.

But in *Polk v. Lane*, 4 Yerg. (Tenn.) 36, it was held that where a statute requires cultivated lands to be inclosed by a fence "at least five feet high," a landowner cannot recover for damage done by cattle entering upon his land if any part of the fence be less than five feet high, although it is shown that the cattle en-

tered at a place where the fence was of the required height. See also *Prather v. Reeve*, 23 Kan. 627.

If Fence Sufficient Ownership Immaterial. — In *Moore v. White*, 45 Mo. 206, it was held that under a statute requiring lands to be inclosed by a fence it is sufficient if the fence be of the proper dimensions, regardless of the ownership thereof. Thus, if a division fence dividing the lands of A and B be a sufficient fence under the statute, B's land is inclosed though the fence is on A's land.

1. Cattle Driven upon Lands — *Colorado*. — *Norton v. Young*, 6 Colo. App. 187; *Fugate v. Smith*, 4 Colo. App. 201.

Connecticut. — *Hine v. Wooding*, 37 Conn. 123.

Illinois. — *Misner v. Lighthall*, 13 Ill. 609.

Iowa. — *Erbes v. Wehmeyer*, 69 Iowa 85; *Harrison v. Adamson*, 76 Iowa 337; *Broadwell v. Wilcox*, 22 Iowa 568.

Kansas. — *Powers v. Kindt*, 13 Kan. 74.

Massachusetts. — *Melody v. Reab*, 4 Mass. 471.

Michigan. — *Williams v. Michigan Cent. R. Co.*, 2 Mich. 260, 55 Am. Dec. 59.

Nebraska. — *Delaney v. Errickson*, 11 Neb. 533.

Nevada. — *Chase v. Chase*, 15 Nev. 259.

Oregon. — *Bileu v. Paisley*, 18 Oregon 47.

Pennsylvania. — *Adams v. McKinney*, Add. (Pa.) 258.

Texas. — *Clarendon Land Invest. Agency Co. v. McClelland*, 86 Tex. 179; *Finley v. Bradley*, (Tex. Civ. App. 1893) 21 S. W. Rep. 609; *Davis v. Davis*, 70 Tex. 123.

2. Tobin v. Deal, 60 Wis. 87, 50 Am. Rep. 345. See the authorities on this point collected in the title ANIMALS, vol. 2, p. 357.

When Landowner Is Liable for Loss. — In *Tobin v. Deal*, 60 Wis. 87, 50 Am. Rep. 345, it appeared that the occupant of land upon which cattle had trespassed turned the cattle into the highway and drove them in a direction he knew to be from their owner's home, and they were lost. It was held that the occupant upon whose land the cattle had trespassed was liable for the loss of the cattle; that the act was unlawful, regardless of intent or good faith. And see *Knour v. Wagoner*, 16 Ind. 414.

So where cattle entered upon land through a partition fence which the owner of the land entered upon was bound to maintain, and an attempt was made by him to drive the cattle along the highway to their owner's house, during which an ox was abandoned and strayed on a railroad track, where he was killed, it was held that the owner of the ox could recover for his loss in an action against his neighboring landowner. *Morse v. Glover*, (N. H. 1894) 40 Atl. Rep. 396.

Where cattle escape through a defect in a partition fence which the occupant of the land

ordinary means to which a prudent man would naturally resort, using reasonable care to inflict no injury upon the animals.¹

(d) **Injury to Trespassing Animals** — *aa.* **WILFUL OR CARELESS INJURY.** — But if the owner of land upon which animals have entered, wilfully or carelessly inflicts injury upon them in driving them off or otherwise, he will be liable for such injury.²

trespassed upon is bound to maintain, or in consequence of such occupant's taking down a partition fence which the owner of the cattle is bound to maintain, the occupant of the land may not drive them into the highway, but must return them to the close whence they escaped. *Carruthers v. Hollis*, 8 Ad. & El. 113, 35 E. C. L. 344; *Roby v. Reed*, 39 N. H. 461.

1. Right to Drive Off Cattle from Uninclosed Land. — The owner of uninclosed or insufficiently fenced land upon which cattle have strayed may drive them off, though in law they are not trespassers; but he must not inflict unnecessary injury upon them.

Alabama. — *Thompson v. State*, 67 Ala. 106, 42 Am. Rep. 101.

Illinois. — *Snap v. People*, 19 Ill. 80, 68 Am. Dec. 582.

Iowa. — *Aspegren v. Kotas*, 91 Iowa 497.

Michigan. — *Wood v. La Rue*, 9 Mich. 158.

Missouri. — *Heald v. Grier*, 12 Mo. App. 556; *Totten v. Cole*, 33 Mo. 138, 82 Am. Dec. 157; *Hughes v. Hannibal*, etc., R. Co., 66 Mo. 326.

North Carolina. — *Morrison v. Cornelius*, 63 N. Car. 346.

Ohio. — *Kerwhacker v. Cleveland*, etc., R. Co., 3 Ohio St. 172, 62 Am. Dec. 246.

Pennsylvania. — *Knight v. Abert*, 6 Pa. St. 472, 47 Am. Dec. 478; *New York*, etc., R. Co. v. *Skinner*, 19 Pa. St. 298; *Gregg v. Gregg*, 55 Pa. St. 227; *North Pennsylvania R. Co. v. Rehman*, 49 Pa. St. 101.

Texas. — *Davis v. Davis*, 70 Tex. 124; *Jobe v. Houston*, (Tex. Civ. App. 1893) 23 S. W. Rep. 408.

Vermont. — *Davis v. Campbell*, 23 Vt. 236; *Clark v. Adams*, 18 Vt. 425, 46 Am. Dec. 161.

Wisconsin. — *Tobin v. Deal*, 60 Wis. 87, 50 Am. Rep. 345.

In *Knight v. Abert*, 6 Pa. St. 472, 47 Am. Dec. 478, the court said: "In this and perhaps every other American state, an owner of cattle is not liable to an action for their browsing on his neighbor's uninclosed woodland. But it follows not that, because such browsing is excusable as a trespass, it is matter of right. It is an immunity, not a privilege; or, at most, a license revokable at the will of the tenant, who may turn his neighbor's cattle away from his grounds at pleasure. Their entry is, in strictness, a trespass, which, for its insignificance, is not noticed by the law."

From Lands Legally Fenced, etc. — And though animals are trespassers, having entered upon land through a sufficient fence, or through an insufficient fence which the owner of the animals is bound to maintain, or upon lands not required to be fenced, reasonable care must be used to inflict no unnecessary injury. *Thompson v. State*, 67 Ala. 106, 42 Am. Rep. 101; *Richardson v. Carr*, 1 Harr. (Del.) 142, 25 Am. Dec. 65; *Spray v. Ammerman*, 66 Ill. 309; *Knott v. Digges*, 6 Har. & J. (Md.) 230; *Eames v. Salem*, etc., R. Co., 98 Mass. 563, 96 Am.

Dec. 676; *Cook v. Pickrel*, 20 Neb. 433; *McIntire v. Plaisted*, 57 N. H. 606; *Smith v. Waldorf*, 13 Hun (N. Y.) 127; *Bost v. Mingués*, 64 N. Car. 44; *Ford v. Taggart*, 4 Tex. 492; *Ladue v. Branch*, 42 Vt. 574; *Tobin v. Deal*, 60 Wis. 87, 50 Am. Rep. 345.

Reasonableness of Means Used Is Question for Jury. — Whether the means used in driving away trespassing cattle were reasonable and necessary to the defense of property is a question for the jury. *McIntire v. Plaisted*, 57 N. H. 606.

The Use of a Dog for Driving Off Strayed Cattle is permissible, unless there is something in the size, character, or habits of the dog, or in the mode of setting him on or pursuing which negatives the idea of ordinary care or prudence. *Thompson v. State*, 67 Ala. 106; *Wood v. La Rue*, 9 Mich. 158; *Totten v. Cole*, 33 Mo. 138, 82 Am. Dec. 157; *Clark v. Adams*, 18 Vt. 425, 46 Am. Dec. 161; *Davis v. Campbell*, 23 Vt. 236; *Tobin v. Deal*, 60 Wis. 87, 50 Am. Rep. 345. See also *Spray v. Ammerman*, 66 Ill. 309.

2. Wilful or Careless Injury to Trespassing Cattle. — *Thompson v. State*, 67 Ala. 106, 42 Am. Rep. 101; *Cannon v. Horsey*, 1 Houst. (Del.) 440; *Tumlin v. Parrott*, 82 Ga. 732; *Snap v. People*, 19 Ill. 80, 68 Am. Dec. 582; *Eames v. Salem*, etc., R. Co., 98 Mass. 563, 96 Am. Dec. 676; *Bost v. Mingués*, 64 N. Car. 44; *Jones v. Witherspoon*, 7 Jones L. (52 N. Car.) 555, 78 Am. Dec. 263; *Hobson v. Perry*, 1 Hill L. (S. Car.) 277; *State v. Council*, 1 Overt. (Tenn.) 305.

Improper Use of Dog. — Where it appears from the manner in which dogs are set upon trespassing animals, or from the size and fierce character of the dog used, that the owner of the land trespassed upon has wilfully or carelessly inflicted unnecessary injury upon the animals, using more force than was necessary for the protection of his property, he will be liable for such injury. *Thompson v. State*, 67 Ala. 106, 42 Am. Rep. 101; *Amick v. O'Hara*, 6 Blackf. (Ind.) 258; *Aspegren v. Kotas*, 91 Iowa 497; *Wood v. La Rue*, 9 Mich. 158; *Bost v. Mingués*, 64 N. Car. 44; *Ford v. Taggart*, 4 Tex. 492.

Killing or Wounding. — In *Snap v. People*, 19 Ill. 80, 68 Am. Dec. 582, the court said: "It is a violation of the common law * * * for a person to shoot or wound stock found trespassing upon his premises. He may expel them from his premises, and use the necessary force for that purpose, doing them no unnecessary damage, * * * but the law of right, as well as humanity, forbids him to inflict an unnecessary injury upon the brute." And see *Johnson v. Patterson*, 14 Conn. 1, 35 Am. Dec. 96; *Reis v. Stratton*, 23 Ill. App. 314; *Clark v. Keliher*, 107 Mass. 406; *Gillium v. Sisson*, 53 Mo. App. 516; *Matthews v. Fiestel*, 2 E. D. Smith (N. Y.) 90; *McKay v. Woodlee*, 6 Ired. L. (28 N. Car.) 352.

bb. ACCIDENTAL INJURY — Generally. — Though the owner of cattle may, under the law of the states where they are, permit them to go at large, yet he does so at the risk of any injury to them by unavoidable accident arising from any danger into which they may wander.¹ And the owner of land, though it is not inclosed, is under no obligation to make it safe for pasturage of stray cattle.²

b. PARTITION FENCES — (1) Generally. — The obligation to build and maintain a partition or division fence between adjoining lands may exist by force of an agreement or covenant, or by prescription, as at common law, or it may be imposed by statute.³

(2) By Agreement or Covenant — (a) Effect of Statute Upon — aa. GENERALLY. — The existence of a statute regulating partition fences does not preclude an agreement between adjoining owners to build and maintain a partition fence between their lands.⁴

Application of the Statute. — And the statutory provisions for the establishment of a partition fence and the assignment of portions by fence viewers appointed

Restraining Trespassing Animal on Premises. — In *Dickson v. Parker*, 3 How. (Miss.) 219, 34 Am. Dec. 78, the plaintiff's mule broke into the defendant's close through an insufficient fence, and was taken by the defendant damage feasant, and tied by a halter in a stable, whereby the mule was killed in his efforts to escape. It was held that the defendant was liable in damages to the plaintiff to the value of the mule.

South Carolina Statute as to Injuring Trespassing Cattle. — By statute in South Carolina, Code 1876, § 1587, the owner of lands not fenced as prescribed by statute is liable in fivefold damages if he injures or destroys animals of another that enter upon his land. *Thompson v. State*, 67 Ala. 106, 42 Am. Rep. 101.

Criminal Liability. — *Thompson v. State*, 67 Ala. 106, 42 Am. Rep. 101; *Snap v. People*, 19 Ill. 80, 68 Am. Dec. 582; *Avery v. People*, 11 Ill. App. 332; *State v. Godfrey*, 97 N. Car. 507; *State v. Council*, 1 Overt. (Tenn.) 305.

Punitive Damages. — In *Alabama*, by statute, if an animal that has strayed upon land not inclosed by a lawful fence is injured by the fault or neglect of the landowner, the owner of the animal may recover double damages. *Smith v. Causey*, 22 Ala. 568; *Tankersly v. Wedgworth*, 22 Ala. 677; *Woodward v. Purdy*, 20 Ala. 379. And by a later statute he may recover fivefold damages. *Mobile, etc., R. Co. v. Williams*, 53 Ala. 595; *Wilhite v. Speakman*, 79 Ala. 400; *Hurd v. Lacy*, 93 Ala. 427, 30 Am. St. Rep. 61; *Pruitt v. Ellington*, 59 Ala. 454.

1. Accidental Injury to Trespassing Cattle. — *Tonawanda R. Co. v. Munger*, 5 Den. (N. Y.) 255, 49 Am. Dec. 239; *Crandall v. Eldridge*, 46 Hun (N. Y.) 411; *Kerwhacker v. Cleveland, etc., R. Co.*, 3 Ohio St. 172, 62 Am. Dec. 246; *Murray v. South Carolina R. Co.*, 10 Rich. L. (S. Car.) 227, 70 Am. Dec. 219.

2. Land Unsafe for Pasturage — Uninclosed Pit. — The owner of uninclosed land is not liable for injury to cattle permitted by law to go at large and which wander upon his land and fall into an uninclosed pit. *Knight v. Abert*, 6 Pa. St. 472, 47 Am. Dec. 478; *Hughes v. Hannibal, etc., R. Co.*, 66 Mo. 326; *Illinois Cent. R. Co. v. Carraher*, 47 Ill. 333; *Morrison v. Cornelius*, 63 N. Car. 346; *Headen v. Rust*, 39 Ill.

186; *Turner v. Thomas*, 71 Mo. 596. But see *Vicksburg, etc., R. Co. v. Patton*, 31 Miss. 156, 66 Am. Dec. 552; *Jones v. Nichols*, 46 Ark. 207, 55 Am. Rep. 575.

Falling Tree. — The owner of land is not liable for the value of a horse killed by the falling of a tree that had been previously cut and around which a fire had been built so that it might fall at any time. *Durham v. Musselman*, 2 Blackf. (Ind.) 96, 18 Am. Dec. 133.

Injuries from Things Eaten by trespassing cattle have been held to create no liability in the owner of the property. *Bush v. Brainard*, 1 Cow. (N. Y.) 78, 13 Am. Dec. 513; *Morrison v. Cornelius*, 63 N. Car. 346. See also *Williams v. Michigan Cent. R. Co.*, 2 Mich. 260, 55 Am. Dec. 59.

See further the title INJURIES TO ANIMALS.

3. Partition Fences Generally — Common Law. — When the obligation to build and maintain a fence between adjoining lands exists at common law it is by force of an agreement or covenant, or by prescription. And the party injured by the failure to fence has no remedy but by an action on the agreement. *Nowell v. Smith*, Cro. Eliz. 709; *Star v. Rookesby*, 1 Salk. 335; *Boyle v. Tamlyn*, 6 B. & C. 329, 13 E. C. L. 191; *Lawrence v. Jenkins*, L. R. 8 Q. B. 275; *Little v. Lathrop*, 5 Me. 360; *Rust v. Low*, 6 Mass. 90; *Minor v. Deland*, 18 Pick. (Mass.) 267; *Lawrence v. Combs*, 37 N. H. 335, 72 Am. Dec. 332; *Glidden v. Towle*, 31 N. H. 164; *Holladay v. Marsh*, 3 Wend. (N. Y.) 142, 20 Am. Dec. 678.

4. Partition Fence by Agreement, Statute Existing — Illinois. — *D'Arcy v. Miller*, 86 Ill. 102, 29 Am. Rep. 11.

Indiana. — *Hinshaw v. Gilpin*, 64 Ind. 116; *Lowe v. Guard*, 11 Ind. App. 472; *Bruner v. Palmer*, 108 Ind. 397.

Iowa. — *Panther v. Trauman*, 89 Iowa 101.

Kansas. — *Robertson v. Bell*, 36 Kan. 748.

Kentucky. — *Grief v. Kahn*, 87 Ky. 17.

Massachusetts. — *Lawton v. Fitchburg R. Co.*, 8 Cush. (Mass.) 230, 54 Am. Dec. 753.

Missouri. — *O'Riley v. Diss*, 41 Mo. App. 184.

Nebraska. — *Burr v. Hamer*, 12 Neb. 483.

New Jersey. — *Ivins v. Ackerson*, 38 N. J. L. 220; *Coxe v. Robbins*, 9 N. J. L. 384; *Castner v. Riegel*, 54 N. J. L. 498.

for the purpose has reference only to cases where the parties cannot or do not agree upon a division of the fence.¹ A division of the fence by agreement is of the same force and effect as a division by the fence viewers.²

bb. AS TO EVIDENCE OF THE AGREEMENT. — Whether there is anything in the nature of an agreement to build and maintain a partition fence that requires it to be in writing under the statute of frauds seems to be unsettled.³ The statutes regulating partition fences have in some instances, however, been construed to require, either expressly or by implication, a written agreement.⁴

cc. AS TO MANNER OF BUILDING — Statute May Be Varied by Agreement. — Though a statute prescribes the manner in which partition fences shall be built, yet the provisions of the statute may be varied by agreement.⁵

New York. — *Bush v. Brainard*, 1 Cow. (N. Y.) 78, 13 Am. Dec. 513.

Wisconsin. — *Farr v. Spain*, 67 Wis. 631; *Voelz v. Breitenfeld*, 68 Wis. 491.

1. Application of the Statute — Connecticut. — *Guyer v. Stratton*, 29 Conn. 421.

Kansas. — *Robertson v. Bell*, 36 Kan. 748.

Massachusetts. — *Thayer v. Arnold*, 4 Met. (Mass.) 590; *Sears v. Charlemont*, 6 Allen (Mass.) 437.

Nebraska. — *Burr v. Hamer*, 12 Neb. 483.

New Hampshire. — *York v. Davis*, 11 N. H. 241; *Glidden v. Towle*, 31 N. H. 163.

New Jersey. — *Miller v. Barnett*, 5 N. J. L. 629; *Coxe v. Robbins*, 9 N. J. L. 384; *Castner v. Riegel*, 54 N. J. L. 498.

New York. — *Bush v. Brainard*, 1 Cow. (N. Y.) 78, 13 Am. Dec. 513; *Adams v. Van Alstyne*, 25 N. Y. 232.

Tennessee. — *Stallcup v. Brady*, 3 Coldw. (Tenn.) 406.

Wisconsin. — *Farr v. Spain*, 67 Wis. 631; *Voelz v. Breitenfeld*, 68 Wis. 491.

Fence viewers have no authority to divide a partition fence where a division already exists by agreement. So where such an agreement has been made, and upon application of one of the parties fence viewers make another division, placing upon the other party the burden of maintaining more of the fence than he is bound by the agreement to maintain, such action by the fence viewers is beyond their authority, and in the absence of any remedy being provided in the statute the injured party may have the division set aside in an action in the nature of a suit in equity. *Robertson v. Bell*, 36 Kan. 748.

2. Force of Division by Agreement. — *Robertson v. Bell*, 36 Kan. 748; *Thayer v. Arnold*, 4 Met. (Mass.) 590; *Adams v. Van Alstyne*, 25 N. Y. 232; *Bush v. Brainard*, 1 Cow. (N. Y.) 78, 13 Am. Dec. 513.

3. Whether Agreement as to Partition Fence Is Within the Statute of Frauds. — In *Osborne v. Kimball*, 41 Kan. 187, an agreement between adjoining landowners to build and maintain a division fence was held to be within the provision of the statute of frauds that requires a contract not to be performed within a year to be in writing.

But in *Talmadge v. Rensselaer, etc.*, R. Co., 13 Barb. (N. Y.) 493, it was held that a parol agreement between the owners of adjoining lands that one of them will, for adequate consideration, erect and keep up the division fence between them is not within the provision of the statute of frauds which renders void a

parol agreement not to be performed within a year.

And in *Ivins v. Ackerson*, 38 N. J. L. 222, it was held that an agreement respecting the building and maintaining of a partition fence is not such a contract touching lands as is contemplated in the statute of frauds, and that such an agreement may be by parol. See also *Castner v. Riegel*, 54 N. J. L. 498; *Brooks v. Allen*, 1 Wis. 127.

4. Writing Required by Statute. — In the following cases the statute regulating partition fences has been held to contemplate a written agreement: *Guyer v. Stratton*, 29 Conn. 421; *Sturtevant v. Merrill*, 33 Me. 62; *Knox v. Tucker*, 48 Me. 373, 77 Am. Dec. 233; *Rust v. Low*, 6 Mass. 90; *Thayer v. Arnold*, 4 Met. (Mass.) 590; *York v. Davis*, 11 N. H. 241; *Glidden v. Towle*, 31 N. H. 163.

Executed Parol Agreement. — A mere parol agreement, however, while it will not deprive either party of the right to have a division by fence viewers, yet when executed remains obligatory upon the parties until overruled by such division, and it cannot be revoked by mere notice to the adjoining owner. *York v. Davis*, 11 N. H. 241. See *Glidden v. Towle*, 31 N. H. 163; *Guyer v. Stratton*, 29 Conn. 421.

Not Binding on Grantees or Lessees. — A mere parol division will not, however, bind third persons who may become owners or lessees of the premises and who have in no way recognized or acted upon the division. *Pitzner v. Shinnick*, 41 Wis. 676.

5. Agreements Varying the Statute — Location. — A partition fence by agreement may be elsewhere than on the line between the adjoining owners. *Grief v. Kahn*, 87 Ky. 17; *Kennedy v. Owen*, 131 Mass. 431; *Oxborough v. Boesser*, 30 Minn. 1; *Robb v. Brachmann*, 24 Ohio St. 3.

It may be wholly upon the land of one of the parties. *Maudlin v. Hanscombe*, 12 Colo. 204; *Byers v. Davis*, 3 Ind. App. 387; *Grief v. Kahn*, 87 Ky. 17; *Moore v. White*, 45 Mo. 206; *Jeffries v. Burgin*, 57 Mo. 327; *Stallcup v. Brady*, 3 Coldw. (Tenn.) 406.

Contribution. — The entire fence may be required to be built and maintained by one of the parties if they so agree. *Tower v. Providence, etc.*, R. Co., 2 R. I. 404; *Talmadge v. Rensselaer, etc.*, R. Co., 13 Barb. (N. Y.) 493; *Newell v. Hill*, 2 Met. (Mass.) 180.

Sufficiency of Fence. — Though the statute prescribes a particular kind of fence as to its height, etc., a partition fence by agreement may be of a different height, and the agree-

Construction of Agreement Incomplete in Particulars. — But where the agreement is silent in any particular it will be deemed to have been made with reference to the statute, and as to such particular the statute must be followed.¹

(b) **By Covenant in a Deed** — *aa. EFFECT OF COVENANT — Runs with Land.* — A covenant in a deed of land to build and maintain a fence between the land granted and the adjoining land of the grantor runs with the land.²

Creates an Incumbrance. — And such a covenant creates an incumbrance upon the land of the covenantor within the meaning of the covenant of title against incumbrances in a subsequent conveyance of it.³

bb. STIPULATION IN A DEED POLL. — A stipulation in a deed poll that the grantee shall build and maintain a fence along the line of the grantor's land binds the grantee to the performance of the stipulation by his acceptance of the deed, though the deed is not signed by him.⁴

(3) **By Prescription** — (a) **Generally.** — The obligation to maintain the whole or a distinct portion of a partition fence may exist by prescription.⁵

ment will govern as to its sufficiency. *Albright v. Bruner*, 14 Ill. App. 319. See *Panther v. Trauman*, 89 Iowa 101.

1. Construction of Agreement Incomplete in Particulars. — Where the agreement does not settle the location of the fence that must be determined by the statute. *Newell v. Hill*, 2 Met. (Mass.) 180. The same rule is applied where an agreement is without provision as to the height or sufficiency of the fence. *Albright v. Bruner*, 14 Ill. App. 319; *Panther v. Trauman*, 89 Iowa 101.

2. Covenant to Fence Runs with Land. — *Duffy v. New York*, etc., R. Co., 2 Hilt. (N. Y.) 496; *Beach v. Crain*, 2 N. Y. 86, 49 Am. Dec. 369; *Thayer v. Smith*, 7 R. I. 164. See also *Burbank v. Pillsbury*, 48 N. H. 475, 97 Am. Dec. 633.

For a full collection of authorities on this point see the title COVENANTS, vol. 8, p. 138. See also, as to the enforcement in equity of positive agreements calling for the expenditure of money, the title BUILDING RESTRICTIONS AND RESTRICTIVE AGREEMENTS, vol. 5, p. 15.

Obligation Not Impaired by Omission. — Where property was conveyed by deed containing a covenant binding the grantor, his heirs and assigns, to make and maintain a fence, and the performance of the obligation was omitted for more than twenty years, it was held that the grantee acquired an interest in the nature of an easement in the adjoining land of the grantor, and the obligation to maintain the fence, being a continuing charge upon the land, was not impaired by the omission without any evidence of the charge having been released or extinguished. *Bronson v. Coffin*, 108 Mass. 175, 11 Am. Rep. 335. For the general principle as to covenants operating as grants of easements see the title EASEMENTS, vol. 10, p. 413.

3. Covenant to Fence Incumbrance on Land. — *Bronson v. Coffin*, 108 Mass. 175, 11 Am. Rep. 335; *Burbank v. Pillsbury*, 48 N. H. 475, 97 Am. Dec. 633; *Blain v. Taylor*, 19 Abb. Pr. (N. Y. Supreme Ct.) 228; *Kellogg v. Robinson*, 6 Vt. 276, 27 Am. Dec. 550. See also the title COVENANTS, vol. 8, p. 130.

4. Grantee in Deed Poll Bound by Stipulation to Fence. — *Midland R. Co. v. Fisher*, 125 Ind. 19, 21 Am. St. Rep. 189; *Toledo*, etc., R. Co. v. *Cosand*, 6 Ind. App. 222; *Toledo*, etc.,

R. Co. v. Burgan, 9 Ind. App. 604; *Lake Erie*, etc., R. Co. v. *Power*, 15 Ind. App. 179; *Minor v. Deland*, 18 Pick. (Mass.) 266; *Newell v. Hill*, 2 Met. (Mass.) 180; *Maine v. Cumiston*, 98 Mass. 317; *Moxley v. New Jersey*, etc., R. Co., 66 Hun (N. Y.) 632, 21 N. Y. Supp. 347; *Dey v. Prentice*, 90 Hun (N. Y.) 27; *Countryman v. Deck*, 13 Abb. N. Cas. (N. Y. Supreme Ct.) 110. See also the titles EASEMENTS, vol. 10, p. 415; ESTOPPEL, vol. 11, pp. 399, 442.

Whether a Stipulation in a Deed Poll Creates a Covenant is a matter of dispute. Some authorities hold that there can be no covenant, since the grantee seals nothing. *Kennedy v. Owen*, 136 Mass. 199. Other authorities hold the grantee estopped to deny that the seal attached is his as well as the grantor's. See *Midland R. Co. v. Fisher*, 125 Ind. 19, 21 Am. St. Rep. 189; *Lake Erie*, etc., R. Co. v. *Power*, 15 Ind. App. 179. See also *Kellogg v. Robinson*, 6 Vt. 276, 27 Am. Dec. 550. Further authorities and a comprehensive discussion of this question are given under the titles referred to in the last paragraph of this note.

5. Prescription Giving Rise to Obligation to Fence — *England*. — *Nowel v. Smith*, Cro. Eliz. 709; *Star v. Rookesby*, 1 Salk. 335; *Boyle v. Tamlyn*, 6 B. & C. 329, 13 E. C. L. 191; *Lawrence v. Jenkins*, L. R. 8 Q. B. 274.

Kentucky. — *Grief v. Kahn*, 87 Ky. 17.

Maine. — *Heath v. Ricker*, 2 Me. 72; *Little v. Lathrop*, 5 Me. 360; *Knox v. Tucker*, 48 Me. 373, 77 Am. Dec. 233; *Harlow v. Stinson*, 60 Me. 347.

Massachusetts. — *Binney v. Lands in Hull*, 5 Pick. (Mass.) 503; *Rust v. Low*, 6 Mass. 90; *Bronson v. Coffin*, 108 Mass. 185, 11 Am. Rep. 335; *Kennedy v. Owen*, 136 Mass. 199.

Missouri. — *Canefox v. Crenshaw*, 24 Mo. 199, 69 Am. Dec. 427.

New Hampshire. — *Gibson v. Heyward*, (N. H. 1893) 30 Atl. Rep. 407.

New Jersey. — *Castner v. Riegel*, 54 N. J. L. 498.

New York. — *Adams v. Van Alstyne*, 25 N. Y. 232.

See also the title PRESCRIPTION.

The obligation to fence is in the nature of an easement, and it comes within the general rule allowing the creation of easements by prescription. See the title EASEMENTS, vol. 10, p. 426.

(b) *Effect of Statute.* — And such prescriptive obligation is not impaired by the existence of a statute regulating partition fences.¹

(4) *By Statute* — (a) *Generally.* — The subject of partition or division fences is very generally controlled in the *United States* by statutes, reference to which must be had in particular cases. There are certain general principles, however, common to all statutes, and these will be set forth.

(b) *Between What Lands Required* — *aa. GENERALLY.* — The statutes require partition fences between such lands only as are inclosed, occupied, or improved,²

Person Bound to Maintain Fence Becoming Tenant in Common of Adjoining Land. — The obligation of an owner of land to maintain a division fence is not destroyed by the owner becoming tenant in common of the adjoining land. *Binney v. Lands in Hull*, 5 Pick. (Mass.) 503. See also *Gibson v. Heyward*, (N. H. 1893) 30 Atl. Rep. 407.

Unity of possession merely will not destroy the obligation to fence, but at most will only suspend it. Unity of ownership is necessary and equal estates in each of the tenants. *Hunt on Boundaries*, (3d ed.) 79; *Co. Litt.* 114*b*; *Canham v. Fisk*, 2 Crompt. & J. 126; *Thomas v. Thomas*, 2 C. M. & R. 41.

Where the duty to fence becomes extinguished by unity of ownership, and afterwards the adjoining closes come to different hands, the duty to fences does not revive. *Polus v. Henstock*, 1 Vent. 97.

Prescription to Maintain a Distinct Portion. — *Knox v. Tucker*, 48 Me. 373, 77 Am. Dec. 233; *Heath v. Ricker*, 2 Me. 72; *Harlow v. Stinson*, 60 Me. 347; *Sturtevant v. Merrill*, 33 Me. 62; *Gibson v. Heyward* (N. H. 1893) 30 Atl. Rep. 407.

Must Extend to Entire Fence. — But in *Castner v. Riegel*, 54 N. J. L. 498, it was held that the right by prescription to have a division fence maintained applies only where the party to be charged with the duty has been accustomed to maintain the entire fence for the prescriptive period, and not where he has maintained only a portion. An obligation to maintain perpetually a certain portion of the fence may be imposed by grant or agreement, but in the absence of proof of one of these the continued maintenance of the portion for any length of time must be deemed to be referable to an agreement or assignment made under the statute. See also *Adams v. Van Alstyne*, 25 N. Y. 232.

Custom to Maintain. — In *Walker v. Chester*, 2 Brev. (S. Car.) 69, it was held that the common-law rule may be abrogated by custom, and the plaintiff, having built a partition fence and brought his action to enforce contribution, alleging a custom of the city of Charleston to maintain partition fences between adjoining lands, a majority of the court held the custom good and sufficient to sustain the action. See also *Knox v. Artman*, 3 Rich. L. (S. Car.) 283.

1. Effect of Statute. — *Castner v. Riegel*, 54 N. J. L. 498; *Binney v. Lands in Hull*, 5 Pick. (Mass.) 503; *Grief v. Kahn*, 87 Ky. 17.

And so, where a prescriptive liability to repair a fence between an ancient inclosure and the waste lands of a manor existed, it was held that the prescriptive obligation was not taken away by the inclosure of the waste lands

under the Inclosure Act. *Barber v. Whiteley*, 34 L. J. Q. B. 212.

In *Glidden v. Towle*, 31 N. H. 160, it was held that the prescriptions to build fences in *New Hampshire* which the courts would recognize must have had their origin prior to the enactment of the General Statutes of that state upon the subject of division fences, in order to preclude the jurisdiction of fence viewers. See also *Chase v. Jefts*, 58 N. H. 43. This decision, however, led to the change of the act therein construed, by the Act of 1862, so that such obligation may exist by prescription, unimpaired by statute. *Gibson v. Heyward*, (N. H. 1893) 30 Atl. Rep. 407.

2. Partition Fence Required Between Inclosed Improved Lands — *Colorado.* — *Maudlin v. Hanscombe*, 12 Colo. 204.

Massachusetts. — *Rust v. Low*, 6 Mass. 90; *Eames v. Salem, etc., R. Co.*, 98 Mass. 565, 96 Am. Dec. 676.

Michigan. — *Johnson v. Wing*, 3 Mich. 163; *Curtis v. Leasia*, 78 Mich. 480.

Minnesota. — *Boenig v. Hornberg*, 24 Minn. 307; *Oxborough v. Boesser*, 30 Minn. 1.

New Hampshire. — *Lawrence v. Combs*, 37 N. H. 335, 72 Am. Dec. 332; *Wiggin v. Baptist Soc.*, 43 N. H. 260; *Chase v. Jefts*, 58 N. H. 280.

Pennsylvania. — *Stoner v. Hunsicker*, 47 Pa. St. 514; *Rangler v. McCreight*, 27 Pa. St. 95; *Painter v. Reece*, 2 Pa. St. 126; *Rohrer v. Rohrer*, 18 Pa. St. 367; *Palmer v. Silverthorn*, 32 Pa. St. 68.

"Improved" Defined. — In *Chase v. Jefts*, 58 N. H. 280, it was held that the question whether lands are "under improvement" is one of mixed law and fact, and is properly left to the jury with proper instructions. The court said: "The term 'under improvement,' as used in the statute, means used, occupied, employed, turned to profitable account."

To "improve" land is to put it to any private and useful purpose in such manner that the owner will derive from a division fence a like benefit and advantage as his adjoining owner. The term is not confined to cultivation. *Boenig v. Hornberg*, 24 Minn. 307.

Land Used for Pasturage is "improved." *Boenig v. Hornberg*, 24 Minn. 307.

Land for Public Buildings. — In *Wiggin v. Baptist Soc.*, 43 N. H. 260, the court said: "There are many cases where a man may continue to improve—that is, to use, occupy, turn to profitable account—his land where he can derive no advantage from a fence. Such are the cases of wharves, shipyards, millyards, and the like, commons, and common fields, where, though the owner should be compelled to contribute to the common fence, he can derive no benefit

and only where such occupation or improvement extends up to the line between the adjacent lands.¹

bb. LANDS LAID IN COMMON — (aa) Generally. — Where one of the adjoining owners chooses to let his land, or a part of it, lie in common, he may do so, and be relieved of the obligation to contribute to a partition fence except as to so much of it, if any, as he has occasion for.²

(bb) After Having Been Inclosed. — Though the land has been inclosed and improved and assignment has been made of portions of a partition fence, the owner may yet elect to lay his land, or a part of it, in common.³ But in the latter case the adjoining owner may have a new division of the fence along

from a partition fence against his neighbor; to which may be added the not uncommon case, in many parts of the country, where lands are, by common consent, cultivated without fences, either common or partition. The case of public buildings seems to us to fall within this class. Meeting houses, schoolhouses, town houses, courthouses, were heretofore often placed on open commons, beside the highways. * * * It would not be reasonable to burden the owners of such property with the expense of maintaining fences exclusively for the benefit of others."

"Occupancy" Defined. — The word "occupy" as used in the statute is held to mean "such occupation only as will make it necessary or advantageous for the purpose thereof, to fence the land" and is not limited to actual residence. *Maudlin v. Hanscombe*, 12 Colo. 204.

1. Lands Must Be Occupied or Improved up to the Line. — *Smith v. Johnson*, 76 Pa. St. 191; *Painter v. Reece*, 2 Pa. St. 126; *Dysart v. Leeds*, 2 Pa. St. 488; *Potts v. Everhart*, 26 Pa. St. 493; *Rohrer v. Rohrer*, 18 Pa. St. 367; *Palmer v. Silverthorn*, 32 Pa. St. 68.

Under the *Pennsylvania* act of 1700 an occupant was not bound to join in a division fence. He may have set his fence not on the line, but within it, and if his neighbor extended his fence across the line to join it, the act would have been a trespass. But when one party set his fence directly on the line the other could not only join a panel of his fence to it, but could insert rails into it so as to extend a few inches beyond it without incurring liability for a trespass. *Dysart v. Leeds*, 2 Pa. St. 488; *Smith v. Johnson*, 76 Pa. St. 191.

Interjection of Unimproved Strip — Public Lane. — Where one of two adjoining owners abandons the division line, and builds a fence on his own land in order to make a lane dedicated to the public, the two parties no longer "improve adjacent lands," as contemplated in the statute (Pa. Act, March 11, 1842), and the party so building cannot oblige the other to bear half the expense of such fence. *Rohrer v. Rohrer*, 18 Pa. St. 367. And see *Palmer v. Silverthorn*, 32 Pa. St. 68.

Lane Ingress and Egress. — So where the object is to open a lane or way of ingress and egress necessary to the landowner and himself in the enjoyment of his land. *Bills v. Belknap*, 38 Iowa 225; *Bland v. Hixenbaugh*, 39 Iowa 532.

Pent Road. — But in *Carpenter v. Cook*, 67 Vt. 102, (Vt. 1898) 41 Atl. Rep. 1038, it was held that the duty imposed upon adjoining land-owners to fence is not altered by the fact that there is a "pent road" wholly upon the land

of one and contiguous to the land of the other, though no fence is required along a highway. But where the pent road is upon the land of both, partly on one's and partly on the other's, neither is required to fence, under the statute regulating division fences, and they are left to their common-law rights and remedies.

2. Letting Lands Lie in Common — In Whole. — If the owner of land permits it to lie in common, he is under no obligation to contribute to a partition fence between it and adjoining lands. *Hale v. Andrews*, 75 Ill. 252; *Selover v. Osgood*, 52 Ill. App. 260; *Farmer v. Young*, 86 Iowa 382; *Bills v. Belknap*, 38 Iowa 225; *Baker v. Robbins*, 9 Kan. 303; *Rust v. Low*, 6 Mass. 90; *Johnson v. Wing*, 3 Mich. 163; *Lantis v. Reithmiller*, 95 Mich. 45; *Boenig v. Hornberg*, 24 Minn. 307; *Jones v. Perry*, 50 N. H. 134; *Perkins v. Boody*, 62 N. H. 452; *Coxe v. Robbins*, 9 N. J. L. 384; *Castner v. Riegel*, 54 N. J. L. 498; *Holladay v. Marsh*, 3 Wend. (N. Y.) 142, 20 Am. Dec. 678; *Perkins v. Perkins*, 44 Barb. (N. Y.) 134; *Smith v. Johnson*, 76 Pa. St. 191.

In Part. — If an adjoining owner has occasion for a fence to protect a portion of his land under improvement, he may be compelled to contribute to maintain the fence so far as he has occasion for it, but if he chooses to let a part of his land lie in common he may not be compelled to contribute to the fence on that part. *Jones v. Perry*, 50 N. H. 134; *Perkins v. Boody*, 62 N. H. 452; *Smith v. Johnson*, 76 Pa. St. 191.

3. Improved Land Afterwards Laid in Common. — The fact that land has once been under improvement and a partition fence divided throughout its entire length does not prevent the exercise of the right to lay the whole or a part of it in common and be relieved wholly or in part of the duty of contributing to the maintenance of the partition fence. *Bills v. Belknap*, 38 Iowa 225; *Boenig v. Hornberg*, 24 Minn. 307; *Jones v. Perry*, 50 N. H. 134; *Perkins v. Boody*, 62 N. H. 452; *Smith v. Johnson*, 76 Pa. St. 191.

Notice to Adjoining Owner. — But a mere abandonment of improving, without notice to the adjoining owner of an intention to lay the land in common, is not sufficient. *Boenig v. Hornberg*, 24 Minn. 307.

Removal of Fence Standing. — The owner of inclosed land which he lays in common has no right to remove any portion of the partition fence standing. He is relieved only from further duty of contributing to maintaining it. *Jones v. Perry*, 50 N. H. 134; *Perkins v. Boody*, 62 N. H. 452; *Smith v. Johnson*, 76 Pa. St. 191.

the land not laid in common.¹

(c) **Location** — *aa. GENERALLY.* — A partition fence as contemplated in the statutes must be built upon the line between the adjoining owners, and not wholly upon the land of one and parallel with the dividing line.²

bb. ON WHAT LAND. — It should be built equally on the lands of both of the parties, and for this purpose the land of each may be taken in such quantity as under the circumstances is reasonable.³ And where more than half is built upon the land of one without his consent he may remove the excess, though doing so necessitates the removal of the entire fence.⁴

cc. WORM FENCES. — Crooked, Virginia, or worm fences have been held to be within these requirements, the centre of the line of rails being considered the line of the fence and the dividing line between the adjoining lands.⁵

1. *Jones v. Perry*, 50 N. H. 134; *Perkins v. Boody*, 62 N. H. 452.

2. **Line of Partition Fence.** — A division fence, when properly built, is, in contemplation of the statutes, upon the line between the adjoining lands. *Maudlin v. Hanscombe*, 12 Colo. 204; *Byers v. Davis*, 3 Ind. App. 387; *Newell v. Hill*, 2 Met. (Mass.) 180; *Pettigrew v. Lancy*, 48 Mo. 380; *Jeffries v. Burgin*, 57 Mo. 327; *Sims v. Field*, 74 Mo. 139; *Ferris v. Van Buskirk*, 18 Barb. (N. Y.) 397; *Higgins v. Kingsley*, 82 Hun (N. Y.) 150; *Dysart v. Leeds*, 2 Pa. St. 488; *Odenwelder v. Frankenfield*, 153 Pa. St. 526; *Stallcup v. Bradley*, 3 Coldw. (Tenn.) 406.

It cannot lawfully be built upon any other line except by agreement. *Kennedy v. Owen*, 131 Mass. 431.

Owner Bound to Contribute to a Fence on the Line. — Where one of two adjoining owners has erected, when the two properties were both his, a fence which was not on the division line between the two lots, he may be made to contribute toward building a fence on the division line, it not appearing that the existing fence had been maintained as a substitute for a division fence or to avoid contribution thereto. *Odenwelder v. Frankenfield*, 153 Pa. St. 526.

Division Line in Litigation. — In *Stephens v. Shriver*, 25 Pa. St. 78, it was held that it is no excuse for letting a partition fence go to ruin that the line between the adjoining owners is in litigation. If there is in fact a division fence the parties are bound to contribute to its maintenance, and when the litigation is ended the fence, if not on the line, may be set right. And see *Trego v. Pierce*, 119 Pa. St. 139. See also *Kennedy v. Owen*, 131 Mass. 431, construing the *Massachusetts* statute.

Statute in Missouri. — A fence built wholly upon the land of one of two adjoining owners and treated as a partition fence is a partition fence within the meaning of the statute (Gen. Stat. Mo., 1865, §§ 1, 2) requiring that "all fields and inclosures shall be inclosed" by a fence of given description. The statute says nothing about who shall erect, preserve, or own it. Therefore if the fence is of the required character the owner thereof may recover for injury done to his crop by his neighbor's cattle entering through such fence. *Moore v. White*, 45 Mo. 206.

Where Impossible to Build on Division Line. — And where there is a river, brook, pond, or creek, not in itself a sufficient fence, and no

fence can be built upon the true line without unreasonable expense, the fence viewers may designate a line different from the true one on which the fence is to be built. *Lamb v. Hicks*, 11 Met. (Mass.) 502.

But in *Bissel v. Southworth*, 1 Root (Conn.) 269, similar circumstances were held to constitute a case not provided for in the statute, and it was held that the adjoining owners need not fence, but each must restrain his cattle and prevent their going on the land of the other.

3. **Should Be Equally on the Land of Parties.** — *Higgins v. Kingsley*, 82 Hun (N. Y.) 150; *Ferris v. Van Buskirk*, 18 Barb. (N. Y.) 397; *Warren v. Sabin*, 1 Lans. (N. Y.) 79; *Pettigrew v. Lancy*, 48 Mo. 380; *Byers v. Davis*, 3 Ind. App. 387.

Reasonable Amount of Land to Be Taken. — In building a division fence one adjoining occupant may take the land of the other equally with his own, to build upon, but the amount taken must be reasonable, taking into consideration the usage and practice of men of ordinary skill and judgment in building fences on their own lands, on similar kinds of soil, and for like purposes. *Newell v. Hill*, 2 Met. (Mass.) 183; *Holbrook v. McBride*, 4 Gray (Mass.) 220.

And so in case of a ditch between adjoining lands when a ditch is proper. *Newell v. Hill*, 2 Met. (Mass.) 183; *Warner v. Southworth*, 6 Conn. 471.

4. **Right to Remove Excess.** — *Sparhawk v. Twichell*, 1 Allen (Mass.) 450; *Kennedy v. Owen*, 131 Mass. 431; *Thayer v. Wright*, 4 Den. (N. Y.) 180; *Higgins v. Kingsley*, 82 Hun (N. Y.) 150; *Ferris v. Van Buskirk*, 18 Barb. (N. Y.) 397.

As to Removal of Entire Fence see *Sparhawk v. Twichell*, 1 Allen (Mass.) 450; *Kennedy v. Owen*, 131 Mass. 431.

5. **Worm Fences.** — Crooked or Virginia fences have been built and used as division fences time out of mind, and are by the common law, therefore, fences in contemplation of law, upon the line between the adjoining lands. *Ferris v. Van Buskirk*, 18 Barb. (N. Y.) 397; *Pettigrew v. Lancy*, 48 Mo. 380; *Carpenter v. Halsey*, 60 Barb. (N. Y.) 45.

And no trespass is committed upon the land of either party by building such a fence. *Ferris v. Van Buskirk*, 18 Barb. (N. Y.) 397; *Pettigrew v. Lancy*, 48 Mo. 380.

License to Build Division Fence Does Not Authorize Worm Fence. — But in *Morton v. Rey-*

(a) **Who Must Build and Maintain**—*aa. GENERALLY.*—The statutes contemplate the building and maintaining of partition fences by both parties in just proportion.¹

bb. BEFORE DIVISION.—Before a division of the fence and assignment of a distinct portion to each party to build and maintain, either by fence viewers or otherwise, the duty of maintaining every portion of the fence rests equally on both of the parties, and neither can allege neglect on the part of the other.²

cc. AFTER DIVISION—(*aa*) *Assignment by Fence Viewers.*—Where the adjoining owners cannot agree upon a division of the partition fence between them, the statutes provide for a division and assignment of portions by fence viewers, to be made upon application to them by either of the parties.³

nolds, 45 N. J. L. 326, 46 Am. Rep. 776, it was held that a license to build a fence upon a division line confers the privilege to place a fence so as to occupy an equal space on each side of the actual mathematical line of division. For this purpose a reasonable amount of space of the licensor's line may be used, and what is a reasonable amount of space for that purpose is to be determined by the situation of the land, the use to which it is devoted, and by the usage and custom of the locality, but such usage and custom cannot control the requirements of the license, and unless expressly authorized, such license does not authorize the building of a worm or zigzag fence. See also *Herrick v. Stover*, 5 Wend. (N. Y.) 580.

1. Duty to Make and Maintain in Just Proportion is the language of some of the statutes. *Maudlin v. Hanscombe*, 12 Colo. 204; *Studwell v. Rich*, 14 Conn. 292; *Sharp v. Curtiss*, 15 Conn. 526; *Selover v. Osgood*, 52 Ill. App. 260; *Hale v. Andrews*, 75 Ill. 252; *Johnson v. Wing*, 3 Mich. 163; *Curtis v. Leasia*, 78 Mich. 480; *Burr v. Hamer*, 12 Neb. 483; *Coxe v. Robbins*, 9 N. J. L. 384; *Castner v. Riegel*, 54 N. J. L. 498; *Tower v. Providence*, etc., R. Co., 2 R. I. 404.

Expense of Fence to Be Borne Equally.—Such expression is probably no different in meaning from the language of the cases immediately preceding. *McCormick v. Tate*, 20 Ill. 335; *Hinshaw v. Gilpin*, 64 Ind. 116; *Bruner v. Palmer*, 108 Ind. 397; *Rust v. Low*, 6 Mass. 90; *Newell v. Hill*, 2 Met. (Mass.) 183; *Holbrook v. McBride*, 4 Gray (Mass.) 220; *Boenig v. Hornberg*, 24 Minn. 307; *Oxborough v. Boesser*, 30 Minn. 1; *Rohrer v. Rohrer*, 18 Pa. St. 367; *Painter v. Reece*, 2 Pa. St. 126; *Milligan v. Wehinger*, 68 Pa. St. 235; *Stephens v. Shriver*, 25 Pa. St. 78; *Trego v. Pierce*, 119 Pa. St. 139.

"Joint Expense."—The statutes of some of the states make no provision for a division of the fence, and under these the adjoining owners are required to maintain the fence at their joint expense. *Walker v. Watrous*, 8 Ala. 493, 42 Am. Dec. 646; *Stallcup v. Brady*, 3 Coldw. (Tenn.) 406; *Saxton v. Bacon*, 31 Vt. 540; *Carpenter v. Cook*, 67 Vt. 102.

Under Rev. Stat. *Indiana*, 1894, § 6564 *et seq.*, the duty of maintaining a partition fence is imposed upon the parties jointly with the right to set off portions by special agreement. *Lowe v. Guard*, 11 Ind. App. 472.

Contribution to Fence Standing.—Where the owner of uninclosed land incloses it he is required to pay a half, or a just proportion, of

the value of a partition fence standing, to the adjoining owner who built it. *Bliss v. Sneath*, 103 Cal. 43; *Maudlin v. Hanscombe*, 12 Colo. 204; *Hale v. Andrews*, 75 Ill. 252; *Bodell v. Nehls*, 85 Iowa 164; *Farmer v. Young*, 86 Iowa 382; *Boenig v. Hornberg*, 24 Minn. 307; *Stallcup v. Brady*, 3 Coldw. (Tenn.) 406.

But in *Nolan v. Mendere*, 77 Tex. 565, it was held that if one proprietor incloses his land, putting his fence upon the line, the owner of adjacent land may avail himself of the advantage of inclosing without incurring liability to account for the use of his neighbor's fence.

Redivision for Apportionment Rendered Unjust.—Where a division of a partition fence has been made, either by agreement or by assignment under the statute, the obligation upon each party to maintain the portion of the fence assigned him is binding only so long as the lands continue to be coterminous and there is no other change of circumstances to make the division unequal or unjust. And where such division is rendered unequal or unjust by a change of ownership of a portion of the land, or by laying it in common or otherwise, a new division may be had. *Adams v. Van Alstyne*, 25 N. Y. 232; *Wright v. Wright*, 21 Conn. 329; *Walker v. Wetherbee*, 65 N. H. 656; *Jones v. Perry*, 50 N. H. 134; *Perkins v. Boody*, 62 N. H. 452.

2. Before Division Parties Jointly Bound.—In *Thayer v. Arnold*, 4 Met. (Mass.) 589, the court said: "We take the rule, therefore, to be that the obligation to make and maintain a partition fence is equally operative upon both adjacent owners; each party is equally bound to move in the matter; and until such division, there can be no deficiency or neglect alleged as to the fence of either party, separately and individually. If either, therefore, puts cattle on his own land and they enter upon the land of the adjacent proprietor, there being no partition of the fence separating the lots, he will be liable to an action of trespass therefor." See also *Walker v. Watrous*, 8 Ala. 493, 42 Am. Dec. 646; *Thompson v. State*, 67 Ala. 106, 42 Am. Rep. 101; *Selover v. Osgood*, 52 Ill. App. 260; *Lowe v. Guard*, 11 Ind. App. 472; *Tewksbury v. Bucklin*, 7 N. H. 518; *Lawrence v. Combs*, 37 N. H. 335; 72 Am. Dec. 332; *Bush v. Brainard*, 1 Cow. (N. Y.) 78, 13 Am. Dec. 513; *Angell v. Hill*, (Supreme Ct.) 45 N. Y. St. Rep. 83. And see *infra*, this section, *Failure to Maintain—Liability for Trespass by Cattle*.

3. Division by Fence Viewers.—See *infra*, this section, *Fence Viewers*.

(bb) *Enforced Contribution — Against Unwilling Neighbor.* — The division of the duty of building and maintaining a partition fence between adjacent improved lands may be insisted upon under the statutes, even against an unwilling neighbor.¹

Manner of Enforcing — By Building Entire Fence and Recovering. — On default of one adjoining owner to build and maintain the portion of the fence assigned to him by the fence viewers, the other may build the entire fence and recover the value of the portion of the party in default, such value to be determined by the fence viewers.²

Double Value. — Some of the statutes fix the amount to be recovered at double the value of the portion of the party in default.³

All Damages Caused by Neglect. — And others allow the party building the entire fence to recover in one action all the damages arising from the neglect of the other.⁴

Waiver of Obligation. — The statutory obligation to build a partition fence is common to the parties and may be waived by agreement.⁵ When so waived the parties are left to their common-law rights and remedies.⁶

(e) *Obligation as Between Owner and Occupier.* — The person occupying land and interested in the making and maintaining of a partition fence, whatever his estate in the premises might be, is the one upon whom the rights and duties touching partition fences rest. And the term "owner," as used in the statutes, has been construed to mean occupier.⁷

1. Enforced Contribution — Against Unwilling Neighbor. — *Talbot v. Blacklege*, 22 Iowa 572; *Rust v. Low*, 6 Mass. 90; *Quinn v. Crimmings*, 171 Mass. 255; *Stoner v. Hunsicker*, 47 Pa. St. 514; *Rangler v. McCreight*, 27 Pa. St. 95.

2. Right to Build Entire Fence and Recover. — *Walker v. Watrous*, 8 Ala. 493, 42 Am. Dec. 646; *McCormick v. Tate*, 20 Ill. 335; *Dexter v. Heaghey*, 47 Ill. App. 205; *Brawner v. Langton*, 57 Mo. 516; *Burr v. Hamer*, 12 Neb. 483; *Fairbanks v. Childs*, 44 N. H. 458; *Coxe v. Robbins*, 9 N. J. L. 384; *Castner v. Riegel*, 54 N. J. L. 498; *Stephens v. Shriver*, 25 Pa. St. 78; *Stoner v. Hunsicker*, 47 Pa. St. 514.

Where one adjoining owner, being dissatisfied with a fence built in accordance with the report of fence owners, tears down his portion and builds a more expensive fence, he cannot recover from his neighbor any portion of the cost of the new fence. *Trego v. Pierce*, 119 Pa. St. 139.

The Statutory Right to Contribution Does Not Preclude Common-law Remedies. — *Saxton v. Bacon*, 31 Vt. 540. But in *Dexter v. Heaghey*, 47 Ill. App. 205, it was held that where one of two adjoining owners, after the refusal of the other to build his portion of a division fence, put horses in his field to graze knowing that an insufficient fence separated them from his neighbor's grain, the latter had the right to distrain the horses damage feasant on his land. The owner of the horses had the right to enforce contribution under the statute and failed to resort to it.

Whether Right to Contribution Passes with Grant of Land. — The right to enforce contribution from an adjoining owner for the expense of a division fence is a mere chose in action, a personal right, which does not pass with the grant of the property in respect of which the grantor was entitled to contribution. *Hale v. Andrews*, 75 Ill. 252. A contrary decision was reached in *Brawner v. Langton*, 57 Mo. 516.

3. Recovery of Double Value. — *Abbott v. Wood*, 22 Me. 541; *Cobb v. Corbitt*, 78 Me. 242; *Johnson v. Wing*, 3 Mich. 163; *Curtis v. Leasia*, 78 Mich. 480; *Oxborough v. Boesser*, 30 Minn. 1; *Farr v. Spain*, 67 Wis. 631; *Voelz v. Breitenfeld*, 68 Wis. 491.

Under the *Maine* statute, the person seeking to recover such double value must have built all of the portion assigned to the delinquent, and not a part only. *Cobb v. Corbitt*, 78 Me. 242.

4. All Damages Caused by Neglect. — *Burr v. Hamer*, 12 Neb. 483; *Trego v. Pierce*, 119 Pa. St. 139; *Saxton v. Bacon*, 31 Vt. 540; *Sargent v. Slack*, 47 Vt. 674, 19 Am. Rep. 136.

5. Waiver of Obligation by Agreement. — *Sharp v. Curtiss*, 15 Conn. 526; *Bruner v. Palmer*, 108 Ind. 397; *Broadwell v. Wilcox*, 22 Iowa 568; *Winters v. Jacobs*, 29 Iowa 115; *Bills v. Belknap*, 38 Iowa 225; *Farmer v. Young*, 86 Iowa 382; *Baker v. Robbins*, 9 Kan. 303; *Rangler v. McCreight*, 27 Pa. St. 95; *Milligan v. Wehinger*, 68 Pa. St. 235; *Tower v. Providence, etc., R. Co.*, 2 R. I. 404.

An agreement to dispense with a division fence will be presumed when neither party insists on its construction. *Rangler v. McCreight*, 27 Pa. St. 95. And see *Markin v. Priddy*, 40 Kan. 684.

Agreement Need Not Be in Writing. — *Bills v. Belknap*, 38 Iowa 225.

6. Effect of Waiver. — By waiver, parties are left to their common-law rights and remedies. *Broadwell v. Wilcox*, 22 Iowa 568; *Winters v. Jacobs*, 29 Iowa 115; *Baker v. Robbins*, 9 Kan. 303; *Milligan v. Wehinger*, 68 Pa. St. 235. See *infra*, this section, *Failure to Maintain — Liability for Trespass by Cattle*.

7. Duty of Occupier to Maintain Fence. — *Moore v. Levert*, 24 Ala. 310; *Weymouth v. Gile*, 72 Me. 446; *Fay v. Elliott*, 154 Mass. 587; *Fenton v. Montgomery*, 19 Mo. App. 156; *Tewksbury v. Bucklin*, 7 N. H. 518; *Bronk v. Becker*, 17 Wend. (N. Y.) 320.

The person occupying land is entitled to

(f) **Fence Viewers** — *aa. NATURE OF THE OFFICE.* — Statutes regulating partition fences usually make provision for special officers with a defined jurisdiction over matters pertaining to partition fences. In some instances they constitute a permanent tribunal, while in others they are selected to serve for a single occasion. The office is judicial in its nature.¹

bb. PRINCIPAL DUTIES — (*aa*) *To Assign Portions.* — Where the conditions under which a partition fence is required exist, and the parties cannot agree upon a division of the duty of building and maintaining it, either party may make application to the fence viewers whose duty it is to make a division of the fence, assigning to each of the parties a distinct and just proportion, for the condition of which he will thereafter be responsible.²

(*bb*) *To Assess Damages for Default.* — And where one of the parties, after a division of the fence, refuses or neglects to build or maintain the portion assigned to him, and the other builds the entire fence, it is the duty of the fence viewers, upon application, to determine the sufficiency and value of the fence in order that the party so building may recover against the delinquent.³

cc. NOTICE OF PROCEEDINGS. — Notice to parties to be affected by proceedings by fence viewers is generally required by the statute, and is necessary, it seems, though not specifically required. But the voluntary appearance of parties is equivalent to notice, and the party so appearing may not afterwards complain of lack of it.⁴

dd. VALIDITY AND EFFECT OF PROCEEDINGS. — If fence viewers exceed their authority and jurisdiction or fail to comply with the statute in any essential particular, their proceedings are void.⁵ But as to matters within their juris-

avail himself of the provisions of the statute in regard to division fences (1 Rev. Stat. 353, § 30). The remedy is not limited to the owner of the fee. *Bronk v. Becker*, 17 Wend. (N. Y.) 320.

To Restrain Cattle. — And, likewise, the occupier of lands where there are no fences is bound to keep cattle he puts there upon the land. *Tewksbury v. Bucklin*, 7 N. H. 518.

1. Fence Viewers — Office Judicial. — *Gilson v. Deerfield Tp.*, (Mich. 1897) 72 N. W. Rep. 994; *McClay v. Clark*, 42 Minn. 363; *Sanborn v. Fellows*, 22 N. H. 473. See *contra*, *Edgerton v. Moore*, 28 Conn. 600.

2. Division by Viewers. — *Thompson v. Bulson*, 78 Ill. 277; *Peschongs v. Mueller*, 50 Iowa 237; *Farmer v. Young*, 86 Iowa 382; *Abbott v. Wood*, 22 Me. 541; *Sears v. Charlemont*, 6 Allen (Mass.) 437; *Boenig v. Hornberg*, 24 Minn. 307; *McClay v. Clark*, 42 Minn. 363; *Castner v. Riegel*, 54 N. J. L. 498; *Burger v. Kortright*, 4 Johns. (N. Y.) 414; *Farr v. Spain*, 67 Wis. 631; *Voelz v. Breitenfeld*, 68 Wis. 491.

The *New Jersey* Act contemplated a division of the whole fence between adjoining owners, and neither party can invoke its aid to divide it by piecemeal. *Castner v. Riegel*, 54 N. J. L. 498.

Division Cannot Be by Act of One of the Parties. — One of two adjoining owners may not choose what half of a division fence he will build, and having built it require his neighbor to build the other half. The matter must be decided by the fence viewers. *Markin v. Priddy*, 39 Kan. 462.

Hedge Fences negligently left untrimmed were not within the jurisdiction of the Iowa fence viewers under the code of 1873. *Kinney v. Kinney*, 104 Iowa 703. This omission was remedied by section 2355 of the code of 1897.

3. To Determine the Value of Fences is one of

the duties of the fence viewers, where one of the parties has built the whole fence upon default or neglect of the other. *Farmer v. Young*, 86 Iowa 382; *Peschongs v. Mueller*, 50 Iowa 237; *Sears v. Charlemont*, 6 Allen (Mass.) 437; *Farr v. Spain*, 67 Wis. 631; *Voelz v. Breitenfeld*, 68 Wis. 491.

Or where uninclosed lands are inclosed it is the duty of fence viewers to determine upon application the value of a partition fence already standing. *Boenig v. Hornberg*, 24 Minn. 307; *Farmer v. Young*, 86 Iowa 382.

Damages by Trespassing Cattle. — See *Quinton v. Van Tuyl*, 30 Iowa 554.

4. Notice. — *Thompson v. Bulson*, 78 Ill. 277; *Emery v. Maguire*, 87 Me. 116; *Sears v. Charlemont*, 6 Allen (Mass.) 437; *McClay v. Clark*, 42 Minn. 363; *Willoughby v. Carleton*, 9 Johns. (N. Y.) 136; *Shriver v. Stephens*, 20 Pa. St. 138.

Notice Is Required by Implication, though not specifically provided for in the statute. *Gilson v. Deerfield Tp.*, (Mich. 1897) 72 N. W. Rep. 994; *Scott v. Dickinson*, 14 Pick. (Mass.) 276; *Lamb v. Hicks*, 11 Met. (Mass.) 502; *Shriver v. Stephens*, 20 Pa. St. 138.

Reasonable in Time. — Where no time is prescribed the notice must be reasonable. *Tubbs v. Ogden*, 46 Iowa 134.

Whether in Writing. — Notice need not be written unless the statute so requires. *Talbot v. Blackleg*, 22 Iowa 572.

Written notice is required by statute in *Wisconsin*, *Voelz v. Breitenfeld*, 68 Wis. 491, and *Maine*, *Abbott v. Wood*, 22 Me. 541.

Notice Must Be Unconditional. — *Emery v. Maguire*, 87 Me. 116.

Service of Notice on a Person's Wife is presumptively sufficient. *Brown v. Petrie*, 86 Iowa 581.

5. Validity of Proceedings. — *Farmer v.*

diction their determination is final and conclusive in the absence of fraud or mistake.¹

(5) *Failure to Maintain* — (a) **Generally.** — One who is bound to maintain a partition fence or a part thereof, and fails to do so, is liable for all the legal and natural consequences of his neglect.²

(b) **Liability for Trespass by Cattle** — *aa.* **BEFORE DIVISION.** — Until a division of a partition fence has been made by the agreement of the parties or under statute, no particular portion thereof belongs to either owner to be kept in repair, but their rights are regulated by the common law, and each is bound at his peril to keep his cattle on his own land.³

bb. **WHERE OBLIGATION TO FENCE IS WAIVED.** — Where the statutory obligation to fence is waived, the same rule as to trespass by cattle applies. Each of the parties must keep his cattle on his own land.⁴

Young, 86 Iowa 382; Bills v. Belknap, 38 Iowa 225; Sears v. Charlemont, 6 Allen (Mass.) 437; Miller v. Barnet, 5 N. J. L. 629.

1. **Finality of Proceedings.** — Bills v. Belknap, 38 Iowa 225; McKeever v. Jenks, 59 Iowa 300; Oxborough v. Boesser, 30 Minn. 1; Robb v. Brachmann, 24 Ohio St. 3.

Not Conclusive as to Line. — The decision of fence viewers is not conclusive as to line. One of the parties may show that the fence directed to be built by them is wholly on his land and may recover. Peschongs v. Mueller, 50 Iowa 237; Bills v. Belknap, 38 Iowa 225; State v. Ford, 1 N. J. L. 64.

2. **Liability for Consequences of Failure to Maintain.** — Powell v. Salisbury, 2 Y. & J. 391; Durgin v. Kennett, (N. H. 1893) 29 Atl. Rep. 414; Trego v. Pierce, 119 Pa. St. 139; Saxton v. Bacon, 31 Vt. 540; Eddy v. Kinney, 60 Vt. 554; Burr v. Hamer, 12 Neb. 483; Sargent v. Slack, 47 Vt. 674, 19 Am. Rep. 136.

Thus where, through the defendant's failure to maintain a fence, cattle escape and while roaming about are injured, the defendant is liable, and the injury is not too remote. Powell v. Salisbury, 2 Y. & J. 391; Wilder v. Stanley, 65 Vt. 145. And see Cate v. Cate, 50 N. H. 144, 9 Am. Rep. 179; Gilman v. Noyes, 57 N. H. 636; Clark v. Brown, 18 Wend. (N. Y.) 213.

The fact that the plaintiff's portion of the fence as well as that of the defendant was defective has been held no defense in such a case. Saxton v. Bacon, 31 Vt. 540.

Injury to Person by Falling of Fence. — Where one is injured by the falling of a division fence that has not been kept in proper repair, he alone is liable whose duty it was to repair and maintain the fence, but his obligation is only for the exercise of the care of a prudent man. Quinn v. Crimmings, 171 Mass. 255.

3. **Liability for Trespass by Cattle Before Division of Fence** — *Illinois.* — McCormick v. Tate, 20 Ill. 334; Stoner v. Shugart, 45 Ill. 76; McNeer v. Boone, 52 Ill. App. 181; McBride v. Lynd, 55 Ill. 411; D'Arcy v. Miller, 86 Ill. 102, 29 Am. Rep. 11; Birkett v. Williams, 30 Ill. App. 451.

Indiana. — Myers v. Dodd, 9 Ind. 290, 68 Am. Dec. 624; Brady v. Ball, 14 Ind. 317; Crisman v. Masters, 23 Ind. 319.

Maine. — Little v. Lathrop, 5 Me. 356; Lord v. Wormwood, 29 Me. 282, 50 Am. Dec. 586; Sturtevant v. Merrill, 33 Me. 62; Webber v. Closson, 35 Me. 26; Ellis v. Ellis, 39 Me. 526;

Knox v. Tucker, 48 Me. 373, 77 Am. Dec. 233; Bradbury v. Gilford, 53 Me. 99.

Massachusetts. — Thayer v. Arnold, 4 Met. (Mass.) 590; Rust v. Low, 6 Mass. 90.

Michigan. — Johnson v. Wing, 3 Mich. 163; Aylesworth v. Herrington, 17 Mich. 417.

Nebraska. — Burr v. Hamer, 12 Neb. 483.

New Hampshire. — Tewksbury v. Bucklin, 7 N. H. 518; Lawrence v. Combs, 37 N. H. 331, 72 Am. Dec. 332; Chase v. Jeffs, 58 N. H. 280.

New Jersey. — Cox v. Robbins, 9 N. J. L. 384; Chambers v. Matthews, 18 N. J. L. 368.

New York. — Bush v. Brainerd, 1 Cow. (N. Y.) 78, 13 Am. Dec. 513; Angell v. Hill, (Supreme Ct.) 45 N. Y. St. Rep. 83, quoting 7 AM. AND ENG. ENCYC. OF LAW (1st ed.) 895.

Pennsylvania. — Barber v. Mensch, 157 Pa. St. 390.

Vermont. — Keenan v. Cavanaugh, 44 Vt. 268.

But in Hooper v. Kittredge, 16 Vt. 677, decided under statute, it was held that, in the absence of division by agreement or assignment, neither party could have a remedy for trespass by the other's cattle.

Under the *Maine* statute of 1834, c. 137, previous to an assignment and division of a partition fence, either by fence viewers, prescription, or agreement, neither of the adjoining owners could maintain an action against the other for cattle breaking through an insufficient fence, they being lawfully on the other side thereof. Gooch v. Stephenson, 13 Me. 371; Eastman v. Rice, 14 Me. 419. This statute was subsequently repealed, restoring the common law. Webber v. Closson, 35 Me. 26.

4. **When the Obligation Is Waived.** — Baker v. Robbins, 9 Kan. 303; Dent v. Ross, 52 Miss. 188; Milligan v. Wehinger, 68 Pa. St. 235.

Lands Fenced in Common. — Where two adjoining owners have fields inclosed in common, each is bound to restrain his cattle from trespassing upon the land of the other, and if one wilfully permits his cattle to go into the inclosure the insufficiency of the fence surrounding such inclosure is no defense to the trespass. Broadwell v. Wilcox, 22 Iowa 568; Winters v. Jacobs, 29 Iowa 115.

Where two adjoining owners have their lands inclosed by uniting their outside fences, and there is no partition fence between them, but each occupies his land in severalty, the lands are fenced in common as a matter of law, even though there was no agreement or

cc. AFTER DIVISION. — After the duty to maintain a specific portion of the partition fence devolves upon each of the adjoining owners as a result of a division by agreement or under the statute, one who neglects to build or to keep in repair his portion of the fence is liable for the trespass of his own cattle by reason of the defective fence,¹ and is without remedy for damages happening to himself through the trespass of his neighbor's cattle.² And one owner cannot escape liability for an injury resulting from a failure to maintain his portion of the fence because of the fact that the other owner was negligent in keeping his part in repair.³

dd. LIABILITY OF BAILEE. — Where cattle are bailed or agisted, the better rule appears to be that the bailee is liable for their trespass and the owner is not,⁴ though some of the cases hold that either the bailee or the owner is liable.⁵

contract to occupy the farms in common or fence in common. In such case either of the adjoining landowners is liable for injury to the other caused by cattle of the former going upon the land of the latter. *Markin v. Priddy*, 40 Kan. 684.

Statutory Remedies for Trespass Not Available. — Where adjoining owners agree not to build a partition fence, but that each shall keep up his stock, there is an obligation upon both which the law will enforce in an action for damages or other appropriate proceeding. But it does not permit either party to resort to the statutory remedy provided for the case where animals break through a lawful fence. *Dent v. Ross*, 52 Miss. 188. Nor can the double damages provided for by statute be recovered. *Tumlin v. Parrott*, 82 Ga. 732.

1. **Cattle Owner's Neglect.** — *Moore v. Levert*, 24 Ala. 310; *Baker v. Robbins*, 9 Kan. 303; *Thayer v. Arnold*, 4 Met. (Mass.) 589; *Durgin v. Kennett*, (N. H. 1893) 29 Atl. Rep. 414; *Holladay v. Marsh*, 3 Wend. (N. Y.) 142, 20 Am. Dec. 678; *Stafford v. Ingersol*, 3 Hill (N. Y.) 38; *Angell v. Hill*, (Supreme Ct.) 45 N. Y. St. Rep. 83, *quoting* 7 AM. AND ENG. ENCYC. OF LAW (1st ed.) 895; *Milligan v. Wehinger*, 68 Pa. St. 235; *Sorenberger v. Houghton*, 40 Vt. 150; *Keenan v. Cavanaugh*, 44 Vt. 268.

Liability After Notice to Owner of Cattle. — If the owner of land upon which cattle have entered through an insufficient fence which he is bound to maintain gives notice to the owner of the cattle that they are there, and the latter suffers them to continue there, the cattle become trespassers, and the owner of the land may recover damages for the trespass. *Poole v. Longueville*, 2 Saund. 285; *Kempe v. Crewes*, 2 Lutw. 1578; *Edwards v. Hallender*, 2 Leon. 93.

2. **No Remedy for Trespass Due to His Own Failure to Repair** — *England*. — *Poole v. Longueville*, 2 Saund. 285; *Kempe v. Crewes*, 2 Lutw. 1578; *Edwards v. Hallender*, 2 Leon. 93.

Connecticut. — *Studwell v. Ritch*, 14 Conn. 292.

Maine. — *Lord v. Wormwood*, 29 Me. 282, 50 Am. Dec. 586; *Sturtevant v. Merrill*, 33 Me. 62; *Webber v. Closson*, 35 Me. 26.

New Hampshire. — *Page v. Olcott*, 13 N. H. 399; *Lawrence v. Combs*, 37 N. H. 335, 72 Am. Dec. 332; *Durgin v. Kennett*, (N. H. 1893) 29 Atl. Rep. 414.

New York. — *Deyo v. Stewart*, 4 Den. (N. Y.) 101; *Angell v. Hill*, (Supreme Ct.) 45 N. Y. St. Rep. 83.

Ohio. — *Phelps v. Cousins*, 29 Ohio St. 135.

Pennsylvania. — *Rangler v. McCreight*, 27 Pa. St. 95; *Stoner v. Hunsicker*, 47 Pa. St. 514; *Vermont*. — *Hooper v. Kittredge*, 16 Vt. 677; *Keenan v. Cavanaugh*, 44 Vt. 268.

Trespass by Cattle of Third Person. — Under the statute of *New Jersey*, the same liability devolves upon one for the trespass of the cattle of a third person through a fence which he is bound to maintain as for the trespass of his own cattle, and he is equally without remedy for a trespass committed by the cattle of a third person as where the cattle belong to the other part owner of the fence. *Coxe v. Robbins*, 9 N. J. L. 384.

3. **No Defense that Plaintiff's Portion Is Out of Repair.** — *Saxton v. Bacon*, 31 Vt. 540; *Sorenberger v. Houghton*, 40 Vt. 150. See also *Angell v. Hill*, (Supreme Ct.) 45 N. Y. St. Rep. 83.

In *New York* it has been held that where both the defendant's portion and the plaintiff's portion of the fence were out of repair, the plaintiff might recover although he did not show over which portion the animal escaped. *Deyo v. Stewart*, 4 Den. (N. Y.) 101.

But in *Vermont* the plaintiff cannot recover without proof that the animal passed over the portion of the fence which it was the duty of the defendant to maintain. *Tupper v. Clark*, 43 Vt. 200.

4. **Bailee and Not Owner Liable.** — *Ward v. Brown*, 64 Ill. 307, 16 Am. Rep. 561; *Ozburn v. Adams*, 70 Ill. 291; *Weide v. Thiel*, 9 Ill. App. 226; *Cook v. Morea*, 33 Ind. 497; *Reddick v. Newburn*, 76 Mo. 423; *Rossell v. Cotton*, 31 Pa. St. 525.

Liability of Tenant in Control of Cattle. — The owner of cattle is not liable for damage done by them while trespassing upon the lands of another, when the cattle are in the possession and under the control of the tenant to whom both farm and cattle have been leased. *Van Slyck v. Snell*, 6 Lans. (N. Y.) 299; *Atwater v. Lowe*, 39 Hun (N. Y.) 150; *Kennett v. Durgin*, 59 N. H. 560; *Moulton v. Moore*, 56 Vt. 701.

Liability Where Owner Retains Control. — But the owner of cattle kept on land of another, but remaining in his own care and control, is liable for their trespasses on the land of a third person. *Kennett v. Durgin*, 59 N. H. 560.

5. **Either Bailee or Owner Liable.** — *Weymouth v. Gile*, 72 Me. 446; *Sheridan v. Bean*, 8 Met. (Mass.) 284, 41 Am. Dec. 507; *Blaisdell v. Stone*, 60 N. H. 507; *Stafford v. Ingersol*, 3 Hill (N. Y.) 38; *Atwater v. Lowe*, 39 Hun (N. Y.) 150.

(6) *Malicious Erection*. — According to the received view of the common law, the erection of a fence upon one's own land is not an actionable injury to one's neighbor, although the erection may deprive him of light and air, and may be dictated by motives of ill will.¹ Special liability may, however, arise where title to the uninterrupted enjoyment of light and air has been acquired by contract, or, in *England* and perhaps in one or two American jurisdictions, by prolonged user under the doctrine of ancient lights.² There are some authorities in the *United States* which support the contrary rule in accordance with which malice makes that actionable which would otherwise not be so, and the doctrine has been declared that "a fence erected maliciously, and with no other purpose than to shut out the light and air from a neighbor's window, is a nuisance."³

Statutes in some states have been enacted regulating the construction of division fences and declaring them to be nuisances when unnecessarily high or maliciously erected for the purpose of annoying neighbors.⁴

c. ANIMALS TO BE FENCED AGAINST. — The obligation to fence in order to prevent animals from trespassing applies only to domestic animals of ordinary disposition. The owner of animals of a wild nature or of vicious or diseased domestic animals is held to strict accountability.⁵

Right on Adjoining Soil. — Moreover, the obligation to fence, when it exists, extends only to such domestic animals as are lawfully on the adjoining highway or inclosure.⁶

When Cattle Lawfully on Highway. — In the absence of general law or statute permitting animals to be at large on the highway they are lawfully there only when passing and repassing, and not when they are grazing or loitering therein.⁷

1. No Liability for Fences Erected on One's Own Land. — *Western Granite, etc., Co. v. Knickerbocker*, 103 Cal. 111; *Lapere v. Luckey*, 23 Kan. 534, 33 Am. Rep. 196; *Lord v. Langdon*, 91 Me. 221; *Rideout v. Knox*, 148 Mass. 372, 12 Am. St. Rep. 560; *Mahan v. Brown*, 13 Wend. (N. Y.) 261, 28 Am. Dec. 461; *Levy v. Brothers*, 4 Misc. Rep. (N. Y. Super. Ct.) 48; *Pickard v. Collins*, 23 Barb. (N. Y.) 444; *Letts v. Kessler*, 54 Ohio St. 73, reversing *Kessler v. Letts*, 7 Ohio Cir. Ct. Rep. 108, 3 Ohio Cir. Dec. 687.

2. For a full discussion of this topic, see the title LIGHT AND AIR.

3. Malice Held to Render Fence a Nuisance. — *Flaherty v. Moran*, 81 Mich. 52, 21 Am. St. Rep. 510 [approving opinion of *Morse, J.*, in *Burke v. Smith*, 69 Mich. 380]; *Kirkwood v. Finegan*, 95 Mich. 543; *Peek v. Roe*, 110 Mich. 52; *Sankey v. St. Mary's Female Academy*, 8 Mont. 265.

4. Statutes. — *Lord v. Langdon*, 91 Me. 221; *Rideout v. Knox*, 148 Mass. 368, 12 Am. St. Rep. 560; *Smith v. Morse*, 148 Mass. 407; *Rice v. Moorehouse*, 150 Mass. 482; *Hunt v. Coggin*, 66 N. H. 140.

Malevolence must be the dominant motive without which the fence would not have been built or maintained, in order to bring the case within the statute. See the cases last cited.

The *Massachusetts* statute has been held not to apply to a fence erected alongside of a highway by one who owned the title to the land to the middle line of the highway. *Spaulding v. Smith*, 162 Mass. 543.

A *California* Statute applying only to division fences and walls in cities and towns limits the height to ten feet. *Western Granite, etc., Co.*

v. Knickerbocker, 103 Cal. 111; *Ingwersen v. Barry*, 118 Cal. 342.

5. See *supra* this section, subdiv. 1. a. (2) (b) cc. *Exception as to Dangerous Animals*. And see the title ANIMALS, vol. 2, pp. 351, 352, 380.

6. Cattle Must Be Lawfully on Adjoining Soil — *England*. — *Dovaston v. Payne*, 2 H. Bl. 527; *Right v. Baynard*, *Freem.* 379; *Anonymous*, 3 Wils. 126.

Iowa. — *Herold v. Meyers*, 20 Iowa 378; *Little v. McGuire*, 43 Iowa 447.

Maine. — *Little v. Lathrop*, 5 Me. 360; *Gooch v. Stephenson*, 13 Me. 371; *Lord v. Wormwood*, 29 Me. 282, 50 Am. Dec. 586; *Sturtevant v. Merrill*, 33 Me. 62; *Webber v. Closson*, 35 Me. 26.

Massachusetts. — *Lyman v. Gipson*, 18 Pick. (Mass.) 422; *Pool v. Alger*, 11 Gray (Mass.) 489, 71 Am. Dec. 726; *Melody v. Reab*, 4 Mass. 471; *Rust v. Low*, 6 Mass. 90; *Stackpole v. Healy*, 16 Mass. 33, 8 Am. Dec. 121; *Lyons v. Merrick*, 105 Mass. 71.

Missouri. — *Colvin v. Sutherland*, 32 Mo. App. 77.

New Hampshire. — *Mills v. Stark*, 4 N. H. 512, 17 Am. Dec. 444; *Cornwall v. Sullivan R. Co.*, 28 N. H. 168; *Lawrence v. Combs*, 37 N. H. 331, 72 Am. Dec. 332; *Chapin v. Sullivan R. Co.*, 39 N. H. 53, 75 Am. Dec. 207; *Morse v. Boston, etc., R. Co.*, 66 N. H. 148.

New Jersey. — *Vandegrift v. Rediker*, 22 N. J. L. 185, 51 Am. Dec. 262.

Vermont. — *Jackson v. Rutland, etc., R. Co.*, 25 Vt. 150, 60 Am. Dec. 246.

7. When Lawfully on Highway. — *Stackpole v. Healy*, 16 Mass. 33, 8 Am. Dec. 121; *Mills v. Stark*, 4 N. H. 512, 17 Am. Dec. 444; *North Pennsylvania R. Co. v. Rehman*, 49 Pa. St. 109.

When Cattle Lawfully on Adjoining Land. — In order that animals may be lawfully on adjoining land the owner of them must have an interest in the land or they must be there with the consent of the owner of the land.¹

2. Property in Fences — *a.* **GENERALLY.** — A fence is a part of the freehold, and the ownership of it is determined accordingly;² and to be so considered it is not necessary that it be attached to the soil otherwise than by its own weight.³ On alienation it passes with the land.⁴

Cattle Grazing on Highway Not Lawfully There. — Cattle grazing on a highway are not lawfully there as regards the obligation to fence against them. *Manchester, etc., R. Co. v. Wallis*, 25 Eng. L. & Eq. 373; *Caulkins v. Mathews*, 5 Kan. 191; *Lyman v. Gipson*, 18 Pick. (Mass.) 422; *Stackpole v. Healy*, 16 Mass. 33, 8 Am. Dec. 121; *Avery v. Maxwell*, 4 N. H. 36; *Mills v. Stark*, 4 N. H. 512, 17 Am. Dec. 444; *Jackson v. Rutland, etc., R. Co.*, 25 Vt. 150, 60 Am. Dec. 246; *Harrison v. Brown*, 5 Wis. 27.

Where the Soil of the Highway Belongs to the Owner of Cattle he may keep them on the part belonging to himself, but if they stray it is at his peril. *Avery v. Maxwell*, 4 N. H. 36; *Mills v. Stark*, 4 N. H. 513, 17 Am. Dec. 444.

1. When Cattle Lawfully on Adjoining Land. — Thus, where cattle get into a close through the insufficiency of a fence which the owner of the close is bound to maintain, and thence through an insufficient fence into another close, the owner of the last close may recover against the owner of the cattle, for they were not lawfully in the adjoining close. *Lord v. Wormwood*, 29 Me. 282, 50 Am. Dec. 586; *Eames v. Salem, etc., R. Co.*, 98 Mass. 560, 96 Am. Dec. 676; *Lyons v. Merrick*, 105 Mass. 71; *McDonnell v. Pittsfield, etc., R. Corp.*, 115 Mass. 564; *Mills v. Stark*, 4 N. H. 512, 17 Am. Dec. 444.

But the owner of the cattle may recover over from the owner of the intermediate close through whose insufficient fences the damage occurred. *Mills v. Stark*, 4 N. H. 512, 17 Am. Dec. 444.

Where cattle break into a lawfully fenced close, and thence through an insufficient fence into another close, the owner of the last close may recover from the owner of the cattle. *Little v. McGuire*, 43 Iowa 447; *Rust v. Low*, 6 Mass. 90. But he can recover nothing from the owner of the intermediate close, for no one is bound to secure his neighbor against the cattle of third persons unlawfully on his premises. *Little v. McGuire*, 43 Iowa 447. And where the first field is insufficiently fenced, he has no remedy. *Singleton v. Williamson*, 7 H. & N. 410.

Where cattle break into a lawfully fenced inclosure, and then into an insufficiently fenced field belonging to the same owner, the owner may recover against the owner of the cattle for a trespass. *Herold v. Meyers*, 20 Iowa 378.

2. Fences Are Part of the Freehold — *Bagley v. Columbus Southern R. Co.*, 98 Ga. 626, citing 7 AM. AND ENG. ENCYC. OF LAW (1st ed.) 905, 906.

Indiana. — *Seymour v. Watson*, 5 Blackf. (Ind.) 555, 36 Am. Dec. 556.

Iowa. — *Smith v. Carroll*, 4 Greene (Iowa) 146.

Mississippi. — *Emrich v. Ireland*, 55 Miss. 390.

Missouri. — *Climer v. Wallace*, 28 Mo. 556, 75 Am. Dec. 135; *Hopper v. Vance*, 27 Mo. App. 336.

New York. — *Thayer v. Wright*, 4 Den. (N. Y.) 180; *Goodrich v. Jones*, 2 Hill (N. Y.) 142.

North Carolina. — *State v. Graves*, 74 N. Car. 396.

Texas. — *McCauley v. State*, 43 Tex. 374.

Wisconsin. — *Murray v. Van Derlyn*, 24 Wis. 67; *Conklin v. Parsons*, 1 Chand. (Wis.) 240; *Kimball v. Adams*, 52 Wis. 554.

Prima Facie a Fence Constitutes a Part of the Realty, and is such as a matter of law, as much as a barn or a house. If it is not impressed with that character it is in consequence of peculiar circumstances, which must be shown by the party claiming the advantage thereof. *Brown v. Bridges*, 31 Iowa 158.

Trover Will Not Lie. — Since a fence is a part of the realty, an action of trover is not sustainable for the removal and appropriation of a rail fence. *Wentz v. Fincher*, 12 Ired. L. (34 N. Car.) 297, 55 Am. Dec. 416.

Validity of Oral Contracts Touching Fences. — A fence is not out and out a part of the land. It is a fixture and passes with the land, but contracts touching fixtures of this nature are not inoperative, when oral, by reason of the statute of frauds. *Graham v. Roark*, 23 Ark. 19; *Ivins v. Ackerson*, 38 N. J. L. 220.

Fence Built on Another's Land by Mistake. — The legal title to a fence as a part of the land is not affected by the fact that the builder of the fence believed it to be upon his own land. *Kimball v. Adams*, 52 Wis. 554; *Seymour v. Watson*, 5 Blackf. (Ind.) 555, 36 Am. Dec. 556.

A special statute in *Wisconsin* protects one who builds a boundary fence before a survey of the line by a county surveyor. *Scholl v. Kinitzer*, 83 Wis. 307.

Right to Remove Fence Built under Mistake. — If one of two adjoining owners knowingly permits the other to build a fence, under a mistake as to the boundary line, upon the land of the former, or if both parties are so mistaken, the owner of the land is not entitled to the value of the fence if the builder of it moves it upon his own land. The right of the party building the fence to remove it under such circumstances is an equitable one. *Long v. Cude*, 75 Tex. 225.

3. Necessity for Attachment to the Soil. — A fence which forms a close or any part of an inclosed place on the premises is a part of the freehold. It makes no difference how the fence is constructed, or of what material. If of rails, it may or may not have stakes sunk or fastened in the ground. *Seymour v. Watson*, 5 Blackf. (Ind.) 555, 36 Am. Dec. 556; *Smith v. Carroll*, 4 Greene (Iowa) 146; *Kimball v. Adams*, 52 Wis. 554.

4. Fence Passes with the Land. — *Graham v. Roark*, 23 Ark. 19; *Seymour v. Watson*, 5 Blackf. (Ind.) 555, 36 Am. Dec. 556; *Climer v.*

Detached Material. — Fencing material placed on the ground along the line of a contemplated fence, or temporarily detached from an existing fence, has likewise been held to be a part of the freehold.¹ But there are authorities holding unattached fencing material to be personalty.²

Personalty by Agreement. — As between the parties to an agreement made before a fence is built, the material in the fence may be made to retain its character as personalty.³

b. IN PARTITION FENCES AND RIGHT TO REMOVE THEM. — A partition fence built wholly upon the land of one of the parties is his property, and in the absence of statute the other cannot maintain trespass for its removal, though, as has been seen, he may have a remedy for injuries arising from the removal of it where the owner is bound to maintain it for his benefit.⁴ But a partition fence on the line between adjoining lands has generally been held to be the common property of the owners of the adjacent lands, and either may maintain trespass for the removal or destruction of any part of it by the other.⁵

Removal Regulated by Statute. — The removal of partition fences, whether on the land of one of the adjoining owners or on the line between them, and whether divided or not, is generally regulated by statute, and they can be removed only in the manner prescribed therein.⁶

Wallace, 28 Mo. 556, 75 Am. Dec. 135; Hopper v. Vance, 27 Mo. App. 336; Ivins v. Ackerson, 38 N. J. L. 220.

Breach of Covenant. — The Removal of a Fence by a tenant pursuant to a prior agreement with the grantor constitutes a breach of the covenant of seizin. *Mott v. Palmer*, 1 N. Y. 564. See also the title COVENANTS, vol. 8, p. 92.

1. Materials Temporarily and Accidentally Detached. — *Goodrich v. Jones*, 2 Hill (N. Y.) 142.

Materials for Contemplated Fence. — *Conklin v. Parsons*, 1 Chand. (Wis.) 240.

2. Detached Material Held Not Realty. — *Thweat v. Stamps*, 67 Ala. 96; *Robertson v. Phillips*, 3 Greene (Iowa) 220.

Materials Permanently Detached Become Personalty. — *Harris v. Scovel*, 85 Mich. 32.

3. Personalty under an Agreement. — *Harris v. Scovel*, 85 Mich. 32; *Curtis v. Leasia*, 78 Mich. 480; *Mott v. Palmer*, 1 N. Y. 564.

Not as to Purchaser Without Notice of the Agreement. — Where two adjoining proprietors agree to build a partition fence, each to own the part constructed by himself, and the part built by one is mistakenly located on the land of the other, a purchaser of the latter's land, without notice of the agreement, will take the fence thereon along with the land. *Climer v. Wallace*, 28 Mo. 556, 75 Am. Dec. 135.

4. Property in Partition Fences. — *Matts v. Hawkins*, 5 Taunt. 20, 1 E. C. L. 4; *Quillen v. Betts*, (Del. 1897) 39 Atl. Rep. 595; *Jeffries v. Burgin*, 57 Mo. 327; *Sims v. Field*, 74 Mo. 139; *Clowers v. Sawyers*, 1 Head (Tenn.) 156.

5. Partition Fences on the Line Between Lands — *England.* — *Voyce v. Voyce*, Gow. 201; *Cubitt v. Porter*, 8 B. & C. 257, 15 E. C. L. 211; *Murly v. M'Dermott*, 8 Ad. & El. 138, 35 E. C. L. 356; *Matts v. Hawkins*, 5 Taunt. 20, 1 E. C. L. 4.

Arkansas. — *Drees v. State*, 37 Ark. 122.

Delaware. — *Quillen v. Betts*, (Del. 1897) 39 Atl. Rep. 595.

Georgia. — *Gilreath v. State*, 96 Ga. 303.

Pennsylvania. — *Stoner v. Hunsicker*, 47 Pa. St. 514; *Smith v. Johnson*, 76 Pa. St. 191; *Dysart v. Leeds*, 2 Pa. St. 483.

South Carolina. — *Gibson v. Vaughn*, 2 Bailey L. (S. Car.) 389, 23 Am. Dec. 143.

Tennessee. — *Stallcup v. Bradley*, 3 Coldw. (Tenn.) 406.

Wisconsin. — *Sayles v. Bemis*, 57 Wis. 315.

But see *Burrell v. Burrell*, 11 Mass. 294.

Partition Fence Joint Property. — Though a division fence be built in separate sections, each of the adjoining owners has an interest in the whole, and in every section; and when built the fence belongs beneficially to both, as much as if it had been done by contract and the expense divided, or if the two had joined in building the whole fence. *Newell v. Hill*, 2 Met. (Mass.) 183; *Holbrook v. McBride*, 4 Gray (Mass.) 220; *Holladay v. Marsh*, 3 Wend. (N. Y.) 142, 20 Am. Dec. 678.

Removal After Notice. — In *Clowers v. Sawyers*, 1 Head (Tenn.) 156, it was held that if a fence was made and kept up jointly by the adjoining owners immediately upon the line between them, then either had the right to remove his portion of it upon giving to the other notice of his intention so to do.

Effect of Division by Agreement. — In *Walker v. Watrous*, 8 Ala. 493, 42 Am. Dec. 646, construing the Act of 1807, the court held that neither of two adjoining owners could maintain an action against the other for injury caused by the insufficiency of any part of the fence, though an action might lie upon a special agreement between the parties.

Removal for Purpose of Rebuilding. — One of two adjoining owners may remove the partition fence for the purpose of rebuilding. *Cubitt v. Porter*, 8 B. & C. 257, 15 E. C. L. 211; *Murly v. M'Dermott*, 8 Ad. & El. 138, 35 E. C. L. 356; *Burrell v. Burrell*, 11 Mass. 294.

6. Removal of Division Fence under Statutes — *Illinois.* — *Deimel v. Obert*, 20 Ill. App. 557; *Brown v. Brown*, 23 Ill. App. 90; *McCormick v. Tate*, 20 Ill. 334 (removal allowed after one year's actual notice).

Kentucky. — *Grief v. Kahn*, 87 Ky. 17; *Clemmons v. Grow*, (Ky. 1897) 43 S. W. Rep. 728 (removal allowed during winter months only, and after three months' notice).

3. Fences as Boundaries — In Ascertaining Lines. — Fences may serve the purpose of ascertaining the boundaries of land either by reference to them as monuments in a deed or by reason of their becoming monuments when other landmarks have disappeared.¹

In Giving Adverse Possession. — The inclosure of land by a fence is not necessary to adverse possession unless required by statute.² But such inclosure may have great value as evidence.³

IV. RAILROAD FENCES — 1. Obligation to Fence in Absence of Statute. — Where there is no statute or agreement, express or implied, requiring railroad companies to erect and maintain fences, cattle guards, or other contrivances to prevent animals from getting on the tracks, a railroad company is under no obligation to do so.⁴ In such a case the common-law obligation to keep his

Missouri. — *Jeffries v. Burgin*, 57 Mo. 327 (six months' notice required).

Texas. — *Jamison v. State*, 27 Tex. App. 442 (six months' notice required).

Fence on Land of One Adjoining Owner. — A fence wholly on the land of one adjoining owner may by the consent of the parties acquire the character of a division fence under the *Missouri* statute, so that notice of its removal must be given. *Jeffries v. Burgin*, 57 Mo. 327. See also *Jamison v. State*, 27 Tex. App. 442. But the rule under other statutes seems to be different. *Clemmons v. Grow*, (Ky. 1897) 43 S. W. Rep. 728; *Gilreath v. State*, 96 Ga. 303.

A Criminal Liability is created by some of the statutes, though a civil action will lie under other statutes in the same states. *Gilreath v. State*, 96 Ga. 303; *State v. Watson*, 86 N. Car. 626. See also *State v. Edmonds*, 121 N. Car. 679. For the criminal liability created by the *Texas* statute, see *Jamison v. State*, 27 Tex. App. 442.

1. Fence Described as Boundary. — Where in a deed a boundary is described by a fence, such description controls courses and distances or quantity. *Kashman v. Parsons*, 70 Conn. 295; *Richwine v. Jones*, 140 Ind. 289. See also the title **BOUNDARIES**, vol. 4, pp. 764, 817.

Value of Old Fences in Fixing Boundaries. — In *Hoffman v. Port Huron*, 102 Mich. 434, the court said: "Old fences have always been regarded as strong and trustworthy evidences in ascertaining and fixing boundaries." And in *Diehl v. Zanger*, 39 Mich. 605, it was said: "As between old boundary fences and any survey made after the monuments have disappeared, the fences are by far the better evidence of what the lines of a lot actually are." See also *Wilmarth v. Woodcock*, 66 Mich. 337; *Beaubien v. Kellogg*, 69 Mich. 333; *Baker v. McArthur*, 54 Mich. 139; *Stewart v. Carleton*, 31 Mich. 270.

2. Adverse Possession — Fence Not Necessary unless Required by Statute. — *Normant v. Eureka Co.*, 98 Ala. 181, 39 Am. St. Rep. 45. See also the title **ADVERSE POSSESSION**, vol. 1, p. 829.

Statute. — A Boom Fence has been held a sufficient inclosure under the *California* statute. *Allen v. McKay*, 120 Cal. 332.

3. Inclosure as Evidence of Adverse Possession. — See the title **ADVERSE POSSESSION**, vol. 1, p. 829.

As to the Intent with Which Land Is Inclosed and the effect of ignorance or mistake, see the title **ADVERSE POSSESSION**, vol. 1, p. 791 *et seq.*

An Occasional Breach in a fence will not constitute a discontinuance of adverse possession. *Hillman v. White*, (Ky. 1898) 44 S. W. Rep. 111; *Sharrock v. Ritter*, (Tex. Civ. App. 1898) 45 S. W. Rep. 156. See also the title **ADVERSE POSSESSION**, vol. 1, p. 830.

4. Railroad Companies Not Required to Fence — England. — *Buxton v. North Eastern, etc., R. Co.*, L. R. 3 Q. B. 549.

Canada. — *Bennett v. Covert*, 24 U. C. Q. B. 38; *Van Natter v. Buffalo, etc., R. Co.*, 27 U. C. Q. B. 581.

Alabama. — *Birmingham Mineral R. Co. v. Parsons*, 100 Ala. 662, 46 Am. St. Rep. 92, citing 7 AM. AND ENG. ENCYC. OF LAW, pp. 906, 912.

Arkansas. — *St. Louis, etc., R. Co. v. Walbrink*, 47 Ark. 330; *Little Rock, etc., R. Co. v. Finley*, 37 Ark. 562.

Colorado. — *Cowan v. Union Pac. R. Co.*, 35 Fed. Rep. 43.

Connecticut. — *Campell v. New York, etc., R. Co.*, 50 Conn. 128, 13 Am. & Eng. R. Cas. 589.

Delaware. — *Vandegrift v. Delaware R. Co.*, 2 Houst. (Del.) 287.

Georgia. — *Collier v. Georgia R. Co.*, 76 Ga. 611; *Rossignoli v. Northeastern R. Co.*, 75 Ga. 354.

Illinois. — *Alton, etc., R. Co. v. Baugh*, 14 Ill. 211; *Chicago, etc., R. Co. v. Patchin*, 16 Ill. 198.

Indiana. — *Williams v. New Albany, etc., R. Co.*, 5 Ind. 111; *Lafayette R. Co. v. Shriner*, 6 Ind. 141; *Indianapolis, etc., R. Co. v. Harter*, 38 Ind. 557, 10 Am. Ry. Rep. 247.

Indian Territory. — *Gulf, etc., R. Co. v. Washington*, 4 U. S. App. 121.

Iowa. — *Henry v. Dubuque, etc., R. Co.*, 2 Iowa 288; *Kennedy v. Dubuque, etc., R. Co.*, 2 Iowa 521.

Kansas. — *Union Pac. R. Co. v. Rollins*, 5 Kan. 167.

Kentucky. — *Louisville, etc., R. Co. v. Ballard*, 2 Metc. (Ky.) 177; *Louisville, etc., R. Co. v. Milton*, 14 B. Mon. (Ky.) 61; *Louisville, etc., R. Co. v. Waincott*, 3 Bush. (Ky.) 149; *O'Bannon v. Louisville, etc., R. Co.*, 8 Bush. (Ky.) 348; *Ward v. Paducah, etc., R. Co.*, 4 Fed. Rep. 862.

Louisiana. — *Tillotson v. Texas, etc., R. Co.*, 44 La. Ann. 95, citing *Stevenson v. New Orleans Pac. R. Co.*, 35 La. Ann. 498.

Maine. — *Perkins v. Eastern R. Co.*, 29 Me. 307, 50 Am. Dec. 589.

Maryland. — *Baltimore, etc., R. Co. v. Lam-born*, 12 Md. 257; *Baltimore, etc., R. Co. v.*

cattle on his own lands rests with peculiar force upon the adjoining land-owner.¹ And the owner of cattle which stray upon the tracks of a railroad company is liable for their trespass.²

Mulligan, 45 Md. 486; *Western Maryland R. Co. v. Carter*, 59 Md. 306.

Massachusetts. — *Eames v. Salem*, etc., R. Co., 98 Mass. 563, 96 Am. Dec. 676; *Boston*, etc., R. Co. v. *Briggs*, 132 Mass. 24, 7 Am. & Eng. R. Cas. 541; *Stearns v. Old Colony*, etc., R. Corp., 1 Allen (Mass.) 493.

Michigan. — *Williams v. Michigan Cent. R. Co.*, 2 Mich. 260, 55 Am. Dec. 59; *Robinson v. Flint*, etc., R. Co., 79 Mich. 323, 19 Am. St. Rep. 174.

Minnesota. — *Locke v. First Div. St. Paul*, etc., R. Co., 15 Minn. 350; *Stacey v. Winona*, etc., R. Co., 42 Minn. 158.

Mississippi. — *Vicksburg*, etc., R. Co. v. *Patton*, 31 Miss. 156, 66 Am. Dec. 552; *New Orleans*, etc., R. Co. v. *Field*, 46 Miss. 573.

Missouri. — *Gorman v. Pacific R. Co.*, 26 Mo. 441, 72 Am. Dec. 220; *Davis v. Wabash R. Co.*, 46 Mo. App. 477; *Clark v. Hannibal*, etc., R. Co., 36 Mo. 202.

New Hampshire. — *Woolson v. Northern R. Co.*, 19 N. H. 267; *Towns v. Cheshire R. Co.*, 21 N. H. 363; *Dean v. Sullivan R. Co.*, 22 N. H. 316; *Cornwall v. Sullivan R. Co.*, 28 N. H. 161; *Chapin v. Sullivan R. Co.*, 39 N. H. 57, 75 Am. Dec. 207; *Mayberry v. Concord R. Co.*, 47 N. H. 391.

New Jersey. — *Vandegrift v. Rediker*, 22 N. J. L. 185, 51 Am. Dec. 262.

New York. — *Tonawanda R. Co. v. Munger*, 5 Den. (N. Y.) 255, 49 Am. Dec. 239; *Clark v. Syracuse*, etc., R. Co., 11 Barb. (N. Y.) 112; *Langlois v. Buffalo*, etc., R. Co., 19 Barb. (N. Y.) 364.

North Carolina. — *Jones v. Western North Carolina R. Co.*, 95 N. Car. 328.

Ohio. — *Kerwhacker v. Cleveland*, etc., R. Co., 3 Ohio St. 172, 62 Am. Dec. 246; *Cincinnati*, etc., R. Co. v. *Waterson*, 4 Ohio St. 425.

Oregon. — *Oregon Cent. R. Co. v. Wait*, 3 Oregon 91, 6 Am. Ry. Rep. 517.

Pennsylvania. — *New York*, etc., R. Co. v. *Skinner*, 19 Pa. St. 298; *North Pennsylvania R. Co. v. Rehman*, 49 Pa. St. 101; *Pennsylvania R. Co. v. Riblet*, 66 Pa. St. 164.

Vermont. — *Hurd v. Rutland*, etc., R. Co., 25 Vt. 116.

West Virginia. — *Blaine v. Chesapeake*, etc., R. Co., 9 W. Va. 252; *Clark v. Ohio River R. Co.*, 34 W. Va. 200; *Layne v. Ohio River R. Co.*, 35 W. Va. 438.

Wisconsin. — *Stucke v. Milwaukee*, etc., R. Co., 9 Wis. 202.

Cuts and Embankments. — There is no duty or obligation upon a railroad company in *Georgia* to fence in or place guards along its tracks where there may be cuts or embankments, notwithstanding a public road may run parallel with such tracks. *Collier v. Georgia R. Co.*, 76 Ga. 611.

Nor where a railroad company removes a fence and makes a deep cut where the fence stood is it liable for injury to the stock of an adjoining owner which fall into the cut, there being no statutory duty to fence. *Jones v. Western North Carolina R. Co.*, 95 N. Car. 328.

Agreement to Build Bridge. — An agreement on the part of a railroad to erect and maintain

a bridge at a certain point upon the county road, which runs parallel to the railroad, will not impose upon the railroad company the obligation of fencing the bridge so erected by it. *Brown v. Grand Trunk R. Co.*, 24 U. C. Q. B. 350.

Division Fences. — At common law railroad companies are not bound to construct one-half of the division fences between the right of way and the adjoining lands. *Hall v. Cincinnati R. Co.*, 13 Ky. L. Rep. 436. But see *contra*, *Matter of Rensselaer*, etc., R. Co., 4 Paige (N. Y.) 553.

Voluntary Fencing Does Not Impose the Duty. — There being no obligation upon railroad companies to fence their tracks, the fact that the company voluntarily fences a part of its track will not impose a duty to fence the whole of its road. *Tillotson v. Texas*, etc., R. Co., 44 La. Ann. 95. See *Morss v. Boston*, etc., R. Co., 2 Cush. (Mass.) 536; *Ward v. Paducah*, etc., R. Co., 4 Fed. Rep. 862.

A Voluntary Gift of the Right of Way will not raise an implication that the company undertook to protect the donor by fencing. *Rossignoll v. Northeastern R. Co.*, 75 Ga. 354.

Degree of Care Requisite. — Though no obligation rests upon a railroad company to fence its track, yet its failure to do so is evidence to be considered by the jury in determining the degree of care to be used toward animals straying thereon. *Gorman v. Pacific R. Co.*, 26 Mo. 441, 72 Am. Dec. 220. See also *Dickson v. Omaha*, etc., R. Co., 124 Mo. 140, 46 Am. St. Rep. 429.

1. Peculiar Obligation as to Railroad Tracks. — There is a peculiar obligation upon the owners of cattle to keep them off the tracks of railroad companies. *Louisville*, etc., R. Co. v. *Ballard*, 2 Metc. (Ky.) 177, *affirming Louisville*, etc., R. Co. v. *Milton*, 14 B. Mon. (Ky.) 61.

For the general obligation at common law to keep cattle on premises, see *supra*, this title, *Fences Inclosing Lands*, subdiv. 1. a. (1) *At Common Law*.

Effect of Ordinance Allowing Cattle at Large. — Railroads are not highways, and an ordinance allowing cattle to run at large gives no right to them to go upon the track of a railroad company. *Tonawanda R. Co. v. Munger*, 5 Den. (N. Y.) 255, 49 Am. Dec. 239; *Williams v. Michigan Cent. R. Co.*, 2 Mich. 259, 55 Am. Dec. 59.

2. Cattle on Railroad Trespassers. — *New Orleans*, etc., R. Co. v. *Field*, 46 Miss. 573; *Tonawanda R. Co. v. Munger*, 5 Den. (N. Y.) 255, 49 Am. Dec. 239; *Stucke v. Milwaukee*, etc., R. Co., 9 Wis. 202. See also *Chicago*, etc., R. Co. v. *Patchin*, 16 Ill. 198; *Vanhorn v. Burlington*, etc., R. Co., 63 Iowa 67; *Union Pacific R. Co. v. Rollins*, 5 Kan. 167; *Western Maryland R. Co. v. Carter*, 59 Md. 306; *Clark v. Hannibal*, etc., R. Co., 36 Mo. 202.

But where cattle go on the track by general use and implied consent resulting from clear knowledge of such use and failure to object on the part of the company, the cattle owner is not liable for such trespass. *Evans v. Burlington*, etc., R. Co., 21 Iowa 374.

In States Not Adopting the Common-law Rule. — In those states which do not adopt the common-law rule as to fences it is generally held that while railroad companies, in the absence of statutes, are not compelled to fence their tracks, yet where such tracks are left open and uninclosed by sufficient fences and cattle guards, the company assumes the risk of intrusion upon its road by animals running at large, as do other proprietors who leave their lands uninclosed, without any remedy against the owner of such animals for the trespass.¹

2. Obligation to Fence under Statutes — *a. STATUTORY DUTY.* — In *England* and in many of the *United States* statutes have been enacted requiring railroad companies to erect and maintain fences and cattle guards along the line of their roads and imposing penalties for failure to comply with such statutes.²

In *Missouri* it is settled law that the owner of animals is under no obligation to fence them in; that is, in not confining them he is in no fault, nor is he guilty of any negligence. *Hannibal, etc., R. Co. v. Kenney*, 41 Mo. 271.

Where No Duty to Fence Rests on Either Party.

— In the *Indian Territory* the owners of cattle are not bound to fence them up, and a railroad company is not bound to fence them out. Under these conditions, the railroad company is bound to exercise ordinary care and watchfulness to discover domestic animals on its track and to avoid harming them when discovered. *Gulf, etc., R. Co. v. Washington*, 4 U. S. App. 121.

1. Unfenced Railroads Assume Risks of Intrusion. — *Kerwhacker v. Cleveland, etc., R. Co.*, 3 Ohio St. 172, 62 Am. Dec. 246; *Mobile, etc., R. Co. v. Williams*, 53 Ala. 595; *Macon, etc., R. Co. v. Baber*, 42 Ga. 300; *Alger v. Mississippi, etc., R. Co.*, 10 Iowa 268; *Mobile, etc., R. Co. v. Hudson*, 50 Miss. 572. But see *Gorman v. Pacific R. Co.*, 26 Mo. 441, 72 Am. Dec. 220, and *McPheeters v. Hannibal, etc., R. Co.*, 45 Mo. 22.

Liability for Injury to Animals on Uninclosed Track. — In *Georgia* a railroad company is liable for injuries to domestic animals occurring on its uninclosed tracks, notwithstanding it is guilty of no other neglect than that of failure to inclose the track. *Macon, etc., R. Co. v. Baber*, 42 Ga. 300.

And in *McCoy v. California Pac. R. Co.*, 40 Cal. 532, 6 Am. Rep. 623, a railroad under the circumstances was held *prima facie* liable, and it was declared that by leaving its track through a field open the road undertook at its peril that no harm for want of a proper fence should come to cattle lawfully in the field.

Liable for Failure to Exercise Reasonable Care. — *Raiford v. Mississippi Cent. R. Co.*, 43 Miss. 233; *Kerwhacker v. Cleveland, etc., R. Co.*, 3 Ohio St. 172, 62 Am. Dec. 246; *Moses v. Southern Pac. R. Co.*, 18 Oregon 385, 42 Am. & Eng. R. Cas. 555.

Special Agreement by Railroad to Fence. — Where a railroad company is under a special contract with a landowner to fence its track, it is liable for damages resulting from a failure to perform its agreement. *Gulf, etc., R. Co. v. Washington*, 4 U. S. App. 121; *Fernow v. Dubuque, etc., R. Co.*, 22 Iowa 528; *Missouri Pac. R. Co. v. Lynch*, 31 Kan. 531, 15 Am. & Eng. R. Cas. 517. But a suit for specific performance has been held not to be against the company. *Columbus, etc., R. Co. v. Watson*,

26 Ind. 50. But see *Varner v. St. Louis, etc., R. Co.*, 55 Iowa 677.

Some of these cases arose in states where the special agreement between the parties superseded the railroads duty to fence created by statutes.

To charge the railroad under such an agreement it is necessary and sufficient to show that the railroad's neglect contributed to the injury complained of; it need not be shown that the fence would have been a perfect inclosure. *Joliet, etc., R. Co. v. Jones*, 20 Ill. 221.

Measure of Damages. — In an action for the breach of such an agreement, the landowner may recover what it would reasonably cost to construct the road and fence. *Taylor v. North Pac. Coast R. Co.*, 56 Cal. 317.

Tenant Cannot Sue. — When the railroad has agreed with the owner of land to fence, a tenant of the land for a year cannot maintain an action against the company for a breach of the agreement, in the absence of the evidence that the contract or a right of action arising thereunder was assigned. *Hoyleman v. Kanawha, etc., R. Co.*, 33 W. Va. 489.

2. Obligation to Fence under Statute — *England.* — *Manchester, etc., R. Co. v. Wallis*, 25 Eng. L. & Eq. 373.

Canada. — *Bradley v. Great Western R. Co.*, 11 U. C. Q. B. 220; *Elliott v. Buffalo, etc., R. Co.*, 16 U. C. Q. B. 289.

California. — *Fontaine v. Southern Pac. R. Co.*, 54 Cal. 645.

Connecticut. — *Bulkley v. New York, etc., R. Co.*, 27 Conn. 480; *Kane v. New York, etc., R. Co.*, 49 Conn. 139.

Illinois. — *Galena, etc., R. Co. v. Crawford*, 25 Ill. 529; *St. Louis, etc., R. Co. v. Linder*, 39 Ill. 433, 89 Am. Dec. 319; *Toledo, etc., R. Co. v. Wickery*, 44 Ill. 76; *Ohio, etc., R. Co. v. Brubaker*, 47 Ill. 462; *Chicago, etc., R. Co. v. Harris*, 54 Ill. 528; *Toledo, etc., R. Co. v. Pence*, 68 Ill. 524; *Chicago, etc., R. Co. v. Umphenour*, 69 Ill. 198; *Toledo, etc., R. Co. v. Lavery*, 71 Ill. 524; *Ohio, etc., R. Co. v. Clutter*, 82 Ill. 123.

Indiana. — *Williams v. New Albany, etc., R. Co.*, 5 Ind. 111; *Indianapolis, etc., R. Co. v. Kinney*, 8 Ind. 404; *McKinney v. Ohio, etc., R. Co.*, 22 Ind. 99; *Toledo, etc., R. Co. v. Cory*, 39 Ind. 218.

Iowa. — *Davis v. Burlington, etc., R. Co.*, 26 Iowa 549; *Swift v. North Missouri R. Co.*, 29 Iowa 243; *Aylesworth v. Chicago, etc., R. Co.*, 30 Iowa 450; *Perry v. Dubuque Southwestern R. Co.*, 36 Iowa 102; *Flattes v. Chicago, etc.,*

Landowner's Right to Fence and Recover Cost. — The statutes sometimes provide that when a railroad company neglects to fence its track as required by law, the owner of the land, after notice to the company, may build the fence and recover the value thereof from the company or person operating the road.¹

Landowner May Compel Company to Fence. — It has been held under some of the statutes that the landowner may compel the railroad company to build a fence in accordance with the requirements of the law.²

R. Co., 35 Iowa 191; *McCormick v. Chicago*, etc., R. Co., 41 Iowa 193.

Kansas. — *St. Joseph, etc., R. Co. v. Grover*, 11 Kan. 302.

Kentucky. — *Louisville, etc., R. Co. v. Simmons*, 85 Ky. 151.

Maine. — *Perkins v. Eastern, etc., R. Co.*, 29 Me. 307, 50 Am. Dec. 589; *Waldron v. Portland, etc., R. Co.*, 35 Me. 426; *Norris v. Androscoggin R. Co.*, 39 Me. 273, 63 Am. Dec. 621; *Gilman v. European, etc., R. Co.*, 60 Me. 235; *Osborne v. Canadian Pac. R. Co.*, 87 Me. 393.

Massachusetts. — *Morss v. Boston, etc., R. Co.*, 2 Cush. (Mass.) 536; *Eames v. Boston, etc., R. Corp.*, 14 Allen (Mass.) 151; *Eames v. Salem, etc., R. Co.*, 98 Mass. 561, 96 Am. Dec. 676; *Keliher v. Connecticut River R. Co.*, 107 Mass. 411.

Minnesota. — *Gillam v. Sioux City, etc., R. Co.*, 26 Minn. 268.

Missouri. — *Burton v. North Missouri R. Co.*, 30 Mo. 372; *Cary v. St. Louis, etc., R. Co.*, 60 Mo. 209; *Nall v. St. Louis, etc., R. Co.*, 59 Mo. 112; *Parks v. Hannibal, etc., R. Co.*, 20 Mo. App. 440; *Boyle v. Missouri Pac. R. Co.*, 21 Mo. App. 416; *Carpenter v. St. Louis, etc., R. Co.*, 25 Mo. App. 110; *Smith v. St. Louis, etc., R. Co.*, 25 Mo. App. 113; *Russell v. Hannibal, etc., R. Co.*, 26 Mo. App. 368; *Vail v. Kansas City, etc., R. Co.*, 28 Mo. App. 372; *Calvert v. Hannibal, etc., R. Co.*, 34 Mo. 242.

New Hampshire. — *Smith v. Eastern R. Co.*, 35 N. H. 356; *Horn v. Atlantic, etc., R. Co.*, 35 N. H. 169.

New York. — *Suydam v. Moore*, 8 Barb. (N. Y.) 358; *Waldron v. Rensselaer, etc., R. Co.*, 8 Barb. (N. Y.) 390; *Lackin v. Delaware, etc., Canal Co.*, 22 Hun (N. Y.) 309.

Ohio. — *Warner v. Baltimore, etc., R. Co.*, 31 Ohio St. 265.

Oregon. — *Sullivan v. Oregon R., etc., Co.*, 19 Oregon 319.

Virginia. — *Richmond, etc., R. Co. v. Jones*, 6 Am. L. J. 346; *Norfolk, etc., R. Co. v. Stephens*, 85 Va. 302.

Wisconsin. — *Sika v. Chicago, etc., R. Co.*, 21 Wis. 370; *Quackenbush v. Wisconsin, etc., R. Co.*, 71 Wis. 472.

Duty Imposed by Implication. — A statute which defines what shall constitute a sufficient fence for railroads, and in another section imposes a liability upon railroad companies for injury to cattle on their unfenced tracks, imposes the duty upon such railroad companies to fence their tracks, by implication, as if expressly declared. *Sullivan v. Oregon R., etc., Co.*, 19 Oregon 319, 42 Am. & Eng. R. Cas. 625.

A Statute Requiring a Fence on Both Sides of the Road looks to a fence built on the margin or border of the entire ground used as a roadway, so that a fence built inside such line does not

comply with the statute. *Wabash, etc., R. Co. v. Zeigler*, 108 Ill. 304; *Ohio, etc., R. Co. v. People*, 121 Ill. 483, *affirming* 21 Ill. App. 23; *McNear v. Wabash R. Co.*, 42 Mo. App. 14.

Fence to Prevent Animals Crossing Railroad. — One of the purposes of a fence by the railroad is to prevent animals crossing either under or over the track and trespassing on the land on the other side of the railroad; and in case animals do so cross as under a bridge and so trespass, the company is liable. *Baker v. Chicago, etc., R. Co.*, 41 Mo. App. 260.

Duty to Fence as Affected by Change of Sovereignty. — Where the duty to fence is imposed upon a railroad company by state laws, the duty does not cease to exist as to a certain part of the land over which the railroad is built, by reason of the fact that such land is ceded to the government of the United States for a military reservation. *Chicago, etc., R. Co. v. McGlinn*, 114 U. S. 542.

The Passage of an Act Prohibiting Animals from Running at Large does not repeal, by implication, the statute requiring railroad companies to fence their tracks. *Rockford, etc., R. Co. v. Irish*, 72 Ill. 404.

Division Fences. — The provisions in the Code of Iowa regulating division fences are not applicable as between the owner in fee of land and a railroad company having a right of way for a railroad over such land. *Henry v. Dubuque, etc., R. Co.*, 2 Iowa 288. See also *Quimby v. Vermont Cent. R. Co.*, 23 Vt. 387; *Matter of Rensselaer, etc., R. Co.*, 4 Paige (N. Y.) 553.

1. Owner's Right to Build and Recover from Company. — *Toledo, etc., R. Co. v. Sieberns*, 63 Ill. 217, 7 Am. Ry. Rep. 163; *Logansport, etc., R. Co. v. Wray*, 52 Ind. 578; *Warner v. Baltimore, etc., R. Co.*, 31 Ohio St. 265.

The Owner Need Not Finish the Whole Fence before recovering. He is entitled to do so upon the completion of any considerable portion. *Toledo, etc., R. Co. v. Sieberns*, 63 Ill. 217.

Owner Must Build Lawful Fence. — To recover the cost of a fence built in consequence of the company's neglect to build, the owner must prove under the *Kansas* law that his premises, at least in part, are inclosed by a lawful fence. *Missouri Pac. R. Co. v. Youngstrom*, 47 Kan. 349.

The Owner Need Fence Only on One Side of the road, to entitle him to recover. *Fletcher v. St. Louis, etc., R. Co.*, 73 Mo. 142, 7 Am. & Eng. R. Cas. 556.

In an Action by the Landowner to Recover the Cost of a Fence the railroad cannot defeat a recovery by showing that the fence was placed not on the boundary line, but within the boundary toward the railroad track. *Marshal v. St. Louis, etc., R. Co.*, 51 Mo. 138.

2. *Ohio, etc., R. Co. v. People*, 121 Ill. 483,

b. CONSTITUTIONALITY OF STATUTES. — It is an undoubted right of the legislature, in the exercise of the police power incident to government, to require all railroad corporations within the limit of its jurisdiction to inclose their roads with suitable and sufficient fences, as a matter of public safety,¹ and to impose penalties for failure to perform the duty.²

Nature of the Penalties Imposed for Failure to Fence. — These penalties are usually imposed in the shape of double the actual damages suffered,³ double

affirming 21 Ill. App. 23; *Jones v. Seligman*, 81 N. Y. 190; *Wheeler v. Rochester, etc.*, R. Co., 12 Barb. (N. Y.) 227. But see *Columbus, etc.*, R. Co. *v.* *Watson*, 26 Ind. 50.

Statute Requiring Fencing upon Request of Landowner. — Where the statute required the railroad company to fence its track when requested so to do by a person duly authorized by the adjoining owner, and such fences had been constructed at such request, but afterwards were removed by agreement between the company and the landowner, the company was not required to rebuild such fences, after the land had changed hands, without a new request from the new landowner. *Kilmer v. Great Western R. Co.*, 35 U. C. Q. B. 595.

1. Fencing Acts a Valid Exercise of Police Power — *Indiana.* — *Madison, etc.*, R. Co. *v.* *Whiteneck*, 8 Ind. 217; *Indianapolis, etc.*, R. Co. *v.* *Townsend*, 10 Ind. 38; *Indianapolis, etc.*, R. Co. *v.* *Kercheval*, 16 Ind. 84; *Indianapolis, etc.*, R. Co. *v.* *McKinney*, 24 Ind. 283; *Indianapolis, etc.*, R. Co. *v.* *Parker*, 29 Ind. 471.

Illinois. — *Ohio, etc.*, R. Co. *v.* *McClelland*, 25 Ill. 140; *Toledo, etc.*, R. Co. *v.* *Jacksonville*, 67 Ill. 37; *Ohio, etc.*, R. Co. *v.* *Clutter*, 82 Ill. 123; *Cairo, etc.*, R. Co. *v.* *Peoples*, 92 Ill. 97, 34 Am. Rep. 112; *Chicago, etc.*, R. Co. *v.* *Dunser*, 109 Ill. 402, 19 Am. & Eng. R. Cas. 545; *Ohio, etc.*, R. Co. *v.* *Russell*, 115 Ill. 52.

Iowa. — *Small v. Chicago, etc.*, R. Co., 50 Iowa 338.

Kansas. — *Kansas Pac. R. Co. v. Mower*, 16 Kan. 573; *Missouri Pac. R. Co. v. Harrelson*, 44 Kan. 253.

Kentucky. — *Owensboro, etc.*, R. Co. *v.* *Todd*, 91 Ky. 175, 45 Am. & Eng. R. Cas. 461.

Maine. — *Wilder v. Maine Cent. R. Co.*, 65 Me. 333, 20 Am. Rep. 698.

Minnesota. — *Winona, etc.*, R. Co. *v.* *Waldron*, 11 Minn. 515, 88 Am. Dec. 100.

Missouri. — *Trice v. Hannibal, etc.*, R. Co., 49 Mo. 438; *Nall v. St. Louis, etc.*, R. Co., 59 Mo. 112; *Speelman v. Missouri Pac. R. Co.*, 71 Mo. 434, 2 Am. & Eng. R. Cas. 636; *Dickson v. Omaha, etc.*, R. Co., 124 Mo. 140, 46 Am. St. Rep. 429.

Oregon. — *Sullivan v. Oregon R., etc., Co.*, 19 Oregon 319.

Pennsylvania. — *Pennsylvania R. Co. v. Ribbet*, 66 Pa. St. 164.

Texas. — *Texas Cent. R. Co. v. Childress*, 64 Tex. 346.

Vermont. — *Thorpe v. Rutland, etc.*, R. Co., 27 Vt. 140, 62 Am. Dec. 625.

Wisconsin. — *McCall v. Chamberlain*, 13 Wis. 637; *Bennett v. Chicago, etc.*, R. Co., 19 Wis. 145; *Blair v. Milwaukee, etc.*, R. Co., 20 Wis. 254; *Brown v. Milwaukee, etc.*, R. Co., 21 Wis. 39, 91 Am. Dec. 456.

A statute requiring railroad companies to fence under penalty of paying double the value of losses due to their failure in this duty

does not deprive a company against which such a recovery has been had, of its property without due process of law, or deny to it the equal protection of the laws. *Missouri Pac. R. Co. v. Humes*, 115 U. S. 512; *Missouri Pac. R. Co. v. Mackey*, 127 U. S. 205; *Minneapolis, etc.*, R. Co. *v.* *Beckwith*, 129 U. S. 26; *Minneapolis, etc.*, R. Co. *v.* *Emmons*, 149 U. S. 364.

Police Power Cannot Be Delegated to a Private Citizen. — The legislature of a state cannot delegate to a citizen the police power of the state; so, while the legislature may require railroad companies to fence their tracks, it cannot leave to the adjoining owner the determination of the question as to the necessity for a fence and require the company to fence at the mere will of such adjoining owner. Nor can the legislature discriminate between landowners, and it is not within its power to provide that when a railroad company has been given the right of way free of charge, the fencing is all to be done at the cost of such company. *Owensboro, etc.*, R. Co. *v.* *Todd*, 91 Ky. 175, 45 Am. & Eng. R. Cas. 461.

Power May Be Granted to Municipalities. — A statute which authorizes municipal corporations to require railroad companies to provide protection against injury to persons and property in the use of such railroads confers plenary power over railroads within the corporate limits and authorizes an ordinance requiring a railroad to fence its right of way within the corporate limits. *Hayes v. Michigan Cent. R. Co.*, 111 U. S. 228.

Assessment of Railroad Fences for Taxation under California Statutes. — In Santa Clara County *v.* *Southern Pac. R. Co.*, 118 U. S. 394, it was held that fences erected on the line between railroads and the lands of adjoining proprietors are not, within the meaning of the law of California, part of the "roadway" for the purposes of taxation, but are "improvements" assessable by the local authorities of the proper county.

2. Validity of Penalties for Nonperformance of Duty. — *Missouri Pac. R. Co. v. Humes*, 115 U. S. 512.

3. Double Damages. — *Missouri Pac. R. Co. v. Humes*, 115 U. S. 512; *Minneapolis, etc.*, R. Co. *v.* *Beckwith*, 129 U. S. 26; *Minneapolis, etc.*, R. Co. *v.* *Emmons*, 149 U. S. 364; *Cairo, etc.*, R. Co. *v.* *Peoples*, 92 Ill. 97, 34 Am. Rep. 112; *Cairo, etc.*, R. Co. *v.* *Warrington*, 92 Ill. 157; *Jones v. Galena, etc.*, R. Co., 16 Iowa 6; *Tredway v. Sioux City, etc.*, R. Co., 43 Iowa 527; *Welsh v. Chicago, etc.*, R. Co., 53 Iowa 632; *Phillips v. Missouri Pac. R. Co.*, 86 Mo. 540; *Hines v. Missouri Pac. R. Co.*, 86 Mo. 629; *Barnett v. Atlantic, etc.*, R. Co., 68 Mo. 56, 30 Am. Rep. 773; *Revelle v. St. Louis, etc.*, R. Co., 74 Mo. 438; *Humes v. Missouri Pac. R. Co.*, 82 Mo. 221, 52 Am. Rep. 369; *Cummings v. St. Louis, etc.*, R. Co., 70

costs,¹ absolute liability in case of injury to domestic animals,² and like provisions.³

c. **PURPOSE OF STATUTES — FOR WHOSE BENEFIT INTENDED.** — The purpose of statutes requiring railroad companies to fence their tracks is often to be found in the language of the statute.⁴ In the absence of such a guide it is generally held to be for the purpose of affording protection to domestic animals and promoting the security of persons and property passing over the road; not merely for the benefit of the adjoining landowner.⁵

Mo. 570; *Meyers v. Union Trust Co.*, 82 Mo. 237; *Hamilton v. Missouri Pac. R. Co.*, 87 Mo. 85; *Kaes v. Missouri Pac. R. Co.*, 6 Mo. App. 397. But see *Atchison, etc., R. Co. v. Baty*, 6 Neb. 37, where it was held that a statute which gave to the owner of live stock "double the value of his property injured, killed, or destroyed" on a railroad track in case the same is not paid for within thirty days after demand is unconstitutional, as unwarrantably depriving the citizen of private property. See *ante*, the title **EXEMPLARY DAMAGES**.

1. **Double Costs.** — *Johnson v. Chicago, etc., R. Co.*, 29 Minn. 425, *approved* in *Schimmele v. Chicago, etc., R. Co.*, 34 Minn. 216.

2. **Absolute Liability.** — *Illinois Cent. R. Co. v. Crider*, 91 Tenn. 489, *citing* *Gorman v. Pacific R. Co.*, 26 Mo. 441, 72 Am. Dec. 220; *Wilder v. Maine Cent. R. Co.*, 65 Me. 332, 20 Am. Rep. 698; *Quackenbush v. Wisconsin, etc., R. Co.*, 62 Wis. 411, *reaffirmed* 71 Wis. 472.

Not Class Legislation. — The provision of the statute rendering railroad corporations absolutely liable for injury to cattle on their unfenced tracks is not "vicious class legislation," giving advantage to cattle owners and disadvantage to the owners of unfenced railroads. These classes are natural and not arbitrary. *Illinois Cent. R. Co. v. Crider*, 91 Tenn. 489.

But where the statute provided that "the findings of such appraisers shall be taken and held to be conclusive evidence of the value and ownership of, and the injury to, such stock," it was held that such provision deprived the railroad company of the right to trial by jury by preventing an appeal from the findings of the appraisers. *Graves v. Northern Pac. R. Co.*, 5 Mont. 556, 51 Am. Rep. 81. See also *Oregon R., etc., Co. v. Smalley*, 1 Wash. 206, 42 Am. & Eng. R. Cas. 550, *overruling* *Dacres v. Oregon R., etc., Co.*, 1 Wash. 525, and *Oregon R., etc., Co. v. Dacres*, 1 Wash. 195.

In an action under the *Kentucky* statute (Gen. Stat., 1888, c. 57, § 2) which provides that in case cattle are killed on a railroad track adjoining the lands belonging to the owner of the cattle, "who has not received compensation for fencing said land along said road, the loss shall be divided between the railroad company and the owner of such cattle," unless the company is chargeable with wilful negligence, the plaintiff need not allege or prove negligence; and the fact that a liability which is not imposed on other citizens is imposed on railroads by the statute for the result of acts not negligent does not render it unconstitutional. *Louisville, etc., R. Co. v. Belcher*, 89 Ky. 193. This statute is repeated in a slightly different form in Stat. Ky., 1894, § 809.

3. **Attorney's Fees Against Railroads.** — The legislature has no power to authorize the imposition of an "attorney fee" against a railroad in a suit brought against it for the killing of the plaintiff's cattle by reason of the fact that the defendant failed to maintain a fence as required by law. Such an imposition is a penalty in disguise and is class legislation repugnant to the form and genius of our institutions. *Wilder v. Chicago, etc., R. Co.*, 70 Mich. 382. See also *South, etc., Alabama R. Co. v. Morris*, 65 Ala. 193; *St. Louis, etc., R. Co. v. Williams*, 49 Ark. 492. But see *Perkins v. St. Louis, etc., R. Co.*, 103 Mo. 52, where provision for an attorney's fee was sustained as a valid exercise of the police power. And in *Indianapolis, etc., R. Co. v. Buckles*, 21 Ill. App. 181, it was held that where a provision was made for the taxing of an attorney's fee against the defendant company in case of recovery by the plaintiff, in case a new trial be granted and recovery be had in the second trial also, attorney's fees may be taxed in both the trials.

4. **Purpose Disclosed in Statute.** — *Buxton v. North Eastern R. Co.*, L. R. 3 Q. B. 549; *Corry v. Great Western R. Co.*, 7 Q. B. Div. 322; *Hynes v. San Francisco, etc., R. Co.*, 65 Cal. 316; *People v. Ohio, etc., R. Co.*, 21 Ill. App. 23; *Silver v. Kansas City, etc., R. Co.*, 78 Mo. 528, 47 Am. Rep. 118; *Walsh v. Virginia, etc., R. Co.*, 8 Nev. 110; *Tombs v. Rochester, etc., R. Co.*, 18 Barb. (N. Y.) 583; *Langlois v. Buffalo, etc., R. Co.*, 19 Barb. (N. Y.) 364; *Sullivan v. Oregon R., etc., Co.*, 19 Oregon 319; *Newsom v. Norfolk, etc., R. Co.*, 2 Va. L. Reg. 882.

Several of these statutes have been held to be for the benefit of adjoining owners or adjoining owners and occupiers only. *Buxton v. North Eastern R. Co.*, L. R. 3 Q. B. 549; *Corry v. Great Western R. Co.*, 7 Q. B. Div. 322; *Cornwall v. Sullivan R. Co.*, 28 N. H. 161; *Newsom v. Norfolk, etc., R. Co.*, 2 Va. L. Reg. 882.

5. **Statutes Not Generally Regarded as for Adjoining Landowners Solely** — *Illinois*. — *Ohio, etc., R. Co. v. McClelland*, 25 Ill. 140, see *Cairo, etc., R. Co. v. Warrington*, 92 Ill. 157; *People v. Ohio, etc., R. Co.*, 21 Ill. App. 23, *affirmed* 121 Ill. 483; *Wabash R. Co. v. Brown*, 5 Ill. App. 590. But see *Wabash R. Co. v. Perbex*, 57 Ill. App. 62.

Indiana. — *Indianapolis, etc., R. Co. v. Townsend*, 10 Ind. 38; *New Albany, etc., R. Co. v. Tilton*, 12 Ind. 3, 74 Am. Dec. 195; *New Albany, etc., R. Co. v. Maiden*, 12 Ind. 10; *Toledo, etc., R. Co. v. Fowler*, 22 Ind. 316; *Indianapolis, etc., R. Co. v. Guard*, 24 Ind. 222; *Indianapolis R. Co. v. McKinney*, 24 Ind. 283; *Jeffersonville R. Co. v. Gabbert*,

d. UPON WHOM THE DUTY TO FENCE RESTS. — Where the duty to inclose railroad tracks is imposed by statute, the duty rests upon the operators of the road although they be not the owners, and such operators are held liable for damages arising from failure to fence; ¹ for public policy demands

25 Ind. 431; *Jeffersonville, etc., R. Co. v. Nichols*, 30 Ind. 321; *Baltimore, etc., R. Co. v. Johnson*, 59 Ind. 188.

Kansas. — *Missouri Pac. R. Co. v. Roads*, 33 Kan. 640.

Maine. — *Wilder v. Maine Cent. R. Co.*, 65 Me. 332, 20 Am. Rep. 698.

Minnesota. — *Gillam v. Sioux City, etc., R. Co.*, 26 Minn. 268.

Missouri. — *Dickson v. Omaha, etc., R. Co.*, 124 Mo. 140, 46 Am. St. Rep. 429; *Clark v. Hannibal, etc., R. Co.*, 36 Mo. 202; *Lafferty v. Hannibal, etc., R. Co.*, 44 Mo. 291; *Tiarks v. St. Louis, etc., R. Co.*, 58 Mo. 45. See *Slatery v. St. Louis, etc., R. Co.*, 55 Mo. 362; *Kaes v. Missouri Pac. R. Co.*, 6 Mo. App. 397.

New York. — *Corwin v. New York, etc., R. Co.*, 13 N. Y. 42; *Shepard v. Buffalo, etc., R. Co.*, 35 N. Y. 641; *Tracy v. Troy, etc., R. Co.*, 38 N. Y. 433, 98 Am. Dec. 54; *Donnegan v. Erhardt*, 119 N. Y. 468, 42 Am. & Eng. R. Cas. 580; *Ditchett v. Spuyten Duyvil, etc., R. Co.*, 67 N. Y. 425; *Graham v. Delaware, etc., Canal Co.*, 46 Hun (N. Y.) 386.

Oregon. — *Sullivan v. Oregon R., etc., Co.*, 19 Oregon 319.

Texas. — *Texas Cent. R. Co. v. Childress*, 64 Tex. 346.

Vermont. — *Trow v. Vermont Cent. R. Co.*, 24 Vt. 487, 58 Am. Dec. 191. But see *Jackson v. Rutland, etc., R. Co.*, 25 Vt. 150, 60 Am. Dec. 246.

Wisconsin. — *McCall v. Chamberlain*, 13 Wis. 637; *Schmidt v. Milwaukee, etc., R. Co.*, 23 Wis. 186.

In *Hopkins v. Kansas Pac. R. Co.*, 18 Kan. 462, it was said that the purpose was to obviate the necessity of inquiring into the mere negligence of the stock owners or parties in charge of trains.

"The policy of the statute is to induce and stimulate the fencing of railroads for the protection of live stock from destruction by trains used thereon." *Tredway v. Sioux City, etc., R. Co.*, 43 Iowa 527, *quoted in Fletcher v. St. Louis, etc., R. Co.*, 73 Mo. 142.

Injury to Employees. — A statute requiring railroads to maintain fences, while primarily intended for the benefit of owners of stock killed on the railroad track, is also available for all classes of persons who need protection; and so not only a passenger on a railroad train, but an employee of the road working on such a train who suffers injury by reason of the road's failure to maintain a fence as required by such a statute is entitled to recover damages from the railroad for the injuries sustained. *Atchison, etc., R. Co. v. Reesman*, 60 Fed. Rep. 370, *construing the Missouri statute*; *Terre Haute, etc., R. Co. v. Williams*, 172 Ill. 379 (*affirming* 69 Ill. App. 392; and *overruling* *Wabash R. Co. v. Brown*, 5 Ill. App. 590); *Dickson v. Omaha, etc., R. Co.*, 124 Mo. 140, 46 Am. St. Rep. 429; *Donnegan v. Erhardt*, 119 N. Y. 468, 42 Am. & Eng. R. Cas. 580, *reversed*, 55 N. Y. Super. Ct. 502, and *overruling*

Langlois v. Buffalo, etc., R. Co., 19 Barb. (N. Y.) 364.

Where neither the common nor the statute law requires that a railroad company should fence its track to prevent cattle straying upon it, the company is not liable for the death of one of its employees due to an accident caused by stray cattle suddenly getting upon the track. *Cowan v. Union Pac. R. Co.*, 35 Fed. Rep. 43.

The contrary conclusion was reached in *Newsom v. Kimball*, 42 U. S. App. 282, 2 Va. L. Reg. 882. In this case it was held that the Virginia statute as to fencing by railroad companies was not intended for the benefit of passengers and employees upon the railroad trains, and the above decisions were distinguished upon the ground that the Missouri and New York statutes were entirely different from the Virginia law.

In *Sweeney v. Central Pac. R. Co.*, 57 Cal. 15, it was held that a railroad company is not liable for an injury to an employee resulting from an accident occasioned by failure to fence its track, if the person injured knew of the want of the fence.

In *Dewey v. Chicago, etc., R. Co.*, 31 Iowa 373, it was held that the negligence of the employee injured under such circumstances would prevent a recovery of damages by him from the road.

Injury to Railway Mail Clerk. — Where a collision with a calf occurred on an unfenced railroad track and the railway mail clerk was injured, it was held that, in view of the fact that the company may fence its right of way, if this is not done it is a fact to be looked to in ascertaining whether or not the company exercised due care. *Gulf, etc., R. Co. v. Wilson*, 79 Tex. 371, 23 Am. St. Rep. 345. See *Hayes v. Michigan Cent. R. Co.*, 111 U. S. 228.

Injury to Person Not Passenger or Employee. — In *Hayes v. Michigan Cent. R. Co.*, 111 U. S. 228, it appeared that a railroad company was required by an ordinance of a municipal corporation to erect a fence along the line of its road within the corporate limits, but failed to comply with this ordinance, and the plaintiff, a boy of tender years, while running near the track fell on it and was run over by the passing cars. It was held that the plaintiff had a right of action against the railroad for the injury received, if that injury was due to the railroad's failure to fence in accordance with the ordinance.

1. Duty Rests upon Operators — *California.* — *Fontaine v. Southern Pac. R. Co.*, 54 Cal. 645, 1 Am. & Eng. R. Cas. 159.

Georgia. — *Davis v. Central R. Co.*, 75 Ga. 645.

Illinois. — *Illinois Cent. R. Co. v. Kanouse*, 79 Ill. 272, 89 Am. Dec. 307, *approving* *Clement v. Canfield*, 28 Vt. 302; *East St. Louis, etc., R. Co. v. Gerber*, 82 Ill. 632; *Toledo, etc., R. Co. v. Rumbold*, 49 Ill. 143.

Indiana. — *Fort Wayne, etc., R. Co. v.*

that the operators of a railroad should be held responsible for all injury resulting from the use by them of a road in a defective condition.¹

Owners Also Liable. — The owners of the road would also be liable because of their neglect to perform the statutory duty.² And it has been held that both the owner and the operator of an unfenced road are liable for damages caused by the failure to fence such road.³

Hinebaugh, 43 Ind. 354; Pittsburgh, etc., R. Co. v. Hannon, 60 Ind. 417. See Cincinnati, etc., R. Co. v. McDougall, 108 Ind. 179.

Iowa. — Stewart v. Chicago, etc., R. Co., 27 Iowa 282; Clary v. Iowa Midland R. Co., 37 Iowa 344.

Kansas. — Union Trust Co. v. Kendall, 20 Kan. 515; St. Louis, etc., R. Co. v. Curl, 28 Kan. 622, 11 Am. & Eng. R. Cas. 458; Missouri Pac. R. Co. v. Morrow, 32 Kan. 217, 19 Am. & Eng. R. Cas. 630; Missouri Pac. R. Co. v. Ricketts, 45 Kan. 617.

Maine. — Whitney v. Atlantic, etc., R. Co., 44 Me. 362, 69 Am. Dec. 103; Wyman v. Penobscot, etc., R. Co., 46 Me. 162; Bean v. Atlantic, etc., R. Co., 63 Me. 293; Gould v. Bangor, etc., R. Co., 82 Me. 125.

Missouri. — Farley v. St. Louis, etc., R. Co., 72 Mo. 338; Farrell v. Union Trust Co., 77 Mo. 475, 13 Am. & Eng. R. Cas. 552.

New York. — Burchfield v. Northern Cent. R. Co., 57 Barb. (N. Y.) 589; Purdy v. New York, etc., R. Co., 61 N. Y. 353. But see Parker v. Rensselaer, etc., R. Co., 16 Barb. (N. Y.) 315.

Vermont. — Clement v. Canfield, 28 Vt. 302, approved in Illinois, etc., R. Co. v. Kanouse, 39 Ill. 272, 89 Am. Dec. 307.

Wisconsin. — McCall v. Chamberlain, 13 Wis. 641; Cook v. Milwaukee, etc., R. Co., 36 Wis. 45.

Canada. — Van Natter v. Buffalo, etc., R. Co., 27 U. C. Q. B. 581.

Operators Must Erect Cattle Guards. — It is the duty of the company operating the road to see that proper cattle guards exist wherever the track enters and leaves inclosed or fenced lands, whether such company owns the road or is operating it under lease. Missouri Pac. R. Co. v. Ricketts, 45 Kan. 617; Missouri Pac. R. Co. v. Morrow, 32 Kan. 217; Downing v. Chicago, etc., R. Co., 43 Iowa 96.

Individual Operators. — If individual operators should build and operate a railroad they would come within the spirit if not the language of the statute. Liddle v. Keokuk, etc., R. Co., 23 Iowa 378.

Lessee Subject to Duties Imposed on Lessor. — A railroad company in possession of a railroad as lessee of the owner company holds it subject to all duties imposed on the lessor company for the benefit and protection of the public. Cook v. Milwaukee, etc., R. Co., 36 Wis. 45. See Stewart v. Chicago, etc., R. Co., 27 Iowa 282. Nor can such lessee deny the validity of the lease so as to escape liability for its neglect to fence. Gould v. Bangor, etc., R. Co., 82 Me. 125. See also Brown v. Grand Trunk R. Co., 24 U. C. Q. B. 350, where a lessee is held a "proprietor" within the meaning of an act requiring fencing.

Liability of One of Several Companies Using Road. — Where the defendant railroad company did not own the roadbed and track over

which it ran, but in conjunction with other companies used it for the purpose of running its cars over it, and none of the companies owned the track, it was held that it was the road of the defendant company so as to make it liable for injury to cattle caused by lack of the fences required by statute. Tracy v. Troy, etc., R. Co., 55 Barb. (N. Y.) 529.

1. Reason of Liability. — Illinois Cent. R. Co. v. Kanouse, 39 Ill. 272, 89 Am. Dec. 307; Toledo, etc., R. Co. v. Rumbold, 40 Ill. 143; Fort Wayne, etc., R. Co. v. Hinebaugh, 43 Ind. 354; Cincinnati, etc., R. Co. v. Paskins, 36 Ind. 380; Huey v. Indianapolis, etc., R. Co., 45 Ind. 320.

2. Liability of the Owner of the Road. — Fontaine v. Southern Pac. R. Co., 54 Cal. 645; Toledo, etc., R. Co. v. Rumbold, 40 Ill. 143; Illinois Cent. R. Co. v. Kanouse, 39 Ill. 272, 89 Am. Dec. 307; Fort Wayne, etc., R. Co. v. Hinebaugh, 43 Ind. 354; Louisville, etc., R. Co. v. Meadows, 87 Ind. 441; Liddle v. Keokuk, etc., R. Co., 23 Iowa 378; St. Louis, etc., R. Co. v. Curl, 28 Kan. 622; Bay City, etc., R. Co. v. Austin, 21 Mich. 390; Brown v. Hannibal, etc., R. Co., 27 Mo. App. 395.

Liability of Owner for Acts of Lessee. — Where stock is injured upon a railroad under circumstances which would render the owner liable for the injury under the statute, the owner cannot escape liability upon the ground that the injury was inflicted by the engine of another railroad company which was at the time using the track under a license from the owner. Kansas City, etc., R. Co. v. Ewing, 23 Kan. 273. See also Illinois Cent., etc., R. Co. v. Kanouse, 39 Ill. 272, 89 Am. Dec. 307; Toledo, etc., R. Co. v. Rumbold, 40 Ill. 143; Cincinnati, etc., R. Co. v. Paskins, 36 Ind. 380; Fort Wayne, etc., R. Co. v. Hinebaugh, 43 Ind. 354; Huey v. Indianapolis, etc., R. Co., 45 Ind. 320.

Liability for Failure to Fence Central of Five Parallel Tracks. — Five railroad companies had tracks parallel and just far enough apart for the passage of trains. The defendant company occupied the central track. No fence was maintained by any of the railroad companies beside its tracks at that point, and cattle strayed upon the tracks and were killed upon the track of the defendant company. It was held that the defendant company was liable, the land from which the cattle escaped being adjoining land within the statute; and the fact that the track nearest the land from which the cattle escaped was not fenced was no excuse for the defendant company's failure to fence as required by statute. Kelver v. New York, etc., R. Co., 126 N. Y. 365.

3. Both Owner and Operator Held Liable. — Davis v. Central R. Co., 75 Ga. 645; Ohio, etc., R. Co. v. Russell, 115 Ill. 52; Cincinnati, etc., R. Co. v. McDougall, 108 Ind. 179; Downing v. Chicago, etc., R. Co., 43 Iowa 96;

Receiver. — The fact that a railroad is in the hands of a receiver will not relieve it from the duty to fence and the consequent liability for failure.¹

e. DUTY NOT TRANSFERABLE. — Railroad companies cannot relieve themselves of the statutory duty to fence their tracks and erect cattle guards thereon by contract or agreement with another person to perform the duty.²

Gould v. Bangor, etc., R. Co., 82 Me. 125. See Toledo, etc., R. Co. v. Rumbold, 40 Ill. 143; Indianapolis, etc., R. Co. v. Warner, 35 Ind. 515.

May Sue Either Owner or Operator. — Where a railroad company fails to build the fences required by the statute to be erected along the sides of its track, the adjoining owner may build them and sue for double value against either the company owning the road or any other company actually occupying it. Ohio, etc., R. Co. v. Russell, 115 Ill. 52.

Owner and Lessee Each Liable for Injuries Caused by Its Own Trains. — The owner of the road is liable for injuries caused upon its unfenced track by its own trains, and the lessee company is liable for injuries caused by its trains. Stephens v. Davenport, etc., R. Co., 36 Iowa 327.

Lessee Road as "Agent" of Lessor. — A railroad company operating the road of another company under a contract is an agent of the lessor company in the meaning of the General Railroad Act, and neglect of the lessee company to maintain fences as required by statute subjects the lessor company to resulting liability. Bay City, etc., R. Co. v. Austin, 21 Mich. 390. See Dolan v. Newburgh, etc., R. Co., 120 N. Y. 571.

Liability of Contractor. — Under a statute which provides that until proper fences are erected by a railroad company the company and its agents shall be liable for injuries to stock, caused by failure to erect fences, a contractor engaged in erecting a railroad is liable as an agent of the company for the loss of stock caused by his tearing down fences; and on account of his independent powers, a primary liability rests upon him. Gardner v. Smith, 7 Mich. 410, 74 Am. Dec. 722.

Owner Liable for Contractor. — The company owning a railroad is not excused from the consequences of a failure to erect fences because of the fact that the contractor building the road failed to erect proper fences. Chicago, etc., R. Co. v. Hutchinson, 45 Kan. 186; Houston, etc., R. Co. v. Meador, 50 Tex. 77. See also Pound v. Port Huron, etc., R. Co., 54 Mich. 117.

Liability of Foreign Corporations. — Where the statute requires railroad companies to build and maintain fences along the lines of their roads open for use, a foreign company extending its line into the state is subject to the statute so far as the line is open for use, and is liable for injury to cattle caused by a failure to build fences. Purdy v. New York, etc., R. Co., 61 N. Y. 353.

1. Receiver's Liability. — Wyatt v. Ohio, etc., R. Co., 10 Ill. App. 289; Indianapolis, etc., R. Co. v. Ray, 51 Ind. 269; Ohio, etc., R. Co. v. Fitch, 20 Ind. 498; Kansas Pac. R. Co. v. Wood, 24 Kan. 619; Farrell v. Union Trust Co., 77 Mo. 475.

The fact that a railroad is run by receivers in bankruptcy will not defeat an action for the

value of an animal killed by a train on such railroad on account of its failure to fence its track as required by statute. Indianapolis, etc., R. Co. v. Ray, 51 Ind. 269.

2. Contract with Another to Maintain Fence Does Not Relieve from Liability. — Illinois Cent. R. Co. v. Swearingen, 33 Ill. 289; New Albany, etc., R. Co. v. Tilton, 12 Ind. 3, 74 Am. Dec. 195; New Albany, etc., R. Co. v. Maiden, 12 Ind. 10; New Albany, etc., R. Co. v. Pace, 13 Ind. 411; Norris v. Androscoggin R. Co., 39 Me. 273, 63 Am. Dec. 621; Whitney v. Atlantic, etc., R. Co., 44 Me. 362, 69 Am. Dec. 103, affirmed in Wyman v. Penobscot, etc., R. Co., 46 Me. 162; Silver v. Kansas City, etc., R. Co., 78 Mo. 528, 47 Am. Rep. 118. But see Buxton v. North Eastern R. Co., L. R. 3 Q. B. 540.

Agreement with Adjoining Owner. — Where a railroad company is required by statute to maintain fences at private crossings and fails to do so, it cannot escape liability for injury to cattle at such place by showing a contract with an adjoining owner that the latter shall maintain the fence at such crossing, the owner of the injured cattle not being a party. Indianapolis, etc., R. Co. v. Thomas, 84 Ind. 194. See also Illinois Cent. R. Co. v. Swearingen, 33 Ill. 289.

But where proper fences are built and maintained it will make no difference, in an action for damages on account of injury to animals on the track, whether such fence be built by the railroad company or the adjoining owner; nor whether the fence be built on the right of way or upon the land of such adjoining owner with his consent. Bond v. Evansville, etc., R. Co., 100 Ind. 301. But see San Antonio, etc., Pass. R. Co. v. Peterson, 8 Tex. Civ. App. 367. See also Norfolk, etc., R. Co. v. McGavock, 90 Va. 507, in which case it was held that the obligation imposed by Code Va., 1887, § 1258, upon railroad companies, to fence their right of way through inclosed land, could not be avoided by proof that a lawful fence existed at the place of the accident, erected by the adjoining landowner; and the defendant company was not permitted to prove such fact.

Whether Landowner's Covenant to Fence a Defense in Action for Injuries. — Where the statute fixes a railroad with the duty of fencing its line and with liability for injuries happening through its neglect to fence, the fact that a neighboring landowner has agreed to maintain a fence along the railroad will not relieve the railroad from liability for injuries suffered by such landowner's stock from the insufficiency of the fence. Shepard v. Buffalo, etc., R. Co., 35 N. Y. 641.

In other states, however, it has been held that a covenant on the part of an adjoining landowner to fence is a bar to a recovery by him for injuries suffered by his stock for want of a sufficient fence, and the tenant of such a landowner who has knowledge of his landowner's covenant is in no better position than

f. **WHEN THE STATUTORY DUTY ATTACHES.** — In the absence of special provision the duty to fence its track attaches against a railroad company when the necessity for protection to stock and to land arises.¹ This necessity arises at least as soon as cars are run over the road.²

his landlord in this respect. *St. Louis, etc., R. Co. v. Washburn*, 97 Ill. 253; *Indianapolis, etc., R. Co. v. Petty*, 25 Ind. 413; *Terre Haute, etc., R. Co. v. Smith*, 16 Ind. 102; *Indianapolis, etc., R. Co. v. Adkins*, 23 Ind. 340; *Ellis v. Pacific R. Co.*, 48 Mo. 231; *Cincinnati, etc., R. Co. v. Waterson*, 4 Ohio St. 425.

Owner's Covenant No Defense as Against Occupier. — Where, under the statute, the railroad owes the duty of fencing to "the owners and occupiers of lands adjoining the railway," a covenant between the company and the owners of the adjoining land will not discharge the company from its obligation with respect to the occupier thereof. *Corry v. Great Western R. Co.*, 7 Q. B. Div. 322.

Where Stock Owner Has Made Voluntary Repairs. — The duty of keeping railroad fences, gates, and bars in repair is not to be shifted from the company to owners of stock injured on the track merely because, through the neglect of the railroad company, such owner has found it necessary to make some temporary repairs thereon. *Peoria, etc., R. Co. v. Babbs*, 23 Ill. App. 454. See *Louisville, etc., R. Co. v. White*, 94 Ind. 257, 20 Am. & Eng. R. Cas. 449; *Jeffersonville, etc., R. Co. v. Nichols*, 30 Ind. 321; *Jeffersonville, etc., R. Co. v. Sullivan*, 38 Ind. 262. But see *Hovorka v. Minneapolis, etc., R. Co.*, 34 Minn. 281.

So if the adjoining landowner erects fences which prove insufficient, that fact will not excuse the railroad company from liability for injuries caused by absence of fences, the duty to build fences being upon such company. *Wilson v. Ontario, etc., R. Union Co.*, 12 U. C. Q. B. 463.

Where the landowner releases a right of way over his land to a railroad company, and the company erects fences along the line of such right of way, the fact that such adjoining owner uses the fence as his boundary to a pasture will not make such fence a division fence which he should keep in repair. *Cleveland, etc., R. Co. v. Crossley*, 36 Ind. 370.

Agreement with Lessee Company. — A railroad company owning a railroad cannot avoid its obligation to fence by an agreement with a company leasing the road that the lessee will perform all the duties and obligations imposed by statute on the lessor. *St. Louis, etc., R. Co. v. Curl*, 28 Kan. 622.

Effect of Allowance for Cost of Fencing in Estimating Damages for Taking Land. — Where a railroad company made payment for right of way condemned through a landowner's field, including the amount allowed for fencing the track through such field, this did not bind the landowner to fence at all. It was at his option. But the duty upon the railroad company was to the public, and it was not excused by such payment from the duty to fence imposed by statute. *Baltimore, etc., R. Co. v. Johnson*, 59 Ind. 188.

1. When Duty to Fence Begins. — *Silver v. Kansas City, etc., R. Co.*, 78 Mo. 528, 47 Am.

Rep. 118; *Gordon v. Chicago, etc., R. Co.*, 44 Mo. App. 201.

Difficulty in Getting Material. — The attaching of the duty to fence cannot be delayed by a railroad company until the road is so far constructed as to enable it to obtain material from a distance. *Gordon v. Chicago, etc., R. Co.*, 44 Mo. App. 201.

Statute Requiring Fencing Within Six Months After Road in Operation. — Where the statute requires a railroad company to fence its track within six months after the road is in operation, the duty does not attach until it has been in operation for that period, and though the company may have built fences prior to that time, the duty to keep them in repair does not attach until the road has been in operation six months. *Toledo, etc., R. Co. v. Miller*, 45 Ill. 42.

A Statute Requiring Fencing Within Six Months After Land Taken for the use of the railroad, although the construction of the road is incomplete or even not commenced, where the landowner requests the fence, and which imposes the duty of erecting and maintaining fences after the road is constructed, is construed in *Brown v. Grand Trunk R. Co.*, 24 U. C. Q. B. 350.

Duty Attaches When Possession Taken. — In *Gardner v. Smith*, 7 Mich. 410, 74 Am. Dec. 722, the court rejected the view that the neglect to fence and the corresponding liability under the statute did not arise until the road was completed, and it was held that the statute having imposed the obligation of fencing upon the company as a general duty, it was bound to do so as soon as it took possession of the road and entered along its lines for the purpose of constructing it. See also *Continental Imp. Co. v. Ives*, 30 Mich. 448.

Statute Applies to Railroads Already Chartered. — *Bulkley v. New York, etc., R. Co.*, 27 Conn. 479; *Wilder v. Maine Cent. R. Co.*, 65 Me. 332, 20 Am. Rep. 698; *Norris v. Androscoggin R. Co.*, 39 Me. 273, 63 Am. Dec. 621. *Contra*, *Bronson v. Coffin*, 108 Mass. 175, 11 Am. Rep. 335. See also *Stearns v. Old Colony, etc., R. Corp.*, 1 Allen (Mass.) 493, and *Baxter v. Boston, etc., R. Corp.*, 102 Mass. 383, where such a statute was held not to apply to a railroad partially constructed, at the time of the passage of the act.

2. Duty to Fence When Cars in Operation. — *Rockford, etc., R. Co. v. Heflin*, 65 Ill. 366; *Toledo, etc., R. Co. v. Crane*, 68 Ill. 355; *Baltimore, etc., R. Co. v. McClellan*, 59 Ind. 440; *Glandon v. Chicago, etc., R. Co.*, 68 Iowa 457; *Continental Imp. Co. v. Ives*, 30 Mich. 448; *Cobb v. Kansas City, etc., R. Co.*, 43 Mo. App. 313; *Comings v. Hannibal, etc., R. R. Co.*, 48 Mo. 512; *Clark v. Vermont, etc., R. Co.*, 28 Vt. 103; *Holden v. Rutland, etc., R. Co.*, 30 Vt. 297; *Mead v. Burlington, etc., R. Co.*, 52 Vt. 278, 7 Am. & Eng. R. Cas. 550. See *Elliott v. Buffalo, etc., R. Co.*, 16 U. C. Q. B. 289.

Interpretation of Contract for Fencing. — Where

When Liability Begins. — Liability for damages resulting from neglect to erect proper fences attaches after a reasonable time has elapsed for their erection from the time when the duty to fence begins.¹

g. AGREEMENT WITH ADJOINING LANDOWNER TO FENCE. — A railroad company, though required by statute to erect and maintain fences along its road, may agree with the adjoining landowner, as between themselves, to dispense with such fences, or that the landowner shall build and maintain them, or to maintain them jointly; and in such cases the landowner cannot maintain an action against the company for injury resulting from neglect to erect or maintain such fences.²

a railroad company contracts to fence within a reasonable time after the "completion of their railway," the words "completion of their railway" mean completion over the tract to be fenced under the contract and the running of cars thereon, and not the completion of the whole line of road. *Baltimore, etc., R. Co. v. McClellan*, 59 Ind. 440.

Right and Liability as to Removal of Fence During Construction. — But a railroad is not required to fence its right of way while it is constructing its road through a tract of land. It may even remove existing fences and other obstructions for the purpose of such construction. *Cincinnati, etc., R. Co. v. Harris*, 61 Ind. 290. But see *Bradley v. Great Western R. Co.*, 11 U. C. Q. B. 220.

Where fences are removed to facilitate the construction of the railroad, a reasonable time is to be allowed before they are rebuilt, even where the law requires them to be erected during the construction of the road. *Rutledge v. Woodstock, etc., R., etc., Co.*, 12 U. C. Q. B. 663.

1. When Liability for Damages for Failure to Fence Attaches. — *Silver v. Kansas City, etc., R. Co.*, 78 Mo. 528, 47 Am. Rep. 118. See *Glandon v. Chicago, etc., R. Co.*, 68 Iowa 457; *Gardner v. Smith*, 7 Mich. 410, 74 Am. Dec. 722; *Continental Imp. Co. v. Ives*, 30 Mich. 445.

Road Need Not Be Completed. — The moving of trains over a road for whatever purpose, as for construction, before the completion of the road, is operating a railroad within the meaning of the statute and renders the company liable for stock killed on account of failure to fence the track. *Glandon v. Chicago, etc., R. Co.*, 68 Iowa 457.

Open for Use. — A statute which requires that a railroad must be open for use for six months in order for liability to attach for injury occasioned by its failure to fence does not require that the road shall be open for public or general use for that period. It is sufficient if the road has been open for construction trains during that time. *Rockford, etc., R. Co. v. Hefflin*, 65 Ill. 366. See also *Toledo, etc., R. Co. v. Crane*, 68 Ill. 355.

Statutory Requirements as to Time of Fencing. — In some states fences are required to be built only within a specified time after the completion of the road. In such states the common-law principles govern actions for injury occurring before the completion of such specified time. *Gilman, etc., R. Co. v. Spencer*, 76 Ill. 192; *St. Louis, etc., R. Co. v. Kirby*, 104 Ill. 345, 10 Am. & Eng. R. Cas. 214; *McCall v. Chamberlain*, 13 Wis. 637.

2. Agreement for Fencing Valid as Between Railroad and Adjoining Owner — Illinois. — *St. Louis, etc., R. Co. v. Washburn*, 97 Ill. 253.

Indiana. — *Terre Haute, etc., R. Co. v. Smith*, 16 Ind. 102; *Indianapolis, etc., R. Co. v. Petty*, 25 Ind. 413; *Indianapolis, etc., R. Co. v. Shimer*, 17 Ind. 295; *Louisville, etc., R. Co. v. Skelton*, 94 Ind. 222; *Bond v. Evansville, etc., R. Co.*, 100 Ind. 301; *Midland R. Co. v. Fisher*, 125 Ind. 19, 21 Am. St. Rep. 189.

Iowa. — *Warren v. Keokuk, etc., R. Co.*, 41 Iowa 484; *Warner v. St. Louis, etc., R. Co.*, 55 Iowa 677.

Maine. — *Wilder v. Maine Cent. R. Co.*, 65 Me. 332, 20 Am. Rep. 698.

Minnesota. — *Whittier v. Chicago, etc., R. Co.*, 24 Minn. 394.

Missouri. — *Ells v. Pacific R. Co.*, 48 Mo. 231; *Busby v. St. Louis, etc., R. Co.*, 81 Mo. 43.

New York. — *Duffy v. New York, etc., R. Co.*, 2 Hilt. (N. Y.) 496; *Tonawanda R. Co. v. Munger*, 5 Den. (N. Y.) 255, 49 Am. Dec. 239; *Talmadge v. Rensselaer, etc., R. Co.*, 13 Barb. (N. Y.) 493; *Tombs v. Rochester, etc., R. Co.*, 18 Barb. (N. Y.) 583; *Shepard v. Buffalo, etc., R. Co.*, 35 N. Y. 641.

Ohio. — *Cincinnati, etc., R. Co. v. Waterson*, 4 Ohio St. 425; *Pittsburg, etc., R. Co. v. Smith*, 26 Ohio St. 124; *Pittsburgh, etc., R. Co. v. Heiskell*, 38 Ohio St. 666.

Rhode Island. — *Tower v. Providence, etc., R. Co.*, 2 R. I. 404.

Vermont. — *Hurd v. Rutland, etc., R. Co.*, 25 Vt. 116; *Jackson v. Rutland, etc., R. Co.*, 25 Vt. 150, 60 Am. Dec. 246.

Where an adjoining owner agrees to fence the track passing through his land, as to him it will be regarded as fenced, whether it be so in fact or not. *Bond v. Evansville, etc., R. Co.*, 100 Ind. 301.

Statutory Duty Waived — Common Law Governs. — Where by agreement the adjoining landowner releases the railroad company from the obligation to fence its track through his land, the parties stand as at common law. *Tower v. Providence, etc., R. Co.*, 2 R. I. 404 [citing with approval *Tonawanda R. Co. v. Munger*, 5 Den. (N. Y.) 255, 49 Am. Dec. 239]; *Cincinnati, etc., R. Co. v. Waterson*, 4 Ohio St. 425.

Effect of Statute of Frauds. — An agreement by a railroad company to maintain cattle guards over an adjoining owner's land is not such an agreement "not to be performed within one year" as to require a written agreement. *Arkansas Midland R. Co. v. Whitley*, 54 Ark. 199. See *Vandegrift v. Delaware R. Co.*, 2 Houst. (Del.) 287.

Burden of Proof. — Where by statute the railroad is bound to maintain fences, the burden

Not Released from Duty to Others. — But the company is not released by such agreement from its duty to others than the adjoining owner with whom the agreement is made.¹

Written Agreements Run with the Land. — A written agreement between a railroad company and the adjoining landowner, binding either party to maintain fences along the railroad track, attaches to the land and is binding on the successors of the railroad company and subsequent owners of the land.²

is upon it to show an agreement by which the duty was shifted to the landowner. *Wabash, etc., R. Co. v. Neikirk*, 15 Ill. App. 172. See also *Great Western R. Co. v. Bacon*, 30 Ill. 347, 83 Am. Dec. 199.

Construction of Agreement to Keep Open Pathway. — Where a landowner granted to a railroad company a right of way over his field, but inserted a reservation that the company should keep in convenient state of use a defined path or passageway for carts, cattle, etc., the company cannot obstruct such path by gates or bars. *Eames v. Worcester, etc., R. Co.*, 105 Mass. 193.

Agreement as to Openings in Fence. — Where a railroad company agreed with an adjoining owner to have open places in the fences along its track, for his convenience as cattle crossings, it was held that the company was not required to subordinate the operation of its road to the privilege granted, but might run its cars as usual except to use ordinary care to prevent injury to animals thus liable to get upon the track. *Whittier v. Chicago, etc., R. Co.*, 26 Minn. 484; *Wabash R. Co. v. Williamson*, 104 Ind. 154.

Implied Obligation to Maintain Fence in Changed Condition. — The acceptance by an adjoining owner who has contracted to maintain a fence along the line of a railway of changes made by the railroad company in the design of the fence originally built by him makes it his duty to repair the fence with the changes made by the railroad company, and this although the company has at times voluntarily made some repairs therein. *Pittsburgh, etc., R. Co. v. Heiskell*, 38 Ohio St. 666.

Reformation by Insertion of Covenant. — In *Martin v. New York, etc., R. Co.*, 36 N. J. Eq. 109, a deed prepared with a covenant on the part of the railroad company, the grantor to maintain fences along its line, but which covenant had been stricken out on the execution of the deed, was under the circumstances of the case reformed by the insertion of the covenant.

1. Railroad Companies Not Relieved from Duty to Others Not Parties to the Agreement. — *Corry v. Great Western R. Co.*, 7 Q. B. Div. 322; *Wabash R. Co. v. Williamson*, 104 Ind. 154; *Warren v. Keokuk, etc., R. Co.*, 41 Iowa 484; *Thomas v. Hannibal, etc., R. Co.*, 82 Mo. 538; *Berry v. St. Louis, etc., R. Co.*, 65 Mo. 172; *Harrington v. Chicago, etc., R. Co.*, 71 Mo. 384. See also *supra*, this section, *Duty Not Transferable*.

Innocent Third Persons Not Bound. — The plaintiff's ox, having escaped from his pasture through a defective fence which the defendant was bound to maintain, was by mistake driven by the employees of the defendant to the land adjoining the plaintiff's. Thence the ox strayed across certain defectively fenced land of the plaintiff, without his pasture, and on to

land adjoining him on the other side. Between the owner of the last-mentioned tract and the defendant there was an agreement to dispense with fences, and by reason of there being no fence the ox strayed on the track and was killed. On these facts it was held that the agreement did not bind innocent third persons, and the defendant, having failed to show that the ox was wrongfully on the adjoining close, was liable for his death. *Gilman v. European, etc., R. Co.*, 60 Me. 235. See *St. Louis, etc., R. Co. v. Todd*, 36 Ill. 409.

Agreement to Fence—Stipulation as to Price Merged. — Where the owner of land has made an agreement with a railroad company that he will build a fence along the railroad track through his own land for a certain sum per rod, and afterwards, at a hearing before the commissioners for appraising land damages, the expenses of building and maintaining the fence are assessed at a certain amount, for which amount the owner obtains judgment, and which he collects, he cannot afterwards sue the company for the agreed price of the fence. The original agreement has become merged in the judgment upon the report. *Curtis v. Vermont Cent. R. Co.*, 23 Vt. 613.

2. Written Agreements Run with Land. — *Midland R. Co. v. Fisher*, 125 Ind. 19, 21 Am. St. Rep. 189; *Varner v. St. Louis, etc., R. Co.*, 55 Iowa 677; *Kentucky Cent. R. Co. v. Kenney*, 82 Ky. 154; *Thomas v. Hannibal, etc., R. Co.*, 82 Mo. 538; *Shepard v. Buffalo, etc., R. Co.*, 35 N. Y. 641; *Easter v. Little Miami R. Co.*, 14 Ohio St. 48; *Cook v. Milwaukee, etc., R. Co.*, 36 Wis. 45. But see *Vandegrift v. Delaware R. Co.*, 2 Houst. (Del.) 289. See for further treatment of this point the title COVENANTS, vol. 8, p. 138, note; also *supra*, this title, *Fences Inclosing Lands*, subdiv. 1. b. (2) (b) *By Covenant in a Deed*.

Failure to Perform Covenant to Fence. — Where the owner of land grants a right of way over it to a railroad company, and covenants that he will maintain a fence on each side of the track, and reserves the right of crossing the track, not to interfere with trains thereon, and he afterwards sells the lands without reservation to another, and that other's tenant fails to build or maintain the fence, and through lack of it his horse strays upon the track and is killed, the company is to be held to no higher degree of care to avoid injury to the horse than if the covenant had been kept. *Easter v. Little Miami R. Co.*, 14 Ohio St. 48.

Subsequent Purchaser Without Notice Not Bound. — A written agreement by an adjoining landowner to fence the right of way through his land will not affect the right of a subsequent purchaser from such landowner to require the railroad company to fence as required by statute, where such purchaser was without actual or constructive notice of the existence of such

Verbal Agreements. — A mere verbal license or agreement does not affect the rights of persons not parties, and without notice of such agreement or license, and does not become annexed to the land.¹

h. WHERE RAILROAD OWNS THE ADJACENT LAND. — The authorities are divided as to whether a railroad company's duty to fence still exists where the company is itself the owner of the tract lying next to the right of way. In *New Hampshire* it has been held that no duty to fence rests upon the company in such a case,² while a contrary conclusion has been reached in *New York*.³

i. LIABILITY FOR FAILURE TO MAINTAIN. — Where railroad companies are required by statute to fence their tracks, and they fail to do so, in the absence of special provision restricting their liability they are liable in damages to all who have an interest in the maintenance of the fence and who suffer injury in consequence of such failure.⁴

agreement. And the mere use and occupation of the right of way by the company and its successors is not constructive notice of such agreement, it not being recorded. *Cincinnati, etc., R. Co. v. Bosworth*, 46 Ohio St. 81.

Under Agreement Construed as Covenant Rather than as Condition. — An agreement to fence will if possible be construed as a covenant, and not as a condition. *Hartung v. Witte*, 59 Wis. 285. See also the title COVENANTS, vol. 8, p. 61.

1. Verbal Agreements Do Not Run with Land. — *St. Louis, etc., R. Co. v. Todd*, 36 Ill. 409; *Gilman v. European, etc., R. Co.*, 60 Me. 235; *Wilder v. Maine Cent. R. Co.*, 65 Me. 332, 20 Am. Rep. 698; *Morss v. Boston, etc., R. Co.*, 2 Cush. (Mass.) 536; *Boston, etc., R. Co. v. Briggs*, 132 Mass. 24; *Thomas v. Hannibal, etc., R. Co.*, 82 Mo. 538; *Cook v. Milwaukee, etc., R. Co.*, 36 Wis. 45.

2. In *Cornwall v. Sullivan R. Co.*, 28 N. H. 161, it was held that where a railroad company was the owner of a tract of land adjoining its railway, and that tract was not separated by any division fence from the plaintiff's tract, which lay next to it on the side away from the railroad, the railroad owed no duty to the plaintiff to protect his stock by fencing in its railway. The decision was based upon the ground that the owner of the close is bound to fence only against those cattle which are rightfully in the adjoining close, and that as the plaintiff's stock was wrongfully upon the railroad's tract of ground the company was not obliged to fence against them.

3. In *Klock v. New York Cent., etc., R. Co.*, 62 Hun (N. Y.) 291, it was held that under the New York statute a railroad company is required to fence its railroad track against the adjoining land of the company so that cattle trespassing upon such land may not stray thence upon the railroad track and be injured. In this case it was further held that a railroad company is not bound to maintain an exterior line fence between its lands outside of, but adjoining its railroad lands and the lands of adjoining owners.

In a preceding case in the same state it was held that a railroad company owes no duty to fence to the tenant who rents of it a tract of land belonging to the company and adjacent to its line of railway. *Potter v. New York Cent., etc., R. Co.*, 60 Hun (N. Y.) 314.

4. Generally Liable to All Injured by Breach of Statutory Duty to Fence — *United States*, —

Hayes v. Michigan Cent. R. Co., 111 U. S. 228; *Union Pac. R. Co. v. McDonald*, 152 U. S. 262.

California. — *Farley v. Moran*, (Cal. 1892) 31 Pac. Rep. 158.

Illinois. — *Terre Haute, etc., R. Co. v. Williams*, 172 Ill. 379; *Peoria, etc., R. Co. v. Barton*, 80 Ill. 72.

Indiana. — *Baltimore, etc., R. Co. v. Kreiger*, 90 Ind. 380.

Maine. — *Norris v. Androscoggin R. Co.*, 39 Me. 273, 63 Am. Dec. 621.

Michigan. — *Bay City, etc., R. Co. v. Austen*, 21 Mich. 390; *Talbot v. Minneapolis, etc., R. Co.*, 82 Mich. 66; *Pound v. Port Huron, etc., R. Co.*, 54 Mich. 13; *Lafferty v. Chicago, etc., R. Co.*, 71 Mich. 35.

Minnesota. — *Nelson v. Chicago, etc., R. Co.*, 30 Minn. 74; *Maher v. Winona, etc., R. Co.*, 31 Minn. 401.

Missouri. — *Bigelow v. North Missouri R. Co.*, 48 Mo. 510; *Cecil v. Pacific R. Co.*, 47 Mo. 246; *Clardy v. St. Louis, etc., R. Co.*, 73 Mo. 576; *Hamilton v. Missouri Pac. R. Co.*, 87 Mo. 85; *Buttles v. Chicago, etc., R. Co.*, 43 Mo. App. 280.

Nebraska. — *Union Pac. R. Co. v. High*, 14 Neb. 14.

Nevada. — *Walsh v. Virginia, etc., R. Co.*, 8 Nev. 110.

New Hampshire. — *Smith v. Eastern R. Co.*, 35 N. H. 356.

New York. — *Matter of Rensselaer, etc., R. Co.*, 4 Paige (N. Y.) 553; *Corwin v. New York, etc., R. Co.*, 13 N. Y. 42; *Suydam v. Moore*, 8 Barb. (N. Y.) 358; *Rhodes v. Utica, etc., R. Co.*, 5 Hun (N. Y.) 344; *Leggett v. Rome, etc., R. Co.*, 41 Hun (N. Y.) 80; *Graham v. Delaware, etc., Canal Co.*, 46 Hun (N. Y.) 386; *Purdy v. New York, etc., R. Co.*, 61 N. Y. 353.

Pennsylvania. — *Dunkirk, etc., R. Co. v. Mead*, 90 Pa. St. 454.

Texas. — *San Antonio, etc., Pass. R. Co. v. Peterson*, 8 Tex. Civ. App. 367; *Gulf, etc., R. Co. v. Hudson*, 77 Tex. 494.

Vermont. — *Quimby v. Vermont Cent. R. Co.*, 23 Vt. 387; *Congdon v. Central Vermont R. Co.*, 56 Vt. 390, 48 Am. Rep. 793.

West Virginia. — *Layne v. Ohio River R. Co.*, 35 W. Va. 438.

Wisconsin. — *Bennett v. Chicago, etc., R. Co.*, 19 Wis. 145; *Brown v. Milwaukee, etc., R. Co.*, 21 Wis. 39, 91 Am. Dec. 456; *Bremmer v. Green Bay, etc., R. Co.*, 61 Wis. 114.

A Failure to Maintain the Fence creates the same liability as a failure to build,¹ unless perhaps the accident follows upon a sudden destruction of the fence by unavoidable accident, and immediate steps have been taken to rebuild.²

Both Sides of the Railroad Track must be fenced. Tredway v. Sioux City, etc., R. Co., 43 Iowa 527; Tiarks v. St. Louis, etc., R. Co., 58 Mo. 45.

The Removal of an Existing Fence and the failure to replace it by another fence render a railroad company liable for the damage caused by the trespassing of escaping cattle. Pound v. Port Huron, etc., R. Co., 54 Mich. 13. But see Gowan v. St. Paul, etc., R. Co., 25 Minn. 328.

Embankment.—The necessity of a fence as required by statute is not obviated by the existence of an embankment along which the road runs, in the absence of proof that such embankment is sufficient to turn stock. Such necessity would be shown by the fact that cattle got upon the track at that point. Toledo, etc., R. Co. v. Sweeney, 41 Ill. 226. See also White Water Valley R. Co. v. Quick, 31 Ind. 127.

Failure of Proprietor to Fence.—The fact that the proprietor of the adjoining land has failed to fence up to his line does not absolve a railroad company from compliance with its statutory duty to fence its road where it passes through uninclosed lands. Hamilton v. Missouri Pac. R. Co., 87 Mo. 85.

As to Liability for Injuries to Employees under statute requiring railroads to fence, see *supra*, this section, Purpose of Statutes—For Whose Benefit Intended.

Failure to Fence Must Be Occasion of Injury.—In order to bring a case within the statute, the absence of a fence at a point where the railroad company is bound to fence must be the occasion of the injury. Cecil v. Pacific R. Co., 47 Mo. 246; Clardy v. St. Louis, etc., R. Co., 73 Mo. 576; Ridenore v. Wabash, etc., R. Co., 81 Mo. 227; Bennett v. Chicago, etc., R. Co., 19 Wis. 145; Bremmer v. Green Bay, etc., R. Co., 61 Wis. 114. But by this it is not meant that the want of a fence must be the "efficient cause, *causa causans*," of the injury. "That is not the sense in which the law uses the term in this connection. The question is, was it *causa sine qua non*, a cause which if it had not existed the injury would not have taken place, an occasional cause? and that is a question of fact unless the causal connection is evidently not proximate." Matthews, J., in Hayes v. Michigan Cent. R. Co., 111 U. S. 241.

Animals Injured by Fright.—Where injury occurs to an animal that is upon a railroad, the injury being due to fright without any actual contact between the injured animal and the locomotive machinery of the train, the authorities are in conflict whether or not the company can be held liable. In *Iowa* it is held that the road is liable. Young v. St. Louis, etc., R. Co., 44 Iowa 172; Van Slyke v. Chicago, etc., R. Co., 80 Iowa 620.

In several other jurisdictions the road has been held not to be liable under such circumstances. Schertz v. Indianapolis, etc., R. Co., 107 Ill. 577, *affirming* 12 Ill. App. 304; Chicago, etc., R. Co. v. Taylor, 8 Ill. App. 108; Peru, etc., R. Co. v. Hasket, 10 Ind. 409, 71 Am. Dec. 335; Ohio, etc., R. Co. v. Cole, 41 Ind. 331;

Indianapolis, etc., R. Co. v. MacBrown, 46 Ind. 229; Louisville, etc., R. Co. v. Smith, 58 Ind. 575; Baltimore, etc., R. Co. v. Thomas, 60 Ind. 107; Pittsburgh, etc., R. Co. v. Stuart, 71 Ind. 500; Foster v. St. Louis, etc., R. Co., 90 Mo. 116; Hughes v. Hannibal, etc., R. Co., 66 Mo. 325; Lafferty v. Hannibal, etc., R. Co., 44 Mo. 291.

Failure to Fence Not Excused Because Kind of Fence Not Specified.—Where a municipal ordinance required a railroad company to fence its track with suitable material and of slightly appearance, of such height as the common council might direct, the company cannot excuse neglect to fence because the council had not directed the character of work to be done. The council is not required to act in the first instance, nor at all if satisfied with the work as executed by the company. Hayes v. Michigan Cent. R. Co., 111 U. S. 228.

The Fact that the Statutory Fence Would Have Been Insufficient to keep the cattle from getting on the track under the circumstances of the case does not relieve the company from liability when it has failed in its duty to fence. Gulf, etc., R. Co. v. Hudson, 77 Tex. 494.

Landowner Need Not Repair Fence.—Although the statute gives to the landowner the liberty of building or repairing the fence, after notice, upon the company's failure to do so, he is not bound to build or repair in order to hold the company liable for injury occasioned by its failure to repair or build. Buttles v. Chicago, etc., R. Co., 43 Mo. App. 280; Farley v. Moran, (Cal. 1892) 31 Pac. Rep. 158.

Breach of Bond to Build.—Where the statute requires a railroad company to enter into a bond for the erection and maintenance of its fences, and the company, after doing so, fails to fence, the landowner may sue for the breach of the bond before he himself has erected the fence. Farley v. Moran, (Cal. 1892) 31 Pac. Rep. 158.

1. Failure to Maintain.—Congdon v. Central Vermont R. Co., 56 Vt. 390, 48 Am. Rep. 793; Brown v. Milwaukee, etc., R. Co., 21 Wis. 39, 91 Am. Dec. 456.

The railroad is bound to maintain a careful watch as to its fences, and must take notice of their state at all times. Studer v. Buffalo, etc., R. Co., 25 U. C. Q. B. 160.

Where Snow Has Drifted Over a Fence so that cattle are able to cross the fence and get upon the railroad track, the railroad company is not liable for failing to maintain a sufficient fence. The company "is not required to build fences which will resist the power of the elements or are so high that the snows of our winters will never cover them." Patten v. Chicago, etc., R. Co., 75 Iowa 459.

Duty to Keep Gate Closed.—The duty to maintain a fence is violated by leaving a gate therein open so that domestic animals escape upon the road and are injured. West v. Missouri Pac. R. Co., 26 Mo. App. 344.

2. Brown v. Milwaukee, etc., R. Co., 21 Wis. 39, 91 Am. Dec. 456; Studer v. Buffalo, etc., R. Co., 25 U. C. Q. B. 160.

Failure to Erect Fence.—Where a fence built

Company Not Relieved by Law Prohibiting Stock from Running at Large. — A law prohibiting domestic animals from running at large does not relieve the railroad company from the statutory duty to fence its track, nor from liability for stock killed or injured in consequence of neglect to observe such duty.¹

j. DUTY TO FENCE AT PARTICULAR PLACES — (1) *Generally.* — Where the statutory obligation to fence railroad tracks exists, it is not construed to extend to fencing at points which do not properly admit of being fenced, as where public necessity or convenience requires a space to be open.² The true

across the bed of a stream became insufficient because the stream dried up and left an opening under the fence, it was held that the defect in the fence was due to the failure to erect a sufficient fence rather than to the failure to maintain such a fence. *Selders v. Kansas City, etc., R. Co.*, 19 Mo. App. 334.

Repairing Fences. — Where the statute providing for repairs to fences requires that they must conform to the requirements therein made for new fences, the nailing on of loose boards and putting others in place of defective ones is not "repairs." *Moeckley v. Chicago, etc., R. Co.*, 92 Iowa 748.

Fence Not on the Division Line. — Where, through defects in a fence which the company has maintained for some time, the adjoining owner's cattle escape upon the track and are injured, the company cannot escape liability by showing that the fence was not upon the division line, but was situated on the land of the adjoining owner, where the company had given no notice to the adjoining owner that it intended to cease to maintain the fence because of its location. *Chicago, etc., R. Co. v. Guertin*, 115 Ill. 466.

1. Effect of Law Against Animals Running at Large. — *Wabash R. Co. v. Perbex*, 57 Ill. App. 62; *Cairo, etc., R. Co. v. Woosley*, 85 Ill. 370; *Moore v. Missouri Pac. R. Co.*, (Mo. 1886) 3 West. Rep. 755; *Morrow v. Missouri Pac. R. Co.*, 17 Mo. App. 103. See *Burlington, etc., R. Co. v. Brinkman*, 14 Neb. 70; *Burlington, etc., R. Co. v. Franzen*, 15 Neb. 365; *Burlington, etc., R. Co. v. Webb*, 18 Neb. 215, 53 Am. Rep. 809. But see *Williams v. Michigan Cent. R. Co.*, 2 Mich. 260, 55 Am. Dec. 59, and *Stanley v. Missouri Pac. R. Co.*, 84 Mo. 625, where it was held that the railroad company was excused from fencing against swine restrained by law from running at large, merely to keep them off the track.

Where the statute provides that the owners of domestic animals shall not "suffer" them to run at large, and a horse strayed from his fenced inclosure without knowledge or consent of the owner, it was held that the owner did not "suffer" him to go at large within the meaning of the statute. *Ohio, etc., R. Co. v. Jones*, 63 Ill. 472.

2. Places to Which Statutory Duty to Fence Does Not Extend. — *Galena, etc., R. Co. v. Griffin*, 31 Ill. 303; *Toledo, etc., R. Co. v. Chapin*, 66 Ill. 504; *Lafayette, etc., R. Co. v. Shriner*, 6 Ind. 141; *White Water Valley R. Co. v. Quick*, 30 Ind. 385; *Indianapolis, etc., R. Co. v. Kinney*, 8 Ind. 402; *Latty v. Burlington, etc., R. Co.*, 38 Iowa 259; *Atchison, etc., R. Co. v. Jones*, 20 Kan. 527; *Atchison, etc., R. Co. v. Shaft*, 33 Kan. 521; *Union Pac. R. Co. v. Dyche*, 28 Kan. 202; *Prickett v. Atchi-*

son, etc., R. Co., 33 Kan. 748; *Flint, etc., R. Co. v. Lull*, 28 Mich. 510; *McGrath v. Detroit, etc., R. Co.*, 57 Mich. 555; *Russell v. Hannibal, etc., R. Co.*, 26 Mo. App. 368; *Johnson v. Chicago, etc., R. Co.*, 27 Mo. App. 379; *Chouteau v. Hannibal, etc., R. Co.*, 28 Mo. App. 556; *Crenshaw v. St. Louis, etc., R. Co.*, 54 Mo. App. 233; *Halloran v. New York, etc., R. Co.*, 2 E. D. Smith (N. Y.) 257; *Cleveland, etc., R. Co. v. McConnell*, 26 Ohio St. 57; *International, etc., R. Co. v. Dunham*, 68 Tex. 231, 2 Am. St. Rep. 484, *following International, etc., R. Co. v. Cocke*, 64 Tex. 152.

Considerations of Mere Private Interest, convenience, or inconvenience, on its own part, *Wabash R. Co. v. Howard*, 57 Ill. App. 66; *Bellefontaine R. Co. v. Reed*, 33 Ind. 476; *Comstock v. Des Moines Valley R. Co.*, 32 Iowa 376; *Peyton v. Chicago, etc., R. Co.*, 70 Iowa 522; *Atchison, etc., R. Co. v. Shaft*, 33 Kan. 521; *Morris v. St. Louis, etc., R. Co.*, 58 Mo. 78; *Tracy v. Troy, etc., R. Co.*, 38 N. Y. 433, 98 Am. Dec. 54; or on the part of individuals, *Peoria, etc., R. Co. v. Barton*, 80 Ill. 72; *Indiana Cent. R. Co. v. Leamon*, 18 Ind. 173; *Indianapolis, etc., R. Co. v. Thomas*, 84 Ind. 194, 11 Am. & Eng. R. Cas. 491; *McKinley v. Chicago, etc., R. Co.*, 47 Iowa 76; *Atchison, etc., R. Co. v. Shaft*, 33 Kan. 521; *Pittsburgh, etc., R. Co. v. Cunningham*, 39 Ohio St. 327, 13 Am. & Eng. R. Cas. 529, will not relieve the company from the duty to fence.

Mills, Engine Houses, etc. — "A railroad company is relieved from the obligation to fence against adjoining lands when such fence would be a public nuisance, or prevent access to a mill through whose yard the railroad passes, or at points where its engine house, machine shop, car house, wood house, wood shop, and depot are so situated as to render a fence unnecessary." *Wilder v. Maine Cent. R. Co.*, 65 Me. 332, 20 Am. Rep. 698. See also *Indianapolis, etc., R. Co. v. Oestel*, 20 Ind. 231; *Galena, etc., R. Co. v. Griffin*, 31 Ill. 303.

Land used partly as a millyard, and also mowed and occasionally used as a pasture for grazing animals, was held not to be within the exceptions above. *Wilder v. Maine Cent. R. Co.*, 65 Me. 332, 20 Am. Rep. 698.

Nor, it appears, is land used simply as a woodyard within the exception. *Bellefontaine R. Co. v. Reed*, 33 Ind. 476.

There is no obligation upon a railroad company to fence its track at a sawmill or hay press. *Pittsburgh, etc., R. Co. v. Bowyer*, 45 Ind. 496; *Ohio, etc., R. Co. v. Rowland*, 50 Ind. 349. See *Indianapolis, etc., R. Co. v. Kinney*, 8 Ind. 402.

Nor is such company obliged to fence around a warehouse in a village adjoining a

rule is that wherever and whenever a railroad company can fence its road without injury or obstruction to its own business and to public rights or easements it must do so.¹

(2) *Depot Grounds*. — Depot grounds, and the tracks and switches adjacent thereto, so far as their proper use and convenience require them to be left open for the transaction of business with the public, are not required to be fenced.²

switch. Toledo, etc., R. Co. v. Chapin, 66 Ill. 504.

Where One Side Cannot Be Fenced In, but must necessarily be left open and free for access to the railroad track, the railroad cannot be securely fenced in by building a fence on the other side, and it is held that the statute requiring a fence does not extend to such places. Indiana, etc. R. Co. v. Leak, 89 Ind. 596; Wabash, etc., R. Co. v. Nice, 99 Ind. 152.

Fencing Off Parallel Track. — A statute requiring railroads to fence will not be construed literally where such a construction leads to absurdity and injustice. Within this principle it was held that a railroad would not be required to fence off its own track from that of another railroad running parallel to it and only a few feet distant, since "it could not have been contemplated that animals requiring such protection would be on an adjoining railroad track, and it is obvious that a fence confining them to one track would ordinarily increase, rather than diminish, the risk of injury." Gallagher v. New York, etc., R. Co., 57 Conn. 442, 40 Am. & Eng. R. Cas. 197.

Must Fence as Near as Practicable. — Where railroads are relieved from fencing their roads at any particular place or places, then they must construct fences or other barriers as near thereto as is reasonably practicable. Archison, etc., R. Co. v. Shaft, 33 Kan. 521; Cleveland, etc., R. Co. v. Newbrander, 40 Ohio St. 15, 11 Am. & Eng. R. Cas. 480; Morris v. St. Louis, etc., R. Co., 58 Mo. 78.

Obligation to Fence One of Law. — The question of the obligation of a railroad company to fence its tracks at any particular point or place is one of law, not of fact, and should not be left to the jury to decide. Illinois Cent. R. Co. v. Whalen, 42 Ill. 396.

1. Baltimore, etc., R. Co. v. Kreiger, 90 Ind. 380; Ohio, etc., R. Co. v. Rowland, 50 Ind. 349; Jeffersonville, etc., R. Co. v. Beatty, 36 Ind. 15.

Where Fencing Interferes with Rights of Company or of Public. — The company need not fence where such fence interferes with its own rights in operating its road, or transacting its business, nor where the rights of the public in traveling or doing business with the company are interfered with. Indianapolis, etc., R. Co. v. Kinney, 8 Ind. 402; Indianapolis, etc., R. Co. v. Oestel, 20 Ind. 231; Jeffersonville, etc., R. Co. v. Beatty, 36 Ind. 15; Indianapolis, etc., R. Co. v. Christy, 43 Ind. 143; Pittsburgh, etc., R. Co. v. Bowyer, 45 Ind. 496; Ohio, etc., R. Co. v. Rowland, 50 Ind. 349; Indianapolis, etc., R. Co. v. Crandall, 58 Ind. 365; Cincinnati, etc., R. Co. v. Wood, 82 Ind. 593; Evansville, etc., R. Co. v. Willis, 93 Ind. 507; Lake Erie, etc., R. Co. v. Kneadle,

94 Ind. 454; Wabash, etc., R. Co. v. Tretts, 96 Ind. 450; Fort Wayne, etc., R. Co. v. Herbold, 99 Ind. 91; Jeffersonville, etc., R. Co. v. Peters, 1 Ind. App. 69.

Question for Jury. — Whether any particular place could be properly fenced or not is a question for the jury to pass upon, and is not a question upon which the opinions of witnesses can be received. Indiana, etc., R. Co. v. Hale, 93 Ind. 79.

But where the interrogatory submitted to the jury was, "Could the defendant have lawfully fenced its track at the point" where the animals entered upon it, it was held to be a question of law, not of fact, and it was error to submit it to the jury. Louisville, etc., R. Co. v. Warley, 107 Ind. 320.

An Embankment as a Fence. — Where the statute provides that no fence need be erected "where the proximity of ponds, * * * hills, embankments, or other sufficient protection renders a fence unnecessary to protect cattle from straying upon the right of way or track," it was held that the fact that cattle in a given instance did surmount the embankment in question and get upon the track was conclusive evidence that such embankment was not "sufficient protection." Veerhusen v. Chicago, etc., R. Co., 53 Wis. 689.

2. Depot Grounds Need Not Be Fenced — Illinois. — Cleveland, etc., R. Co. v. Abney, 43 Ill. App. 92; Cleveland, etc., R. Co. v. Myers, 43 Ill. App. 251; Toledo, etc., R. Co. v. Franklin, 53 Ill. App. 632; Wabash R. Co. v. Howard, 57 Ill. App. 66; Terre Haute, etc., R. Co. v. Grissom, 60 Ill. App. 114; Chicago, etc., R. Co. v. Hans, 111 Ill. 114.

Indiana. — Indianapolis, etc., R. Co. v. Christy, 43 Ind. 143; Indiana, etc., R. Co. v. Sawyer, 109 Ind. 342; Indiana, etc., R. Co. v. Quick, 109 Ind. 295; Becholdt v. Grand Rapids, etc., R. Co., 113 Ind. 343.

Iowa. — Packard v. Illinois Cent. R. Co., 30 Iowa 474; Davis v. Burlington, etc., R. Co., 26 Iowa 549; Smith v. Chicago, etc., R. Co., 34 Iowa 506; Rhines v. Chicago, etc., R. Co., 75 Iowa 597; Cleveland v. Chicago, etc., R. Co., 35 Iowa 220; Plaster v. Illinois Cent. R. Co., 35 Iowa 449; Latty v. Burlington, etc., R. Co., 38 Iowa 250; Mundhenk v. Central Iowa R. Co., 57 Iowa 718.

Kansas. — Hopkins v. Kansas Pac. R. Co., 18 Kan. 462.

Michigan. — Flint, etc., R. Co. v. Lull, 28 Mich. 510; Chicago, etc., R. Co. v. Campbell, 47 Mich. 265; McGrath v. Detroit, etc., R. Co., 57 Mich. 555, 22 Am. & Eng. R. Cas. 574. See also Flagg v. Chicago, etc., R. Co., 96 Mich. 30.

Minnesota. — Smith v. Minneapolis, etc., R. Co., 37 Minn. 103.

Missouri. — McIntosh v. Hannibal, etc., R. Co., 26 Mo. App. 379; Jenkins v. Chicago, etc., R. Co., 27 Mo. App. 578; Robertson v. Atlantic,

Questions of Law and Fact. — Whether the company ought to fence at any given point has been declared to be a question of law, and not of fact; ¹ but in any given case this can be so only where all the facts and circumstances are con-

etc., R. Co., 64 Mo. 412; *Lloyd v. Pacific R. Co.*, 49 Mo. 199; *Swearingen v. Missouri*, etc., R. Co., 64 Mo. 73.

Oregon. — *Moses v. Southern Pac. R. Co.*, 18 Oregon 385, approved in *Fisk v. Northern Pac. R. Co.*, 19 Oregon 163.

For a Definition of Depot Grounds, see DEPOT GROUNDS, vol. 9, p. 367.

What Depot Grounds Include. — The fact that a place is occasionally used for making up trains, *Union Pac. R. Co. v. Knowlton*, 43 Neb. 751; or for receiving and discharging freight, *Moser v. St. Paul*, etc., R. Co., 42 Minn. 480, will not make it a part of depot grounds or relieve the company from the duty of fencing. Nor will the fact that there is a switch alongside the track at a particular point relieve the company from such duty. *Comstock v. Des Moines Valley R. Co.*, 32 Iowa 376.

A mere side track used only for loading and shipping tank, there being no depot buildings or platform, and no station agent, and no highway leading thereto, is not depot grounds. *Jaeger v. Chicago*, etc., R. Co., 75 Wis. 130, 40 Am. & Eng. R. Cas. 194.

Nor do a disused station house and a side track used occasionally constitute depot grounds. *McDonough v. Milwaukee*, etc., R. Co., 73 Wis. 223.

"Where a railroad company has its depot or station grounds surveyed and platted, or distinctly and definitely allotted, such survey or allotment and use would constitute a very strong, if not conclusive, proof of their necessary boundaries." *Cole v. Chicago*, etc., R. Co., 38 Iowa 311.

Depot Is Public Place. — A railroad station is a public place regardless of the amount of business transacted there, and need not be fenced even though a special finding declares that a fence could be maintained without inconvenience. *Stewart v. Pennsylvania R. Co.*, 2 Ind. App. 142.

Statute Containing Exceptions Not Including Depot Grounds Construed. — Where the statute requires a railroad company to fence its track except at public road crossings and in cities and villages laid out in lots and blocks, it does not apply to depot grounds, though they be outside of such city or village and though there is no road crossing at such depot. *Chicago*, etc., R. Co. v. *Hans*, 111 Ill. 114, explained in *Chicago*, etc., R. Co. v. *Dumser*, 109 Ill. 402.

Fence to Prevent Passing Through Depot Grounds to Track Beyond. — A railroad company must erect and maintain suitable fences and guards to prevent domestic animals from passing over and through the depot grounds on to the track beyond the limits of such grounds. *Kobe v. Northern Pac. R. Co.*, 36 Minn. 518.

A Flag Station, where there is a platform and near which are yards, cribs, and a grain dump, but no building except a store at which tickets are sold, is not a depot at which the company

is exempt from the duty to fence. *Iowa Cent. R. Co. v. Gushee*, 49 Ill. App. 609.

A flag station where there was a regular stopping place for trains when there were passengers or freight to be delivered, or express or freight to be taken, and where trains stopped daily, was held to be exempt from the operation of the statute requiring fences, although no depot building had been built, and no agent was kept there. *Schneekloth v. Chicago*, etc., R. Co., 108 Mich. 1.

Removal of Fence — Platting Town Lots. — When a fence along the track is removed at a small flag station, and the land is laid out in town lots, and cattle guards are put in, if no other changes are made of a character to entitle the place to be considered a depot the company cannot claim that these changes make it such; and of course it could make no claim that the place possessed such character while the fence remained. *Anderson v. Stewart*, 76 Wis. 43.

Part of Main Track Used in Connection with Siding. — The fact that a certain portion of the main track of a railroad is necessarily used by trains in switching on to side tracks which are confessedly depot grounds does not so clearly fix such portion of the main track with the character of depot grounds as to justify setting aside the verdict of a jury by which it is denied that character. *Fowler v. Farmers' L. & T. Co.*, 21 Wis. 77. But compare *Grondin v. Duluth*, etc., R. Co., 100 Mich. 598, where it was held that at least as much of the track and ground outside of the switches as is required and is in actual use for reaching the side tracks is part of a station ground to which the statutory requirement of fencing does not apply, and that the submission to the jury of the question whether a point within these limits should be fenced was error. See also *McGrath v. Detroit*, etc., R. Co., 57 Mich. 555.

Present or Contemplated Use of Land as Criterion. — The criterion is not whether all the grounds set apart by a company for depot and station purposes have been actually used, but whether, in view of the present and prospective needs of such grounds for such purposes, the company has used a reasonable discretion in throwing them open for that purpose. And where evidence clearly shows that such grounds are not unreasonably extensive for the accommodation of the public, the question of extent is one of law, not of fact, and should not be left to the jury. *Rinear v. Grand Rapids*, etc., R. Co., 70 Mich. 620, affirming *McGrath v. Detroit*, etc., R. Co., 57 Mich. 555.

In *Cox v. Minneapolis*, etc., R. Co., 41 Minn. 101, it was held that the exemption from the duty to fence should not be extended where the reason for it is wanting and where the land in controversy was not actually used for such public purposes; it was not enough that the plans of the company contemplated such use at some indefinite time in the future.

1. *Jeffersonville*, etc., R. Co. v. *Peters*, 1 Ind. App. 69.

ceded or uncontroverted, otherwise the matter is a mixed question of law and fact.¹

(3) *Within Cities and Villages.* — In the absence of special exception, an act requiring railroads to fence their tracks applies as well within the limits of cities and villages as in the country.² But the conditions surrounding the railroad's tracks in a city or town may excuse the absence of fences or forbid their erection. Thus the company is not required or permitted to fence its tracks at the crossings or intersections of public streets or alleys,³ nor should it

1. **Question of Mixed Law and Fact.** — *Brandenburg v. St. Louis, etc., R. Co.*, 44 Mo. App. 224; *Bean v. St. Louis, etc., R. Co.*, 20 Mo. App. 641; *Grosse v. Chicago, etc., R. Co.*, 91 Wis. 482. See also *Chicago, etc., R. Co. v. Modesitt*, 124 Ind. 212; *Cleveland, etc., R. Co. v. De Bolt*, 10 Ind. App. 174.

Whether a Company Has Securely Fenced Its Road is a question of fact to be determined by the jury. *Toledo, etc., R. Co. v. Cory*, 39 Ind. 218. In this case the court said: "It was for the court to tell the jury whether, under the law, the appellant was required to fence the road at the point where the cattle entered upon the track, but it was a question of fact, to be determined by the jury from the testimony of witnesses, whether the railroad company had fenced its track in such a manner as to prevent cattle from entering thereon."

Extent of Depot Grounds. — Thus, how far in a given case the safe and convenient transaction of the railroad's business with the public requires unfenced depot grounds to be extended is a question for the jury. *Toledo, etc., R. Co. v. Franklin*, 53 Ill. App. 632, *affirmed* 159 Ill. 99; *Wabash R. Co. v. Howard*, 57 Ill. App. 66; *Terre Haute, etc., R. Co. v. Grissom*, 60 Ill. App. 114; *Brandenburg v. St. Louis, etc., R. Co.*, 44 Mo. App. 224; *Plunkett v. Minneapolis, etc., R. Co.*, 79 Wis. 222.

Ordinarily the question whether the *locus in quo* is depot grounds is for the jury. *Grosse v. Chicago, etc., R. Co.*, 91 Wis. 482.

Whether an opening in the fence around a station yard, which opening was made for the purpose of enabling a single shipper to receive his goods within the inclosure at a place where freight was not ordinarily received and delivered, was required by the public convenience and the interests of the road, was a question of fact to be submitted to the jury. *Rhines v. Chicago, etc., R. Co.*, 75 Iowa 597.

Facts Undisputed — Question of Law. — Where there is no evidence tending to show that the depot grounds in use are unreasonably extensive, the question of the company's right to have a particular spot unfenced is one of law. *Mills, etc., Lumber Co. v. Chicago, etc., R. Co.*, 94 Wis. 336. See also *Grondin v. Duluth, etc., R. Co.*, 100 Mich. 598.

2. **Fencing Statute Applies in Cities.** — *Indianapolis, etc., R. Co. v. Parker*, 29 Ind. 471; *Wabash R. Co. v. Forshee*, 77 Ind. 158; *Coyle v. Chicago, etc., R. Co.*, 62 Iowa 518; *Greeley v. St. Paul, etc., R. Co.*, 33 Minn. 136, 53 Am. Rep. 16; *La Paul v. Truesdale*, 44 Minn. 275, 45 Am. & Eng. R. Cas. 468; *Crawford v. New York Cent. R. Co.*, 18 Hun (N. Y.) 108. See also *Chicago, etc., R. Co. v. Dumser*, 109 Ill. 402.

If the Free Use of the Streets Will Not Be Interfered With by the construction of the fence

along the railroad track, and the free use of the railroad will not be impeded, the company must construct such fence even along city or village streets. *Indianapolis, etc., R. Co. v. Lindley*, 75 Ind. 426. So as to other places within the city limits. *Jeffersonville, etc., R. Co. v. Parkhurst*, 34 Ind. 501; *Toledo, etc., R. Co. v. Howell*, 38 Ind. 447.

Where Track Does Not Cross Streets. — The mere fact that the road runs through a city or town will not of itself, without more, exempt the company from its duty to fence its track. *Nashville, etc., R. Co. v. Hughes*, 94 Tenn. 450; *La Paul v. Truesdale*, 44 Minn. 275, 45 Am. & Eng. R. Cas. 468; *Toledo, etc., R. Co. v. Howell*, 38 Ind. 447; *Ells v. Pacific R. Co.*, 48 Mo. 231; *Pittsburgh, etc., R. Co. v. Laufman*, 78 Ind. 319.

See as to small hamlets, *Flint, etc., R. Co. v. Lull*, 28 Mich. 510.

Where a side track extends adjacent to the boundaries of a city on one side, and such side track is necessary to the proper conduct of business at that place, and it would be inconvenient and unsafe to the employees to erect a cattle guard and a fence there, the company is not required to erect such structures. *Chicago, etc., R. Co. v. Hogan*, 27 Neb. 801.

In *Missouri* a railroad company is not required to fence the sides of its railroad at any point within the limits of an incorporated town, but it may lawfully so fence at any place within the limits of such a town where its track is not crossed by streets or alleys already opened or dedicated to the public, and where by so fencing the public will not be inconvenienced. *Wymore v. Hannibal, etc., R. Co.*, 79 Mo. 249; *Lane v. Chicago, etc., R. Co.*, 18 Mo. App. 555; *Kirkland v. Missouri Pac. R. Co.*, 82 Mo. 466.

Other cases appear to hold that the same obligation to fence exists in cities as elsewhere, provided no streets are obstructed or travel interrupted. *Ells v. Pacific R. Co.*, 48 Mo. 232. The mere fact that the railroad track is in a city or village does not excuse the company from the duty of fencing its road in such city or village. *Young v. Hannibal, etc., R. Co.*, 79 Mo. 336. See also *Pittsburgh, etc., R. Co. v. Laufman*, 78 Ind. 319; *Toledo, etc., R. Co. v. Owen*, 43 Ind. 405.

Town Limits Contracted. — When the legislature contracts the limits of a town and thus throws certain uninclosed fields outside of the town limits, a railroad company whose track runs through the town must fence such uninclosed fields. *McCormick v. St. Louis, etc., R. Co.*, 20 Mo. App. 640.

3. **Fences Not Required at Crossings.** — The statute requiring fences is always to be construed as allowing an exception when the company has no legal right to do the act; for in-

fence where it occupies the street jointly with the public.¹

Statutes sometimes exempt railroad companies from the duty of fencing within the limits of cities, towns, or villages.²

(4) *Highway Crossings*. — Railroad companies are not permitted to fence their tracks where they are crossed by public highways.³

stance, fencing at street crossings and thereby creating obstructions in the streets.

Indiana. — Lafayette, etc., R. Co. v. Shriner, 6 Ind. 141; Madison, etc., R. Co. v. Kane, 11 Ind. 375; Indianapolis, etc., R. Co. v. Warner, 35 Ind. 515; Wabash R. Co. v. Forshee, 77 Ind. 155.

Iowa. — Davis v. Burlington, etc., R. Co., 26 Iowa 549; Rogers v. Chicago, etc., R. Co., 26 Iowa 558; Durand v. Chicago, etc., R. Co., 26 Iowa 559; Long v. Central Iowa R. Co., 64 Iowa 657; Lathrop v. Central Iowa R. Co., 69 Iowa 105; Blanford v. Minneapolis, etc., R. Co., 71 Iowa 310, 60 Am. Rep. 795.

Minnesota. — Greeley v. St. Paul, etc., R. Co., 33 Minn. 136, 53 Am. Rep. 16; Hooper v. Chicago, etc., R. Co., 37 Minn. 52; Smith v. Minneapolis, etc., R. Co., 37 Minn. 103; Rippe v. Chicago, etc., R. Co., 42 Minn. 34.

Missouri. — Lane v. Chicago, etc., R. Co., 18 Mo. App. 555; Vanderworker v. Missouri Pac. R. Co., 48 Mo. App. 654; Gerren v. Hannibal, etc., R. Co., 60 Mo. 405; Edwards v. Hannibal, etc., R. Co., 66 Mo. 567; Cousins v. Hannibal, etc., R. Co., 66 Mo. 572; Elliott v. Hannibal, etc., R. Co., 66 Mo. 683; Rhea v. St. Louis, etc., R. Co., 84 Mo. 345.

Streets Dedicated to Public Use need not be fenced, whether they be actually opened to public travel or not. Long v. Central Iowa R. Co., 64 Iowa 657; Lathrop v. Central Iowa R. Co., 69 Iowa 105; Meyer v. North Missouri R. Co., 35 Mo. 352; Vanderworker v. Missouri Pac. R. Co., 48 Mo. App. 654.

Where, within the limits of a city or town, the original proprietor or person takes possession of and uses for farming purposes land dedicated to the public use which crosses or abuts upon the right of way of a railway company, such occupancy will not make it lawful for the railway company to fence such dedicated land. Elliott v. Hannibal, etc., R. Co., 66 Mo. 683.

Cuts Within City Limits. — A railroad company within the limits of a city, is not required to place guards around a cut, away from a public thoroughfare, in order to prevent cattle grazing near the cut in violation of law from falling down the bank. Clary v. Burlington, etc., R. Co., 14 Neb. 232.

1. **Railroad Occupying Street Jointly with Public**. — Indianapolis, etc., R. Co. v. Warner, 35 Ind. 516; Rippe v. Chicago, etc., R. Co., 42 Minn. 34.

2. **Statutes Exempting from Duty to Fence in Cities**. — Chicago, etc., R. Co. v. Engle, 58 Ill. 381; Toledo, etc., R. Co. v. Spangler, 71 Ill. 568; Ewing v. Chicago, etc., R. Co., 72 Ill. 25; Illinois Cent. R. Co. v. Bull, 72 Ill. 537; Peoria, etc., R. Co. v. Barton, 80 Ill. 72.

The exception will not be extended by intentment. Chicago, etc., R. Co. v. Dumsen, 109 Ill. 402.

What Constitutes a Village. — A village, within the meaning of statutes requiring railroads to

fence their tracks and making exceptions as to streets in cities and villages, need not have streets laid off and dedicated to the public; but any small assemblage of houses, for the purpose of dwellings or business or both, in the country, constitutes a village. Illinois Cent. R. Co. v. Williams, 27 Ill. 48.

Houses need not be along streets regularly laid off; a station, warehouse, blacksmith shop, post office, and five or six dwellings constitute a village. Toledo, etc., R. Co. v. Spangler, 71 Ill. 568.

3. **Highway Crossings**. — Illinois Cent. R. Co. v. Trowbridge, 31 Ill. App. 190; Iowa Cent. R. Co. v. Gushee, 49 Ill. App. 609; McKinley v. Chicago, etc., R. Co., 47 Iowa 76; Soward v. Chicago, etc., R. Co., 30 Iowa 551; Schneir v. Chicago, etc., R. Co., 40 Iowa 337; Brown v. Kansas City, etc., R. Co., 20 Mo. App. 427, approved in Jenkins v. Chicago, etc., R. Co., 27 Mo. App. 578; McIntosh v. Hannibal, etc., R. Co., 26 Mo. App. 377; Roberts v. Quincy, etc., R. Co., 43 Mo. App. 287; Wright v. Atchison, etc., R. Co., 56 Mo. App. 367.

See also Hopkins v. Kansas Pac. R. Co., 18 Kan. 462; Louisville, etc., R. Co. v. Hurst, 98 Ind. 330; Wabash R. Co. v. Forshee, 77 Ind. 158; Luckie v. Chicago, etc., R. Co., 76 Mo. 639; Clare v. Chicago, etc., R. Co., 79 Mo. 39.

De Facto Highways. — Railroads are excused from fencing such crossings as are public highways *de facto*; and the failure of a County Court to recognize them as such does not divest the rights of the public in such *de facto* highways. Brown v. Kansas City, etc., R. Co., 20 Mo. App. 427; Jenkins v. Chicago, etc., R. Co., 27 Mo. App. 578; Luckie v. Chicago, etc., R. Co., 76 Mo. 639. See also Roberts v. Quincy, etc., R. Co., 43 Mo. App. 287.

A lane due to public necessity and convenience need not be fenced. Texas, etc., R. Co. v. Glenn, 8 Tex. Civ. App. 301.

An Abandoned Highway Must Be Fenced. — Jeffersonville, etc., R. Co. v. O'Connor, 37 Ind. 95. See Louisville, etc., R. Co. v. Shanklin, 94 Ind. 297.

Road Crossing Switch. — Where a switch of a railroad track is crossed by a public road, the company is excused from fencing such crossing, and, not being able to fence the whole switch, need not fence it at all. Wright v. Atchison, etc., R. Co., 56 Mo. App. 367.

A switch crossing provided by a railroad company across its own ground for ingress to and egress from its depot, is not a "traveled public road" within the meaning of the statute requiring the engine's bell to be rung, etc. Hodges v. St. Louis, etc., R. Co., 71 Mo. 50.

Where the Roadbed Occupies the Highway. — In Louisville, etc., R. Co. v. Francis, 58 Ind. 389, it was held that where a railroad company is allowed by proper authority to use a portion of a public highway the company need not fence its track at such place. A contrary con-

(5) *Private Crossings*. — Railroads must fence private crossings where such crossings are not actually used by the public.¹

k. *CHARACTER OF FENCE REQUIRED*. — Where the statute which requires a railroad company to fence its track² does not specify the character of the fence to be erected, it is generally held that a company fulfils its duty by building a legal fence in accordance with the general fence law.³ In *Iowa*

clusion was reached in *Illinois Cent. R. Co. v. Trowbridge*, 31 Ill. App. 190. See also *Iowa Cent. R. Co. v. Gushee*, 49 Ill. App. 609.

Where by its charter a railroad company was required to leave a breadth of thirty-six feet for the highway, when its track passed along such highway, and the company in fact left between forty-five and fifty feet for such highway, it was held that the company should have fenced its track at such place. *Jeffersonville, etc., R. Co. v. Sweeney*, 32 Ind. 430.

Highway Parallel to Track. — The fact that the county road runs parallel to and immediately adjoining the company's right of way does not excuse the company from fencing such part of its road. *Rutledge v. Hannibal, etc., R. Co.*, 78 Mo. 286; *Morris v. Hannibal, etc., R. Co.*, 79 Mo. 367; *Rozzelle v. Hannibal, etc., R. Co.*, 79 Mo. 349; *Missouri Pac. R. Co. v. Eckel*, 49 Kan. 795. This is so even though the right of way occupies part of such public road. It is the "road," not the right of way, that is required to be fenced. *Emmerson v. St. Louis, etc., R. Co.*, 35 Mo. App. 621. And the fact that the fence between the track and a highway running parallel thereto would have to be constructed on the right of way will not excuse the company from the statutory duty to fence the track. *Wabash R. Co. v. Forshee*, 77 Ind. 158. See *Louisville, etc., R. Co. v. Shanklin*, 94 Ind. 297.

Construing the statute requiring railroad companies to fence their tracks as a police regulation for the safety of the public, the fact that the railroad runs along the side of a public highway would seem to require peculiar care on the part of the company in complying with the law. *Indianapolis, etc., R. Co. v. Guard*, 24 Ind. 222; *Indianapolis, etc., R. Co. v. McKinney*, 24 Ind. 283.

Obstructing Highway by Fence. — A railroad company obstructed the highway by erecting a fence thereon. A party was under contract, at fifteen cents a load, to haul a number of loads of dirt from a given point to another across the road, and was actually doing so. By the erection of the fence he was compelled to go a route three times as far, and it was worth forty cents a load to haul the dirt over such longer route. It was held that he suffered specially from the nuisance and was entitled to recover damages. *Knowles v. Pennsylvania R. Co.*, 175 Pa. St. 623.

1. *Private Crossings*. — *Indiana Cent. R. Co. v. Leamon*, 18 Ind. 173; *Indianapolis, etc., R. Co. v. Thomas*, 84 Ind. 194; *Baltimore, etc., R. Co. v. Kreiger*, 90 Ind. 380; *Evansville, etc., R. Co. v. Mosier*, 101 Ind. 597; *Louisville, etc., R. Co. v. Goodbar*, 102 Ind. 596; *McKinley v. Chicago, etc., R. Co.*, 47 Iowa 76; *Jenkins v. Chicago, etc., R. Co.*, 27 Mo. App. 578; *Pittsburgh, etc., R. Co. v. Cunningham*, 39 Ohio St. 327. See also *Indianapolis,*

etc., R. Co. v. Lowe, 29 Ind. 545. And as to farm crossings generally, see the title *CROSSINGS*, vol. 8, p. 427.

Railroad companies are not required to erect cattle guards or cross-fences at private crossings. *Pennsylvania Co. v. Spaulding*, 112 Ind. 47.

The Crossing of a Railroad by a Private Logging Railroad is within the statute requiring railroads to fence and must be protected by cattle guards. *Caldon v. Chicago, etc., R. Co.*, 85 Wis. 527.

Farm Crossing — Indiana Statute. — In *Indiana* it is provided by statute that gates and bars at farm crossings shall be constructed and maintained by the owners of the farms. *Indianapolis, etc., R. Co. v. Adkins*, 23 Ind. 340. As to what is such a farm crossing, see *Louisville, etc., R. Co. v. Hughes*, 2 Ind. App. 68, and the title *CROSSINGS*, vol. 8, p. 427.

Cannot Close Up Proprietors' Means of Access to Highway. — A railroad company has no right, by fencing its tracks, to exclude proprietors from the use of the highway or to close their private passageway to and from it. *Croy v. Louisville, etc., R. Co.*, 97 Ind. 126.

2. **The Illinois Statute** requires railroad corporations to erect and maintain fences "suitable and sufficient to prevent cattle, horses, sheep, hogs, or other stock from getting on such railroad." 3 *Starr & Curt. Annot. Stat. Ill.*, 1896, p. 3253.

In *Chicago, etc., R. Co. v. Utley*, 38 Ill. 410, the rule was laid down that "a good and sufficient fence must be not merely one which will turn ordinary stock, for a slight barrier might do that, but one that will turn stock even though to some extent unruly;" and again, "the fence and guards [must be] good and sufficient for turning stock under all ordinary circumstances." See also *Chicago, etc., R. Co. v. Bryant*, 29 Ill. App. 17.

In *Leggett v. Illinois Cent. R. Co.*, 72 Ill. App. 577, the court said: "The rule as now settled by the Supreme and Appellate Courts of this state is that a fence that will turn 'ordinary' stock, or stock 'not ordinarily breachy,' is a good and sufficient fence."

The Indiana Statute requires the railroad to be "securely fenced." *Evansville, etc., R. Co. v. Tipton*, 101 Ind. 197.

Fence Not Connected with Cattle Guards at Crossing. — A road is not "securely fenced" under the statute where the cattle guards at a highway crossing are placed so far apart as to leave an open space on both sides of the crossing. *Indianapolis, etc., R. Co. v. Bonnell*, 42 Ind. 539; *Louisville, etc., R. Co. v. Thomas*, 106 Ind. 10.

3. **Legal Fence Held Sufficient**. — *Davidson v. Michigan Cent. R. Co.*, 49 Mich. 428; *King v. Chicago, etc., R. Co.*, 79 Mo. 328.

A railroad company is bound to keep up only a legal fence, and the statute defines:

the statute provides that the general law regulating the sufficiency of fences is inapplicable to railroad fences,¹ and the court, taking into consideration the purpose of the railroad fence law, holds that the fence required is one reasonably sufficient to prevent live stock getting on a railroad track.² In *Massachusetts* the statute requiring railroads to maintain "suitable" fences is not held to require them to maintain such fences as are by statute the "legal and sufficient" fences to be built by adjoining proprietors.³

A Barbed-wire Fence, properly constructed by a railroad for its line fence, has been held to be a compliance with a railroad fence law,⁴ and not to be a nuisance *per se*,⁵ but the erection and management of such a fence require a care commensurate with the danger to stock from its negligent construction and maintenance.⁶

Gates and Bars. — A gate or set of drawbars is a part of the fence in which it is constructed,⁷ and a railroad company's obligation to maintain fences along the side of its right of way includes the duty of keeping such gates or bars in repair.⁸

what is such a fence. *Toledo, etc., R. Co. v. Thomas*, 18 Ind. 215.

"Hog-tight" Fences. — Where there is a prohibition against hogs running at large, a railroad whose track passes through an inclosure need not be protected by "hog-tight" fences. *Atchison, etc., R. Co. v. Yates*, 21 Kan. 613.

A Virginia Rail Fence built by the company is sufficient to satisfy the statute. *Ferris v. Van Buskirk*, 18 Barb. (N. Y.) 397.

1. *Lee v. Minneapolis, etc., R. Co.*, 66 Iowa 131; Code Iowa, 1897, § 2055.

2. **Iowa Statute — Fence Must Be Reasonably Sufficient.** — *Morrison v. Burlington, etc., R. Co.*, 84 Iowa 663; *Shellabarger v. Chicago, etc., R. Co.*, 66 Iowa 18. See also *Hilliard v. Chicago, etc., R. Co.*, 37 Iowa 442.

The fence must be sufficient to turn all kinds of live stock, and not merely cattle and horses. *Lee v. Minneapolis, etc., R. Co.*, 66 Iowa 131. It must be sufficient to turn swine. *Fritz v. Milwaukee, etc., R. Co.*, 34 Iowa 337.

3. *Eames v. Salem, etc., R. Co.*, 98 Mass. 569, 96 Am. Dec. 676.

4. **In Minnesota a Wire Fence** constructed in accordance with the statute prescribing that such a fence built in a certain way should be sufficient in all cases where any law of the state required any fence or fences for any purpose whatever was held a legal railroad fence. *Halverson v. Minneapolis, etc., R. Co.*, 32 Minn. 88.

5. **A Barbed-wire Fence** built by a railroad alongside of its track is not *per se* a nuisance, so as to render the road liable for injury to stock because of their running into the fence. *Hillyard v. Grand Trunk R. Co.*, 8 Ont. Rep. 583.

6. **Care Required in Maintenance of Barbed-wire Fence.** — In *Gould v. Bangor, etc., R. Co.*, 82 Me. 122, the court said: "It must, perhaps, be further conceded that a fence made of barbed wire 'protected by an upper rail or board of wood' may, under the proviso attached to section 1, c. 22, Rev. Stat., be deemed a legal and sufficient fence, and, when properly built and kept in repair, a full discharge of the obligation resting upon the corporation by virtue of the statute. But the statute must have a reasonable construction.

* * * While the fence must be so built and

maintained as to be a reasonable restraint against all domestic animals of ordinary docility, it is not to be made unnecessarily dangerous to that class of animals, or permitted to become so by neglect." See also *Rehler v. Western New York, etc., R. Co.*, (Supreme Ct.) 28 N. Y. St. Rep. 311.

A railroad having inclosed its track with a skeleton fence made of wire set with barbs must use due diligence in running its trains, not only to avoid injuring live stock upon its track, but to avoid precipitating them, by fright, upon the fence, and causing them to be thus mangled or bruised. *Atlanta, etc., R. Co. v. Hudson*, 62 Ga. 679. See also *Louisville, etc., R. Co. v. Upton*, 18 Ill. App. 605.

See *Missouri Pac. R. Co. v. Metzger*, 24 Neb. 90, for a case where the railroad company was held liable for negligence in maintaining a barbed-wire fence.

7. **Gate a Part of the Fence.** — *Wabash R. Co. v. Kime*, 42 Ill. App. 272; *Payne v. Kansas City, etc., R. Co.*, 72 Iowa 214, 35 Am. & Eng. R. Cas. 113; *West v. Missouri Pac. R. Co.*, 26 Mo. App. 344; *Fremont, etc., R. Co. v. Pounder*, 36 Neb. 247; *Poler v. New York Cent. R. Co.*, 16 N. Y. 476.

Gates Erected Elsewhere than at Farm Crossing. — A railroad company may have gates already constructed, or may erect gates at other places than at farm crossings, and the fact that a gate is more apt to be left open than a fence to be thrown down or get out of repair does not affect the sufficiency of the fence required by statute. *Detroit, etc., R. Co. v. Hayt*, 55 Mich. 347.

Gaps and Bars. — As between the owner of stock and the railroad company, a gap and bars are to be regarded as a fence, and are to be kept in condition to serve all the purposes of a fence as prescribed by statute. *Jacksonville, etc., R. Co. v. Harris*, 33 Fla. 217, 39 Am. St. Rep. 127; *Great Western R. Co. v. Helm*, 27 Ill. 199, 81 Am. Dec. 226; *Illinois Cent. R. Co. v. Arnold*, 47 Ill. 173. See also *Harrington v. Chicago, etc., R. Co.*, 71 Mo. 384.

8. **Gates Must Be Kept in Condition.** — *Lake Erie, etc., R. Co. v. Beam*, 60 Ill. App. 68; *Hammond v. Chicago, etc., R. Co.*, 43 Iowa 168; *Payne v. Kansas City, etc., R. Co.*, 72

Keeping Gates Closed. — In some jurisdictions it is held that the company must use reasonable diligence to keep closed the gates which are required at farm crossings,¹ but in other states it is held that the duty of keeping the gates closed rests upon the adjoining owners or their tenants.²

Cattle Guards. — Cattle guards are held to be part of a secure and proper fence,³ and failure to erect them wherever necessary to prevent cattle from

Iowa 214, 35 Am. & Eng. R. Cas. 113; *Adams v. Atchison*, etc., R. Co., 46 Kan. 161; *Binicker v. Hannibal*, etc., R. Co., 83 Mo. 660; *Freet v. Kansas City*, etc., R. Co., 63 Mo. App. 548; *Fremont*, etc., R. Co. *v. Pounder*, 36 Neb. 247; *Poler v. New York Cent. R. Co.*, 16 N. Y. 476.

In *Missouri* gates in a railroad fence are to "be hung, and have latches or hooks, so that they may be easily opened and shut," and if a railroad company allows such a gate so placed to be out of repair, so that it cannot be easily opened and shut, such company does not fulfil its statutory duty. *Morrison v. Kansas City*, etc., R. Co., 27 Mo. App. 418.

Permitting Bars to Remain Down. — Where the railroad company permits bars in a fence at a farm crossing to remain down for a long period, it is chargeable with not maintaining the fence. *Illinois Cent. R. Co. v. Arnold*, 47 Ill. 173.

Gate in Fence Not on Edge of Right of Way. — Where a railroad fence at a certain point receded from the right of way so as to include a lot of ground belonging to a third person, the railroad is not bound to keep a gate in the fence of such lot closed, although it may be liable for the failure to maintain a fence between the lot and the right of way. *Davis v. Wabash R. Co.*, 46 Mo. App. 477.

Sufficiency of Gate Fastening. — In *Chicago*, etc., R. Co. *v. Buck*, 14 Ill. App. 394, it was held that a railroad company is not required to fasten gates in such a way that it is impossible for stock to open them under any and all circumstances. The company, it was considered, had the right to use the fastenings commonly adopted in the country by persons reasonably prudent and careful, and regarded by them as safe for the purpose. But in *Payne v. Kansas City*, etc., R. Co., 72 Iowa 214, 35 Am. & Eng. R. Cas. 113, it was held that it was not sufficient for the company to show that the fastenings used were of the kind in general use unless there were proofs also that such fastenings were reasonably sufficient to answer the purposes intended.

Under 46 Vict., (D), c. 24, § 16, gates with proper fastenings are required to be erected and maintained at farm crossings. A gate which slides back and forth and holds itself in place by its own weight merely, having no fastening or catch, is not a compliance with this section of the act. *Vernon v. Grand Trunk R. Co.*, Montreal L. R. 2 Super. Ct. 181. And the mere fact that the plaintiff continued to use the gates having a defective fastening does not show that he had adopted them as sufficient. *McMichael v. Grand Trunk R. Co.*, 12 Ont. Rep. 547.

Landowner Must Notify Company of Defects. — In *New York* it has been held that although the statute imposes upon the railroad company the absolute duty of maintaining fences, gates, etc., a duty in this respect devolves also

upon the proprietors along the road, and when defects have actually come to their knowledge they must make suitable efforts to apprise the company thereof; but in enforcing this rule upon proprietors care should be taken not to exempt the company, upon which the primary duty rests, from its due share of responsibility. *Poler v. New York Cent. R. Co.*, 16 N. Y. 476. See also *Hammond v. Chicago*, etc., R. Co., 43 Iowa 168.

1. Reasonable Diligence to Keep Gates Closed. — *Chicago*, etc., R. Co. *v. Sierer*, 13 Ill. App. 261; *Wabash R. Co. v. Perbex*, 57 Ill. App. 62; *Chicago*, etc., R. Co. *v. Harris*, 54 Ill. 528; *Wait v. Burlington*, etc., R. Co., 74 Iowa 207; *Aylesworth v. Chicago*, etc., R. Co., 30 Iowa 459; *West v. Missouri Pac. R. Co.*, 26 Mo. App. 344; *Woods v. Missouri*, etc., R. Co., 51 Mo. App. 500.

Fixing Company with Notice that Gate Open — Questions of Law and Fact. — The question whether a gate has been left open for such a length of time before the happening of the injury in consequence thereof that the railroad company knew, or ought to have known, of the open condition is ordinarily a question that should be left to the jury; but there may be cases where the time intervening between that of leaving the gate open and the escape of the stock through it is so short that the court may declare, as a matter of law, that no negligence is imputed to the railroad company for its failure to discover the fact. *Box v. Atchison*, etc., R. Co., 58 Mo. App. 359. See also *Wait v. Burlington*, etc., R. Co., 74 Iowa 207.

After the railroad company has erected the gate required by statute, it is not expected to stand perpetual guard over it to keep it closed against the act of third parties in leaving it open; and if stock escape thus, before the servants of the company have notice of the fact of the gate's being open, or reasonable time in which to discover the fact, no liability attaches. *Morrison v. Kansas City*, etc., R. Co., 27 Mo. App. 418; *Ridenore v. Wabash*, etc., R. Co., 81 Mo. 227.

2. Duty to Keep Gate Closed Held to Rest on Landowner. — *Adams v. Atchison*, etc., R. Co., 46 Kan. 161. See *Bond v. Evansville*, etc., R. Co., 100 Ind. 301, where there was a special agreement between the parties.

Injunction Lies Against Property Owner to Close Gate. — An injunction will lie to prevent the property owner from leaving open the gates of his private railway crossing where his doing so is likely to cause accidents on the road. *Truesdale v. Jensen*, 91 Iowa 313.

3. Cattle Guards Part of Fence. — *Toledo*, etc., R. Co. *v. Franklin*, 53 Ill. App. 632; *Pittsburgh*, etc., R. Co. *v. Ehrhart*, 36 Ind. 118; *Pittsburgh*, etc., R. Co. *v. Eby*, 55 Ind. 567; *Grand Rapids*, etc., R. Co. *v. Jones*, 81 Ind. 523; *Louisville*, etc., R. Co. *v. Porter*, 97 Ind. 267; *Banister v. Pennsylvania R. Co.*, 98

getting on the track is a failure to fence.¹ Where a railroad company is relieved from the duty of fencing, it need not erect cattle guards. This is the case at street crossings within depot grounds² or across streets in cities and villages,³ although the mere fact that the crossing of the railroad and the street is within a city or village does not prevent the application of the statute requiring fences or cattle guards.⁴

Sufficiency of Erection. — According to many of the decisions all that is required, under the statute, of a cattle guard is that it be reasonably sufficient to turn ordinary cattle, not breachy cattle;⁵ but it has been held that the structure

Ind. 220; Fort Wayne, etc., R. Co. v. Herbold, 99 Ind. 91; Welty v. Indianapolis, etc., R. Co., 105 Ind. 55; Nelson v. Vermont, etc., R. Co., 26 Vt. 717, 62 Am. Dec. 614. See also the title CROSSINGS, vol. 8, p. 367.

Erection of Cattle Guards Included in Duty of Fencing. — Where tracks are required by the statute to be fenced, the duty includes the putting in of proper cattle guards to prevent animals from getting upon the track from streets and highways. Indianapolis, etc., R. Co. v. Kibby, 28 Ind. 479; Pittsburgh, etc., R. Co. v. Ehrhart, 36 Ind. 119; Indianapolis, etc., R. Co. v. Irish, 26 Ind. 268.

An Action for a Penalty for Failing to Erect Cattle Guards is given under the statutes of Virginia. Russell v. Louisville, etc., R. Co., 93 Va. 322.

Bridges. — Where there is no proof that it is impracticable to construct bridges with cattle guards, a company that maintains a bridge in such a condition that animals may enter upon it from the public highway has not securely fenced its road. Cincinnati, etc., R. Co. v. Jones, 111 Ind. 250.

Cattle Guards in Division Fences. — Cattle guards must be constructed as well where the railroad track passes through a fence connecting two parts of land belonging to the same owner as where it passes through boundary fences. Smith v. Chicago, etc., R. Co., 38 Iowa 518. So where the track passes through a division fence dividing the lands of two separate owners. Donald v. St. Louis, etc., R. Co., 44 Iowa 157.

At Farm Crossings. — Under the statutes of Indiana the company is held bound to construct cattle guards at farm crossings. Grand Rapids, etc., R. Co. v. Jones, 81 Ind. 523. A different doctrine has been laid down in Iowa. Bartlett v. Dubuque, etc., R. Co., 20 Iowa 188. In West Virginia cattle guards are not necessary at farm crossings where there are at the point no fences dividing fields. Clarke v. Ohio River R. Co., 39 W. Va. 732.

1. Failure to Erect Cattle Guards a Failure to Fence. — Toledo, etc., R. Co. v. Franklin, 53 Ill. App. 632; Fort Wayne, etc., R. Co. v. Herbold, 99 Ind. 91; Welty v. Indianapolis, etc., R. Co., 105 Ind. 55; Pittsburgh, etc., R. Co. v. Eby, 55 Ind. 567; Atchison, etc., R. Co. v. Shaft, 33 Kan. 521.

Specific Performance Not Enforced. — A covenant by a railroad company to maintain cattle guards will not be specifically enforced by a court of equity. Columbus, etc., R. Co. v. Watson, 26 Ind. 50; Darnley v. London, etc., R. Co., L. R. 2 H. L. 43.

2. Stern v. Michigan Cent. R. Co., 76 Mich.

591; Cleveland, etc., R. Co. v. Newbrander, 40 Ohio St. 15.

Must Erect Guards at First Practicable Point. — Where for any reason a company is excused from erecting cattle guards at any particular place, such company must erect them at the first point practicable nearest such excepted place. Cleveland, etc., R. Co. v. Newbrander, 40 Ohio St. 15; Missouri Pac. R. Co. v. Manson, 31 Kan. 337.

3. Halloran v. New York, etc., R. Co., 2 E. D. Smith (N. Y.) 257; Vanderkar v. Rensselaer, etc., R. Co., 13 Barb. (N. Y.) 390; Parker v. Rensselaer, etc., R. Co., 16 Barb. (N. Y.) 315.

4. In Brace v. New York Cent. R. Co., 27 N. Y. 269, it was held that a statute requiring the construction and maintenance of cattle guards at all railroad crossings was applicable to the crossings of roads or streets in cities and villages. The court referred to Vanderkar v. Rensselaer, etc., R. Co., 13 Barb. (N. Y.) 390, and Parker v. Rensselaer, etc., R. Co., 16 Barb. (N. Y.) 315, and distinguished those cases, observing that a cattle guard constructed across a street in a city or village would be a nuisance, but that such a case was very different from the construction of a cattle guard along the margin of a street and across the track of a railroad which crossed such street within the limits of the town. See Tracy v. Troy, etc., R. Co., 38 N. Y. 436, 98 Am. Dec. 54.

5. Must Be Sufficient to Turn Stock. — Chicago, etc., R. Co. v. Farrelly, 3 Ill. App. 60; Chicago, etc., R. Co. v. Buck, 14 Ill. App. 394; Chicago, etc., R. Co. v. Kennedy, 22 Ill. App. 308; Chicago, etc., R. Co. v. Evans, 45 Ill. App. 79; Scott v. Buck, 85 Ill. 334; Missouri Pac. R. Co. v. Manson, 31 Kan. 337; Missouri Pac. R. Co. v. Morrow, 32 Kan. 217. See also Pittsburgh, etc., R. Co. v. Eby, 55 Ind. 567; Jones v. Chicago, etc., R. Co., 59 Mo. App. 137.

So where a railroad company complied with the statute by erecting a cattle guard reasonably sufficient to turn ordinary animals, it was held not liable, in the absence of negligence, for injury to a mule which jumped over such cattle guard and got upon the track. Chicago, etc., R. Co. v. Farrelly, 3 Ill. App. 60.

Whole Right of Way to Be Protected. — The whole width of the right of way must be protected by wing fences or by some such contrivance, and a mere pit under the track is not sufficient. This is so whether the company owns the right of way or merely exercises an easement therein. Missouri Pac. R. Co. v. Manson, 31 Kan. 337.

And where cattle guards are required to be erected, wing or cross fences are necessary parts of such cattle guards, connecting them

must be made good, sufficient, and safe for all the purposes for which the company habitually uses it.¹

l. ANIMALS TO BE FENCED AGAINST. — The duty to fence their tracks imposed upon railroad companies by the various statutes is generally the same as that imposed upon individuals by prescription, at common law, or by statute, and requires them to fence their tracks only against domestic animals rightfully on the adjoining close or rightfully on the highway.²

m. WHETHER DUTY TO FENCE AGAINST CHILDREN. — Fences along the line of railways are required not to protect rational, intelligent beings, but animals incapable of protecting themselves, and therefore it seems that when a human being of sufficient age and intelligence to understand the danger of going upon a railroad track is killed or injured thereon, the failure of the railroad to fence its track is not to be considered in determining its liability, even though by statute it is required to maintain fences.³ But it has been decided that where a child too young to know or understand the danger of going upon a railroad track is injured thereon, the railroad company's failure to fence

with the fences running parallel to the track. *Edwards v. Kansas City, etc., R. Co.*, 74 Mo. 117.

Filled with Snow and Ice. — The statute requiring railroad companies to erect suitable cattle guards along their tracks is not complied with where for an unreasonable time such cattle guards are allowed to remain filled with snow and ice so as to destroy their usefulness. *Indiana, etc., R. Co. v. Drum*, 21 Ill. App. 331.

But a reasonable time should be given in which to remove such accumulated snow and ice. *Chicago, etc., R. Co. v. Kennedy*, 22 Ill. App. 308.

In *Stacey v. Winona, etc., R. Co.*, 42 Minn. 158, affirming *Blais v. Minneapolis, etc., R. Co.*, 34 Minn. 57, it was held that reasonable care and diligence do not require, save under exceptional and extraordinary circumstances, that railroad companies should remove the natural accumulation of snow and ice from their cattle guards.

1. Must Be Sufficient for All Ordinary Uses. — *Ford v. Chicago, etc., R. Co.*, 91 Iowa 189. In this case the court said: "If it be necessary, in the prosecution of defendant's business, to locate its yards so, as in this case, as to virtually embrace a cattle guard, then it is clear that defendant owes the duty to its employees, whom it requires to constantly cross it in the proper discharge of their duties, to make such guard reasonably safe for all such uses and purposes."

2. Animals Railroad Must Fence Against. — *England.* — *Ricketts v. East and West India Docks, etc., R. Co.*, 12 Eng. L. & Eq. 520, 21 L. J. C. P. 201; *Manchester, etc., R. Co. v. Wallis*, 25 Eng. L. & Eq. 373, 14 C. B. 213, 78 E. C. L. 213.

Canada. — *Dolrey v. Ontario, etc., R. Union Co.*, 11 U. C. Q. B. 600; *Auger v. Ontario, etc., R. Union Co.*, 16 U. C. Q. B. 92; *Douglas v. Grand Trunk R. Co.*, 5 Ont. App. 585; *Henderson v. Grand Trunk R. Co.*, 20 U. C. Q. B. 602; *McAlpine v. Grand Trunk R. Co.*, 38 U. C. Q. B. 446.

Maine. — *Perkins v. Eastern R. Co.*, 29 Me. 307, 50 Am. Dec. 589.

Massachusetts. — *Eames v. Salem, etc., R. Co.*, 98 Mass. 560, 96 Am. Dec. 676.

Missouri. — *Berry v. St. Louis, etc., R. Co.*

65 Mo. 172; *Ells v. Pacific R. Co.*, 55 Mo. 278; *Johnson v. Missouri Pac. R. Co.*, 80 Mo. 620.

New Hampshire. — *Chapin v. Sullivan R. Co.*, 39 N. H. 53, 75 Am. Dec. 207; *Mayberry v. Concord R. Co.*, 47 N. H. 391; *Giles v. Boston, etc., R. Co.*, 55 N. H. 552.

New Jersey. — *Vandegrift v. Rediker*, 22 N. J. L. 185, 51 Am. Dec. 262.

New York. — *Waldron v. Rensselaer, etc., R. Co.*, 8 Barb. (N. Y.) 390; *Brooks v. New York, etc., R. Co.*, 13 Barb. (N. Y.) 594.

Vermont. — *Jackson v. Rutland, etc., R. Co.*, 25 Vt. 150, 60 Am. Dec. 246; *Trow v. Vermont Cent. R. Co.*, 24 Vt. 487, 58 Am. Dec. 191; *Bemis v. Connecticut, etc., Rivers R. Co.*, 42 Vt. 375, 1 Am. Rep. 339.

See *supra*, this title, *Fences Inclosing Lands — Animals to Be Fenced Against*. And for a full discussion of the question see the title *INJURY TO ANIMALS*.

3. No Duty to Fence Against Intelligent Persons. — *Nolan v. New York, etc., R. Co.*, 53 Conn. 461, in which case the persons injured were two boys, aged respectively seven and ten years.

Fence Required by City Ordinance. — A city ordinance required a railroad company to erect and maintain along a certain part of its track such a suitable and sufficient fence as would prevent animals from straying upon and obstructing its tracks and secure persons and property from danger. The company did not build the fence. It was held in an action brought by a boy between eight and nine years of age, to recover damages for an injury received while upon the tracks of the company, that he might recover if he could show that he was not guilty of contributory negligence and that it was reasonably probable that the accident resulted from the failure of the railroad company to build the fence. *Hayes v. Michigan Cent. R. Co.*, 111 U. S. 228.

Common-law Duty to Fence. — At common law, in circumstances where the public safety requires such a precaution as a fence to prevent danger from the ordinary operations of a railroad to strangers not themselves in fault, the omission of it is negligence, and it is a question of fact for the jury whether the circumstances exist which create such a duty. *Hayes v. Michigan Cent. R. Co.*, 111 U. S. 228.

should be considered in determining whether or not it was negligent, when by statute it was required to fence its track.¹

FEOFFMENT. (See also LIVERY OF SEIZIN.)—A feoffment has been defined as a conveyance of corporeal hereditaments, by delivery of the possession upon or within view of the land.²

FERÆ NATURÆ.—See the title ANIMALS, vol. 2, pp. 342-351.

FERMENTED LIQUORS. (See also the title INTOXICATING LIQUORS.)—See note 3.

FERMER.—See note 4.

FERRIAGE. (See also the title FERRIES, *post.*)—Ferriage, literally speaking, is the price or fare fixed by law for the transportation of the traveling public, with such goods and chattels as they may have with them, across a river, bay, or lake.³

1. Infants Injured on Account of Failure to Fence.—Keyser *v.* Chicago, etc., R. Co., 56 Mich. 559, 56 Am. Rep. 405; Isabel *v.* Hannibal, etc., R. Co., 60 Mo. 475; Schmidt *v.* Milwaukee, etc., R. Co., 23 Wis. 186. See also Singleton *v.* Eastern Counties R. Co., 7 C. B. N. S. 287, 97 E. C. L. 287; Mar *v.* Marquette, etc., R. Co., 47 Mich. 9, 49 Mich. 99; Stuetgen *v.* Wisconsin Cent. R. Co., 80 Wis. 498. But see Fitzgerald *v.* St. Paul, etc., R. Co., 29 Minn. 336.

Statute Not Requiring a Fence.—In Walkenhauer *v.* Chicago, etc., R. Co., 3 McCrary (U. S.) 553, it was held in an action for injuries to an infant that the Iowa statute (Code 1873, § 1289; Code 1897, § 2055) did not make it the duty of the railroad company to fence its road, but only subjected it to a certain liability if it failed to do so, and that, therefore, it was not negligent for a failure in this regard.

No Liability for Injury on Adjoining Premises.—A child four years of age strayed across an unfenced track into an adjoining lot, where, within a few feet of the railroad, there was a trench filled with water. The child fell into this trench and was injured. In an action for damages against the railroad company the court said: "The obligation of a railroad company to guard its track by fences is chiefly for the purpose of protecting persons and cattle from harm to which they would there be liable. The duty of the company is to keep people from danger on its own premises, and not from danger on the premises of its neighbors. The company is not bound so to guard its road

that children or cattle cannot get across it to the land of other persons." Morrissey *v.* Providence, etc., R. Co., 15 R. I. 271.

2. French *v.* French. 3 N. H. 260. See also Western Minn., etc., Co. *v.* Peytona Cannel Coal Co., 8 W. Va. 445; Ochiltree *v.* McClung, 7 W. Va. 234.

3. Fermented Liquors.—Cider has been held to be a *fermented liquor*. Eureka Vinegar Co. *v.* Gazette Printing Co., 35 Fed. Rep. 571. See also People *v.* Toster, 64 Mich. 732. Beer has been held to be a *fermented liquor*. State *v.* Lemp, 16 Mo. 389.

Fermented Liquor Distinguished from Spirits.—In McDuffie *v.* State, 87 Ga. 688, it was held that *fermented liquors*, though intoxicating, were not spirituous. Citing 11 AM. AND ENG. ENCYC. OF LAW (1st ed.) 571. See also Com. *v.* Grey, 2 Gray (Mass.) 501, 61 Am. Dec. 476; State *v.* Oliver, 26 W. Va. 422, 53 Am. Rep. 79; Sarlls *v.* U. S., 152 U. S. 573; State *v.* Adams, 51 N. H. 569.

Fermented beer is not necessarily strong or spirituous liquor. The term may include spruce beer, ginger beer, and the like. Nevin *v.* Ladue, 3 Den. (N. Y.) 450.

4. Fermer.—(See also FARMER, *ante.*)

The term "*fermer*" as used in the statute of Marlbridge, comprehended all such as held by lease for life or lives or for years, by deed or without deed. Woodhouse *v.* Walker, 5 L. B. D. 404; More *v.* Townsend, 23 N. Y. 301.

5. People *v.* San Francisco, etc., R. Co., 35 Cal. 619.

FERRIES.

BY BRISCOE B. CLARK.

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CROSS-REFERENCES.

For matters of *PLEADING AND PRACTICE* connected with this title, see 8 *ENCYCLOPEDIA OF PLEADING AND PRACTICE*, 920.

For other matters of *SUBSTANTIVE LAW* and *EVIDENCE* related to this subject, see the following titles in this work: *ADMIRALTY JURISDICTION*, vol. 1, p. 645; *BOUNDARIES*, vol. 4, p. 756; *BRIDGES*, vol. 4, p. 918; *CANALS*, vol. 5, p. 111; *CARRIERS OF GOODS*, vol. 5, p. 154; *CARRIERS OF LIVE STOCK*, vol. 5, p. 427; *CARRIERS OF PASSENGERS*, vol. 5, p. 474; *COMMON CARRIERS*, vol. 6, p. 236; *CONTRACTS OF AFFREIGHTMENT AND CHARTER-PARTIES*, vol. 7, p. 156; *CONTRIBUTORY NEGLIGENCE*, vol. 7, p. 368; *COUNTIES*, vol. 7, p. 898; *DAMAGES*, vol. 8, p. 537; *EMINENT DOMAIN*, vol. 10, p. 1043; *EXEMPLARY DAMAGES*, *ante*; *HIGHWAYS*; *IMPAIRMENT OF OBLIGATION OF CONTRACTS*; *INJUNCTIONS*; *INTERNATIONAL LAW*; *INTERSTATE COMMERCE*; *JETTISON*; *MANDAMUS*; *MARINE INSURANCE*; *MARITIME LIENS*; *MASTERS OF VESSELS*; *MUNICIPAL CORPORATIONS*; *NAVIGABLE WATERS*; *NAVIGATION*; *NEGLIGENCE*; *NUISANCES*; *RIPARIAN RIGHTS*; *SALVAGE*; *SEAMEN*; *SHIPS AND SHIPPING*; *STATES*; *TAXATION*; *TERRITORIES*; *UNITED STATES*; *USAGES AND CUSTOMS*; *WATERCOURSES*.

I. DEFINITION. — A ferry, when considered as a franchise, is the right to have a boat upon a stream, river, arm of the sea, or lake, for the transportation of persons, horses, carriages, and other property, for a reasonable toll.¹ The term "ferry" is also applied to the place where the right is exercised.²

A Public Highway. — A ferry has often been spoken of as a public highway of a special description,³ and it has been held that it can only exist in connec-

1. **Definition.** — *Newton v. Cubitt*, 12 C. B. N. S. 32, 104 E. C. L. 32; *North, etc., Shields Ferry Co. v. Barker*, 2 Exch. 149; *Huzzey v. Field*, 2 C. M. & R. 442; *State v. Wilson*, 42 Me. 9; *State v. Freeholders*, 23 N. J. L. 206; *Akin v. Western R. Corp.*, 30 Barb. (N. Y.) 311; *Hackett v. Wilson*, 12 Oregon 25.

"A ferry is a liberty by prescription, or the king's grant, to have a boat for passage upon a great stream for carriage of horses and men for reasonable toll." *Termes de la Ley* (1st Am. ed.) 223.

A ferry is the right of "carrying passengers across streams, or bodies of water, or arms of the sea, from one point to another, for a compensation paid by the way of a toll." 2 *Washington on Real Property* (5th ed.), bk. 2, p. 20.

Ferryman — Exemption from Military Duty. —

By the common law, and by the Militia Act, which exempted ferrymen from militia duty, a ferryman is only he who has the exclusive right of transporting passengers over a river or other watercourse, for hire, at an established rate. *Clarke v. State*, 2 McCord L. (S. Car.) 47.

2. See *Schuylkill Bridge Co. v. Frailey*, 13 S. & R. (Pa.) 424; *State v. Freeholders*, 23 N. J. L. 209.

3. **Ferry as a Highway.** — *North, etc., Shields Ferry Co. v. Barker*, 2 Exch. 149; *Huzzey v. Field*, 2 C. M. & R. 442; *New York v. Starin*, 106 N. Y. 1.

Mr. Cooley says, in reference to the right of the states lawfully to establish ferries over navigable waters, that "this is only the estab-

tion with some highway or place where the public have rights. By the weight of authority there cannot be a ferry from or to land owned exclusively by a private individual.¹

II. NATURE AND EXTENT OF RIGHT — 1. In General — A Franchise. — The right to operate a public ferry belongs to that class of rights known to the English law as franchises.²

Real Property. — A ferry franchise is an incorporeal hereditament and, in judgment of law, real property.³ Its nature in this respect is important in connection with questions of transfer, descent, taxation, etc.

Independent of Ownership of Land. — The franchise itself is independent of the land to and from which or over which the ferry is operated.⁴

2. Distance Over Which Ferry May Be Operated. — It is impossible to specify in a general way the distance over which ferries may be operated. When the intervening waters are not wide, and can be traversed at regular and brief intervals by boats adapted to a ferry business, there can be no question that ferries may be established and operated, and a ferry need not be operated merely from one place on one side of the water to a single place on the other

lishment of a public way." *Cooley's Const. Lim.* (6th ed.) 731.

In *Chick v. Newberry County*, 27 S. Car. 419, it was held that the term "highway," as used in the *South Carolina Act of 1874*, which allows an action against a county for damages caused by defective highways, causeways, or bridges, did not include a ferry or its usual appliances.

Ferry a Continuation of Highway. — When a public highway crosses a stream of water it is not interrupted, but the water and the soil beneath it, within the limits of the road, are a continuous part of the road; when necessary for the proper use and enjoyment of the highway by the public, the ferries and bridges are also parts and parcels of the road. *Mills v. Learn*, 2 Oregon 215.

Connection Between Ferry and Highway at Water's Edge. — Strictly speaking, a highway connects with a ferry only at the water's edge, and it was therefore held, on an indictment for obstructing a highway, that, in the absence of positive proof, an open space between the termination of the highway and the water could not be presumed to be a part of the ferry. *State v. Peckham*, 9 R. I. 1.

1. Ferry Must Be in Connection with Highway. — *Hackett v. Wilson*, 12 Oregon 25; *People v. Mago*, 69 Hun (N. Y.) 559, citing 7 AM. AND ENG. ENCYC. OF LAW (1st ed.) 941.

In *Newton v. Cubitt*, 12 C. B. N. S. 58, 104 E. C. L. 58, it was said: "A ferry exists in respect of persons using a right of way, where the line of way is across water. There must be a line of way on land, coming to a landing place on the water's edge."

And in *Huzzey v. Field*, 12 C. M. & R. 432, Lord Abinger said: "A public ferry, then, is a public highway of a special description, and its termini must be in places where the public have rights, as towns or villis, or highways leading to towns or villis."

But in *Patrick v. Ruffners*, 2 Rob. (Va.) 209, 40 Am. Dec. 740, there is a dictum to the effect that the termini, though generally upon some public road, may, however, be altogether on private property.

2. Right to Operate a Ferry a Franchise. — *Ipswich v. Brown*, Sav. 11; *Peter v. Kendal*,

6 B. & C. 703, 13 E. C. L. 299; *Patrick v. Ruffners*, 2 Rob. (Va.) 209, 40 Am. Dec. 740. See also 2 Washburn on Real Property (5th ed.), bk. 2, p. 20; 3 Kent's Com. 458.

3. Ferry Franchise an Incorporeal Hereditament. — *Reg. v. Cambrian R. Co.*, L. R. 6 Q. B. 422; *Mabury v. Louisville, etc., Ferry Co.*, 60 Fed. Rep. 645; *Bowman v. Wathen*, 2 McLean (U. S.) 376; *Chadwick v. Haverhill Bridge Co.*, 2 Dane's Abr. 686; *Dundy v. Chambers*, 23 Ill. 369; *Gunterman v. People*, 138 Ill. 518; *Rohn v. Harris*, 130 Ill. 525; *New York v. Starin*, 106 N. Y. 1; *Patrick v. Ruffners*, 2 Rob. (Va.) 209, 40 Am. Dec. 740.

Method of Conveyance. — In *Dundy v. Chambers*, 23 Ill. 369, the question arose whether a ferry franchise was embraced within, and governed by, the Conveyance Act, or whether it was to be regarded as a personal chattel in its sale and transfer, and the court held that a ferry franchise could only be transferred in accordance with the provisions of the statute in reference to the conveyance of real estate.

Partition. — In *Rohn v. Harris*, 130 Ill. 525, the court said: "Strictly speaking, it may be conceded that a ferry franchise is not real estate, but it partakes so far of the nature of real estate that we are inclined to hold that it may be partitioned in the same manner as real property."

Compensation under English Lands and Railway Clauses Consolidation Acts. — A ferry is "lands" within the meaning of these acts providing compensation to the owner for any damage to lands injuriously affected by the construction of a railway, etc. *Reg. v. Cambrian R. Co.*, L. R. 6 Q. B. 422.

Right to Operate Ferry Granted for Limited Period. — In *Morse v. Garner*, 1 Strobb. L. (S. Car.) 514, 47 Am. Dec. 565, it was held that the franchise was not an incorporeal hereditament, being merely a privilege granted by the state for a limited time, and therefore was not the subject of a covenant for passage toll free which would run with the franchise, and would be binding upon an assignee of the franchise.

4. Independent of Land. — See *School Trustees v. Tatman*, 13 Ill. 27; *Fay, Petitioner*, 15 Pick. (Mass.) 243; *New York v. Starin*, 106 N. Y. 1.

side, but may run from one place on one side of the water to several places on the other side.¹

3. What Motive Power May Be Used. — It is immaterial by what means the ferryboat is propelled. It may be by steam, by hand, by cable, or by the current of the stream.²

4. Ferry May Consist of Right of Ferriage One Way. — It is not necessary to the existence of a ferry that there shall be a right to carry both to and fro. A franchise for ferriage one way only may be granted.³

5. Right of Ferry Is Subject to Rights of the Public in Navigable Waters. — The franchise, when over navigable waters, is held subject to the right of the public to use the waters as a highway.⁴ It follows, therefore, that the owner of a ferry franchise has no right to obstruct the river by stretching a rope across it, so as to interfere with its use by the public as a highway.⁵ And it has also been held that he is not entitled to compensation for damages to his franchise caused by the construction, by the federal government, of a dike, to improve the river for purposes of navigation.⁶

6. The Grant of a Ferry Franchise as a Contract Protected by the Federal Constitution. — The grant of a ferry franchise, as a rule, results in a contract between the grantee and the state which is protected by the provision of the Federal Constitution prohibiting the states from passing any law impairing the obligation of contracts.⁷

The decisions, however, on the question whether a ferry franchise granted to a municipality is within the protection of such constitutional provision are conflicting.⁸

1. Distance Over Which Ferry May Be Operated. — *New York v. New Jersey Steamboat Nav. Co.*, 106 N. Y. 28.

In *The Sylph*, 4 Blatchf. (U. S.) 24, it was held that running a boat between New York and Port Richmond was maintaining a ferry.

2. Motive Power of Boat Immaterial. — *Le Barron v. East Boston Ferry Co.*, 11 Allen (Mass.) 312, 87 Am. Dec. 717; *Douglass's Appeal*, 118 Pa. St. 65; *Parrott v. Lawrence*, 2 Dill. (U. S.) 332.

In this last case it was held that a flat-bottomed boat, connected to each bank by cables and propelled to and fro by an engine situated on the shore, was a ferry.

3. Ferriage One Way Only. — *Pim v. Curell*, 6 M. & W. 234; *Conway v. Taylor*, 1 Black (U. S.) 603; *Burlington, etc., County Ferry Co. v. Davis*, 48 Iowa 133; *People v. Babcock*, 11 Wend. (N. Y.) 586; *Power v. Athens*, 99 N. Y. 592.

4. Right of Ferry Subject to Rights of Public in Navigable Waters. — *Conway v. Taylor*, 1 Black (U. S.) 603; *Fay, Petitioner*, 15 Pick. (Mass.) 253; *Broadnax v. Baker*, 94 N. Car. 675, 55 Am. Rep. 633. See the title NAVIGABLE WATERS.

5. Babcock v. Herbert, 3 Ala. 392, 37 Am. Dec. 695; *Steamboat Globe v. Kurtz*, 4 Greene (Iowa) 433. See, however, *The Vancouver*, 2 Sawy. (U. S.) 381.

6. Lonergan v. Mississippi River Bridge Co., 2 McCrary (U. S.) 451; *Mississippi River Bridge Co. v. Lonergan*, 91 Ill. 508. See also *Pittsburgh, etc., R. Co. v. Jones*, 111 Pa. St. 204.

7. Obligation of Contracts. — *Mills v. St. Clair County*, 7 Ill. 197; *Dufour v. Stacey*, 90 Ky. 288; *McRoberts v. Washburne*, 10 Minn. 23; *Benson v. New York*, 10 Barb. (N. Y.) 223.

Repeal of Grant under Power Reserved. — Where the right to repeal the grant of the franchise is reserved to the legislature, the exclusive limits of the franchise may be reduced. *Perrin v. Oliver*, 1 Minn. 202. See also *Stephens v. Powell*, 1 Oregon 283.

And where the right of repeal is reserved on failure of the grantee to perform certain duties imposed upon him, the legislature may repeal the grant without a judicial ascertainment that the grantee has failed to perform such duties; the question, however, whether he has in fact failed, so as to make the repeal effectual, is for the courts. *Myrick v. Brawley*, 33 Minn. 377.

8. Franchises Held by Municipalities. — In *East Hartford v. Hartford Bridge Co.*, 10 How. (U. S.) 534, it was held that the grant of a ferry franchise to the town of East Hartford, in view of its nature and the character of the parties, was not a contract, so as to prevent the legislature from discontinuing the ferry at will and without compensation. See also *Douglass v. Craig*, 2 La. Ann. 919; *Police Jury v. Shreveport*, 5 La. Ann. 661.

In *Benson v. New-York*, 10 Barb. (N. Y.) 223, it was held that the Cornbury charter of 1708 gave to the mayor, aldermen, and commonalty of New York the right and power to establish ferries between the city of New York and Long Island, and to hold them, with the revenues and tolls, forever; and that the corporation having acted upon that and other grants by establishing the South ferry and the Hamilton avenue ferry, the city of New York and its inhabitants acquired vested rights and valuable interests in those ferries which could not be taken away by the legislature. See also *East-Hartford v. Hartford Bridge Co.*, 17 Conn. 91; *School Trustees v. Tatman*, 13 Ill. 27; *Fay*,

III. ACQUISITION OF FERRY FRANCHISE — 1. Necessity for Legislative Grant. — Under the common law of *England* no one could maintain a public ferry without a grant or license from the king.¹

And in the *United States* no person can do so without legislative authority. A grant of a franchise from the state, directly or indirectly, is essential.²

Imposing Conditions in Grant. — As the right to operate a ferry is dependent upon a grant from the sovereign power, the latter may impose such conditions in the grant as it may see fit.³

By Prescription. — By the weight of authority, the right to maintain a ferry may be acquired by prescription, but in such a case a grant from the legislative authority is presumed.⁴ In some states it has been held, however, that

Petitioner, 15 Pick. (Mass.) 243; *New York v. Starin*, 106 N. Y. 1; *New York v. New Jersey Steamboat Nav. Co.*, 106 N. Y. 28.

For a Full Discussion of the effect of the constitutional provision prohibiting the impairment of the obligation of contracts, see the title **IMPAIRMENT OF OBLIGATION OF CONTRACTS**.

1. Necessity for Legislative Grant — England. — *Blissett v. Hart*, Willes 508, 512 note; *Huzzey v. Field*, 2 C. M. & R. 440; *Pim v. Curell*, 6 M. & W. 234; *Trotter v. Harris*, 2 Y. & J. 285; 2 Roll. Abr. 140; 3 Jacob's Law Dict. 40; 1 Com. Dig., tit. Action upon the Case for a Nuisance (A); 5 Com. Dig., tit. Pischarry.

"No man may set up a common ferry for all passengers without a prescription, time out of mind, or a charter from the king. He may make a ferry for his own use or the use of his family, but not for the common use of all the king's subjects passing that way, because it doth in consequence tend to a common charge, and is become a thing of public interest or use, and every man, for his passage, pays a toll which is a common charge, and every ferry ought to be under a public regulation." *Hale's De Jure Maris* (Harg. Law Tracts), c. 2, 16.

2. United States. — *Mills v. St. Clair County*, 8 How. (U. S.) 569; *Bowman v. Wathen*, 2 McLean (U. S.) 383.

Alabama. — *Dyer v. Tuskaloosa Bridge Co.*, 2 Port. (Ala.) 296, 27 Am. Dec. 655; *Milton v. Haden*, 32 Ala. 30, 70 Am. Dec. 523.

Arkansas. — *Darnell v. State*, 48 Ark. 321; *Bell v. Clegg*, 25 Ark. 26.

California. — *Norris v. Farmers', etc., Co.*, 6 Cal. 590, 65 Am. Dec. 535.

Connecticut. — *Enfield Toll Bridge Co. v. Hartford, etc., R. Co.*, 17 Conn. 64.

Georgia. — *Young v. Harrison*, 6 Ga. 131, 9 Ga. 359, 3 Ga. 31; *Shorter v. Smith*, 9 Ga. 517.

Illinois. — *Gunterman v. People*, 138 Ill. 518; *Mississippi River Bridge Co. v. Lonergan*, 91 Ill. 513; *Mills v. St. Clair County*, 4 Ill. 53.

Iowa. — *Prosser v. Wapello County*, 18 Iowa 327.

Massachusetts. — *Atty.-Gen. v. Boston*, 123 Mass. 460; *Fay, Petitioner*, 15 Pick. (Mass.) 243.

Minnesota. — *McRoberts v. Washburne*, 10 Minn. 23. Compare *Perrin v. Oliver*, 1 Minn. 202.

Missouri. — *Stark v. Miller*, 3 Mo. 470.

New York. — *New York v. Starin*, 106 N. Y. 1; *Power v. Athens*, 99 N. Y. 592; *Chenango Bridge Co. v. Paige*, 83 N. Y. 178, 38 Am. Rep. 407; *Lansing v. Smith*, 4 Wend. (N. Y.)

21, 21 Am. Dec. 89; *Vanderbilt v. Adams*, 7 Cow. (N. Y.) 349; *Benson v. New-York*, 10 Barb. (N. Y.) 234.

North Carolina. — *Barrington v. Neuse River Ferry Co.*, 69 N. Car. 165.

Oregon. — *Gant v. Drew*, 1 Oregon 35.

Pennsylvania. — *Douglass's Appeal*, 118 Pa. St. 65.

South Carolina. — *Stark v. M'Gowen*, 1 Nott & M. (S. Car.) 387, 9 Am. Dec. 712.

South Dakota. — *Evans v. Hughes County*, 3 S. Dak. 580.

Tennessee. — *Allen v. Farnsworth*, 5 Verg. (Tenn.) 189.

Texas. — *Tugwell v. Eagle Pass Ferry Co.*, 74 Tex. 480.

Virginia. — *Somerville v. Wimbish*, 7 Gratt. (Va.) 205.

In *Darnell v. State*, 48 Ark. 321, it was held that a ferry franchise could be obtained only from the County Court, and not by charter under the General Incorporation Act; and that to operate a public ferry under a charter and without authority of the County Court is a usurpation that may be abated by quo warranto. See also *Tugwell v. Eagle Pass Ferry Co.*, 74 Tex. 480.

"A ferry is *publici juris* and cannot be created without a license from the state." *Atty.-Gen. v. Boston*, 123 Mass. 478.

Grant by De Facto Governor. — Where the grant of a right to keep a ferry at a particular place is proved to have been made by a person who was, at the time, *governor de facto* of the Spanish province of Louisiana, his authority to make such a grant will, in the absence of proof of prohibition be presumed from the fact of its having been exercised. *Davis v. Police Jury*, 1 La. Ann. 288.

3. Imposing Conditions upon Grantee — Rates of Ferriage. — *State v. Sickmann*, 65 Mo. App. 499.

4. Right Acquired by Prescription — England. — *Trotter v. Harris*, 2 Y. & J. 285; *Matthews v. Peache*, 5 El. & Bl. 546, 85 E. C. L. 546; *Richards v. Bennett*, 1 B. & C. 223, 8 E. C. L. 96; *Pelham v. Pickersgill*, 1 T. R. 660.

Alabama. — See *Milton v. Haden*, 35 Ala. 230.

Georgia. — *Williams v. Turner*, 7 Ga. 348.

Illinois. — *Mills v. St. Clair County*, 4 Ill. 53.

Massachusetts. — *Fay, Petitioner*, 15 Pick. (Mass.) 243.

Minnesota. — *McRoberts v. Washburne*, 10 Minn. 23.

New Jersey. — *Columbia, etc., Bridge Co. v. Geise*, 34 N. J. L. 268.

New York. — *Benson v. New York*, 10 Barb.

such a right, being a creature of the statute law, could not be acquired by prescription.¹

2. Power of Government to Grant Ferry Franchise — *a*. POWER OF STATES.

— The several states have the power to grant ferry franchises across waters over which they have jurisdiction, whenever they deem them necessary for the public good.²

Ferry Across Boundary Rivers. — A state has the right to grant the exclusive right to ferry from its shores across a navigable river between two states;³ or across a river constituting the boundary between it and a foreign country;⁴

(N. Y.) 245; *Wiswall v. Wandell*, 3 Barb. Ch. (N. Y.) 312.

North Carolina. — *Pipkin v. Wynns*, 2 Dev. L. (13 N. Car.) 402.

South Carolina. — *Stark v. M'Gowen*, 1 Nott & M. (S. Car.) 387, 9 Am. Dec. 712.

Texas. — *Laredo v. Martin*, 52 Tex. 548.

In *Williams v. Turner*, 7 Ga. 348, it was held that seven years continued and exclusive possession of a ferry created a presumption of a grant.

In *Trotter v. Harris*, 2 Y. & J. 285, it was held that the jury might presume that a ferry had a legal origin from its use for thirty-five years.

In *Mills v. St. Clair County*, 4 Ill. 53, it was held that the possession of a ferry for less than twenty years was not evidence from which a grant could be presumed.

Extent of Prescriptive Right. — In *Matthews v. Peache*, 5 El. & Bl. 546, 85 E. C. L. 546, it was held that a prescriptive right to operate a ferry from a given landing place in M. to a given landing place in K. did not authorize the running of the ferry from another place in M., eight hundred yards distant from the ancient landing place.

Act of Legislature Authorizing Prescriptive Ferry. — The *New Jersey* Act of March 6, 1856, authorizing the continuance of a ferry which had been already established for fifty years, the charging of tolls thereon, etc., was held to be merely a confirmation by express grant of the pre-existing rights of the ferry-owner, and gave him additional privileges and safeguards. *Columbia, etc., Bridge Co. v. Geise*, 34 N. J. L. 268.

1. Authorities Holding that Right Cannot Be Acquired by Prescription. — *Sullivan v. Lafayette County*, 58 Miss. 790, *overruling* *Leake County v. McFadden*, 57 Miss. 618; *Bird v. Smith*, 8 Watts (Pa.) 434, 34 Am. Dec. 488; *State v. Roads, etc., Com'rs*, 3 Port. (Ala.) 412; *Scott v. Wilson*, (Ky. 1889) 11 S. W. Rep. 303. Compare *Davis v. Connolly*, (Ky. 1898) 46 S. W. Rep. 679.

2. *Allen v. Farnsworth*, 5 Yerg. (Tenn.) 189.

3. Ferry Franchises Across Boundary Rivers Between States — United States. — *Conway v. Taylor*, 1 Black (U. S.) 603; *Wiggins Ferry Co. v. East St. Louis*, 107 U. S. 365; *Fanning v. Gregoire*, 16 How. (U. S.) 524; *Bowman v. Wathen*, 2 McLean (U. S.) 377; *Mills v. St. Clair County*, 8 How. (U. S.) 569.

Illinois. — *Mills v. St. Clair County*, 7 Ill. 197.

Iowa. — *Weld v. Chapman*, 2 Iowa 524; *Phillips v. Bloomington*, 1 Greene (Iowa) 498; *U. S. v. Fanning*, 1 Morr. (Iowa) 348.

Mississippi. — *Marshall v. Grimes*, 41 Miss. 27.

Missouri. — *Challiss v. Davis*, 56 Mo. 25; *Carroll v. Campbell*, 108 Mo. 550, 110 Mo. 557.

New Jersey. — *Columbia Delaware Bridge Co. v. Geisse*, 38 N. J. L. 39; *Chosen Freeholders v. State*, 24 N. J. L. 718.

Tennessee. — *Memphis v. Overton*, 3 Yerg. (Tenn.) 390.

Concurrent Action of Both States Not Required.

— The grant by one state of a ferry franchise over a river which is the boundary between it and another state is valid, and it is not necessary to its validity that there be concurrent action by both states, nor that the grantee have the right of landing beyond the state by which the grant is made. *Columbia Delaware Bridge Co. v. Geisse*, 38 N. J. L. 39.

Interference with Interstate Commerce. — In *Marshall v. Grimes*, 41 Miss. 27, it was held that the *Mississippi* Act of November 29, 1865, regulating ferries across the Mississippi river, was not unconstitutional as interfering with the right of Congress to regulate commerce among the several states. See also *Carroll v. Campbell*, 108 Mo. 550, 110 Mo. 557.

4. Ferry Between State and Foreign Country. — *Chilvers v. People*, 11 Mich. 43; *People v. Babcock*, 11 Wend. (N. Y.) 586; *Tugwell v. Eagle Pass Ferry Co.*, 74 Tex. 480.

In *People v. Babcock*, 11 Wend. (N. Y.) 586, in speaking of the jurisdiction of the state of New York to license a ferry across the Niagara river, the court said: "So far as jurisdiction is concerned it is as complete over this river to the centre thereof as over any other stream within the county. The privilege of the license may not be as valuable to the grantee by not extending across the river, but as far as it does extend, he is entitled to all the provisions of the law, the object of which is to secure the exclusive privilege of maintaining a ferry at a designated place."

In *Tugwell v. Eagle Pass Ferry Co.*, 74 Tex. 480, it was held, under the *Texas* statute (Rev. Stat., art. 1514), which gave to the commissioners' court authority to establish ferries as required by the public interests, that the commissioners' court could grant a franchise for a ferry between Texas and Mexico across the Rio Grande river, which franchise would extend to the middle of the river; that is, as far as the political jurisdiction of the state extended.

Interference with Foreign Commerce. — The establishment of a ferry over a river constituting the boundary between a state and a foreign country is not an interference with foreign commerce, and is a matter within the discretion of the states respectively, and not of Congress. *Tugwell v. Eagle Pass Ferry Co.*, 74 Tex. 480.

or from its shore to the shore within an Indian reservation which is under the exclusive jurisdiction of the federal government.¹

Extent of Franchise. — The grant of a ferry franchise across a river between two states or independent jurisdictions gives only the right to ferry from the shore of the state or jurisdiction granting the franchise.²

Ferries Over Navigable Waters. — The state has the same right to grant ferry franchises over navigable waters that it has to grant such franchises over non-navigable waters.³

Grants by General and Special Laws. — In the absence of constitutional limitations, a ferry franchise may, of course, like any other franchise, be granted by a special law. But there are constitutional provisions in some states prohibiting the grant of franchises otherwise than by general laws.⁴ It has been held that an act of legislature extending the limits within which an existing ferry franchise may be exercised is not in conflict with the constitutional inhibition against the creation of corporations by special laws.⁵

Power to Grant Exclusive Franchise. — The state, in the absence of constitutional limitations, may grant an exclusive ferry franchise, and such a grant is not unconstitutional as the grant of a monopoly or special privilege.⁶

b. POWER OF FEDERAL GOVERNMENT. — There can be no doubt that the federal government has the power to establish a ferry if that should be an appropriate means of carrying out any of the powers conferred upon it by the Federal Constitution, just as it may establish corporations, but it could not do so otherwise. Thus, it might establish a ferry under its power to establish and maintain post roads, or, perhaps, under the power to regulate commerce.⁷ A license from Congress to engage in the coasting trade, however, does not authorize the licensee to operate a ferry.⁸

c. POWER OF TERRITORIES. — Territories may also grant ferry franchises, under the general power of legislation conferred upon them by Congress.⁹

d. DELEGATION OF POWER TO SUBORDINATE BODIES — (1) *In General.* — The state may authorize subordinate bodies, as a county, a city, or judicial or other tribunals, to establish and license ferries.¹⁰

1. Between State and Indian Reservation. — *Nixon v. Reid*, 8 S. Dak. 507.

2. Extent of Franchise over Boundary Waters. — *Conway v. Taylor*, 1 Black (U. S.) 603; *Burlington, etc., County Ferry Co. v. Davis*, 48 Iowa 133; *Weld v. Chapman*, 2 Iowa 524; *Newport v. Taylor*, 16 B. Mon. (Ky.) 699.

The state of Kentucky has never claimed the exclusive right to grant or protect the right of ferriage across the Ohio river, except from her own shore; and while she has interdicted the establishment of ferries from the Kentucky side, within a certain distance of an existing ferry, she has constantly recognized the right of the authorities upon the other side of the river to establish ferries from that side, regardless of the interdict. *Newport v. Taylor*, 16 B. Mon. (Ky.) 699.

3. Ferries Across Navigable Waters. — *Mills v. St. Clair County*, 7 Ill. 197. See also *Marshall v. Grimes*, 41 Miss. 27.

In *Chiapella v. Brown*, 14 La. Ann. 185, it was held that the Act of Congress declaring the Mississippi river to be a common highway, free to all citizens of the United States, was not intended to interfere with the right of the state to create and regulate ferries over that river.

4. See the titles CORPORATIONS (PRIVATE), vol. 7, p. 620; STATUTES.

5. *McRoberts v. Washburne*, 10 Minn. 23.

6. Power to Grant Exclusive Franchises. — *Broadway, etc., Ferry Co. v. Hankey*, 31 Md. 346.

In *Evans v. Hughes County*, 6 Dakota 102, it was held that the *Dakota* Pol. Code, c. 29, §§ 54-62, giving power to a county to grant exclusive ferry leases, being an exercise of the police power, was not within the prohibition of U. S. Rev. Stat., § 1889, prohibiting the grant of especial privileges by territorial legislatures.

In *Carroll v. Campbell*, 108 Mo. 550, 110 Mo. 557, it was held that the *Missouri* Const., art. 4, § 53, which prohibits the granting of exclusive rights, privileges, or immunities, would prevent a city to which the power of creating ferries was delegated from granting exclusive ferry privileges for a term of years.

7. Power of Federal Government. — *Conway v. Taylor*, 1 Black (U. S.) 603.

8. Coasting-trade License. — *Conway v. Taylor*, 1 Black (U. S.) 603; *Chilvers v. People*, 11 Mich. 43.

9. Power of Territories. — *Evans v. Hughes County*, 6 Dakota 102; *Nixon v. Reid*, 8 S. Dak. 507.

10. Delegation of Power to Subordinate Bodies. — *Blake v. McCarthy*, 56 Miss. 654; *Somerville v. Wimbish*, 7 Gratt. (Va.) 205.

Of course a municipal board, corporation, or other subordinate body has no power to au-

The license, however, is still one emanating from the state,¹ and it has been held that the exercise of this power is not judicial.²

The delegation of this power to subordinate bodies does not deprive the legislature of the power of licensing ferries by direct legislation.³

(2) *Extent of Delegated Power.*—The extent of the authority of the subordinate body to which the power to establish ferries is delegated of course depends entirely upon the construction of the statutes delegating such power.⁴

Power of Subordinate Body to Grant Exclusive Franchise.—Though there are some decisions to the contrary,⁵ yet it is held by the weight of authority that a subordinate body to which the power to grant ferry licenses or establish ferries has been given cannot grant exclusive privileges.⁶ An unauthorized grant of

thorize the establishment of a ferry unless such power has been conferred upon it by the state. Thus, in *New York v. New York, etc., Ferry Co.*, 40 N. Y. Super. Ct. 232, it was held that the department of docks had received no power from the legislature to grant a ferry license.

1. **Grant Still Emanates from the State.**—Fall v. Sutter County, 21 Cal. 237; *Evans v. Hughes County*, 3 S. Dak. 580.

2. *Chard v. Harrison*, 7 Cal. 113.

3. **Effect of Delegation upon Power of Legislature.**—*Wright v. Nagle*, 101 U. S. 791; *Dyer v. Tuskaloosa Bridge Co.*, 2 Port. (Ala.) 296, 27 Am. Dec. 655; *Territory v. Reyburn, McCahon (Kan.)* 134; *Bush v. Peru Bridge Co.*, 3 Ind. 21; *Day v. Stetson*, 8 Me. 365; *Harrison v. State*, 9 Mo. 530.

In *Blake v. McCarthy*, 56 Miss. 654, it was held that the legislature may grant a ferry franchise, though the constitution gave "full jurisdiction" to a subordinate body "over roads, ferries, and bridges."

Baldwin, J., in *Somerville v. Wimbish*, 7 Gratt. (Va.) 227, said: "The power of the legislature to establish particular ferries by direct and special enactments has been freely exercised from an early period of our colonial history down to the present time. * * * This eminent authority never has been, and never could have been, surrendered by the delegation of it to any extent, whether limited or unlimited, to judicial or other tribunals, and has continued to be exercised, notwithstanding the power given by the Act of 1705 * * * to the County Courts, in general terms, to appoint such ferries over rivers and creeks in their respective counties as should be deemed convenient and necessary."

In *Harrison v. State*, 9 Mo. 530, it was held that the right to license and tax ferries within its limits, given to the city of St. Louis by its charter, was not exclusive, and did not take from the state the right to license and tax such ferries.

4. **Extent of Authority.**—It has been held that the delegation to the County Court of power to establish ferries within the county does not authorize it to establish ferries across a navigable river which is the boundary of the state. *Zane v. Zane*, 2 Va. Cas. 63. See also *Ogden v. Lund*, 11 Tex. 688.

Where, however, a river divides two counties, the commissioners of either county may establish a ferry over the same, and the exercise of this right by one county does not preclude the other county from establishing other ferries over the river, under the restrictions of the statute. *Jones v. Johnson*, 2 Ala. 746.

The board of county commissioners of the county to which an unorganized county is attached for judicial purposes has no power to grant a ferry franchise between points one of which is within the unorganized county, but neither of which is within the organized county whose board granted the franchise. *Patterson v. Wollmann*, 5 N. Dak. 608.

Establishment of Ferry for Limited Time.—In *Cason v. Stone*, 1 Oregon 39, it was held that a ferry could not be established for one year only by the county commissioners; it must be permanent.

Term of License.—In *Nixon v. Reid*, 8 S. Dak. 507, the grant, by a board of county commissioners, of a ferry lease for the term of five years, with the privilege of renewal for five years, and at the end of that time a second renewal for five years, was held within the powers of the board under the statutes giving the board authority to grant such leases for a term not exceeding fifteen years.

Several Ferries at Same Place.—In *Anonymous*, 1 Hayw. (2 N. Car.) 457, it was held that the County Courts had power to establish two ferries at the same point.

In *Cason v. Stone*, 1 Oregon 39, it was held that the board of commissioners may establish as many ferries, and as near to each other as the public necessities require, and they are the final judges of such necessity.

Power of County to Operate Ferry.—In *Burrows v. Gonzales County*, 5 Tex. Civ. App. 232, it was held that the *Texas* statute (Rev. Stat., art. 1514) empowering the County Commissioners' Court to establish public ferries authorized it to create and operate a ferry itself, and that such power was not taken away by Rev. Stat., tit. 87, c. 6, authorizing such court to grant licenses for ferries.

5. **Power to Grant Exclusive Franchises.**—*Burlington, etc., County Ferry Co. v. Davis*, 48 Iowa 133; *Costar v. Brush*, 25 Wend. (N. Y.) 628.

In the latter case it was held that a corporation vested with the power of establishing ferries could grant exclusive privileges which would be binding upon themselves and the public.

A municipal corporation in Quebec, under the Municipal Code, art. 549, 550, 860, has power to grant an exclusive ferry privilege within its corporate limits. *Paquet v. La Corporation de St. Lambert*, 14 Quebec L. Rep. 327.

6. The County Commissioners' Court in *Illinois*, under the law authorizing that court to grant ferry licenses, was not authorized by any exclusive grant it might make to divest

an exclusive franchise would be void, however, only to the extent in which it was attempted to be made exclusive.¹

(3) *Execution of the Delegated Power.* — In the execution of the power to establish ferries conferred upon a subordinate body, there must, of course, be a compliance with the statutory requirements.² Thus the statutory requirement that notice shall be given of the application for the establishment of a ferry must be complied with;³ and also there must be a compliance with provisions requiring the payment of a license fee, or the filing of a bond by the licensee of the ferry.⁴ The object of such notice is to warn persons who would be injured by the grant of the ferry, that they may resist such application.⁵

3. Who May Acquire Franchise — *a.* IN GENERAL. — A ferry franchise may

itself of the power to grant other ferries, within any prescribed limits, whenever the public good should require the exercise of that jurisdiction. *Gales v. Anderson*, 13 Ill. 413.

In *Seal v. Donnelly*, 60 Miss. 658, it was held that the board of supervisors, which was given "full jurisdiction" over ferries, could not grant exclusive privileges, so as to deprive itself of the power of establishing other ferries as the public interest might require. See also *Montjoy v. Pillow*, 64 Miss. 705.

In *Minturn v. Larue*, 23 How. (U. S.) 435, it was held that a city authorized to lay out ferries and to authorize the construction of the same could not grant exclusive privileges.

In *Wright v. Nagle*, 101 U. S. 791, it was held that the inferior courts of *Georgia*, which were empowered to "authorize the establishment of such ferries * * * as they may think necessary," could not grant exclusive franchises. But see *dicta* to the contrary in *Shorter v. Smith*, 9 Ga. 517.

In *Carroll v. Campbell*, 108 Mo. 550, it was held that a grant to a city of the right to license all ferries within the city does not carry with it the power to grant exclusive privileges.

In *Fay*, Petitioner, 15 Pick. (Mass.) 243, the court, in speaking of the right of the city of Boston to grant exclusive ferry privileges, the city having leased ferry privileges with covenants for exclusive enjoyment, said: "It is necessary to keep in view the distinction between the powers and functions of the mayor and aldermen, acting as agents for the city in its corporate capacity, capable of entering into contracts, and the same body as exercising powers vested in them by statute, in the unrestricted exercise of which the public have an interest. * * * If the city in its corporate capacity was the legal owner and proprietor of an exclusive franchise, its grantees would hold it notwithstanding any license to others whether granted by the mayor and aldermen or any other tribunal; if it was not the owner of such an exclusive franchise, though the city might have granted it with a covenant for quiet enjoyment, and might be responsible on such covenant to the grantees, still such covenant could not restrain the mayor and aldermen from exercising their judgment as agents and trustees for the public."

1. *An Unauthorized Grant of Exclusive Franchise Not Void in Toto.* — *Carroll v. Campbell*, 108 Mo. 550; *Tugwell v. Eagle Pass Ferry Co.*, 74 Tex. 492.

2. *Determination of Application.* — *Webb v. Hanson*, 3 Cal. 103; *Withersfield v. Humphrey*, 20 Conn. 218; *Muire v. Smith*, 2 Rob. (Va.) 458. See also *Finch v. Tehama County*, 29 Cal. 453.

The statutory right of a ferryman to a renewal of his license will not be defeated by the incompetency or refusal of the supervisors to act, but his rights will be protected in equity, as if the license were renewed, by injunction or otherwise. *Chard v. Stone*, 7 Cal. 117.

Order Establishing Ferry. — The omission of a County Court to fix the rate of ferriage does not render the order establishing the ferry erroneous. *Pentecost v. Miller*, 7 T. B. Mon. (Ky.) 312.

When Grant Complete. — The grant of a license to establish a ferry is complete when a definite order has been made and the required bond has been executed, and, when thus completed, it cannot be collaterally assailed for fraud, nor revoked in favor of another person as having a better right. *Collins v. Ewing*, 51 Ala. 101.

3. *Notice of Application for Franchise.* — See *Givens v. Pollard*, 3 A. K. Marsh. (Ky.) 320; *Hazelp v. Lindsey*, 93 Ky. 14; *Watts v. Horsley*, 3 Bibb (Ky.) 374; *Lexington, etc., Turnpike Road Co. v. McMurtry*, 3 B. Mon. (Ky.) 516; *Matter of Talcott*, 31 Hun (N. Y.) 464; *Wiswall v. Wandell*, 3 Barb. Ch. (N. Y.) 312.

Sufficiency of Notice. — Under Gen. Stat. *Kentucky*, c. 42, § 5, it is sufficient to authorize a County Court to hear and determine an application to establish a ferry for notice of the intended application to be posted at the courthouse door of the county, on the first day of the next preceding term. *Stahl v. Brown*, 84 Ky. 325.

4. *Payment of Fee Required of Licensee.* — A license to keep a ferry cannot be issued on credit, where the statute requires a fee to be paid. *Munsell v. Temple*, 8 Ill. 93.

A license issued for a less sum than that required by law is void. *Lombard v. Cheever*, 8 Ill. 469.

Bond Required. — And when the statute requires a bond to be taken from the owner of the ferry, it is error to establish a ferry without requiring such bond. *Sanders v. Craig*, 1 A. K. Marsh. (Ky.) 196.

5. *Who May Resist Application.* — *Carter v. Kalfus*, 6 Dana (Ky.) 43; *Starin v. New York*, 42 Hun (N. Y.) 549.

The owner of a ferry already established may resist the establishment of a new ferry across the stream near his own. *Williamson v. Hays*, 35 W. Va. 52.

be held by an individual or by a corporation.¹ And the right may be granted to persons other than the owners of the land upon the shores of the water over which the ferry is to be operated.²

Tenancy in Common. — A franchise to operate a ferry may be held by several persons as tenants in common, in which case all the duties and liabilities flowing from such a relation generally will result.³

Grant of Ferry Franchise by Subordinate Bodies. — Where the power to establish ferries is conferred upon a subordinate body, and the statute delegating such power specifies the persons to whom the franchise shall be granted, such subordinate body can, of course, only grant the franchise to persons within the provision of the statute.⁴

δ. RIGHT OF RIPARIAN OWNERS. — Riparian owners have not the right by reason of their ownership of the soil to maintain public ferries.⁵ They

1. Who May Acquire Franchise. — *Hackett v. Multnomah R. Co.*, 12 Oregon 124, 53 Am. Rep. 327.

Priority in Presentation of Application for Ferry License. — Mere priority in filing a petition for a ferry license has been held not to confer a better right among competing claimants whose petitions are considered together. *Oxford Ferry Co. v. Sumner County*, 19 Kan. 293.

Railroad Corporations. — In *Starin v. New York*, 42 Hun (N. Y.) 549, the court construed the General Laws of the State of *New York*, providing for the incorporation of railroad companies, and Act 1884, c. 193, authorizing railroad companies to operate ferries, and held that a railroad company could not acquire a license for a ferry not connected with its railroad.

Municipal Corporations. — In *Maysville v. Boon*, 2 J. J. Marsh. (Ky.) 224, it was held that the trustees of Maysville, as riparian owners, could receive a grant of a ferry franchise across the Ohio river, such franchises being grantable only to riparian owners. See also *Phillips v. Bloomington*, 1 Greene (Iowa) 498; *Dover v. Fox*, 9 B. Mon. (Ky.) 202; *Fay*, Petitioner, 15 Pick. (Mass.) 243; *Atty.-Gen. v. Boston*, 123 Mass. 460; *New York v. Starin*, 106 N. Y. 1; *Benson v. New York*, 10 Barb. (N. Y.) 223.

In *Burrows v. Gonzales County*, 5 Tex. Civ. App. 232, it was held that a county authorized and required to establish public ferries might operate a ferry.

Ownership by a city of a ferry franchise is a public trust, and must be administered as such. *Waterbury v. Laredo*, 68 Tex. 565.

2. Grantee of Ferry Right Need Not Own the Land. — *Peter v. Kendal*, 6 B. & C. 703, 13 E. C. L. 299; *Collins v. Ewing*, 51 Ala. 101; *Harvie v. Cammack*, 6 Dana (Ky.) 242; *Raynor v. Dowdy*, 1 Murph. (5 N. Car.) 279; *Columbia Delaware Bridge Co. v. Geisse*, 38 N. J. L. 39, 580; *Douglass's Appeal*, 118 Pa. St. 65; *Patrick v. Ruffners*, 2 Rob. (Va.) 217, 40 Am. Dec. 740.

The legislature has full power to authorize boards of supervisors to grant ferry licenses, subject to the landowner's right to compensation, where granted to another. *Blake v. McCarthy*, 56 Miss. 654. See 6 U. S. Dig. (old ser.) 583, par. 106.

Under the *Kentucky* statutes it is not necessary on any stream, except the Ohio, that the grantee of a ferry should own the land on the

stream; but such owner is merely a preferred applicant for the ferry privilege, which, whether granted to the owner or to another, is incidental to the title of only so much of the land as constitutes the ferry site. And this privilege is exclusively within the power of the County Courts. *Richmond, etc., Turnpike Road Co. v. Rogers*, 1 Duv. (Ky.) 135.

3. Tenants in Common. — *Hackett v. Multnomah R. Co.*, 12 Oregon 124, 53 Am. Rep. 327.

Here it was held further that under the circumstances the parties were co-owners in the ferry, and as such entitled to share in its earnings, and that upon the exclusion of one by the other a receiver would be appointed and an accounting had.

In *Haven v. Mehlgarten*, 19 Ill. 91, the parties were held to be tenants in common, and it was adjudged that some of them being absent, those who were present might maintain an action of indebitatus assumpsit against their co-owners for money necessarily expended in the preservation of the common property.

A tenant in common of a ferry franchise may maintain an action on the case against his cotenant for his share of the revenue of the ferry. *Puckett v. Smith*, 5 Strobb. L. (S. Car.) 26, 53 Am. Dec. 686.

A and B owned a ferry in common, each being entitled to one-half the proceeds, after paying expenses. Without the consent of A, B made a *bona fide* lease thereof, for value, to C, for one year. It was held that A could not recover of B one-half of the proceeds received by C, but only one-half of the rent reserved by B. *Rogers v. Penniston*, 16 Mo. 432.

4. Betts v. Menard, 1 Ill. 395; *Hazleton v. De Priest*, 143 Ind. 368; *Patterson v. Wollmann*, 5 N. Dak. 608; *Starin v. New York*, 42 Hun (N. Y.) 549; *Wilson v. Gabler*, (S. Dak. 1898) 76 N. W. Rep. 924.

In *Betts v. Menard*, 1 Ill. 396, it was held that the Act of February 12, 1827, authorizing the county commissioners to grant ferry licenses to "qualified persons" and requiring the licensee to execute a bond conditioned that "he, she or they" will keep such ferry according to the law, and granting to ferry keepers certain privileges including exemptions from performance of militia, jury and other duties, did not authorize the commissioner's court to grant ferry privileges to a corporation.

5. Riparian Owner No Right to Operate Ferry — *United States*. — *Mills v. St. Clair County*,

may, however, make a ferry for their own use or the use of their families; this, properly speaking, is not a ferry.¹

Preference Given Riparian Owners. — Some statutes expressly give to the riparian owner the preferential right to the grant of a ferry franchise, or to be the keeper of a public ferry to be established;² and under other statutes, certain ferry privileges can be granted only to riparian owners.³

8 How. (U. S.) 569. See *Bowman v. Wathen*, 2 McLean (U. S.) 376.

Alabama. — *Milton v. Haden*, 32 Ala. 30, 70 Am. Dec. 523.

Arkansas. — *Murray v. Menefee*, 20 Ark. 561; *Bell v. Clegg*, 25 Ark. 26; *Cloyes v. Keatts*, 18 Ark. 19.

California. — *Fall v. Sutter County*, 21 Cal. 252.

Georgia. — *Young v. Harrison*, 6 Ga. 131, 9 Ga. 359.

Illinois. — *School Trustees v. Tatman*, 13 Ill. 27; *Gales v. Anderson*, 13 Ill. 413.

Indiana. — *Bush v. Peru Bridge Co.*, 3 Ind. 21. See *Jeffersonville v. Louisville*, etc., *Steam Ferry Co.*, 27 Ind. 100, 89 Am. Dec. 495.

Minnesota. — *McRoberts v. Washburne*, 10 Minn. 23.

Missouri. — *Stark v. Miller*, 3 Mo. 470.

North Carolina. — *Taylor v. Wilmington*, etc., *R. Co.*, 4 Jones L. (49 N. Car.) 277. See *Pipkin v. Wynns*, 2 Dev. L. (13 N. Car.) 402.

Pennsylvania. — *Cooper v. Smith*, 9 S. & R. (Pa.) 33, 11 Am. Dec. 658.

South Carolina. — *Stark v. McGowen*, 1 Nott & M. (S. Car.) 387.

Tennessee. — *Nashville Bridge Co. v. Shelby*, 10 Yerg. (Tenn.) 280; *Allen v. Farnsworth*, 5 Yerg. (Tenn.) 189; *Sparks v. White*, 7 Humph. (Tenn.) 86.

Texas. — *Johnson v. Erskine*, 9 Tex. 1.

Virginia. — *Somerville v. Wimbish*, 7 Gratt. (Va.) 205.

In *Stark v. Miller*, 3 Mo. 470, it was said: "A ferry, in this country, is not incident to the land but arises out of the license of the County Court."

A grant from the state of land situated on a watercourse does not confer the right to maintain a public ferry. *Harrison v. Young*, 9 Ga. 359.

1. Riparian Owner May Operate Private Ferry.

— *Hale's De Jure Maris* (Harg. Law Tracts), c. 2, 16; *Hunter v. Moore*, 44 Ark. 184, 51 Am. Dec. 589; *Alexandria*, etc., *Ferry Co. v. Wisch*, 73 Mo. 655, 39 Am. Rep. 535.

2. Preference Given Riparian Owners by Statute

— *Arkansas.* — *Cloyes v. Keatts*, 18 Ark. 19.

Illinois. — *Betts v. Menard*, 1 Ill. 395.

Iowa. — *Lippincott v. Allander*, 27 Iowa 468.

Kentucky. — *Ballow v. Pettus*, 3 Bush (Ky.) 608; *Dover v. Fox*, 9 B. Mon. (Ky.) 200.

Mississippi. — *McCearly v. Swayze*, 65 Miss. 351.

Oregon. — *Beckley v. Learn*, 3 Oregon 544.

Tennessee. — *Allen v. Farnsworth*, 5 Yerg. (Tenn.) 189; *Sparks v. White*, 7 Humph. (Tenn.) 86; *Nashville Bridge Co. v. Shelby*, 10 Yerg. (Tenn.) 280.

See also *Pipkin v. Wynns*, 2 Dev. L. (13 N. Car.) 402, *overruling* *Raynor v. Dowdy*, 1 Murph. (5 N. Car.) 279.

Keeper of Ferry. — By the *Tennessee Act of 1807*, c. 25, where the court decided that pub-

lic convenience required a ferry, the owner of the soil on both banks of the river had the exclusive right to be the keeper of it; but he had not, as a matter of right, and merely because he was owner, the privilege of keeping a public ferry. *Nashville Bridge Co. v. Shelby*, 10 Yerg. (Tenn.) 280.

The preference to keep a ferry, given by statute to the owner of land adjoining or embracing the stream where the proposed ferry is to be established, does not apply to the grantee of such owner of a right to use his land for landing places for another ferry. *Knott v. Jefferson St. Ferry Co.*, 9 Oregon 530.

A valid pre-emption right to land lying on one bank only of a river does not entitle the owner to the exclusive privilege of keeping a public ferry. Such right, accompanied by possession, would entitle him, under the restrictions in Dig., c. 69, to that privilege from his own land. *Cloyes v. Keatts*, 18 Ark. 19.

Sufficiency of Title of Riparian Owner. — A certificate of the register of the land office is sufficient evidence of the ownership of the land; the petitioner's title cannot be further inquired into on his petition for the ferry license. *Cox v. Easter*, 1 Port. (Ala.) 130.

Possessory Title. — It has been held that mere possession is not sufficient title to entitle the person in possession to a ferry franchise as a riparian owner. *Mullis v. Cavins*, 5 Blackf. (Ind.) 77. But in *Givens v. Pollard*, 3 A. K. Marsh. (Ky.) 320, it was held that actual possession of lands, in the absence of all other proof, would justify the establishment of a ferry.

Reservation of Ferry Privileges by Vendor. — A reservation of ferry privileges by the vendor of land does not prevent a grant of a ferry to the vendee. *Brown v. Given*, 4 J. J. Marsh. (Ky.) 29; *Kennedy v. Covington*, 4 J. J. Marsh. (Ky.) 538.

3. In *Kentucky*, to justify the establishment of a ferry across the Ohio, the applicant must own the land on the Kentucky shore. *Jefferson Seminary v. Wagnon*, 2 A. K. Marsh. (Ky.) 379. See also *Givens v. Ferguson*, 6 T. B. Mon. (Ky.) 186; *Henry v. Underwood*, 1 Dana (Ky.) 245.

In *New-Port v. Taylor*, 6 J. J. Marsh. (Ky.) 134, it was held that the order of a County Court granting a ferry, appearing correct on its face, is conclusive of the right to the land, and cannot be incidentally assailed upon appeal. See also *Everston v. Sanders*, 6 J. J. Marsh. (Ky.) 142.

Effect of Recovery of Land by Rightful Owner. — When a ferry franchise is granted to a person in possession of land, the rightful owner does not acquire the franchise on recovery of the land. *Fisher v. Higgins*, 5 T. B. Mon. (Ky.) 140.

The grant of a ferry franchise to a person in possession of land is not revoked by the re-

4. The Grant. — The proper mode of granting a ferry franchise is to make the ferry lie between two or more designated points.¹ No set form of words is necessary in the grant, but any words which clearly show the intention of the legislature to grant a ferry franchise are sufficient.²

5. Acceptance of Franchise. — The franchise must be accepted by the grantee, and when it is granted to several persons, it must be accepted by a majority of them.³

6. Acquisition of Right to Land and Embark. — The legislative grant of a ferry franchise does not of itself confer upon the grantee the right of landing and embarking upon the shores of the water over which the ferry is operated,⁴ and therefore, in order to render his franchise effective, he must of course acquire the right to use the land on both sides of the water for the purpose of landing and embarking.⁵

Right to Land and Embark in Public Highway. — By the weight of authority, the owner of a ferry franchise has no right, by virtue of his franchise alone, to land and embark at a public highway the fee of which is not owned by the public.⁶

covery of the land by the rightful owner. *McCearly v. Swayze*, 65 Miss. 351.

1. Description of Ferry. — *Newton v. Cubitt*, 13 C. B. N. S. 864, 106 E. C. L. 864.

A ferry franchise, however, is not invalid for not fixing the landing place at a point certain, where it appears that by reason of the existence ordinarily of sandbars such requirement is impracticable. *Capital City Ferry Co. v. Cole*, etc., Transp. Co., 51 Mo. App. 228. See also *Fay*, Petitioner, 15 Pick. (Mass.) 243.

2. Sufficiency of Language of Grant. — *Stark v. McGowen*, 1 Nott & M. (S. Car.) 387, wherein it was held that an act declaring that a certain ferry be "re-established in the name of A., his heirs," etc., was sufficient to vest a ferry in A.

Construction of Grant. — In *Fitch v. New Haven*, etc., R. Co., 30 Conn. 38, it was held that the grant to a railroad company of the right to establish a ferry from the termination of the railroad on the east side of N. harbor to some convenient place on the west side of the harbor, "as a part of their railroad or route, to connect the same with said railroad on the west side," did not grant a general ferry franchise, but merely one for the transportation of the passengers and freight of the railroad.

In *The Maverick*, 1 Sprague (U. S.) 23, it was held that the charter of a railroad company locating its line to a certain point and "thence by steamboats or other boats over and across the ferry, to B.," did not authorize the company to maintain a ferry for travel disconnected with its railroad.

In the year 1810, the legislature authorized A., his heirs and assigns, to establish a ferry on the east bank of the Mississippi river, near the town of Illinois, and to run it from lands "that may belong to him," provided the ferry should be put in actual operation within eighteen months. At this time he had no land, but within the eighteen months he acquired an interest in a tract of one hundred acres. In 1821 another act was passed, authorizing him to remove the ferry "on lands that may belong to him" on the Mississippi river, under the same privileges as were prescribed by the former act. It was held that the words of the Act of 1821, "on lands that may belong to him," must be construed to ap-

ply to the land which belonged to him at the passage of said Act of 1821 and not to such as he obtained afterwards. *Mills v. St. Clair County*, 8 How. (U. S.) 569, 7 Ill. 197.

3. Acceptance of Franchise Necessary. — *Ferrel v. Woodward*, 20 Wis. 458. See also 2 *Washburn on Real Property* (5th Am. ed.), bk. 2, p. 21.

Sufficiency of Acceptance. — An acceptance of a franchise is sufficiently shown by the fact that the grantors took a boat to the proper place for the operation of the ferry and twice stretched a rope across the river. *Chapin v. Crusen*, 31 Wis. 209. See also *Douglass's Appeal*, 118 Pa. St. 65.

4. Right to Land and Embark. — *Singer v. Carondelet Canal*, etc., Co., 39 La. Ann. 478; *State v. Wilson*, 42 Me. 9; *Cooper v. Smith*, 9 S. & R. (Pa.) 26, 11 Am. Dec. 658; *Pittsburgh*, etc., R. Co. v. *Jones*, 111 Pa. St. 204; *Somerville v. Wimbish*, 7 Gratt. (Va.) 205.

Right to Land on Public Property. — The object of the *California* statute of 1864, 140, § 4, so far as ferry companies are concerned, was to grant to them the use of the wharf free of charge only so far as they might require its use as a landing for their boats; any other or greater privilege could only be secured to them by their leasing the entire estate in the wharf, as provided in the statute in relation to "other persons and companies." *People v. San Francisco*, etc., R. Co., 35 Cal. 606.

5. Must Acquire Right of Landing. — *Peter v. Kendal*, 6 B. & C. 703, 13 E. C. L. 299; *State v. Wilson*, 42 Me. 9; *Chambers v. Furry*, 1 Yeates (Pa.) 167; *Chess v. Manown*, 3 Watts (Pa.) 219.

Necessity of Acquiring Landings in Fee. — The *Pennsylvania* Act of March 14, 1850, which granted the exclusive privilege of operating ferries on the *Youghiogheny* river at *Suter's* sawmill, in *Sewickley* township, *Westmoreland* county, to *Eli Suter*, his heirs and assigns, and authorized him to make good and sufficient landings on both sides of the river, did not require the grantee to acquire the fee in the landing places. *Douglass's Appeal*, 118 Pa. St. 65.

6. Right to Land on Public Highway — *toroa*. — *Prosser v. Davis*, 18 Iowa 367.

By Prescription. — The right of landing and embarking may be acquired by prescription, and the exercise of such right is notice thereof to a subsequent purchaser of the land.¹

Under Power of Eminent Domain. — The acquisition of the right to land and embark may also be authorized by condemnation proceedings under the power of eminent domain, as the use of property for ferry purposes is a public use for which property may be taken.²

IV. TRANSFER OF FRANCHISES — 1. **In General.** — In *England* ferry franchises have always been transferable from the original grantee, either by conveyance, lease, or descent,³ and such also, by the weight of authority, is the rule in the *United States*.⁴ In a number of states, however, it is held that

New York. — Pearsall v. Post, 20 Wend. (N. Y.) 111.

North Carolina. — Pipkin v. Wynns, 2 Dev. L. (13 N. Car.) 402, overruling Raynor v. Dowdy, 1 Murph. (5 N. Car.) 279.

Pennsylvania. — Chess v. Manown, 3 Watts (Pa.) 219; Chambers v. Furry, 1 Yeates (Pa.) 167; Cooper v. Smith, 9 S. & R. (Pa.) 26, 11 Am. Dec. 658; Pittsburgh, etc., R. Co. v. Jones, 111 Pa. St. 204; Bird v. Smith, 8 Watts (Pa.) 434, 34 Am. Dec. 488.

Tennessee. — Memphis v. Overton, 3 Yerg. (Tenn.) 387.

Texas. — Buford v. Smith, 2 Tex. Civ. App. 178.

See, however, Peter v. Kendal, 6 B. & C. 703, 13 E. C. L. 299; McManus v. Carmichael, 3 Iowa 1; Clark v. White, 5 Bush (Ky.) 353; Mills v. Learn, 2 Oregon 215; Tugwell v. Eagle Pass Ferry Co. 74 Tex. 480; Patrick v. Ruffners, 2 Rob. (Va.) 209, 40 Am. Dec. 740; Somerville v. Wimbish, 7 Gratt. (Va.) 232.

In Buford v. Smith, 2 Tex. Civ. App. 178, it was held that the operator of a private ferry, without license from the proper commissioners' court, could not land his boat on property condemned under the statute for a public road without the consent of the riparian proprietor of the land so condemned.

1. **Acquisition of Right to Land and Embark by Prescription.** — Bird v. Smith, 8 Watts (Pa.) 434, 34 Am. Dec. 488; Clark v. White, 5 Bush (Ky.) 353, wherein it was held that a grant of the right to land might be presumed from the use of such privilege for fifty years.

2. **Acquisition of Right under Power of Eminent Domain** — *United States.* — Bowman v. Wathen, 2 McLean (U. S.) 376.

Illinois. — Mills v. St. Clair County, 4 Ill. 53.

Indiana. — Jeffersonville v. Louisville, etc., Steam Ferry Co., 27 Ind. 100, 89 Am. Dec. 495.

Maine. — Day v. Stetson, 8 Me. 365; Cottrill v. Myrick, 12 Me. 222; Allen v. Jay, 60 Me. 138, 11 Am. Rep. 185.

Massachusetts. — Winnisimmet Co. v. Grueby, 111 Mass. 543; Burt v. Wigglesworth, 117 Mass. 302.

New York. — Matter of Union Ferry Co., 98 N. Y. 139.

North Carolina. — Barrington v. Neuse River Ferry Co., 69 N. Car. 165; Pipkin v. Wynns, 2 Dev. L. (13 N. Car.) 402.

South Carolina. — Guignard v. Kinsler, 4 S. Car. 330; Gourdine v. Davis, 1 Bailey L. (S. Car.) 471; M'Gowen v. Stark, 1 Nott. & M. (S. Car.) 387, 9 Am. Dec. 712.

Tennessee. — Allen v. Farnsworth, 5 Yerg.

(Tenn.) 189. See also Thomas v. St. Louis, etc., R. Co., 37 Fed. Rep. 839.

3. **Ferry Franchise Transferable in England.** — Pim v. Curell, 6 M. & W. 234; Peter v. Kendal, 6 B. & C. 703, 13 E. C. L. 299; Willoughby v. Horridge, 12 C. B. 742, 74 E. C. L. 742; Bridgland v. Shapter, 5 M. & W. 375.

4. **States Holding Ferry Franchise Transferable** — *United States.* — Bowman v. Wathen, 2 McLean (U. S.) 376.

Alabama. — Ladd v. Chotard, 1 Minor (Ala.) 366; Lewis v. Gainesville, 7 Ala. 85.

Illinois. — Dundy v. Chambers, 23 Ill. 369; Gunterman v. People, 138 Ill. 518; Rohn v. Harris, 130 Ill. 525; Mississippi River Bridge Co. v. Loneragan, 91 Ill. 508.

Iowa. — Lippencott v. Allander, 27 Iowa 460, 1 Am. Rep. 299.

Kentucky. — Dufour v. Stacey, 90 Ky. 288; Maysville v. Boon, 2 J. J. Marsh. (Ky.) 227.

Massachusetts. — Fay, Petitioner, 15 Pick. (Mass.) 243.

Michigan. — Billings v. Breinig, 45 Mich. 65. See, however, Willard v. Forsythe, 2 Mich. N. P. 190.

Mississippi. — McCearly v. Swayze, 65 Miss. 351.

Missouri. — Stark v. Miller, 3 Mo. 470. Compare Ragan v. McCoy, 29 Mo. 368.

New York. — Benson v. New-York, 10 Barb. (N. Y.) 223.

North Carolina. — Biggs v. Ferrell, 12 Ired. L. (34 N. Car.) 1.

Vermont. — Felton v. Deall, 22 Vt. 170, 54 Am. Dec. 61.

In *Stoops's Estate*, 31 Pittsb. Leg. J. (Pa.) 34, it was held that where the owner of a ferry also owns the land, the ferry is necessarily appurtenant to the soil and descends with it.

An Assignment of a Ferry Lease Granted by the Board of County Commissioners is valid, when it has been approved by the board. Nixon v. Reid, 8 S. Dak. 507.

Assignment of Ferry License as a Consideration. — Where the obligor in an agreement for the lease of ferry rights owned one bank of a river where a public highway crossed and had a license to ferry from his shore, and the obligee owned the land on the opposite side and had a similar right, the surrender of the ferry privilege was held to constitute a sufficient consideration to sustain an action upon the agreement. Clegg v. Roane, 21 Ark. 362.

Confirmation by Legislature of Sale of Ferry — Effect. — In Rohn v. Harris, 130 Ill. 525, it was held that a private act of the legislature confirming the transfer of ferry property did not

ferry franchises are not transferable, these decisions being based on the ground that the franchise involves a personal trust, granted by the sovereign upon conditions imposed on the grantee alone, whose liability cannot be removed by substitution.¹

Operation of Ferries Limited to Riparian Owners. — Where the right to establish ferries is limited by statute to riparian owners, it has been held that the franchise cannot be conveyed as an incorporeal hereditament separate from the land.²

2. How Transferred. — As has already been seen, the franchise is an incorporeal hereditament, and in judgment of law is real estate.³ And by statute in some states it can only be transferred in accordance with the provisions of the statute in reference to the conveyance of real estate.⁴

Whether Conveyance of the Land Includes Ferry Rights. — Where the right to a public ferry is annexed to a tract of land as "appurtenant thereto," a conveyance of the land "with its appurtenances" passes the ferry.⁵ But where the franchise is a right *en gros*, and has never been annexed to the land and made appurtenant thereto, the rule is otherwise.⁶

A Rent Reserved on the Lease of a Ferry is not extinguished by the lessee becoming tenant in fee of the landing place.⁷

3. Who May Question Transfer. — Even though a ferry franchise is not transferable or is not transferred in the proper manner, a conveyance or assignment thereof may not be attacked collaterally, but must be taken advantage of by the public through its officers in an appropriate proceeding brought for that purpose.⁸

V. PROTECTION OF FRANCHISES — 1. What Constitutes an Infringement — a. IN GENERAL. — Every subtraction from the profits of a ferry by carrying, without license, its customers over the intervening waters, either for hire or

affect the rights of third persons, but merely confirmed in the purchaser such rights as he had acquired by his purchase.

Lease of Ferry by Municipal Corporation. — In *Rocky Hill v. Hollister*, 59 Conn. 434, it was held that a town upon which was imposed a duty of operating a ferry could lease such ferry to an individual, and that, since the lessee in operating such ferry is not a public officer, but merely exercises the privilege by virtue of the contract with the town, such individual could not resist the payment of the rent reserved in the lease on the ground that the tolls were public fees for the discharge of a public duty and to compel him to pay over such fees as rent in effect abridged the compensation of a public officer.

Lease of Ferries by City of New York. — In regard to the validity, etc., of leases of ferry privileges by the city of New York in which were vested exclusive ferry privileges, see *Starin v. Edson*, 112 N. Y. 206; *Staten Island Rapid Transit R. Co. v. New York*, 119 N. Y. 96, (Supreme Ct.) 2 N. Y. Supp. 680.

1. Ferry Franchises Not Transferable — *United States*. — See *The Maverick*, 1 Sprague (U. S.) 23; *The Leopard*, 2 Ware (U. S.) 107.

California. — *Munroe v. Thomas*, 5 Cal. 470; *Thomas v. Armstrong*, 7 Cal. 286; *Wood v. Truckee Turnpike Co.*, 24 Cal. 474; *People v. Duncan*, 41 Cal. 507.

Oregon. — *Knott v. Frush*, 2 Oregon 237. See, however, *Hackett v. Wilson*, 12 Oregon 25. See also *Scott v. Wilson*, (Ky. 1889) 11 S. W. Rep. 303.

What Constitutes Transfer. — Where by the

terms of the grant the license is not transferable, yet one partner may acquire the interest of his copartner. *Carroll v. Campbell*, 110 Mo. 557.

Sale of Ferryboat on Execution. — A ferryboat is not exempt from execution because the ferry is on the mail route. *Lathrop v. Middleton*, 23 Cal. 257, 83 Am. Dec. 112.

2. *Haynes v. Wells*, 26 Ark. 464.

3. See *supra*, this title, *Nature and Extent of Right — In General*.

4. Ferries Must Be Conveyed by Deed. — *Bowman v. Wathen*, 2 McLean (U. S.) 376; *Dundy v. Chambers*, 23 Ill. 369; *Gunterman v. People*, 138 Ill. 518; *Rohn v. Harris*, 130 Ill. 525; *Mississippi River Bridge Co. v. Lonergan*, 91 Ill. 508. See also the title *FRAUDS, STATUTE OF*.

Rescission of Conveyance — Estoppel. — See *Fitch v. Conyne*, 65 Ill. 83.

5. *State v. Willis*, Bush, L. (44 N. Car.) 223; *Biggs v. Ferrell*, 12 Ired. L. (34 N. Car.) 1.

6. *Haithcock v. Swift Island Mfg. Co.*, 72 N. Car. 410, *distinguishing* the cases cited in the preceding note.

7. *Gourdine v. Davis*, 1 Bailey L. (S. Car.) 469.

8. Who May Question Transfer. — *Gunterman v. People*, 138 Ill. 518; *Owens v. Roberts*, 6 Bush (Ky.) 608; *State v. Richards*, 30 N. J. L. 266; *New York v. Starin*, 106 N. Y. 1; *Knott v. Jefferson St. Ferry Co.*, 9 Oregon 530; *Hackett v. Wilson*, 12 Oregon 25; *Hackett v. Multnomah R. Co.*, 12 Oregon 124, 53 Am. Rep. 327; *Montgomery v. Multnomah R. Co.*, 11 Oregon 344; *Johnson's Appeal*, 95 Pa. St. 78.

without charge, is an infringement of the ferry franchise.¹

Who Are "Customers." — The customers of a ferry are those wishing to go along the highway of which the ferry forms a part, and whom the ferryman would be bound to transport, and not such as wish to travel from one of the landing places to a point out of the highway.²

Ferry to Provide for New Traffic. — A bridge or ferry made to provide for a new traffic is not an infringement.³

Distance of Rival Ferry. — No general rule can be laid down as to the distance within which the owner of a ferry franchise will be protected against the operation of an unlicensed ferry.⁴ The fact of nearness is not of itself conclusive.⁵ Where the franchise is made exclusive within a certain distance, the distance is to be measured on the course of the river.⁶

1. What Constitutes Infringement of Right — Arkansas. — *Matter of Free Ferries*, 36 Ark. 466; *Shinn v. Cotton*, 52 Ark. 90.

Illinois. — *Golconda v. Field*, 108 Ill. 419.

New York. — *New York v. New York*, etc., *Ferry Co.*, 40 N. Y. Super. Ct. 232; *New York v. New Jersey Steamboat Nav. Co.*, 106 N. Y. 28; *Newburgh*, etc., *Turnpike Road Co. v. Miller*, 5 Johns. Ch. (N. Y.) 101, 9 Am. Dec. 274.

North Carolina. — *Broadnax v. Baker*, 94 N. Car. 675, 55 Am. Rep. 633.

Texas. — *Tugwell v. Eagle Pass Ferry Co.*, 74 Tex. 492. See also *Mason v. Harper's Ferry Bridge Co.*, 28 W. Va. 639.

Free Bridge. — In *Gates v. M'Daniel*, 2 Stew. (Ala.) 211, 19 Am. Dec. 49, it was held that a free bridge, constructed without a license, was an infringement of a ferry license, in so far as the owner permitted its use by others than his family. See also *Mason v. Harper's Ferry Bridge Co.*, 17 W. Va. 396.

Free Ferry. — In *Long v. Beard*, 3 Murph. (7 N. Car.) 57, it was held that a free ferry was an infringement of an established ferry, the court stating that the action for damages for infringement was given, not because the defendants "have derived a benefit, but because the plaintiff has sustained an injury." See also *Harrell v. Ellsworth*, 17 Ala. 576; *Matter of Free Ferries*, 36 Ark. 466; *Smith v. Harkins*, 3 Ired. Eq. (38 N. Car.) 613, 44 Am. Dec. 83.

In *Chiapella v. Brown*, 14 La. Ann. 185, it was held that damages could be recovered for an injury to a right of ferry by one who crossed passengers free, receiving compensation for keeping the horses of those crossed.

Mail Carrier. — In *Weld v. Chapman*, 2 Iowa 524, it was held that a stage owner is not authorized in crossing his passengers, to the injury of an established ferry, because he is a carrier of the mails.

Railroad Ferries. — In *New York v. New England Transfer Co.*, 14 Blatchf. (U. S.) 159, it was held that a ferry for the transportation merely of railroad trains with their passengers was not an infringement of an exclusive ferry franchise for the carrying of "people, horses, cattle, goods, and chattels."

In *Aikin v. Western R. Corp.*, 20 N. Y. 370, *reversing* 30 Barb. (N. Y.) 305, it was held that the maintenance of a ferry by a railroad company on which persons who were not passengers nor employees were transferred free of charge was an infringement of an exclusive ferry franchise.

Railroad Bridges. — In *McRee v. Wilmington*, etc., R. Co., 2 Jones L. (47 N. Car.) 186, it was held that the transportation of persons merely as passengers, by a railroad company whose bridge was within the exclusive limits of a toll-bridge franchise, was not an infringement, no additional charge being made by the railroad company by reason of the transportation across the bridge.

Owners of Fishery Right. — Persons having a prescriptive right of fishery cannot carry passengers for hire to the injury of an established ferry. *Forbet v. Bogle*, 10 Mor. Dec. 4167.

2. Who Are Customers. — *Taylor v. Wilmington*, etc., R. Co., 4 Jones L. (49 N. Car.) 277.

In *Tripp v. Frank*, 4 T. R. 666, it was held that an exclusive ferry franchise from A to B did not prevent the carrying of passengers from A directly to C, two miles from B, provided it was not done as a pretense for avoiding the ferry from A to B.

In *Huzzey v. Field*, 2 C. M. & R. 432, it was held that where there is a ferry from A to B which leads to a public highway, and another constructs a landing place at C, a short distance from B, and carries passengers over from A to C, from whence they pass to the same highway upon which the ancient ferry is established, before it reaches any town or village, it is an infringement of the ancient ferry for which an action will lie.

3. Ferry to Provide for New Traffic. — *Hopkins v. Great Northern R. Co.*, 2 Q. B. Div. 224 [*overruling* *Reg. v. Cambrian R. Co.*, L. R. 6 Q. B. 422]; *Newton v. Cubitt*, 13 C. B. N. S. 864, 106 E. C. L. 864; *Taylor v. Wilmington*, etc., R. Co., 4 Jones L. (49 N. Car.) 277.

4. Distance of Rival Ferry. — *O'Neill v. Police Jury*, 21 La. Ann. 586.

Running an unlicensed ferry within one mile of an established ferry has been held an infringement. *Chard v. Stone*, 7 Cal. 117; *Owens v. Roberts*, 6 Bush (Ky.) 608.

A ferry on the river Thames within three-quarters of a mile of an established ferry was held an infringement. *Atty.-Gen. v. Richards*, 2 Anstr. 608, where it is stated that the injunction refused in *Hard*, 162, was subsequently granted.

A ferry fifteen yards from an established ferry was held an infringement. *Letton v. Goodden*, L. R. 2 Eq. 123.

5. Nearness Not Conclusive. — *Charles River Bridge v. Warren Bridge*, 7 Pick. (Mass.) 522.

6. McLeod v. Burroughs, 9 Ga. 213.

Private Ferry. — The maintenance of a ferry or bridge for private use is not an infringement of an established ferry.¹

Vessels Engaged in Coasting Trade. — The enrolment and license of a vessel under the laws of the United States, for coasting trade, does not authorize the running of the vessel as a ferryboat, to the injury of an established ferry.²

b. ESTABLISHING RIVAL FERRIES, BRIDGES, ETC., BY LEGISLATIVE AUTHORITY — When Franchise Is Exclusive. — When an exclusive ferry franchise has been granted, such grant, as heretofore stated,³ is protected by the provision of the Federal Constitution prohibiting the several states from passing laws impairing the obligation of contracts, and therefore the legislature cannot create a rival ferry without provision being made for the payment of damages for the injury which would be caused thereby to such exclusive ferry.⁴ Where, under statutes, subordinate bodies, such as boards of county commissioners, and the like, are authorized to establish ferries, and are prohibited from licensing other ferries within a certain distance thereof, they, of course, cannot establish a second ferry within the prohibited distance.⁵

When Franchise Not Exclusive. — The grant of a ferry franchise is to be construed strictly, nothing passing as against the public by implication; and unless there is an express provision in the grant of the franchise against the creation of rival ferries, or the erection of bridges, the legislature may license rival ferries or authorize the construction of free or toll bridges near an existing ferry, as the convenience of the public may require, though the effect of so doing is to impair the ferry franchise or render it practically valueless.⁶

1. **Private Ferry.** — *Hanson v. Webb*, 3 Cal. 236.

In *Alexandria, etc., Ferry Co. v. Wisch*, 73 Mo. 655, 39 Am. Rep. 535, it was held that the transportation of one's own property in one's own boat was not an infringement of an established ferry. See also *Trent v. Cartersville Bridge Co.*, 11 Leigh (Va.) 544; *Greer v. Haugabook*, 47 Ga. 282.

In *Hunter v. Moore*, 44 Ark. 184, 51 Am. Rep. 580, it was held that a ferry franchise did not give the owner the right to enjoin citizens from using their own boats for crossing themselves, families, employees, guests, and occasionally a friend, or occasionally lending their boats to each other.

Private Bridge — What Constitutes. — In *Dinner v. Humberstone*, 26 Can. Sup. Ct. Rep. 252, it was held that a ferry operated by a partnership of which any person could, by taking a share, become a member, which would entitle him to a certain number of trips across the ferry, was not a private ferry and was an infringement of a licensed ferry within whose exclusive limits it was operated.

In *Norris v. Farmers', etc., Co.*, 6 Cal. 590, 65 Am. Dec. 535, it was held that the fact that an association whose bridge was constructed within the exclusive limits of an established ferry issued certificates, the holders of which were entitled to passage over the bridge for one month, did not constitute the holders joint owners in the bridge and so prevent the bridge from being an infringement of the ferry franchise on the ground that it was a private bridge.

2. **Vessels Engaged in Coasting Trade.** — *Conway v. Taylor*, 1 Black (U. S.) 603; *New York v. Longstreet*, 64 How. Pr. (N. Y. Supreme Ct.) 30; *New York v. Starin*, 106 N. Y. 1; *Childers v. People*, 11 Mich. 43.

3. See *supra*, this title, *Nature and Extent of Right*.

4. **Establishment of Rival Franchise by Legislature when Franchise Exclusive.** — *New York v. Starin*, 106 N. Y. 1; *New York v. New York, etc., Ferry Co.*, 40 N. Y. Super. Ct. 232; *Piscataqua Bridge v. New Hampshire Bridge*, 7 N. H. 35. And see the title *BRIDGES*, vol. 4, p. 918.

5. **Establishment of Ferries by Subordinate Bodies Within Prohibited Distances.** — *Matter of Free Ferries*, 36 Ark. 466; *Murray v. Menefee*, 20 Ark. 561; *Cotton v. Houston*, 4 T. B. Mon. (Ky.) 288; *Montgomery v. Multnomah R. Co.*, 11 Oregon 344; *Hackett v. Wilson*, 12 Oregon 25; *Nixon v. Reid*, 8 S. Dak. 507.

In *Cotton v. Houston*, 4 T. B. Mon. (Ky.) 288, it was held that the neglect of the ferry owner to attend and transport passengers was no cause for the establishment of another ferry within the prohibited distance, though by such neglect the owner might be guilty of a breach of his bond, and for failure to transport a passenger in due time he was made liable to a fine, and under some circumstances his grant might be annulled.

6. **When Franchise Not Exclusive — United States.** — *Charles River Bridge v. Warren Bridge*, 11 Pet. (U. S.) 420; *Fanning v. Greigore*, 16 How. (U. S.) 524; *East Hartford v. Hartford Bridge Co.*, 10 How. (U. S.) 534, 17 Conn. 79.

Alabama. — *Columbus v. Rodgers*, 10 Ala. 37; *Dyer v. Tuscaloosa Bridge Co.*, 2 Port. (Ala.) 206, 27 Am. Dec. 655.

California. — *Fall v. Sutter County*, 21 Cal. 237; *In re Hanson*, 2 Cal. 262.

Georgia. — *Shorter v. Smith*, 9 Ga. 517.

Indiana. — *Conner v. Paxson*, 1 Blackf. (Ind.) 168; *Bush v. Peru Bridge Co.*, 3 Ind. 21.

Iowa. — *McEwen v. Taylor*, 4 Greene (Iowa) 532.

Kentucky. — *Piatt v. Covington, etc., Bridge Co.*, 8 Bush (Ky.) 31.

Maine. — *Day v. Stetson*, 8 Me. 365.

And it is for the legislature or other body vested with jurisdiction to establish the second ferry to determine whether the public convenience requires a second ferry.¹

2. Remedy for Infringement — *a. REMEDY AT LAW* — (1) *In General*. — As a general rule, an action on the case as for a nuisance will lie at the suit of the owner of a ferry franchise, for an infringement thereof.²

Statutory Penalty for Operation of Unlicensed Ferry. — Under some statutes a penalty

Minnesota. — Perrin *v.* Oliver, 1 Minn. 202.
Mississippi. — Montjoy *v.* Pillow, 64 Miss. 705; Sullivan *v.* Lafayette County, 58 Miss. 790; Seal *v.* Donnelly, 60 Miss. 658.

New York. — Thompson *v.* New York, etc., R. Co., 3 Sandf. Ch. (N. Y.) 625; Costar *v.* Brush, 25 Wend. (N. Y.) 628; Meads *v.* Wandell, 4 Ch. Sent. (N. Y.) 14; Power *v.* Athens, 99 N. Y. 592; Auburn, etc., Plank-road Co. *v.* Douglass, 9 N. Y. 444.

Oregon. — Knott *v.* Jefferson St. Ferry Co., 9 Oregon 530.

Pennsylvania. — Riverton Ferry Co. *v.* McKeesport, etc., Bridge Co., 1 Pa. Super. Ct. Rep. 587, 179 Pa. St. 466; Westfall *v.* Mapes, 3 Grant's Cas. (Pa.) 198; Bridgewater Ferry Co. *v.* Sharon Bridge Co., 145 Pa. St. 404.

Tennessee. — Hyde's Ferry Turnpike Co. *v.* Davidson County, 91 Tenn. 291; Moses *v.* Sanford, 11 Lea (Tenn.) 731.

Virginia. — Tuckahoe Canal Co. *v.* Tuckahoe, etc., River R. Co., 11 Leigh (Va.) 43, 36 Am. Dec. 374; Somerville *v.* Wimbish, 7 Gratt. (Va.) 205.

West Virginia. — Wheeling Bridge Co. *v.* Wheeling, etc., Bridge Co., 34 W. Va. 155, affirmed 138 U. S. 287; Hostler *v.* Marlowe, 44 W. Va. 707.

In *New York v. Starin*, 106 N. Y. 1, it was said that the common-law rule requiring all gratuitous grants by the sovereign of exclusive privileges and franchises to be strictly construed and that any ambiguity therein must operate against the grantee, is not in strictness fully applicable to the grant of a ferry franchise. Such a grant is never without a consideration, as it imposes upon the grantee the obligation of maintaining a ferry with suitable accommodations, for the public convenience.

In *Westfall v. Mapes*, 3 Grant's Cas. (Pa.) 198, it was held that an agreement in regard to exclusive rights of ferry was against public convenience and should be strictly construed, and that an agreement not to establish or permit a ferry between two rifts in a river meant from the lower extremity of the upper to the upper extremity of the lower rift.

Repeal of Statute Prohibiting Establishment of Rival Ferries Within Prescribed Distance. — In *Wheeling Bridge Co. v. Wheeling, etc., Bridge Co.*, 34 W. Va. 155, affirmed 138 U. S. 287, it was held that an act passed after the establishment of a ferry, prohibiting County Courts from licensing other ferries within a specified distance of an established ferry, did not grant a perpetual monopoly so as to prevent the establishment of rival ferries within the prohibited distance after the repeal of the act.

Presumption as to Exclusiveness of Franchise. — In *Wright v. Nagle*, 101 U. S. 791, it was said that an exclusive ferry franchise will never be presumed.

1. Legislature the Judge of Necessity for Second Ferry. — Fall *v.* Sutter County, 21 Cal. 237.

In *Blair v. Carmichael*, 2 Yerg. (Tenn.) 306, it was held that it was no objection to the establishment of a second ferry that the party complaining had a ferry with landing within four hundred yards of the other ferry on one side of the river, and with the same landing on the other side, or that the new ferry, owing to the swiftness of the current and greater length of passage, would be of less benefit than the first.

Subordinate Bodies. — Boards of supervisors have jurisdiction to determine whether the public convenience requires a ferry within a mile of an established ferry or bridge, and their decision cannot be questioned in a collateral action. Fall *v.* Paine, 23 Cal. 302.

When the County Court permits a ferry to be established at or near a town, within one mile of a ferry previously established, the question whether the public convenience required the establishment of the rival ferry is necessarily passed upon and determined by the court. Lindsay *v.* Lindley, 20 Ark. 573.

Review of Decision of Subordinate Body. — Where an application is made to the County Court for the establishment of a ferry across a stream near a ferry which has already been established and is in operation, an important question to be determined by the County Court before establishing such new ferry is as to whether the travel and business across the stream would support two ferries, and as this is a question of fact, the appellate court must have all the facts before it that were before the court below before it can properly pass upon the correctness of the judgment complained of. Williamson *v.* Hays, 35 W. Va. 52. See also Combs *v.* Hogg, (Ky. 1897) 40 S. W. Rep. 453.

2. Action on Case for Infringement — *England*. — North, etc., Shields Ferry Co. *v.* Barker, 2 Exch. 136; Huzzey *v.* Field, 2 C. M. & R. 432; Blacketer *v.* Gillett, 9 C. B. 26.

Alabama. — Gates *v.* M'Daniel, 2 Stew. (Ala.) 211, 19 Am. Dec. 49.

Louisiana. — Miles *v.* Craig, 3 La. Ann. 635; Gillespie *v.* Freeman, 7 La. Ann. 350.

Missouri. — Carroll *v.* Campbell, 110 Mo. 557, 108 Mo. 550.

New York. — *New York v. Starin*, 106 N. Y. 1; Ogden *v.* Gibbons, 4 Johns. Ch. (N. Y.) 150.

North Carolina. — Broadnax *v.* Baker, 94 N. Car. 675, 55 Am. Rep. 633; Long *v.* Beard, 3 Murph. (7 N. Car.) 57; Taylor *v.* Wilmington, etc., R. Co., 4 Jones L. (49 N. Car.) 277.

South Carolina. — Stark *v.* M'Gowen, 1 Nott & M. (S. Car.) 387, 9 Am. Dec. 712.

Defamation of Ferry. — No action will lie for representing the plaintiff's ferry not to be as good as another established rival ferry, and

is imposed upon a person operating an unlicensed ferry, which is recoverable by the owner of a ferry franchise who is injured by such operation.¹

Effect of Statutory Penalty upon Common-law Remedy. — Upon the question of the effect of a statute imposing such penalty upon the common-law remedy of the owner of the ferry franchise injured by the operation of the unlicensed ferry, the decisions are conflicting.²

(2) *Title to Support Action on Case.* — The mere possession of an established ferry has been held sufficient to sustain an action for infringement thereof.³

(3) *Forfeiture of Franchise as a Defense.* — The defendant cannot defeat the action on the ground that the owner of the franchise has been guilty of conduct authorizing the forfeiture of the franchise, for a forfeiture can only

inducing travelers to cross at such other ferry. *Johnson v. Hitchcock*, 15 Johns. (N. Y.) 185.

1. Recovery of Statutory Penalty. — *Lang v. Scott*, 1 Blackf. (Ind.) 405, 12 Am. Dec. 257; *Miles v. Craig*, 3 La. Ann. 635; *Almy v. Harris*, 5 Johns. (N. Y.) 175; *Long v. Beard*, 3 Murph. (7 N. Car.) 57; *Taylor v. Wilmington*, etc., R. Co., 4 Jones L. (49 N. Car.) 277. See also *Gillespie v. Freeman*, 7 La. Ann. 350.

For a Construction of the Term "Opposite," in a statute incorporating a ferry company and prohibiting the operation of other ferries "to or from any point opposite or within the limits of a designated borough," see *Sunbury Steam Ferry, etc., Co. v. Grant*, (Pa. 1888) 15 Atl. Rep. 706.

The penalty denounced by Mansfield's *Arkansas* Dig., § 3335, for running an unlicensed ferry for "money or any other valuable thing," is not recoverable against one who runs a free ferry. *Shinn v. Cotton*, 52 Ark. 90. In this case it appeared that the defendant ran a free skiff within a mile of the plaintiff's ferry, as an inducement to persons to trade at the former's store, but that the person so transported did not agree to buy anything, nor did the defendant make any charge in "money or any other valuable thing" for the ferryage. Accordingly, recovery was denied.

Seizure of Boats Used by Infringer. — Under the *Illinois* statute, a mere license to keep a ferry will not authorize the person licensed to seize boats, etc., run at or near such ferry, unless he shows that he has established his ferry, put it in operation, and done every act required by law. *Lombard v. Cheever*, 8 Ill. 469.

2 Effect of Imposition of Penalty upon Common-law Remedy. — It has been held that the fact that penalties are imposed by statute for the infringement of a ferry franchise, recoverable by the owner of the franchise infringed, does not deprive such owner of his common-law remedy by action on the case to recover damages for such infringement. *Taylor v. Wilmington*, etc., R. Co., 4 Jones L. (49 N. Car.) 277; *Long v. Beard*, 3 Murph. (7 N. Car.) 57. See also *North*, etc., *Shields Ferry Co. v. Barker*, 2 Exch. 136.

In *Almy v. Harris*, 5 Johns. (N. Y.) 175, it was held that a person having a right of ferry, granted under the statute to regulate ferries (20 Sess., c. 64, § 1), cannot maintain an action on the case for the disturbance of his right; his only remedy is for the penalty given by the statute.

And in *Lang v. Scott*, 1 Blackf. (Ind.) 405,

12 Am. Dec. 257; *Almy v. Harris*, 5 Johns. (N. Y.) 175, was followed, the decision being based on the ground that exclusive ferry franchises are purely creatures of statute and therefore to be protected by the statutory remedy alone.

Infringement Made a Misdemeanor — Effect. — In *Carroll v. Campbell*, 110 Mo. 557, 108 Mo. 550, it was held that a general statute making any person receiving pay for services as a ferryman without a license liable to a civil action to a legally licensed ferryman is available to a ferryman licensed by a city ordinance which, although not providing for a civil action, makes the running of an unlicensed ferry a misdemeanor and punishes the guilty party by fine.

In *Ward v. Severance*, 7 Cal. 126, it was held that the *California* Act of 1855 confers on ferry owners no franchise for the infringement of which a civil action will lie, but only a limited right, for the protection of which provision is made by indictment.

3. Title to Support Action on Case. — *Peter v. Kendal*, 6 B. & C. 703, 13 E. C. L. 209; *Blissett v. Hart*, Willes 508, 512 note, 2 Saund. 114, note; *Mississippi River Bridge Co. v. Loneragan*, 91 Ill. 508; *State v. Richards*, 30 N. J. L. 266; *Knott v. Jefferson St. Ferry Co.*, 9 Oregon 530; *Patrick v. Ruffners*, 2 Rob. (Va.) 209, 40 Am. Dec. 740.

Where a statute authorized the trustees of a town to lease a ferry privilege "at public outcry," and they made the lease by private contract, it was held that while under the circumstances the lease might be voidable, as between lessor and lessee, yet it was not void, and its validity could not be denied or questioned by a stranger who attempted to run an unlicensed opposition ferry. *Owens v. Roberts*, 6 Bush (Ky.) 608.

Complaint Must Show Plaintiffs' Right to Ferry. — In an action to recover damages for an alleged disturbance of the plaintiffs' ferry privilege, which they claimed by virtue of a lease from the city of Paducah, the petition was held fatally defective in that it did not allege that the city of Paducah ever acquired or had the exclusive ferry privilege claimed by the plaintiffs. The statement that their ferry was an established ferry, and that they were the owners of the ferry privilege and the right to collect tolls, etc., was held but a conclusion of law. *Owens v. Lockwood*, 83 Ky. 266.

See also *Hanger v. Little Rock Junction R. Co.*, 52 Ark. 61; *Organ v. Memphis*, etc., R. Co., 51 Ark. 235.

be enforced by the state.¹ And for the same reason, when the defendant relies upon a license to run his ferry as a defense, the validity of his license cannot be collaterally attacked.²

(4) *Measure of Damages.* — The measure of damages for infringement of a ferry franchise is the amount of loss of tolls to the owner of the franchise by diminution in the numbers of customers who would have used the ferry.³

(5) *Proof of Existence of Ferry.* — It has been held that reputation is admissible in evidence to prove the existence of a ferry,⁴ as is also a judgment touching the same right, though between third persons,⁵ the reason being that a right of ferry is a matter in which the public are interested.

Private Acts creating or establishing ferries must be proven, as the courts cannot take judicial notice of such acts.⁶

b. INJUNCTION TO RESTRAIN INFRINGEMENT. — Since continuous encroachments upon a ferry franchise are in the nature of a private nuisance, it has been generally held that an injunction will issue to restrain such encroachments,⁷ though in a number of cases an injunction has been

1. Forfeiture of Franchise as a Defense. — *Alabama.* — Harrell v. Ellsworth, 17 Ala. 576.

Indiana. — New Albany, etc., R. Co. v. Huff, 19 Ind. 315; Conner v. Paxson, 1 Blackf. (Ind.) 168.

Kansas. — Walker v. Armstrong, 2 Kan. 198.

Kentucky. — Owens v. Roberts, 6 Bush (Ky.) 608.

Missouri. — Capital City Ferry Co. v. Cole, etc., Transp. Co., 51 Mo. App. 228.

New York. — New York v. Starin, 106 N. Y. 1.

Pennsylvania. — Douglass's Appeal, 118 Pa. St. 65.

Violation of Ferry Regulations. — In Walker v. Armstrong, 2 Kan. 198, the violation by the owner of a ferry franchise of the statutory provisions for the regulation of ferries was held no defense to an action on the case against a person running a rival ferry without a license.

Nonpayment of License Fee. — In New Albany, etc., R. Co. v. Huff, 19 Ind. 315, it was held that the nonpayment of the ferry license fee was no defense to an action for encroachments upon the franchise.

2. Invalid Grant of Franchise as a Defense. — Conner v. Paxson, 1 Blackf. (Ind.) 168; Capital City Ferry Co. v. Cole, etc., Transp. Co., 51 Mo. App. 228.

3. Measure of Damages. — Broadnax v. Baker, 94 N. Car. 675, 55 Am. Rep. 633.

In Stark v. M'Gowen, 1 Nott & M. (S. Car.) 387, 9 Am. Dec. 712, it was held that, in an action for damages for infringement of a ferry franchise, the defendant could not object to his clear gains being made the measure of damages, where it appeared that he had also used unwarrantable means to divert the travel from the plaintiff's ferry.

In Pittsburgh, etc., R. Co. v. Jones, 111 Pa. St. 204, where the owner of a ferry also had a leasehold in the landing, and the defendant constructed a railroad so as materially to interfere with the landing of boats, it was held that the measure of damages for which the defendant was liable was the difference between the value of the leasehold for the purpose to which it was applied until the end of the term under ordinary circumstances, and its value for the same time as affected by the railroad, and that

it was error to allow the recovery of damages for the depreciation of the value of the franchise unconnected with the leasehold.

In a suit to recover for damages to the plaintiff's ferry franchise caused by the erection of a bridge near the ferry, it was held proper to estimate the amount of revenues received by the plaintiff, although he was not the owner of the land at his landing, but was a trespasser, the bridge company not being entitled to benefit from this fact. It was not to be taken into consideration that the legislature might repeal the law under which the plaintiff had the exclusive privilege of operating a ferry. Mason v. Harper's Ferry Bridge Co., 20 W. Va. 223.

In an action to recover damages for the injuries suffered in the destruction of a ferry by the erection of a bridge, the income derived by the plaintiff from tolls received in preceding years was held competent evidence to show the value of the franchise. In such action, the rates of tolls fixed by the board of chosen freeholders, under the *New Jersey* act concerning ferries (Nix. Dig. 337), certified by the clerk of the board, were held competent evidence, although such rates were fixed for the ferry before the plaintiff had obtained a legislative grant of the franchise. Columbia Delaware Bridge Co. v. Geisse, 38 N. J. L. 39.

4. Proof of Existence of Ferry. — Pim v. Curell, 6 M. & W. 234.

5. Pim v. Curell, 6 M. & W. 234.

6. Private Acts Establishing Ferry. — Carrow v. Washington Toll-Bridge Co., Phil. L. (61 N. Car.) 118.

7. Enjoining Infringements. — *United States.* — Hartford Bridge Co. v. East-Hartford, 16 Conn. 171, 10 How. (U. S.) 511.

Alabama. — Collins v. Ewing, 51 Ala. 101.

California. — Chard v. Stone, 7 Cal. 117.

Illinois. — Golconda v. Field, 108 Ill. 419.

Kansas. — Walker v. Armstrong, 2 Kan. 198.

Kentucky. — Davis v. Connolly, (Ky. 1898) 46 S. W. Rep. 679; Newport v. Taylor, 16 B. Mon. (Ky.) 699; Owens v. Roberts, 6 Bush (Ky.) 609; Hazelp v. Lindsey, 93 Ky. 14.

Louisiana. — Miles v. Craig, 3 La. Ann. 635;

Gillespie v. Freeman, 7 La. Ann. 350.

Minnesota. — McRoberts v. Washburne, 10 Minn. 23.

refused.¹

Necessity that Franchise Be Exclusive. — By the weight of authority it is not necessary that the franchise be exclusive to entitle the owner to enjoin encroachments thereon,² though in some courts an injunction has been refused because the franchise of the complainant was not exclusive.³

Compliance with Conditions of Charter. — It is held that, to entitle him to an injunction, the owner must have perfected his franchise by the performance of all conditions precedent in his grant.⁴

Missouri. — *Capital City Ferry Co. v. Cole*, etc., Transp. Co., 51 Mo. App. 228.

New Jersey. — *Midland Terminal, etc., Co. v. Wilson*, 28 N. J. Eq. 537.

New York. — *Livingston v. Van Ingen*, 9 Johns. (N. Y.) 507; *Newburgh, etc., Turnpike Road Co. v. Miller*, 5 Johns. Ch. (N. Y.) 101, 9 Am. Dec. 274; *New York v. Starin*, 106 N. Y. 1.

North Carolina. — *Long v. Beard*, Term (4 N. Car.) 256.

North Dakota. — *Patterson v. Wollmann*, 5 N. Dak. 608.

Pennsylvania. — *Douglass's Appeal*, 118 Pa. St. 65.

Texas. — *Tugwell v. Eagle Pass Ferry Co.*, 74 Tex. 480.

In *Midland Terminal, etc., Co. v. Wilson*, 28 N. J. Eq. 537, an infringement by the operation of an unlicensed ferry was restrained, the infringement consisting of regular hourly trips from New York to the New Jersey shore and the solicitation of passengers on their way to the complainant's ferry.

In *New York v. Starin*, 106 N. Y. 1, it was intimated that the operation of a ferry would not be enjoined, when the ferry was demanded by public convenience, merely because the franchise belonged to another who neglected or refused to use it.

Effect of Penalties for Infringement. — The fact that the complainant is entitled to sue for penalties imposed by statute for infringement of his ferry franchise has been held not to deprive a court of equity of jurisdiction to grant relief by injunction. *Cory v. Yarmouth*, etc., R. Co., 3 Hare 593; *Ward v. Severance*, 7 Cal. 126; *Newport v. Taylor*, 16 B. Mon. (Ky.) 699. See, however, *Letton v. Goodden*, L. R. 2 Eq. 123.

Enjoining Vexatious Suit. — *McCauly v. Givens*, 1 Dana (Ky.) 261.

Title to Support Injunction. — In *Davis v. Connolly*, (Ky. 1898) 46 S. W. Rep. 679, the operation of a second ferry within the distance prohibited by law was enjoined, at the suit of the occupant of an ancient ferry, and the court refused to deny such an injunction on the ground that the complainant was not the rightful owner of such ancient ferry, of which he had been in actual use and enjoyment for many years.

1. Injunctions Denied. — In *Churchman v. Tunstal*, Hardr. 162, the court refused to enjoin the operation of a rival ferry across the river Thames, three-quarters of a mile distant, because the complainant's right, claimed by prescription, came too near being a monopoly and as being in restraint of trade. See, however, *Atty.-Gen. v. Richards*, 2 Anstr. 608, wherein it is said that the injunction refused,

as shown by the report of the above case, was subsequently granted.

In *Levisay v. Delp*, 9 Baxt. (Tenn.) 415, the court refused to enjoin the operation of a rival unlicensed ferry at the instance of the owner of a ferry franchise. And see also *Blewitt v. Vaughn*, 5 How. (Miss.) 418.

In *Long v. Merrill*, Term (4 N. Car.) 112, 7 Am. Dec. 700, an injunction was refused because the complaint, which was based on the loss of the complainant's profits, did not allege any difficulty in determining the complainant's loss, and therefore did not show that the remedy at law was inadequate.

2. Franchise Need Not Be Exclusive. — *East Hartford v. Hartford Bridge Co.*, 10 How. (U. S.) 511; *McRoberts v. Washburne*, 10 Minn. 23; *Carroll v. Campbell*, 108 Mo. 550; *Smith v. Harkins*, 3 Ired. Eq. (38 N. Car.) 613, 44 Am. Dec. 83; *Stark v. M'Gowen*, 1 Nott & M. (S. Car.) 387, 9 Am. Dec. 712; *Tugwell v. Eagle Pass Ferry Co.*, 74 Tex. 480.

3. Franchise Must Be Exclusive. — In *McEwen v. Taylor*, 4 Greene (Iowa) 532, an injunction was refused because the franchise was not exclusive.

And in *Butt v. Colbert*, 24 Tex. 355, it was held that a complaint to enjoin the operation of a rival ferry must allege that the complainant has an exclusive license.

In *Letton v. Goodden*, L. R. 2 Eq. 123, it was held that an Act of Parliament empowering a company to ply on Sunday from a certain point on the south bank of the river Thames, but imposing no obligation to provide means of transportation to the public, or to maintain its plying places, did not confer an exclusive right such as a court of equity would protect by injunction, but the licensee would be left to his action at law to recover the penalties provided by law for infringements.

4. Compliance by Complainant with Conditions of Charter. — *Norris v. Lapsley*, 5 Cal. 47; *Walker v. Armstrong*, 2 Kan. 108.

In *Mills v. Brown*, 3 Ill. 548, where the right to establish a ferry was granted to one, the ferry to be run from lands belonging to him, an injunction to restrain the operation of a rival ferry was refused because the bill did not show that the complainant owned any land from which his ferry could be operated.

In *Harrell v. Ellsworth*, 17 Ala. 576, it was held, however, that in a suit to enjoin an infringement of a ferry by a free bridge, the defendant could not question the complainant's right to his ferry franchise on the ground of his failure to perform a condition annexed to his grant. See also *Douglass's Appeal*, 118 Pa. St. 65, wherein it was held that a usurper could not defeat a suit for an injunction on the ground that the owner of the ferry franchise

Failure of Complainant to Furnish Ferry Facilities to Public. — And it has also been held that the failure of the complainant to furnish the necessary ferry facilities to the public would deprive him of the right to an injunction.¹

Obstructions by the Complainant to the Franchise of the Defendant may also be ground for refusing an injunction.²

VI. DUTIES AND LIABILITIES OF OWNER — 1. Duty to Maintain and Operate. — The owner of a ferry franchise is under an obligation to maintain the ferry for the use of the public.³

Remedy to Compel Operation of Ferry. — It has been held that mandamus would lie to compel the operation of a ferry by one upon whom such duty was cast,⁴ and it has also been said that failure on the part of the owner of the franchise to operate the ferry is an indictable offense;⁵ and, as hereafter shown, in case the owner of a ferry franchise fails to operate the ferry, his franchise may be declared forfeited in quo warranto or the like proceedings.⁶ A private person cannot sue for failure to operate a ferry unless he has sustained some special damage, different in kind from that sustained by the public at large.⁷

2. Duty to Transport. — The owner of a ferry is required to transport passengers at all reasonable hours, and if he fails in this duty he is liable for damages to the person refused transportation.⁸ To enable a passenger, however,

had not complied with the provisions of his charter. And see *Capital City Ferry Co. v. Cole, etc., Transp. Co.*, 51 Mo. App. 228.

1. Failure of Complainant to Furnish Ferry Facilities to Public. — *Walker v. Armstrong*, 2 Kan. 198; *Trent v. Cartersville Bridge Co.*, 11 Leigh (Va.) 544.

In *Ferrel v. Woodward*, 20 Wis. 458, neglect to operate the ferry was held fatal to a bill to enjoin infringement.

See also *New York v. Starin*, 106 N. Y. 1; *Anonymous*, 1 Ves. 476.

2. Obstruction by Complainant to Franchise of Defendant. — *Hill v. Averett*, 27 Ala. 484.

3. Duty to Maintain and Operate Ferry. — *Payne v. Partridge*, 1 Show. 257; *Charles River Bridge v. Warren Bridge*, 11 Pet. (U. S.) 639, *per Story, J.*; *Brownell v. Old Colony R. Co.*, 164 Mass. 29; *State v. Peckham*, 9 R. I. 1.

"Where there is a ferry by prescription, the owner is bound to keep it always in repair and readiness for the ease of all the king's subjects, otherwise he may be grievously amerced." 3 Black. Com. 219.

In *Brownell v. Old Colony R. Co.*, 164 Mass. 29, it was also held that a railroad company which by legislative authorization has acquired an existing ferry franchise as a part of its line, and is operating the rest of its line, may not discontinue the ferry and refuse to obey a legislative requirement to operate it, and this whether the ferry franchise is profitable or not.

Waiver by State of Duty to Operate. — In *Brownell v. Old Colony R. Co.*, 164 Mass. 29, the contention that any obligation to the state to operate the ferry in question was waived by the acquiescence of the state in its abandonment for twenty years, and also by legislation subsequent to the abandonment, was negated by the court.

4. Mandamus to Compel Operation. — *Brownell v. Old Colony R. Co.*, 164 Mass. 29.

5. Indictment. — *Charles River Bridge v. Warren Bridge*, 11 Pet. (U. S.) 639. See also 3 Black. Com. 219; 2 Roll. Abr. 140; *State v. Sewell*, 45 Ark. 387.

In *Carter v. Com.*, 2 Va. Cas. 354, where, for nonuser of a ferry, the statute imposed the penalty of a discontinuance, and also authorized any person refused passage to recover a penalty, it was held that the failure to maintain a ferry was not an indictable offense.

6. See *infra*, this title, *Termination of Franchise*.

7. *Payne v. Partridge*, 1 Salk. 12, 3 Mod. 289.

8. Duty to Transport — Alabama. — *Pate v. Henry*, 5 Stew. & P. (Ala.) 101; *Koretke v. Irwin*, 100 Ala. 323.

Arkansas. — *Jabine v. Midgett*, 25 Ark. 474; *State v. Sewell*, 45 Ark. 387.

Iowa. — *Slimmer v. Merry*, 23 Iowa 90.

Kentucky. — *Reeves v. Little*, 7 Bush (Ky.) 469.

Tennessee. — *Wallen v. McHenry*, 3 Humph. (Tenn.) 245.

Compare Letton v. Goodden, L. R. 2 Eq. 123; *Churchman v. Tunstal*, Hardr. 163.

Transportation After Nightfall. — In *Pate v. Henry*, 5 Stew. & P. (Ala.) 101, it was held that a ferryman was not justified in refusing to cross a person merely because the application was made after nightfall.

Regulation of Ferryman Not to Ply After Dark. — Under the *Alabama* statute (Code Ala., §§ 1444, 1452), which imposes a penalty upon ferrymen for unreasonably detaining any person at a public ferry, and which requires keepers of public ferries to have "safe and convenient boats, with a sufficient number of ferrymen," it was held that a regulation on the part of a ferryman not to carry any person across the ferry after dark until daylight, irrespective of whether or not it was safe to ply under the circumstances of the particular case, would not relieve the ferryman from the statutory penalty, and that one who was detained from six o'clock at night until six o'clock the next morning could recover such penalty. *Koretke v. Irwin*, 100 Ala. 323.

High Water as an Excuse for Delay. — In *Jabine v. Midgett*, 25 Ark. 474, it was held that a delay of fourteen hours in crossing a passenger

to maintain an action for refusal to carry, the toll must have been either paid or tendered.¹

3. Liability for Negligence — *a. IN GENERAL.* — The owner of a ferry franchise is bound to provide proper boats, with competent boatmen, and with all other things necessary for the maintenance of the ferry in an efficient state and safe condition.²

was not justified merely on account of the existence of high water.

Transportation of Cattle. — In *Slimmer v. Merry*, 23 Iowa 90, a ferry company was held liable for damages for delay in affording means for the transportation of cattle.

Forfeiture of Town Lease on Failure to Transport. — In *Phillips v. Bloomington*, 1 Greene (Iowa) 498, a lease of a ferry from the town was annulled by a court of equity for delay on the part of the lessee of the ferry in transporting passengers.

Transportation Across Boundary Rivers. — The *Kentucky* statutes relating to the duties of ferrymen (Myers's Supp. 236) do not require a ferryman to transport persons or things from Ohio, and for refusing to bring a passenger across the river into Kentucky, he is not subject to the penalty denounced in the Act of March 4, 1865, § 2. *Reeves v. Little*, 7 Bush (Ky.) 469.

Effect of Statutory Penalty upon Common-law Action. — Where the keeper of a public ferry refuses to set any one across the river, the ferryage having been paid or tendered, an action on the case lies, at common law, for such refusal; and the Act of 1804, c. 1, § 15, giving any one a right to sue for and recover a penalty for the failure of the ferryman to do his duty as prescribed by the statute, does not bar such action on the case. *Wallen v. McHenry*, 3 Humph. (Tenn.) 245. See also *Pate v. Henry*, 5 Stew. & P. (Ala.) 101.

Failure of Passenger to Obey Regulation of Ferryman — Expulsion. — The agent of a ferry company has no right to expel a passenger from a ferryboat for a breach of a regulation of the company requiring passengers to enter the boat through a certain gate and deliver their tickets thereat, without first notifying such passenger of the existence of the regulation; nor has he any right to touch the person of the passenger without first notifying him that, unless he leaves the boat, he would resort to such extreme means to put him off. *Compton v. Van Volkenburgh*, 34 N. J. L. 134. See generally the title CARRIERS OF PASSENGERS, vol. 5, p. 474.

1. Payment or Tender of Toll. — *Pain v. Patrick*, 3 Mod. 289, 1 Show. 243, 255, 2 Salk. 719.

2. Liability of Ferryman for Negligence — *England.* — *Willoughby v. Horridge*, 12 C. B. 742, 74 E. C. L. 742.

Alabama. — *Garner v. Green*, 8 Ala. 96.
Arkansas. — *Jabine v. Midgett*, 25 Ark. 475.
Connecticut. — *Chadwick v. Haverhill Bridge*, 2 Dan's Abr. 686.

Massachusetts. — *White v. Winnisimmet Co.*, 7 Cush. (Mass.) 157.

Mississippi. — *Richards v. Fuqua*, 28 Miss. 792, 64 Am. Dec. 121.

New York. — *Wyckoff v. Queens County Ferry Co.*, 52 N. Y. 32.

Tennessee. — *Sanders v. Young*, 1 Head (Tenn.) 219, 73 Am. Dec. 175.

Wisconsin. — *Ferrel v. Woodward*, 20 Wis. 461.

Defective Approaches. — In *Willoughby v. Horridge*, 12 C. B. 742, 74 E. C. L. 742, a ferryman was held liable for injuries to a horse which fell from the slip in leaving the boat, owing to the defective condition of the guard rail.

Defective Moorings. — In *Richards v. Fuqua*, 28 Miss. 792, 64 Am. Dec. 121, a ferryman was held liable for the loss of a wagon and mule attached thereto, caused by the boat, which was not provided with an apron, breaking from its moorings, owing to their defective condition, when the gunwale was struck by the rear wheels of the wagon.

Duty to Provide Boat with Barriers. — The *Connecticut* statute (Gen. Stat. 1888, c. 162, p. 604) empowers the ferry commissioners to compel ferrymen to provide their boats with the necessary apparatus for the safety of passengers and teams transported. For over twenty years such commissioners did not require ferrymen to provide their boats with barriers. It was held that the failure of a ferryman to provide his boat with barriers was not negligence as a matter of law. *Gillette v. Goodspeed*, 69 Conn. 363.

Defective Barriers on Boat. — In *Sturgis v. Kountz*, 165 Pa. St. 358, a ferryman was held liable for the loss of a horse which, on being frightened by a whistle, backed from the boat through a defective guard chain. See also *Clark v. Union Ferry Co.*, 35 N. Y. 485, 91 Am. Dec. 66.

In *Wyckoff v. Queens County Ferry Co.*, 52 N. Y. 32, a ferryman was also held liable for the loss of a horse and wagon through his failure to keep a sufficient barrier at the forward end of the boat, though the wagon was not put under the care of the ferryman so as to render him liable as a common carrier.

Failure to Put Up Barrier. — In *Lewis v. Smith*, 107 Mass. 334, in which the plaintiff sought to recover for the loss of a horse which was under his control while on the boat, and which fell from the boat for want of barriers at the forward end, evidence that the boat had been operated without barriers for thirty years, without accident, was held inadmissible.

Duty to Maintain Barrier While Boat Not in Operation. — In *Evans v. Goodrich*, 46 Minn. 388, it was held that the failure to keep up the barriers on the boat while the boat was moored to the bank did not render it liable for the loss of a runaway horse, passing over the boat into the water.

Liability for Act of Servant. — The owners of a ferry are not liable for the death of a third person in a quarrel with the ferryman, as a result either of accident or of unlawful violence on the part of the ferryman outside of the line of his duty, committed without the authority or consent of such owners. *Scanlon v. Suter*, 158 Pa. St. 275. See generally the title MASTER AND SERVANT.

Jettison. — If the ferryman overloads the boat and the property is lost, the ferryman is liable, though the property was thrown overboard to save the passengers; it would be otherwise, though, if there was no such charge and the necessity for casting the property overboard arose from an act of God.¹

Direction of Ferryman as to Positions of Vehicles on Boat. — The ferryman, as captain of the boat, has the right to direct the positions the vehicles shall take upon the boat; and when a loss is suffered by reason of the passenger's failure to obey the directions of the ferryman, it would seem that he cannot recover therefor.²

Effect of Giving Bond and of Penalty. — It is held that the statutory right of action on a ferryman's bond does not preclude a resort to the common-law action for negligence;³ nor does the liability of a ferryman to a fine under a municipal ordinance, for not keeping his boats in running order, constitute a bar to an action by an individual who has been damaged thereby.⁴

Contract Limiting Liability. — The rules of law governing the right of common carriers to restrict their common-law liability have been fully treated elsewhere in this work. A public ferry is a common carrier, and in this particular is controlled by the principles applicable to common carriers generally.⁵

Effect of Lease. — In those states in which it is held that a ferry may be leased by the owner thereof, the lessor is not liable for injuries or accidents occurring at the ferry while it is being operated by the lessee.⁶

Liability of County Operating Ferry. — In *Chick v. Newberry County*, 27 S. Car. 419, it was held that a ferry operated by a county was not a "highway" within the meaning of the *South Carolina Act of 1874*, which allows an action for damages against a county for damages caused by defective highways, causeways, or bridges. In this case the plaintiff sought to recover damages from the county for the loss of a mule and wagon in crossing the river Tyger in a flat-boat operated by the county.

Property Carried Gratuitously. — It has been held that where a ferryman carries property gratuitously, he is liable for gross negligence only. *Dudley v. Camden, etc., Ferry Co.*, 42 N. J. L. 25, 36 Am. Rep. 501.

1. **Jettison.** — In *Mouse's Case*, 12 Coke 63, it was resolved that if the ferryman surcharge the barge it is lawful for any of the passengers, in time of accident and necessity, to cast the things out of the barge for safety of the lives of the passengers, and the owners shall have their remedy on the surcharge; but if there was no surcharge, but the danger occurred only by the act of God, as by tempest, no default being in the ferryman, every one ought to bear his loss for the safeguard and life of a man; for *interest reipublicæ quod homines conserventur*. See the title JETTISON.

2. **Direction of Ferryman as to Position of Vehicles.** — In *McFadden v. Fortier*, 20 Ill. 509, the right of the ferryman to assign to each vehicle its position on the boat was upheld, and it was held that those first arriving at the landing did not necessarily have the right to demand the first place on the boat. See also *Fisher v. Clisbee*, 12 Ill. 344.

3. **Effect of Bond on Common-law Remedy.** — *Babcock v. Herbert*, 3 Ala. 392, 37 Am. Dec. 695; *Ladd v. Chotard, Minor (Ala.)* 366; *Taylor v. Rushing*, 2 Stew. (Ala.) 160; *Pate v. Henry*, 5 Stew. & P. (Ala.) 101; *Wells v. Steele*, 31 Ark. 219; *Miller v. Pendleton*, 8 Gray (Mass.) 547.

4. **Effect of Penalty.** — *Slimmer v. Merry*, 23 Iowa 90; *Wallen v. McHenry*, 3 Humph. (Tenn.) 245.

5. **Limiting Liability.** — See the titles CARRIERS OF GOODS, vol. 5, p. 154; CARRIERS OF LIVE STOCK, vol. 5, p. 427; CARRIERS OF PASSENGERS, vol. 5, p. 474.

In *Wilson v. Shulkin*, 6 Jones L. (51 N. Car.) 375, it was held that a ferryman was liable for the death of a horse, one of a large number which were being transported, caused by its being crowded upon a large spike which was sticking perpendicularly in the guard rail of the boat, though the owner agreed to assume all injuries due to the number of horses transported.

6. **Effect of Lease of Ferry on Liability of Lessor** — *England.* — *Frazer v. Marsh*, 13 East 238.

Alabama. — *Ladd v. Chotard, Minor (Ala.)* 366.

Illinois. — *Claypool v. McAllister*, 20 Ill. 504.

Maine. — *Emery v. Hersey*, 4 Me. 407, 16 Am. Dec. 268; *Thompson v. Snow*, 4 Me. 268, 16 Am. Dec. 263.

Massachusetts. — *Reynolds v. Toppan*, 15 Mass. 370, 8 Am. Dec. 110; *Taggard v. Loring*, 16 Mass. 336, 8 Am. Dec. 140.

New York. — *M'Intyre v. Bowne*, 1 Johns. (N. Y.) 229.

North Carolina. — *Biggs v. Ferrell*, 12 Ired. L. (34 N. Car.) 1.

South Carolina. — *Rutherford v. M'Gowen*, 1 Nott & M. (S. Car.) 17.

Vermont. — *Felton v. Deall*, 22 Vt. 170, 54 Am. Dec. 61.

Virginia. — *Bowyer v. Anderson*, 2 Leigh (Va.) 550.

Compare Harris v. Plant, 31 Ala. 639; *Rutherford v. M'Gowen*, 1 Nott & M. (S. Car.) 17.

A person, however, maintaining a ferry on shares, under contract with the owner, is not a lessee so as to exempt the owner from liability while the ferry is so operated. *Taylor v. Rushing*, 2 Stew. (Ala.) 160.

Georgia Statute — Owner of Land. — Under the

Contributory Negligence. — Negligence on the part of the owner of property of which he retained control will, of course, prevent a recovery from the ferryman for injuries thereto.¹

b. LIABILITY AS TO PROPERTY — Property in Possession of Ferryman. — A person maintaining a public ferry is liable as a common carrier for the safety of property transported, where he accepts the exclusive custody of the property for the purpose of transportation. In other words, he is liable in such a case for loss or injury arising from any cause other than the "act of God or the public enemy."²

Possession of Property Retained by Passenger. — But, by the weight of authority, where the passenger retains the custody of his property, the ferryman is not liable as a common carrier, but only for negligence.³ Some authorities,

Georgia Code, § 690, providing that any proprietor of any ferry, by charter or prescription, or by right of owning the lands on a stream, is liable for all damages occurring by reason of nonattendance, neglect, carelessness, or bad conduct, the owner of the land on which a public ferry is situated, unless the ownership of the ferry is separate from that of the land, is liable for negligent torts committed by the ferryman in the performance of his duties as such, unless the owner did all in his power to prevent the ferry from being used as a public ferry. *Printup v. Patton*, 91 Ga. 422.

1. Contributory Negligence. — *Yerkes v. Sabin*, 97 Ind. 141, 49 Am. Rep. 434; *White v. Winnisimmet Co.*, 7 Cush. (Mass.) 155; *Dudley v. Camden*, etc., Ferry Co., 45 N. J. L. 368; *Clark v. Union Ferry Co.*, 35 N. Y. 485, 91 Am. Dec. 66; *Wyckoff v. Queens County Ferry Co.*, 52 N. Y. 32; *Wilson v. Hamilton*, 4 Ohio St. 723. See generally the title CONTRIBUTORY NEGLIGENCE, vol. 7, p. 368.

In *Dudley v. Camden*, etc., Ferry Co., 45 N. J. L. 368, it was held negligence to throw the reins upon the backs of spirited horses, when driven upon the boat.

Taking Timid Young Horse on Boat. — The owner of a young horse which is timid and easily frightened is not guilty of negligence in taking him on a ferryboat. All that is required of the owner in such a case is to exercise proper care in the management of the horse. Then, if the horse is injured or lost through the negligence of the ferry company, the company is liable. *Clark v. Union Ferry Co.*, 35 N. Y. 485, 91 Am. Dec. 66.

2. Ferrymen as Common Carriers — Property in Possession of Ferrymen — England. — *Walker v. Jackson*, 10 M. & W. 161; *Amies v. Stevens*, 1 Stra. 128; *Oakley v. Portsmouth*, etc., Steam Packet Co., 11 Exch. 622.

Alabama. — *Garner v. Green*, 8 Ala. 96; *Babcock v. Herbert*, 3 Ala. 392, 37 Am. Dec. 695.

Arkansas. — *Harvey v. Rose*, 26 Ark. 3, 7 Am. Rep. 595.

California. — *May v. Hanson*, 5 Cal. 360, 63 Am. Dec. 135; *Griffith v. Cave*, 22 Cal. 534, 83 Am. Dec. 82.

Illinois. — *Claypool v. McAllister*, 20 Ill. 504; *Fisher v. Clisbee*, 12 Ill. 344.

Iowa. — *Whitmore v. Bowman*, 4 Greene (Iowa) 148.

Kentucky. — *Hall v. Renfro*, 3 Metc. (Ky.) 51.

Massachusetts. — *Miller v. Pendleton*, 8 Gray (Mass.) 547; *White v. Winnisimmet Co.*, 7 Cush. (Mass.) 155.

Minnesota. — *Blakeley v. Le Duc*, 19 Minn. 187.

Mississippi. — *Powell v. Mills*, 37 Miss. 691.

Missouri. — *Pomeroy v. Donaldson*, 5 Mo. 36.

New Jersey. — *Dudley v. Camden*, etc., Ferry Co., 42 N. J. L. 28, 36 Am. Rep. 501.

North Carolina. — *Spivey v. Farmer*, 2 Hayw. (3 N. Car.) 339.

Ohio. — *Wilson v. Hamilton*, 4 Ohio St. 722.

Pennsylvania. — *Smith v. Seward*, 3 Pa. St. 342.

South Carolina. — *Littlejohn v. Jones*, 2 McMull. L. (S. Car.) 365, 39 Am. Dec. 132; *Peixotti v. M'Laughlin*, 1 Strobb. L. (S. Car.) 468, 47 Am. Dec. 563; *Clarke v. Edisto Island Ferry Co.*, *Riley L. (S. Car.)* 300; *Miles v. James*, 1 McCord L. (S. Car.) 157; *Rutherford v. M'Gowen*, 1 Nott & M. (S. Car.) 19; *Cohen v. Hume*, 1 McCord L. (S. Car.) 439, 444; *Cook v. Gourdin*, 2 Nott & M. (S. Car.) 19.

Tennessee. — *Sanders v. Young*, 1 Head (Tenn.) 219, 73 Am. Dec. 175.

Texas. — *Albright v. Penn*, 14 Tex. 290.

Virginia. — *Trent v. Cartersville Bridge Co.*, 11 Leigh (Va.) 544.

See generally the titles CARRIERS OF GOODS, vol. 5, p. 154; CARRIERS OF LIVE STOCK, vol. 5, p. 427.

Transportation of Animals. — In *Wilson v. Hamilton*, 4 Ohio St. 723, it was held that a ferryman was liable as a common carrier in the transportation of live animals as well as other property.

Unlicensed Ferryman. — In *Polk v. Coffin*, 9 Cal. 56, it was held that a person maintaining a ferry could not escape liability as a ferryman on the ground that he was unlicensed.

Private Ferry. — In *Self v. Dunn*, 42 Ga. 528, 5 Am. Rep. 544, it was held that one who keeps a ferry merely for the convenience of the customers to his mill, and who charges no toll, is not liable as a common carrier.

But if the keeper of a private ferry on a road not open to public travel undertakes to carry for hire all persons applying to him, he is liable as a common carrier. *Littlejohn v. Jones*, 2 McMull. L. (S. Car.) 365, 39 Am. Dec. 132; *Hall v. Renfro*, 3 Metc. (Ky.) 51.

3. Possession of Property Retained by Passenger — England. — *Willoughby v. Horridge*, 12 C. B. 742, 74 E. C. L. 742; *Walker v. Jackson*, 10 M. & W. 161.

Arkansas. — *Harvey v. Rose*, 26 Ark. 3, 7 Am. Rep. 595; *Evans v. Rudy*, 34 Ark. 383.

Indiana. — *Yerkes v. Sabin*, 97 Ind. 143, 49 Am. Rep. 434.

Massachusetts. — *White v. Winnisimmet Co.*, 7 Cush. (Mass.) 155.

though, have refused to recognize this distinction.¹

When Liability Attaches. — As soon as the ferryman signifies his assent to receive horses and vehicles upon his boat, his liability as a common carrier attaches, and it necessarily continues until the property is landed.²

Statutory Regulation of Ferries — Effect. — The fact that the ferryman has been excused by the County Court, under statutory authority, from maintaining guard rails upon his boat, does not affect his liability as a common carrier, nor relieve him from liability for a loss incurred by reason of the absence of such guard rails.³

c. LIABILITY AS TO PASSENGERS — (1) In General — General Carriers of Passengers. — In another place in this work will be found a full discussion of the general liabilities of carriers of passengers.⁴

Ferryman as Carrier of Passengers. — In the transportation of passengers, the keeper of a public ferry is liable as a common carrier and is required to furnish reasonably safe and convenient means appropriate to the nature of his business. His failure to do so renders him liable to persons injured thereby.⁵

Approaches to Boat. — His duty requires the ferryman to furnish safe approaches for entry upon and exit from the boat.⁶

New Jersey. — *Dudley v. Camden, etc.*, Ferry Co., 42 N. J. L. 25, 36 Am. Rep. 501.

New York. — *New York v. Starin*, 106 N. Y. 1; *Clark v. Union Ferry Co.*, 35 N. Y. 485, 91 Am. Dec. 66; *Wyckoff v. Queens County Ferry Co.*, 52 N. Y. 32.

See generally the titles CARRIERS OF GOODS, vol. 5, p. 154; CARRIERS OF LIVE STOCK, vol. 5, p. 427.

But it is held that in order to exempt the ferryman from liability as a common carrier it must appear affirmatively that the traveler retained the custody and control of his property. *Harvey v. Rose*, 26 Ark. 3, 7 Am. Rep. 595; *Powell v. Mills*, 37 Miss. 691.

1. Distinction Not Recognized. — In *Wilson v. Hamilton*, 4 Ohio St. 723, it was held that control of the property by the passenger did not relieve the ferryman of liability as a common carrier, the only effect thereof being to release the ferryman from liability in case of negligence on the part of the passenger. See also *Fisher v. Clisbee*, 12 Ill. 344; *Powell v. Mills*, 37 Miss. 691.

2. When Liability Attaches. — *Cohen v. Hume*, 1 McCord L. (S. Car.) 439, wherein the above principle was expressed, and the ferryman's liability as a common carrier was held to attach although the vehicle was only upon the slip and was being driven by the servant of the owner.

In *May v. Hanson*, 5 Cal. 360, 63 Am. Dec. 135, wherein the injury complained of occurred while the wagon was being driven from the boat, the same rule was stated.

And in *Blakeley v. Le Duc*, 19 Minn. 187, it was held that the ferryman's liability as a common carrier had attached though only the front wheels of the stagecoach had gotten upon the boat when the boat broke away from the bank.

In *Walker v. Jackson*, 10 M. & W. 161, however, it was held that a ferryman was, as a matter of law, under no obligation to put the carriage upon the boat or discharge it therefrom, though from usage this might become his duty, and it was left to the jury whether, in the case at bar, it was the duty of the ferryman, as such, to place the wagon upon the

quay or whether his liability as ferryman ceased when the wagon was placed upon the slip.

3. *Sanders v. Young*, 1 Head (Tenn.) 219, 73 Am. Dec. 175.

4. See the title CARRIERS OF PASSENGERS, vol. 5, p. 474.

5. Ferryman as Carrier of Passengers. — *Magoric v. Little*, 25 Fed. Rep. 627; *Slimmer v. Merry*, 23 Iowa 90; *Joy v. Winnisimmet Co.*, 114 Mass. 63; *Le Barron v. East Boston Ferry Co.*, 11 Allen (Mass.) 312, 87 Am. Dec. 717; *Hawks v. Winans*, 42 N. Y. Super. Ct. 451.

In *Holmes v. Oregon, etc.*, R. Co., 5 Fed. Rep. 523, it was held that it was the duty of the ferry company to provide its boats with guard chains, to prevent passengers from attempting to go ashore before the boat was properly secured.

Seats for Passengers. — In *Burton v. West Jersey Ferry Co.*, 8 N. J. L. J. 258, 114 U. S. 474, it was held that the mere failure to provide seats for passengers was not negligence.

6. Passageway to Boat. — *Magoric v. Little*, 23 Blatchf. (U. S.) 399.

In *Osborn v. Union Ferry Co.*, 53 Barb. (N. Y.) 629, a ferry company was held liable for injuries received by a passenger in falling over a log which was placed near the entrance to their ferry gate, the fall being due to the darkness.

In *Tonkins v. New York Ferry Co.*, 47 Hun (N. Y.) 562, the failure of a ferry company to provide a guard between the passageway for pedestrians and the way for vehicles, so as to prevent passengers from being crowded onto the way for vehicles, was held negligence.

Bridges for Exit and Entrance. — In *Hazman v. Hoboken Land, etc., Co.*, 2 Daly (N. Y.) 130, it was held that the failure to provide the boat with a bridge for the exit of vehicles, so that it could be raised and lowered with the tide, was negligence, and a passenger was allowed to recover for injuries received from a horse falling upon him in its attempt to pass onto the bridge, which was nine inches higher than the boat.

In *New Jersey R. Co. v. Palmer*, 33 N. J. L. 90, a ferry company was held liable for inju-

Improved Appliances. — He is not required to furnish improved appliances if they are not necessary for the reasonable safety of the passengers, or if the expense would be excessive.¹

Dangers Not to Be Anticipated. — Nor is he required to protect the passengers from dangers not reasonably to be anticipated.²

Degree of Skill. — The ferryman is required to use the utmost skill in the operation of the boat and the application of the means provided by him.³

Presumption of Negligence. — The rule that when a passenger is injured from defects in the means of transportation the presumption of negligence on the part of the carrier arises⁴ applies, of course, to the carriage of passengers by ferrymen.⁵

When Liability Ceases. — The duty to protect the passenger as a passenger continues until he has been landed.⁶

ries to a passenger caused by his foot getting caught and crushed in a vacant space between the boat and bridge.

In *Race v. Union Ferry Co.*, (N. Y. 1893) 34 N. E. Rep. 280, it was held that the fact that there was a difference of from one to eight inches between the level of the boat and the bridge, which was a floating bridge, such discrepancy being inevitable, did not render the ferry company liable for injuries to a passenger received in a fall caused thereby, such bridges having been in use for years and no similar accident having theretofore happened.

In *Loftus v. Union Ferry Co.*, 84 N. Y. 455, 38 Am. Rep. 533, a guard rail to the bridge upon which passengers landed from the boat, consisting of a sill eight inches high and a railing three feet above the sill, was held sufficient to prevent the ferry company from being liable for the death of a child caused by its falling from the bridge through the space between the sill and the railing, such guard rails being in common use upon the bridges of ferryboats.

Dangers Caused by Backward Impulse of Boat. — It is a duty of the ferryman to provide against the danger which may be caused by the backward impulse of the boat after striking the landing; thus, where a passenger's foot was caught in the space between the wharf and the boat, owing to the backward impulse of the boat, the ferryman was held liable, in the absence of evidence to show that it was impossible to provide against such backward impulse. *Spero v. Long Island R. Co.*, 21 Misc. Rep. (N. Y. Supreme Ct.) 683.

Duty to Remedy Obvious Dangers. — The fact that thousands of persons pass over a ferry without injury is no excuse for a ferry company not making adequate provision where a place is obviously dangerous. *Bartholomew v. Poughkeepsie, etc., Ferry Co.*, 55 Hun (N. Y.) 605, 7 N. Y. Supp. 785.

1. Improved Appliances. — *Le Barron v. East Boston Ferry Co.*, 11 Allen (Mass.) 312, 87 Am. Dec. 717.

2. Dangers Not to Be Anticipated. — *Cleveland v. New Jersey Steamboat Co.*, 68 N. Y. 306; *Loftus v. Union Ferry Co.*, 84 N. Y. 455, 38 Am. Rep. 533; *Dougan v. Champlain Transp. Co.*, 56 N. Y. 1.

3. Utmost Degree of Skill Required. — *Le Barron v. East Boston Ferry Co.*, 11 Allen (Mass.) 312, 87 Am. Dec. 717; *McLean v. Burbank*, 11 Minn. 277.

Boat Striking Wharf with Unusual Force. — In *Snelling v. Brooklyn, etc., Ferry Co.*, (Supreme Ct.) 13 N. Y. Supp. 398, a passenger recovered for injuries caused by a fall received on account of the boat striking the landing with unusual force.

Letting Down Guard Chain Prematurely. — In *Ferris v. Union Ferry Co.*, 36 N. Y. 312, a ferry company was held liable for injuries to a passenger on account of the negligence of a servant of the company in letting down the chain which guarded the passage from the boat, before the boat was properly secured.

Suddenly Changing Gangplank. — In *Hawks v. Winans*, 74 N. Y. 609, it was held negligence suddenly to lower the bridge used for exit from the boat as a passenger was about to step upon it.

Trespassers — Negligence. — In *Malloy v. Staten Island Rapid Transit R. Co.*, 78 Hun (N. Y.) 166, the facts were these: the plaintiff went upon the private wharf of the defendant company to fish. East of the wharf was a ferry slip also occupied by the company. The plaintiff sat upon the edge of the wharf, with his legs hanging over, and while in this position was injured by a ferryboat entering the slip. In an action for damages it was held that the plaintiff must be regarded as a trespasser, and not entitled to recover.

4. Presumption of Negligence. — See the title CARRIERS OF PASSENGERS, vol. 5, p. 624.

5. Presumption of Negligence Applied in Case of Ferryman. — *Spero v. Long Island R. Co.*, 21 Misc. Rep. (N. Y. Supreme Ct.) 683. Thus, where a person, having paid for a ticket for ferriage, had, on invitation of the employees of the ferry company, passed out on an iron bridge leading to the ferryboat, and while standing thereon it broke, precipitating her into the river, it was held that it was not for the passenger to prove that the breaking was due to the negligence of the company, but for the company to establish affirmatively a state of facts which would release it from responsibility. *Patton v. Pickles*, 50 La. Ann. 857.

6. When Liability Ceases. — In *Dodge v. Boston, etc., Steamship Co.*, 148 Mass. 207, 12 Am. St. Rep. 541, it was held that the company was under the duty to protect a passenger, as such, while he was upon the slip in leaving the boat.

See also *Hrebrik v. Carr*, 29 Fed. Rep. 298.

(2) *Contributory Negligence of Passenger.* — Of course contributory negligence on the part of the passenger will prevent his recovery.¹

Duty to Obey Regulations. — A passenger is bound to obey all reasonable rules and orders of the ferryman, and refusal or neglect to do so, in the absence of good reason for it, is negligence *per se*.² He must, however, have had notice of the rule or regulation violated, in order that his violation thereof shall render him guilty of contributory negligence.³

VII. RIGHT OF FERRYMAN TO TOLL. — Since the owner of a ferry is required to keep it up, to have suitable ferryboats, etc., he is entitled to have a reasonable compensation by way of toll.⁴ And all persons using the ferry are liable for toll.⁵ A custom for the inhabitants of a village to pass toll free has been held good.⁶ A power of distress given to a ferry company for collection of tolls is constitutional.⁷ In *South Carolina*, where it is held that the franchise is not an incorporeal hereditament, being merely a franchise granted for a limited time, a covenant for passage toll free does not run with the franchise in case of its transfer, but is binding upon the covenantor alone.⁸ Under a

1. **Contributory Negligence of Passenger.** — *Hoboken Ferry Co. v. Feiszt*, 58 N. J. L. 198; *Fogassi v. New York Cent., etc., R. Co.*, 17 N. Y. App. Div. 286. See generally the title CONTRIBUTORY NEGLIGENCE, vol. 7, p. 368.

What Constitutes Contributory Negligence — Passenger in Carriageway. — In *Hazman v. Hoboken Land, etc. Co.*, 2 Daly (N. Y.) 130, it was held that a foot passenger injured while in the carriageway was not, under the circumstances of the case, guilty of contributory negligence as a matter of law.

Standing on Bow of Boat. — In *Peverly v. Boston*, 136 Mass. 366, 49 Am. Rep. 37, it was held that to stand on the bow of the boat when about to land was not necessarily negligence.

Failure to Remain Seated. — And in *Snelling v. Brooklyn, etc., Ferry Co.*, (Supreme Ct.) 13 N. Y. Supp. 398, 128 N. Y. 579, it was held that the failure of a passenger to retain her seat until the boat reached the dock was not negligence.

Following General Custom — Stepping Over Guard Chain. — In *The Manhasset*, 19 Fed. Rep. 430, it was held that the act of a passenger in stepping over the guard chain and passing to the wharf before the boat was secured, contrary to the rules of the ferry company, was not negligence when such act was customarily done by passengers.

Look Before Stepping. — In *Fogassi v. New York Cent., etc., R. Co.*, 17 N. Y. App. Div. 286, a passenger who fell through a two-foot space between the dock and the ferryboat was held guilty of contributory negligence in failing to look where she was walking.

Compare Spero v. Long Island R. Co., 21 Misc. Rep. (N. Y. Supreme Ct.) 683.

In *New Jersey R. Co. v. Palmer*, 33 N. J. L. 90, the plaintiff was a passenger on the defendant's steam ferry and railroad from New York to Newark, N. J. The ferryboat had come up to the bridge and had been fastened by the chains thereto, the front chains on the boat had been let down, and the plaintiff was in the act of stepping from the boat to the shore, immediately behind the other passengers, when his foot was caught between the boat and the bridge, and badly crushed. It was held that the plaintiff was not guilty of want of ordinary care, although, at the very instant of stepping from the boat to the bridge,

he did not examine particularly to see whether there was a vacant space between the boat and the bridge.

2. **Duty to Obey Regulations.** — *Dodge v. Boston, etc., Steamship Co.*, 148 Mass. 207, 12 Am. St. Rep. 541, wherein it was held that a passenger was bound to leave by the way which he was informed was for the use of passengers. *Compare The Manhasset*, 19 Fed. Rep. 430.

3. **Want of Notice of Regulation.** — *Dodge v. Boston, etc., Steamship Co.*, 148 Mass. 207, 12 Am. St. Rep. 541; *Griffith v. Cave*, 22 Cal. 534, 83 Am. Dec. 82.

In *Compton v. Van Volkenburgh*, 34 N. J. L. 134, it was held that a ferry company was not authorized in ejecting a passenger for violation of a rule requiring passengers to enter by a certain gate and leave their tickets at the gate, without notifying the passenger of the existence of the rule.

4. **Ferryman Entitled to Toll.** — *Charles River Bridge v. Warren Bridge*, 7 Pick. (Mass.) 482; 2 Dane's Abr., c. 67, art. 1.

Implied Right to Demand Toll. — In *Magistrates of Montrose v. Scott of Rossie*, 10 Mor. Dec. 4167, it was held that the grant of a ferry franchise implied the right to demand a reasonable toll.

Toll on Property Carried in Wagon. — In *Kelly v. Altemus*, 34 Ark. 184, 36 Am. Rep. 6, it was held that a ferryman cannot charge separately for wagon and contents, though they belong to different persons.

5. **Liability of Persons Using Ferry to Pay Toll.** — *Addison v. Hard*, 1 Bailey L. (S. Car.) 431, wherein it was held that a person accustomed to pass over a ferry without paying toll may be presumed to have been aware of the rates and liable therefor, though they were not posted as required by statute.

A person, however, crossing the river in a boat not belonging to the owner of the ferry is not liable for toll, though in landing he steps upon the ferryboat. *Henry v. Turner*, 2 Port. (Ala.) 23.

6. **Custom of Passage Toll Free.** — *Pain v. Patrick*, 3 Mod. 289, 1 Show. 243, 255, 2 Salk. 719.

7. **Enforcement of Toll by Distress.** — *State v. Patrick*, 3 Dev. L. (14 N. Car.) 478.

8. **Covenant for Passage Toll Free.** — *Morse v.*

reservation in the sale of a ferry franchise that the grantor and his family "shall have all their ferrying across said ferry free," the grantor is entitled to free ferriage for his wagons used in any ordinary business in which he may engage, as lumber hauling.¹

VIII. STATUTORY REGULATION OF FERRIES — Franchise as a Contract. — As has been shown, the grant by a state of a ferry franchise is a contract protected by the provision of the Federal Constitution that no state shall impair the obligation of contracts.²

Regulation of Ferries under Police Power. — Still, owing to the nature of the franchise as *publici juris*, the state may regulate ferries under its police power; thus it may pass laws fixing a reasonable toll, punishing neglect or misconduct in operating ferries, and to secure passengers from danger, imposition, etc.³ The state cannot, however, by a reduction of tolls, deprive the owner of his legitimate profits.⁴

Regulation of Ferries Across Boundary Rivers Between Two States. — The delegation to the federal government of the power to regulate foreign and interstate commerce does not limit the right of a state, in the exercise of its police power, to regulate ferries from its shore across a navigable river which constitutes the boundary between it and another state or a foreign country.⁵ Such state, however, cannot regulate the ferriage of persons from the shore of the other state.⁶

Delegation of Power to Subordinate Bodies. — The power to regulate ferries may be delegated by the state to a subordinate body, in the same way that the power to license may be delegated.⁷ The extent of the delegated power of the subordinate body depends, of course, upon the provisions of the statutes delegating the power.⁸

Garner, 1 Strobb. L. (S. Car.) 514, 47 Am. Dec. 565.

1. **Extent of Covenant for Passage Toll Free.** — Stephens v. Knott, 2 Oregon 304.

2. See *supra*, this title, *Nature and Extent of Right*.

3. **Regulation of Ferries under Police Power** — Arkansas. — Haynes v. Wells, 26 Ark. 464.

Illinois. — Mills v. St. Clair County, 4 Ill. 53, 7 Ill. 197; School Trustees v. Tatman, 13 Ill. 27; Wiggins Ferry Co. v. East St. Louis, 102 Ill. 560, 107 U. S. 365.

Maine — Day v. Stetson, 8 Me. 365.

Massachusetts. — Parker v. Metropolitan R. Co., 109 Mass. 506; Charles River Bridge v. Warren Bridge, 7 Pick. (Mass.) 344; East Boston Ferry Co. v. Boston, 101 Mass. 458.

New Jersey. — Chosen Freeholders v. State, 24 N. J. L. 718.

New York. — Benson v. New York, 10 Barb. (N. Y.) 223; Edmonds v. Abeel, 20 Hun (N. Y.) 441; People v. New York, 32 Barb. (N. Y.) 102.

Posting Ferry Rates. — Some statutes require the ferryman to post upon the boat or in some conspicuous place in the approaches or entrance to the ferry the rates for transportation. Wray v. New York Cent., etc., R. Co., (Supreme Ct.) 4 N. Y. Supp. 355; Blanchard v. Hoboken Land, etc., Co., (Supreme Ct.) 6 N. Y. Supp. 279; Addison v. Hard, 1 Bailey L. (S. Car.) 431.

4. Benson v. New York, 10 Barb. (N. Y.) 223.

5. **Interstate Commerce.** — Wiggins Ferry Co. v. East St. Louis, 107 U. S. 365; Madison v. Abbott, 118 Ind. 337; Marshal v. Grimes, 41 Miss. 27. See also Chilvers v. People, 11 Mich. 43. And see *supra*, this title, *Acquisition of Ferry Franchise*, in regard to the power of the state to grant ferry franchises across boundary rivers between two states.

6. Reeves v. Little, 7 Bush (Ky.) 469.

7. **Delegation of Power to Subordinate Bodies.** — People v. New York, 32 Barb. (N. Y.) 102.

A municipal ordinance passed in pursuance of a charter empowering the city to regulate ferries within its limits does not violate a constitutional inhibition against the passage by the state legislature of local or special laws. St. Louis v. Waterloo-Carondelet Turnpike, etc., Co., 14 Mo. App. 216.

8. **Extent of Delegated Power.** — In Arkadelphia Lumber Co. v. Arkadelphia, 56 Ark. 370, it was held that, under the power to regulate ferries within its corporate limits, a city is authorized, where only one bank of a navigable river is within its limits, to regulate all ferries operated from either bank.

The power of fixing the rates to be taken at the ferries within their counties, given to the board of freeholders by the *New Jersey* "act concerning ferries," passed February 6, 1799, authorizes them to fix the rates to be taken at a ferry where one terminus is within their county, even though the other terminus is out of the state. State v. Freeholders, 23 N. J. L. 206.

In *Indiana* the board of commissioners of the proper county is exclusively authorized by statute to regulate the hours during which a licensed ferryman, whose boat runs to and from points without the limits of the state, is required to keep his ferry open and run his boat, and a city ordinance prescribing inconsistent regulations is not enforceable. Madison v. Abbott, 118 Ind. 337.

Power to Prohibit Ferries. — The power "to regulate ferries" conferred upon the common council of a city by section 33 of the act for the incorporation of cities, etc. (1 G. & H. 223), does not include the authority to prohibit the

IX. PREVENTION OF THE OPERATION OF UNLAWFUL FERRIES.—Aside from the right of the owner of a ferry franchise to prevent the operation of an unlawful ferry to the damage of his ferry, which has been heretofore discussed,¹ the state may, in quo warranto or the like proceedings, test the right of a person to operate a public ferry,² and in such proceedings the defendant must show a legal right to operate the ferry to avoid a judgment of ouster.³ And in some states the operation of a public ferry without authority from the state has been made a misdemeanor.⁴

X. TERMINATION OF FRANCHISE—1. By Forfeiture.—A ferry franchise, being of a public nature, may be forfeited for misuser or nonuser.⁵

operation of ferries without a license first obtained therefor. In all instances in the act where it was intended that for the purpose of restraint a license might be imposed, the power is expressly declared, and is not, therefore, to be implied from other provisions. *Duckwall v. New Albany*, 25 Ind. 283. See also *Shallcross v. Jeffersonville*, 26 Ind. 193.

Stipulations in Lease of Ferry Rights by New York City.—See *People v. New York*, 32 Barb. (N. Y.) 102.

Regulation as to Rates.—The *Illinois* Act of Feb. 26, 1867, granting to certain persons a ferry franchise, and providing that a certain city shall "have the right to regulate and control the rates of toll for crossing the said ferry," implies that the regulation shall be reasonable. *Rohn v. Beardstown*, 32 Ill. App. 407. See also *Troutman v. Smith*, (Ky. 1899) 48 S. W. Rep. 1084, wherein the reduction of the rates of toll for foot passengers was, under the circumstances of the case, held to be unreasonable.

1. See *supra*, this title, *Protection of Franchises*.

2. **Quo Warranto.**—*Darnell v. State*, 48 Ark. 321.

3. *Gunterman v. People*, 138 Ill. 518.

4. **Misdemeanor.**—In *People v. Babcock*, 11 Wend. (N. Y.) 586, it was held that the *New York* statute (1 Rev. Stat. § 8) which declares that if any person shall use any ferry for transporting across any river, stream, or lake, any person, etc., for profit or hire, unless authorized in the manner specified, he shall be considered guilty of a misdemeanor, applied to a person operating a ferry crossing Niagara river between the state of New York and the Dominion of Canada.

Burden of Proof of Want of Authority.—On an indictment under the *Kansas* statute (Act of Feb. 8, 1859) which provides that "if any person demand or receive pay for services as ferryman, without a license, he shall forfeit to the county twenty dollars for every day he shall keep such ferry, * * * to be recovered by indictment in the court of the proper county," it was held that it was incumbent on the prosecution to prove that the defendant had no license, as the fact of the defendant's having or not having a license was as much within the knowledge of the public authorities as of the defendant. *Territory v. Reyburn, McCahon* (Kan.) 134.

Indictment.—An indictment for keeping a ferry without license must specify the stream upon which the ferry was kept. *Wheat v. State*, 6 Mo. 455.

5. **Forfeiture of Franchise.**—*Greer v. Hauga-book*, 47 Ga. 282; *Jeffersonville v. The Steam*

Ferryboat John Shallcross, 35 Ind. 19; *Maysville v. Boon*, 2 J. J. Marsh. (Ky.) 224; *State v. Council Bluff, etc.*, *Ferry Co.*, 11 Neb. 354; *People v. Thompson*, 21 Wend. (N. Y.) 235; *Benson v. New York*, 10 Barb. (N. Y.) 245.

Nonuser.—In *Clarke v. Calloway, Sneed*, (Ky.) 46, 2 Am. Dec. 706, a ferry franchise was held forfeited by failure of the grantee to commence keeping the ferry within a reasonable time.

In *Com. v. Hulings*, 129 Pa. St. 317, the court refused to forfeit the ferry franchise for nonuser where a sufficient bridge had been kept up during the time the ferry was not operated, and where for five years before the institution of the quo warranto proceedings the ferry had been operated in such a manner as to supply the needs of the public.

In *Phillips v. Bloomington*, 1 Greene (Iowa) 498, a ferry franchise held under lease from a city was annulled for failure of the lessee to operate the ferry as required by his lease, and further operation of the ferry was enjoined.

Pennsylvania Statute.—In *Bridgewater Ferry Co. v. Sharon Bridge Co.*, 145 Pa. St. 404, the court, *per Mitchell, J.*, said that it is incorrect to hold that a ferry company is not in actual use, within § 31 of the Act of April 29, 1874, when its operation is temporarily interrupted in consequence of the stream's being frozen and gorged with ice.

Covenant to Use Premises for a Ferry.—In *Heywood v. Berkeley Land, etc., Imp. Assoc.*, 71 Cal. 349, premises were leased, the lessee covenanting that "said leased premises shall be used in good faith, continuously during the existence of this lease, for the usual and ordinary business of a ferry." It appeared that the lessee used the premises for a ferry for about three years, at which time the ferryboat was seized on execution, and for about thirty days, while the boat was under such levy, the ferry was not operated, except that a small schooner was used which made occasional trips as wind and weather would permit. It was held, in an action to declare the lease forfeited for failure to use the premises for a ferry, that a finding that the premises had been used continuously, in good faith, for the usual and ordinary business of a ferry, would not be disturbed.

Effect of Bond.—In *People v. Thompson*, 21 Wend. (N. Y.) 235, it was held that the fact that the owner of the franchise had given bond for the faithful performance of his duties was no defense to quo warranto proceedings for forfeiture of the franchise for misuser.

Forfeiture of Charter for Turnpike to Which Ferry Is an Incident—Effect.—When a ferry is

How Enforced and by Whom. — The forfeiture, unless otherwise provided by statute, can only take effect upon a judgment of a competent tribunal, in quo warranto or like proceedings by the state to enforce the forfeiture; no advantage of the misuser or nonuser, as constituting a forfeiture, can be taken by private individuals,¹ nor can the state raise the question collaterally.²

Date of Forfeiture. — The forfeiture dates only from the date of the judgment of ouster.³

Waiver of Forfeiture. — The state or its representative may waive a forfeiture, and it may do so impliedly by acquiescence as well as expressly.⁴

2. By Abandonment or Surrender. — The exclusive right to maintain a ferry may be lost by abandonment and the assertion of an adverse right by third persons,⁵ or by surrender.⁶

3. By Expiration of Franchise. — A ferry franchise, like any other franchise granted by the state, terminates of course upon the expiration of the term for which it was granted.⁷

4. By Death of Owner. — In those states in which it is held that the franchise is not transferable it terminates upon the death of the grantee, but in most states, as has been shown, the franchise is transferable, in which case it does not terminate upon the death of the grantee, but passes to his representatives.⁸

5. Under Power of Eminent Domain. — A ferry franchise, like other property, may be taken under the power of eminent domain on just compensation being made therefor.⁹

maintained as an incident to a chartered turnpike, to facilitate travel over it, the forfeiture of the turnpike franchise carries with it the privilege of maintaining the ferry. *Darnell v. State*, 48 Ark. 321.

1. Forfeiture Can Only Be Enforced by Quo Warranto or Like Proceedings — *England*. — *Peter v. Kendal*, 6 B. & C. 703, 13 E. C. L. 299.

United States. — *Mackall v. Chesapeake, etc., Canal Co.*, 94 U. S. 308.

Alabama. — *Harrell v. Ellsworth*, 17 Ala. 576.
Illinois. — *School Trustees v. Tatman*, 13 Ill. 197.

Indiana. — *Conner v. Paxson*, 1 Blackf. (Ind.) 168; *New Albany, etc., R. Co. v. Huff*, 19 Ind. 315.

Kentucky. — *Churchill v. Grundy*, 5 Dana (Ky.) 99; *Maysville v. Boon*, 2 J. J. Marsh. (Ky.) 224; *Cotton v. Houston*, 4 T. B. Mon. (Ky.) 290; *Stahl v. Brown*, 84 Ky. 325.

Pennsylvania. — *I. Ritter, etc., Ferry Co.*, 14 Pa. Co. Ct. Rep. 10; *Douglass's Appeal*, 118 Pa. St. 65.

Application for Establishment of Rival Ferry. — In *I. Ritter, etc., Ferry Co.*, 14 Pa. Co. Ct. Rep. 10, it was held that the question whether a ferry company holding an exclusive charter has furnished sufficient facilities to the public cannot be determined upon an application for a charter to a rival company.

Forfeiture of Lease of Ferry. — Where the requirements and conditions of a lease to keep a ferry have been violated by the lessee, a court of equity may declare it forfeited. *Phillips v. Bloomington*, 1 Greene (Iowa) 498.

2. Indictment. — *Territory v. Reyburn, McCahon* (Kan.) 134.

3. From What Time Forfeiture Dates. — *Greer v. Haugabook*, 47 Ga. 282.

4. Waiver of Forfeiture. — *Davis v. Police Jury*, 1 La. Ann. 288.

5. Abandonment. — *Rex v. Amery*, 2 T. R. 515; *Bowman v. Wathen*, 2 McLean (U. S.) 376, 1 How. (U. S.) 189; *Brearily v. Norris*, 23 Ark. 514; *Hartford Bridge Co. v. East Hartford*, 16 Conn. 149; *Jeffersonville v. The Steam Ferryboat John Shallcross*, 35 Ind. 19; *Smith v. Harkins*, 3 Ired. Eq. (38 N. Car.) 613, 44 Am. Dec. 83.

In *Smith v. Harkins*, 3 Ired. Eq. (38 N. Car.) 613, 44 Am. Dec. 83, the nonuser of a ferry for forty years was held to be an abandonment of the franchise.

6. Surrender. — *Charles River Bridge v. Warren Bridge*, 7 Pick. (Mass.) 344, 11 Pet. (U. S.) 420. See also *Janesville Bridge Co. v. Stoughton*, 1 Pin. (Wis.) 667.

7. By Expiration of Franchise. — *Bradley v. Reppe*, 133 Mo. 545.

8. See supra, this title, *Transfer of Franchises*.

9. Under Power of Eminent Domain — *United States*. — *West River Bridge Co. v. Dix*, 6 How. (U. S.) 507.

Illinois. — *Mills v. St. Clair County*, 4 Ill. 53.

Maine. — *State v. Noyes*, 47 Me. 189.

New Hampshire. — *Crosby v. Hanover*, 36 N. H. 404.

New York. — *Benson v. New York*, 10 Barb. (N. Y.) 245.

North Carolina. — *Barrington v. Neuse River Ferry Co.*, 69 N. Car. 165.

Tennessee. — *Allen v. Farnsworth*, 5 Yerg. (Tenn.) 189; *Red River Bridge Co. v. Clarksville*, 1 Sneed (Tenn.) 176.

Vermont. — *Armington v. Barnet*, 15 Vt. 745, 40 Am. Dec. 705.

Virginia. — *James River, etc., Co. v. Thompson*, 3 Gratt. (Va.) 270.

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